

COLORADO REVISED STATUTES



TITLES 16-18

2012



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Colorado

Revised Statutes

2012

Titles 16-18
Criminal Proceedings
Corrections
Criminal Code



Edited, Collated, Revised,
Annotated, and Indexed
Under the Supervision and Direction of the

COMMITTEE ON LEGAL SERVICES

by

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*Reenacted by the General Assembly as the
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TABLE OF CONTENTS

Source note explanation	vi
Colorado statutory research	vii
Bills without safety clauses - explanation of effective dates	ix
Annotation explanation	ix
Title 16 Criminal Proceedings	Title 16 - page 1
Title 17 Corrections	Title 17 - page 1
Title 18 Criminal Code	Title 18 - page 1

Source Note Information

A source note shows the legislative history of a C.R.S. section and is located immediately after the text of the section. The source note for each section indicates the year the section was added, each year it was amended, and the page of the Session Laws and the section of the bill where the amendment can be found. The source note includes the number of the section in prior codifications when applicable. For amendments made after 1973, information on each specific provision of the section that has been changed by a bill, the specific change to the provision (i.e. added, added with relocations, amended, amended with relocations, repealed, repealed and reenacted, or recreated and reenacted), and the effective date of the bill are shown.

The legislative history is arranged by year of passage; if the section was amended by two or more acts in the same year, the order of the information for that year is determined by the effective dates of the acts. The effective date in the source note indicates the date the act or portion of the act takes effect even if the text of the amendment indicates a different date. If the year is not included with the month and day, the provision is effective the year of passage. Additional information to assist the user in researching C.R.S. sections can be found beginning on page vii.

The following provides a further explanation of the information found in a source note:

“L.” is the symbol for “Session Laws” and will be followed by a number indicating the year when the C.R.S. section was changed by an act generally either creating new law, amending existing law, or repealing existing law; except that, in the constitution, “L.” also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

“Ex. Sess.” is the symbol for “Extraordinary Session”. If this symbol follows the year, the amended provision can be found in the Session Laws for an extraordinary session for that year and not in the Session Laws for the regular session of the General Assembly for that year (S, S2 in the Red Book).

“p.” is the symbol for “page” and will be followed by a number indicating the page of the Session Laws where the amendment to the C.R.S. section can be found.

“§” is the symbol for “section” and will be followed by a number indicating the section of the act where the amendment to the C.R.S. section can be found.

“IP” is the symbol for the “introductory portion” to a section, subsection, paragraph, or subparagraph.

“Added” means the provision was newly enacted by the act (N in the Red Book).

“Added with relocations” means the provision in existing law was relocated from one title, article, part, or section to another title, article, part, or section with amendments by the act.

“Amended” means the provision in existing law was amended by the act (A in the Red Book).

“Amended with relocations” means the provision in existing law was amended to reorganize an entire title, article, part, or section by the act.

“Repealed” means the provision was deleted from the existing law by the act through the use of a repeal provision (R in the Red Book).

“R&RE” is the symbol for “Repealed and Reenacted” and means the provision in existing law was repealed and reenacted by the act (RE in the Red Book).

“RC&RE” is the symbol for “Recreated and Reenacted” and means a previously repealed provision has been recreated by the act (RC in the Red Book).

“Added by revision” means a provision providing for the repeal of a statutory provision on a specified date has been added by the Revisor of Statutes as a C.R.S. provision. Adding the provision is necessary because a separate section of the act provided for the repeal of the provision with a future effective date.

“Initiated” means a provision that was amended by means of an initiated petition approved by a vote of the people of Colorado at a general or an odd-year election.

“Referred” means a provision that was amended by a measure referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election; except that, in the constitution, a referred measure is indicated by “L.” and also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

Starting in 2009, references to the bill number and chapter number have been included in the source note. If you are conducting a search on-line, the bill number reference within the source note links directly to the bill itself.

Colorado Statutory Research

Legislative history is not already written. It must be compiled by the researcher from many different sources and materials. The following information is a helpful starting point in identifying information you wish to research. Consult the red book table distributed with the session laws, the softbound editions of Colorado Revised Statutes beginning in 1997, the comparative tables located in the back of the C.R.S. index, C.R.S. 1963 and subsequent cumulative supplements thereto through 1971, and C.R.S. 1973 and annual cumulative supplements thereto through 1996.

Prior to 1921, enacted laws were not compiled into a comparative table, thereby making it more difficult to track the legislative history. Determining the subject matter in the statutory index is the only choice for tracking the history of a statute since a statute did not retain its original number. The General Statutes of 1883 arranged laws into numbered chapters, alphabetically entitled, collated, and arranged by sections. This became the foundation and

model for compiling the statutes until the codification of C.R.S. 1973. (See Revised Statutes of Colorado 1908, An Act Providing For the Compilation, Publication, and Distribution of all the general statutes of the state.)

References in some source notes throughout the Colorado Revised Statutes to “Code 08”, “Code 21”, and “Code 35” are to the Revised Statutes of Colorado 1908, the Compiled Laws of Colorado 1921, and the Colorado Statutes Annotated 1935, respectively. Each of these volumes set forth the general statutes of the state of Colorado, including the Code of Civil Procedure and, in 1935, the Colorado Supreme Court Rules. On January 6, 1941, the Colorado Supreme Court adopted the new Rules of Civil Procedure, which became effective on April 6, 1941, resulting in the publication of a replacement volume. Thereafter, the publication of the Colorado Court Rules, although a continuing part of the Colorado Revised Statutes, contained a combination of the Federal Rules and the Colorado Code of Civil Procedure and, in addition, included some provisions that were entirely distinct from both the Federal Rules and the Colorado Code of Civil Procedure, as adopted or amended by the Supreme Court of Colorado.

To research a statute as it existed in previous years, the following is a chronological list of C.R.S. publications and the correct citation for each publication.

Revised Statutes of Colorado	(1868)	R.S.
General Laws of Colorado	(1877)	G.L.
General Statutes of Colorado	(1883)	G.S.
Revised Statutes of Colorado	(1908)	R.S. 08
Compiled Laws of Colorado	(1921)	C.L.
Colorado Statutes Annotated	(1935)	CSA
Colorado Revised Statutes 1953	(1953)	CRS 53
Colorado Revised Statutes 1963	(1963)	C.R.S. 1963
Colorado Revised Statutes	(1973)	C.R.S.

Comparative Tables:

- R.S. 08 to C.L. 1921 - located in the front of the C.L. 1921
- C.L. 1921 to CSA 1935 - located in the back of the Index to CSA 1935
- CSA 1935 to CRS 1953 - located in the front of the Index to CRS 1953
- CRS 1953 to C.R.S. 1963 - located in the front of the Index to C.R.S. 1963
- C.R.S. 1963 to C.R.S. - located in the back of the Index to C.R.S.

Supplements to C.R.S. 1963 include:

- 1965 hardbound supplement containing laws enacted in 1964 and 1965
- 1967 hardbound supplement containing laws enacted in 1966 and 1967
- 1969 hardbound supplement containing laws enacted in 1968 and 1969
- 1971 hardbound supplement containing laws enacted in 1970 and 1971

The softbound publication of the “Official Report of the Committee on Legal Services” was not intended as an official publication of our office. Copies were distributed to the members of the General Assembly for the purpose of certifying the laws enacted in the 1972 and 1973 Sessions for inclusion in the compilation of the 1973 C.R.S., which was not available until 1974. To find the 1972 or 1973 amended language, refer to the session laws of either 1972 or 1973.

Supplements and Replacement Volumes to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes

Titles	Supplements to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes	Replacement Volumes and Supplements to Replacement Volumes
Titles 16 to 18	1975-77 Supplements	1978 Replacement Volume 1979-85 Supplements 1986 Replacement Volume 1987-96 Supplements Vol. 8A - Titles 16 & 17 1987-96 Supplements Vol. 8B - Titles 18-21 1987-96 Supplements

Starting in 1997, annual softbound volumes are published each year.

For additional information on researching legislative history, see www.leg.state.co.us, Services Agencies, and select Legislative Legal Services. Choose Legal Topics and click on Researching Legislative History.

Bills Enacted Without A Safety Clause Explanation of Effective Date

If a bill is enacted without a safety clause and an effective date is not indicated in the bill, the effective date is the day following the expiration of the ninety-day period after final adjournment of the General Assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state Constitution unless a referendum petition is filed against the act within such time period. If a referendum petition is filed, the act, if approved by the people, will take effect on the date of the official declaration of the vote thereon by proclamation of the Governor or the date indicated in the act if it is later than the Governor's proclamation. The source note for a provision contained in such an act will indicate the actual date following the ninety-day period or the date set out in the act. If a referendum petition is filed, the date in the source note will be adjusted accordingly in the next publication following the election where the referendum petition is considered.

Annotations

Beginning in 2012, the annotations for Colorado state appellate court decisions include both public domain and regional reporter case cites. In preparing annotations to court decisions, we endeavor to include the most recent decisions. Occasionally, this may result in the inclusion of a decision before it becomes finalized and published in an official reporter. In such instances, the case cite will contain blank spaces for the volume and page number of the reporter. The volume and page number will be substituted for the blank spaces in subsequent publications of the statutes.

TITLE 16
CRIMINAL PROCEEDINGS

THE
LIFE OF
JOHN RUSKIN

TITLE 16

CRIMINAL PROCEEDINGS

CODE OF CRIMINAL PROCEDURE

- Art. 1. General Provisions, 16-1-101 to 16-1-108.
- Art. 2. County Court Provisions, 16-2-101 to 16-2-201.
- Art. 2.5. Peace Officers, 16-2.5-101 to 16-2.5-203.
- Art. 2.7. Missing Person Reports - Unidentified Human Remains, 16-2.7-101 to 16-2.7-104.
- Art. 3. Arrest - Searches and Seizures, 16-3-101 to 16-3-503.
- Art. 4. Release from Custody Pending Final Adjudication, 16-4-101 to 16-4-304.
- Art. 5. Commencement of Criminal Action, 16-5-101 to 16-5-501.
- Art. 6. Change of Venue and Disqualification of Judge, 16-6-101 to 16-6-201.
- Art. 7. Separate Trial - Arraignment - Plea Agreements - Deferred Prosecution and Deferred Sentencing, 16-7-101 to 16-7-404.
- Art. 8. Insanity - Release, 16-8-101 to 16-8-307.
- Art. 8.5. Competency to Proceed, 16-8.5-101 to 16-8.5-119.
- Art. 9. Preparation for Trial, 16-9-101 to 16-9-601.
- Art. 10. Jury Trials, 16-10-101 to 16-10-402.
- Art. 11. Imposition of Sentence, 16-11-101 to 16-11-802.
- Art. 11.3. Colorado Commission on Criminal and Juvenile Justice, 16-11.3-101 to 16-11.3-105.
- Art. 11.5. Substance Abuse in the Criminal Justice System, 16-11.5-101 to 16-11.5-107.
- Art. 11.7. Standardized Treatment Program for Sex Offenders, 16-11.7-101 to 16-11.7-109.
- Art. 11.8. Management of Domestic Violence Offenders, 16-11.8-101 to 16-11.8-104.
- Art. 11.9. Standardized Screening Process for Mentally Ill Offenders, 16-11.9-101 to 16-11.9-105.
- Art. 12. Review of Judgments in Criminal Cases, 16-12-101 to 16-12-210.
- Art. 13. Special Proceedings, 16-13-101 to 16-13-906.

UNIFORM MANDATORY DISPOSITION OF DETAINERS ACT

- Art. 14. Uniform Mandatory Disposition of Detainers Act, 16-14-101 to 16-14-108.

WIRETAPPING AND EAVESDROPPING

- Art. 15. Wiretapping and Eavesdropping, 16-15-101 to 16-15-104.

CRIMINAL ACTIVITY INFORMATION

- Art. 15.5. Formal Requests for Criminal Activity Information from Public Utilities, 16-15.5-101 and 16-15.5-102.
- Art. 15.7. Crime Stopper Organizations, 16-15.7-101 to 16-15.7-104.
- Art. 15.8. Safe2tell Program, 16-15.8-101 to 16-15.8-104.

SENTENCING AND IMPRISONMENT

- Art. 16. Criminal Sentencing Act of 1967, 16-16-101 to 16-16-103.
- Art. 17. Commutation of Sentence, 16-17-101 and 16-17-102.

COSTS - CRIMINAL ACTIONS

- Art. 18. Costs in Criminal Actions, 16-18-101 to 16-18-105.
- Art. 18.5. Restitution in Criminal Actions, 16-18.5-101 to 16-18.5-110.

FUGITIVES AND EXTRADITION

- Art. 19. Fugitives and Extradition, 16-19-101 to 16-19-134.
- Art. 20. Extradition of Persons of Unsound Mind, 16-20-101 to 16-20-105.

OFFENDERS - REGISTRATION

- Art. 20.5. Integrated Criminal Justice Information System, 16-20.5-101 to 16-20.5-108.
- Art. 21. Offender-based Tracking System, 16-21-101 to 16-21-105.
- Art. 22. Colorado Sex Offender Registration Act, 16-22-101 to 16-22-115.
- Art. 23. DNA Crime Prevention and Exoneration of the Innocent Act, 16-23-101 to 16-23-105.

CODE OF CRIMINAL PROCEDURE

Editor’s note: Articles 1 to 13 of this title were numbered as articles 1 to 13 of chapter 39, C.R.S. 1963. The provisions of those articles were repealed and reenacted in 1972, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to those articles prior to 1972, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. For a detailed comparison of those articles, see the comparative tables located in the back of the index.

ARTICLE 1

General Provisions

Law reviews: For article, “Criminal Procedure”, which discusses Tenth Circuit decisions dealing with criminal procedure, see 61 Den. L.J. 281 (1984); for article, “Criminal Procedure”, which discusses Tenth Circuit decisions dealing with criminal procedure, see 62 Den. U.L. Rev. 159 (1985); for a discussion of Tenth Circuit decisions dealing with criminal procedure, see 66 Den. U. L. Rev. 717 (1989); for a discussion of Tenth Circuit decisions dealing with criminal procedure, see 67 Den. U. L. Rev. 701 (1990).

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|-----------|--|-----------|---|
| 16-1-101. | Citation of title 16. | | |
| 16-1-102. | Scope. | | under code authorized - definitions. |
| 16-1-103. | Purpose. | 16-1-107. | Integrated court on-line network - municipal court records - legislative declaration. |
| 16-1-104. | Definitions. | | |
| 16-1-105. | Interpretation of words and phrases. | | |
| 16-1-106. | Electronic transmission of documents required for arrest and search warrants | 16-1-108. | Admission of records in court. |

16-1-101. Citation of title 16. (1) Articles 1 to 13 of this title, shall be known and may be cited as the “Colorado Code of Criminal Procedure”. Within those articles, the “Colorado Code of Criminal Procedure” is sometimes referred to as “this code”.

(2) The portion of any section, subsection, paragraph, or subparagraph contained in this code which precedes a list of examples, requirements, conditions, or other items may be referred to and cited as the “introductory portion” of such section, subsection, paragraph, or subparagraph.

Source: L. 72: R&RE, p. 190, § 1. C.R.S. 1963: § 39-1-101.

16-1-102. Scope. The provisions of this code are intended to create, define, and protect rights, duties, and obligations as distinguished from matters wholly procedural. Except as

specifically set forth in this code, the provisions of this code are not applicable to proceedings under the "Colorado Children's Code" or to violations of municipal charters or municipal ordinances.

Source: L. 72: R&RE, p. 190, § 1. C.R.S. 1963: § 39-1-102.

ANNOTATION

Law reviews. For article, "Criminal Procedure", which discusses Tenth Circuit decisions dealing with criminal procedure, see 61 Den. L. J. 281 (1984). For article, "Criminal Procedure", which discusses Tenth Circuit decisions dealing with criminal procedure, see 62 Den. U. L. Rev. 159 (1985).

No sentencing of children. There is no express authority in the Colorado Children's Code

for the imposition of a jail sentence on a delinquent child under the age of 18 years, either as part of a final disposition or as a condition of probation. *People in Interest of A.F.*, 37 Colo. App. 185, 546 P.2d 972 (1975), *aff'd*, 192 Colo. 207, 557 P.2d 418 (1976).

Applied in *People v. District Court*, 198 Colo. 284, 599 P.2d 260 (1979); *People v. Wade*, 757 P.2d 1074 (Colo. 1988).

16-1-103. Purpose. This code is intended to provide for the just determination of every criminal proceeding. Its provisions shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unjustifiable expense and delay, the effective apprehension and trial of persons accused of crime, the just determination of every criminal proceeding by a fair and impartial trial, an adequate review, and the preservation of the public welfare and the fundamental human rights of individuals.

Source: L. 72: R&RE, p. 191, § 1. C.R.S. 1963: § 39-1-103.

16-1-104. Definitions. (1) The following definitions in this section are applicable generally in this code. Other terms which need definition, but which are used only in a limited number of sections of this code are defined in the particular section or article in which the terms appear. Definitions set forth in any section of this code are applicable whenever the same term is used in the same sense in another section of this code, unless the definition is specifically limited or the context indicates that it is inapplicable.

(2) "Arraignment" means the formal act of calling the defendant into open court, informing him of the offense with which he is charged, and the entry of a plea to the charge.

(3) "Bail" means the amount of money set by the court which is required to be obligated by a bond for the release of a person in custody to assure that he will appear before the court in which his appearance is required or that he will comply with other conditions set forth in a bond.

(3.5) "Bail bonding agent" or "bonding agent" means an individual who is in the business of writing appearance bonds and who is subject to regulation by the division of insurance in the department of regulatory agencies, including an insurance producer, cash-bonding agent, or professional cash-bail agent.

(4) "Bind over" means to require a defendant, following a preliminary hearing, to appear and answer in a court having jurisdiction to try the defendant for the crime with which he is charged.

(5) "Bond" means an undertaking, with or without sureties or security, entered into by a person in custody by which he binds himself to comply with the conditions of the undertaking and in default of such compliance to pay the amount of bail or other sum fixed in the bond.

(6) "Charge" means a formal written statement presented to a court accusing a person of the commission of a crime. The charge may be made by complaint, information, or indictment.

(7) "Complaint" means a written statement charging the commission of a crime by an alleged offender, filed in the county court.

(7.5) "Correctional facility" means any facility under the supervision of the department of corrections in which persons are or may be lawfully held in custody as a result of conviction of a crime.

(8) “Court of record” means any court except a municipal court unless otherwise defined by a particular section.

(8.5) (a) (I) “Crime of violence” means a crime in which the defendant used, or possessed and threatened the use of, a deadly weapon during the commission or attempted commission of any crime committed against an elderly person or a person with a disability or a crime of murder, first or second degree assault, kidnapping, sexual assault, robbery, first degree arson, first or second degree burglary, escape, or criminal extortion, or during the immediate flight therefrom, or the defendant caused serious bodily injury or death to any person, other than himself or herself or another participant, during the commission or attempted commission of any such felony or during the immediate flight therefrom.

(II) “Crime of violence” also means any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim. For purposes of this subparagraph (II), “unlawful sexual offense” shall have the same meaning as set forth in section 18-3-411 (1), C.R.S., and “bodily injury” shall have the same meaning as set forth in section 18-1-901 (3) (c), C.R.S.

(III) The provisions of subparagraph (II) of this paragraph (a) shall apply only to felony unlawful sexual offenses.

(b) As used in this subsection (8.5), “elderly person” means a person who is sixty years of age or older. “Person with a disability” means a person who is disabled because of the loss of or permanent loss of use of a hand or foot or because of blindness or the permanent impairment of vision in both eyes to such a degree as to constitute virtual blindness.

(9) “Custody” means the restraint of a person’s freedom in any significant way.

(10) “Felony complaint” means a written statement of the essential facts constituting the offense charged and shall be made upon oath before any person authorized to administer oaths within the state of Colorado.

(11) “Indictment” means a written statement, presented by a grand jury to the district court, which charges the commission of a crime by an alleged offender.

(12) “Information” means a written statement signed by a district attorney presented to the district court, which charges the commission of a crime by an alleged offender.

(13) “Personal recognizance” means a bond secured only by the personal obligation of the person giving the bond.

(14) “Preliminary hearing” means a hearing on a complaint filed in the county court or an information filed in the district court, to determine if there is probable cause to believe that an offense has been committed and that the person charged committed it.

(15) “Prosecuting attorney” means any attorney who is authorized to appear for and on behalf of the state of Colorado in a criminal case.

(16) A “search warrant” is a written order made by a judge of a court of record commanding a peace officer to search the person, premises, place, property, or thing described in the search warrant and to seize property described or identified therein.

(17) “Summons” means a written order or notice directing that a person appear before a designated court at a stated time and place and answer to a charge against him.

(18) A “warrant” is a written order issued by a judge of a court of record directed to any peace officer commanding the arrest of the person named or described in the order.

Source: L. 72: R&RE, p. 191, § 1. C.R.S. 1963: § 39-1-105. L. 79: (7.5) added, p. 678, § 2, effective July 1. L. 87: (8.5) added, p. 657, § 15, effective July 1. L. 93: (8.5)(a)(I) and (8.5)(b) amended, p. 1633, § 14, effective July 1. L. 2012: (3.5) added, (HB 12-1266), ch. 280, p. 1525, § 42, effective July 1.

Editor’s note: Section 52 of chapter 280, Session Laws of Colorado 2012, provides that the act adding subsection (3.5) applies to offenses committed and applications submitted on or after July 1, 2012.

Cross references: For mandatory sentences for crimes of violence, see § 18-1.3-406.

ANNOTATION

The definition of "custody" found in this section does not apply to the offense of escape under § 18-8-208. *People v. Thornton*, 929 P.2d 729 (Colo. 1996).

Defendant was already both in custody and under arrest when he attacked guards at his sentencing on another unrelated charge. *People v. Stanley*, 56 P.3d 1241 (Colo. App. 2002).

It is unnecessary at a preliminary hearing for the prosecution to show beyond a reasonable doubt that the defendant committed the crime, or even the probability of the defendant's conviction. Instead, the trial court is obligated at the preliminary hearing to view the evidence in the light most favorable to the prosecution and the prosecution therefore is accorded latitude at the preliminary hearing to establish probable

cause that the defendant committed the crime charged. *People v. District Ct., 17th Jud. Dist.*, 926 P.2d 567 (Colo. 1996).

The prosecution at a preliminary hearing is not required to produce evidence sufficient to support a conviction of the person charged and the trial court is to view the evidence at the preliminary hearing in the light most favorable to the prosecution. *People v. District Ct. of 11th Jud. Dist.*, 964 P.2d 498 (Colo. 1998).

A preliminary hearing may be had with regard to offenses only. *Brown v. District Court*, 189 Colo. 1481, 569 P.2d 1390 (1977).

Applied in *People v. Abbott*, 638 P.2d 781 (Colo. 1981); *People v. Lucero*, 654 P.2d 835 (Colo. 1982).

16-1-105. Interpretation of words and phrases. (1) In interpreting this code, such words and phrases as are defined in this article shall have the meanings indicated by their definitions, unless a particular context clearly requires a different meaning.

(2) Words or phrases not defined in this code but which are defined in the "Colorado Criminal Code" (title 18, C.R.S.) shall have the meanings given therein except when a particular context clearly requires a different meaning.

(3) Words and phrases used in this code and not expressly defined shall be construed according to the rules governing the construction of statutes of this state.

Source: L. 72: R&RE, p. 191, § 1. C.R.S. 1963: § 39-1-104.

Cross references: For statutory provisions concerning the construction of statutes, see article 4 of title 2.

16-1-106. Electronic transmission of documents required for arrest and search warrants under code authorized - definitions. (1) Whenever a written application for a warrant is required, it shall include both a written application and a sworn or affirmed affidavit. A peace officer may submit an application and affidavit for a warrant and the court may issue the warrant by an electronically or electromagnetically transmitted facsimile or by an electronic transfer that may include an electronic signature. Whenever a sworn or affirmed affidavit is required, the court may orally administer the oath or affirmation to the affiant and the affiant may then electronically transmit back to the court a written affidavit of the oath or affirmation.

(2) Procedures governing application for and issuance of arrest or search warrants consistent with this section may be established by rule of the Colorado supreme court, which rule should require the court administrator to establish paper quality and durability standards for warrants issued pursuant to this section.

(3) (a) Any electronically or electromagnetically transmitted facsimile of a document authorized to be made by this section shall be treated as an original document.

(b) A warrant, signed affidavit, and accompanying documents may be transmitted by electronic facsimile transmission or by electronic transfer with electronic signatures to the judge, who may act upon the transmitted documents as if they were originals. A warrant affidavit may be sworn to or affirmed by administration of the oath over the telephone by the judge. The affidavit with electronic signature received by the judge or magistrate and the warrant approved by the judge or magistrate, signed with electronic signature, shall be deemed originals. The judge or magistrate shall facilitate the filing of the original affidavit and original warrant with the clerk of the court and shall take reasonable steps to prevent tampering with the affidavit and warrant. The issuing judge or magistrate shall also forward

a copy of the warrant and affidavit, with electronic signatures, to the affiant. This subsection (3) does not authorize the court to issue warrants without having in its possession either a faxed copy of the signed affidavit and warrant or an electronic copy of the affidavit and warrant with electronic signatures.

(4) For purposes of this section:

(a) "Digital signature" means a document hash-encrypted with a private cryptographic key that can be used to authenticate the identity of the sender of a message or the signer of a document and can ensure that the original content of the message or document that has been sent is unchanged.

(b) "Digitized signature" means an electronic representation of an actual handwritten signature in which the image of a handwritten signature is created and saved using various methods, such as using a signature pad, scanning a handwritten signature, or digital photography. A digitized signature may be captured at the time the user applies the signature, or a previously saved image may be applied.

(c) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document. An electronic signature may include, but is not limited to, a digitized signature or a digital signature.

Source: **L. 92:** Entire section added, p. 444, § 1, effective April 16. **L. 2007:** (1) and (3) amended and (4) added, p. 22, § 1, effective March 1. **L. 2011:** (3)(b) amended, (HB 11-1018), ch. 18, p. 46, § 2, effective March 11. **L. 2012:** (3)(b) amended, (HB 12-1095), ch. 49, p. 180, § 1, effective August 8.

Editor's note: Section 2 of chapter 84, Session Laws of Colorado 1992, provided that the provisions of the act enacting this section would not become applicable until such time as the Colorado supreme court established by rule procedures governing the application for and issuance of arrest and search warrants consistent with this section. It further provided that the act would apply to arrest or search warrants issued on or after the date specified by rule of the Colorado supreme court. The supreme court promulgated rules effective November 1, 1992; see Crim. P. 41.

16-1-107. Integrated court on-line network - municipal court records - legislative declaration. (1) The general assembly hereby finds and declares that:

(a) The report on the pilot project on criminal background checks for child care providers, prepared for the state department of human services, was presented to the general assembly in August of 2000;

(b) Said report contained several recommendations for the improvement of the process of obtaining accurate and complete criminal history records for child care workers and volunteers;

(c) Some of those recommendations involved the records contained in the integrated Colorado on-line network (ICON) of the state judicial department and the ability to identify case dispositions;

(d) Other recommendations involved the work of the courts and the state judicial department in assisting in the completion and implementation of the integrated criminal justice information system program established by article 20.5 of this title.

(2) The general assembly further finds and declares that, in order to assure that criminal background checks for child care workers are accurate and complete, it is critical that the criminal justice agencies participating in the integrated criminal justice information system program established by article 20.5 of this title and political subdivisions continue to work with each other to complete and implement such program in a timely manner and consider the integration of municipal records, including the county court records of the city and county of Denver, into such program.

Source: **L. 2001:** Entire section added, p. 612, § 1, effective May 30.

16-1-108. Admission of records in court. (1) In a trial or hearing, all official records and documents of the state of Colorado, as defined in section 42-2-121 (2) (c), C.R.S., shall:

- (a) Be admissible in all county and district courts within the state of Colorado without further foundation;
 - (b) Be statutory exceptions to rule 802 of the Colorado rules of evidence; and
 - (c) Constitute prima facie proof of the information contained in the record or document if the record or document is accompanied by a certificate stating that the executive director of the department of revenue, or the executive director's appointee, has custody of the record or document and accompanied by and attached to a cover page that:
 - (I) Specifies the number of pages, exclusive of the cover page, that constitute the record or document being submitted; and
 - (II) Bears the signature of the executive director of the department of revenue, or the executive director's appointee, attesting to the authenticity of the record or document; and
 - (III) Bears the official seal of the department of revenue or a stamped or printed facsimile of the seal.
- (2) As used in subsection (1) of this section, "official records and documents" includes any mechanically or electronically reproduced copy, photograph, or printout of a record or document or any portion of a record or document filed with, maintained by, or prepared by the department of revenue pursuant to section 42-2-121 (2) (c), C.R.S. The department of revenue may also permit the electronic transmission of information for direct recording in the department of revenue's records and systems. Information transmitted by an electronic means that is approved by the department of revenue constitutes an official record for the purposes of this section, regardless of whether an original source document for the information exists or ever existed. The certificate and cover page and its contents required by subsection (1) of this section may be electronically produced and transmitted. An electronic reproduction of the certificate and cover page, including an electronic signature of the executive director of the department of revenue or of the executive director's appointee and an electronic reproduction of the official seal of the department of revenue, shall be admissible in court as set forth in subsection (1) of this section.
- (3) A record or document shall not be required to include every page of a record or document filed with, maintained by, or prepared by the department of revenue pursuant to this section to be an official record or document, if the official record or document includes all of those portions of the record or document relevant to the trial or hearing for which it is prepared. There shall be a presumption that the official record or document contains all information that is relevant to the trial or hearing.

Source: L. 2004: Entire section added, p. 1379, § 6, effective July 1. **L. 2005:** IP(1) and (2) amended, p. 765, § 24, effective June 1.

ARTICLE 2

County Court Provisions

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1		16-2-106.	Content of summons and complaint.
SIMPLIFIED PROCEDURES IN THE COUNTY COURT		16-2-107.	Content of summons after complaint.
16-2-101.	Misdemeanor and petty offense procedures - statement of purpose.	16-2-108.	Place of appearance and trial.
		16-2-109.	Service of summons.
		16-2-110.	Failure to appear.
16-2-102.	Definitions.	16-2-111.	Admission to bail pending appearance.
16-2-103.	Application of article.	16-2-112.	Arrest followed by a complaint.
16-2-104.	Issuance of summons and complaint.	16-2-113.	Appearance of defendant before judge - subsequent procedure.
16-2-105.	Issuance of summons after complaint. (Repealed)	16-2-114.	Appeals.

PART 2

PENALTY ASSESSMENT PROCEDURE

16-2-201. Penalty assessment procedure.

PART 1

SIMPLIFIED PROCEDURES IN THE COUNTY COURT

16-2-101. Misdemeanor and petty offense procedures - statement of purpose. In order to provide a simple and expeditious method for the prosecution of misdemeanors and petty offenses in county courts but one which also guarantees to the defendant his constitutional rights, the general assembly does hereby establish a simplified criminal procedure for misdemeanors and petty offenses to be used under the circumstances set forth in this code in sections 16-2-102 to 16-2-114.

Source: L. 72: R&RE, p. 193, § 1. C.R.S. 1963: § 39-2-101.

16-2-102. Definitions. As used in sections 16-2-104 to 16-2-114, “summons and complaint” means a document combining the functions of both a summons and a complaint.

Source: L. 72: R&RE, p. 193, § 1. C.R.S. 1963: § 39-2-102.

16-2-103. Application of article. (1) Sections 16-2-102 to 16-2-114 apply only to the prosecution of misdemeanors and petty offenses in county courts under simplified procedure and have no application to misdemeanors or petty offenses prosecuted in other courts or to felonies.

(2) Any matter arising in a proceeding under simplified procedure not specifically covered by sections 16-2-102 to 16-2-114 shall be subject to the other provisions of this code and any other applicable statute or court rule or, in the absence of such statute or court rule, to the application of common law principles. In any case due regard shall be had for speed and simplicity.

Source: L. 72: R&RE, p. 193, § 1. C.R.S. 1963: § 39-2-103.

16-2-104. Issuance of summons and complaint. A summons and complaint may be issued by any peace officer for an offense constituting a misdemeanor or a petty offense committed in his presence or, if not committed in his presence, which he has probable cause to believe was committed and probable cause to believe was committed by the person charged. Except for penalty assessment notices, which shall be handled according to the procedures set forth in section 16-2-201, a copy of a summons and complaint so issued shall be filed immediately with the county court before which appearance is required, and a second copy shall be given to the district attorney or deputy district attorney for the county.

Source: L. 72: R&RE, p. 193, § 1. C.R.S. 1963: § 39-2-104. L. 73: p. 498, § 1.

Cross references: For the description of peace officer as it applies to the “Colorado Criminal Code”, see § 16-2.5-101.

ANNOTATION

Annotator’s note. Since § 16-2-104 is similar to repealed § 37-17-5, C.R.S. 1963, a relevant case construing that provision has been included in the annotations to this section.

The contents of a summons and complaint used in the simplified criminal procedure are not found in this section, which enumerates only those circumstances under which the form

of summons and complaint may be used, but rather in section 16-2-106. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

It is sufficient that the summons allege that the complainant “knows or believes” rather than “knows or has reason to believe” ac-

cused committed the offense charged. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

Applied in *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

16-2-105. Issuance of summons after complaint. (Repealed)

Source: L. 72: R&RE, p. 193, § 1. C.R.S. 1963: § 39-2-105. L. 98: Entire section repealed, p. 946, § 2, effective May 27.

16-2-106. Content of summons and complaint. A summons and complaint issued by a peace officer shall contain the name of the defendant, shall identify the offense charged, including a citation of the statute alleged to have been violated, shall contain a brief statement or description of the offense charged, including the date and approximate location thereof, and shall direct the defendant to appear before a specified county court at a stated date, time, and place.

Source: L. 72: R&RE, p. 193, § 1. C.R.S. 1963: § 39-2-106.

ANNOTATION

Annotator’s note. Since § 16-2-106 is similar to repealed § 37-17-7, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

The contents of a summons and complaint are those things enumerated in this section, nothing more, nothing less. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

And the only persons designated as having the authority to sign the summons and complaint are peace officers, but there is no requirement that the complainant should be described as a peace officer on the face of the complaint. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

And it is sufficient that the summons alleges that the complainant “knows or believes” rather than stating more formally that he

“knows or has reason to believe” that the accused committed the offense charged. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

Moreover, this section does not require a verification of a summons and complaint charging a misdemeanor and issued by a peace officer. *Stubert v. County Court*, 163 Colo. 535, 433 P.2d 97 (1967).

And the fact verification is not mentioned is significant. By carefully spelling out in detail the contents of a summons and complaint issued by a peace officer in this section, the fact that there is no mention of any requirement that the summons and complaint contain a verification is quite significant. *Francis v. County Court*, 175 Colo. 308, 487 P.2d 375 (1971).

16-2-107. Content of summons after complaint. A summons issued out of the county court after a complaint is filed need contain only the date, time, and place of appearance of the defendant, but a copy of the complaint shall be attached to and served with the summons.

Source: L. 72: R&RE, p. 194, § 1. C.R.S. 1963: § 39-2-107.

16-2-108. Place of appearance and trial. The place at which the summons directs the defendant to appear shall be the place at which the court having jurisdiction over the matter customarily sits. It shall be a location at which the county court of the county in which the offense was alleged to have been committed sits regularly unless otherwise provided by this section. If the summons and complaint is issued by a peace officer and served personally upon the defendant by such peace officer, it may direct appearance at a location in which the county court of an adjoining county sits regularly if such a place is agreed to be more convenient by both the peace officer and the defendant. Costs and fines, to the extent provided by law, shall be retained by the county in which the matter is heard.

Source: L. 72: R&RE, p. 194, § 1. C.R.S. 1963: § 39-2-108. L. 91: Entire section amended, p. 429, § 5, effective May 24.

16-2-109. Service of summons. A summons issued by the county court in a prosecution for a misdemeanor or class 1 petty offense may be served by giving a copy to the defendant personally or by leaving a copy at the defendant's usual place of abode with some person over the age of eighteen years residing therein or by mailing a copy to the defendant's last known address by certified mail, return receipt requested, not less than fourteen days prior to the time the defendant is required to appear. Service by mail shall be complete upon the return of the receipt signed by the defendant. Personal service shall be made by any disinterested party over the age of eighteen years.

Source: L. 72: R&RE, p. 194, § 1. C.R.S. 1963: § 39-2-109. L. 90: Entire section amended, p. 923, § 2, effective March 27. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 842, § 57, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-2-110. Failure to appear. If a person upon whom a summons or summons and complaint has been served pursuant to this part 1 fails to appear in person or by counsel at the place and time specified therein, a bench warrant may issue for his arrest.

Source: L. 72: R&RE, p. 194, § 1. C.R.S. 1963: § 39-2-110. L. 87: Entire section amended, p. 603, § 1, effective July 1.

16-2-111. Admission to bail pending appearance. Any person charged with a misdemeanor or petty offense by complaint filed in the county court shall be admitted to bail or pretrial release as provided in article 4 of this code. When the county judge or judges are not immediately available for purposes of admission to bail or pretrial release of persons arrested and brought to the county court or jail, on charges of committing a misdemeanor or petty offense, such persons may be admitted to bail or be given a pretrial release by an appropriate officer designated by court rule. Unless otherwise provided by statute or supreme court rule, the county court shall provide by rule for the conditions and circumstances under which an admission to bail or pretrial release will be granted pending appearance before the judge, but in no event shall any such rule require conditions or impose liabilities in excess of those required by this code for cases filed in the district court.

Source: L. 72: R&RE, p. 194, § 1. C.R.S. 1963: § 39-2-111.

ANNOTATION

In addition to procedures under §§ 16-2-112 and 16-3-105, a county court acquires jurisdiction over a defendant when a warrantless arrest for a misdemeanor offense is made and the defendant is admitted to bail through execution of an appearance bond pursuant to this section and a misdemeanor complaint later is filed in the county court. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

The defendant's release upon admission to bail and the subsequent filing of the complaint complied with the requirements of § 16-2-112 when said section properly is read in conjunction with this section. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

By posting bail and executing an appearance bond the defendant waived service of the complaint on him until his appearance date and this procedure complied with § 16-2-112 and related rules, which do not require that a person charged with a misdemeanor be given a copy of the complaint until at or before the time he is arraigned. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

The statutes and procedural rules do not require that a person charged with a misdemeanor be given a copy of the complaint prior to being released on bail. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

16-2-112. Arrest followed by a complaint. If a peace officer makes an arrest without a warrant of a person for a misdemeanor or a petty offense, the arrested person shall be taken without unnecessary delay before the nearest available county or district judge. Thereafter, a complaint shall be filed immediately in the county court having jurisdiction of the offense and a copy thereof given to the defendant at or before the time he is arraigned. The provisions of this section are subject to the right of the arresting authority to release the arrested person pursuant to section 16-3-105.

Source: L. 72: R&RE, p. 195, § 1. C.R.S. 1963: § 39-2-112.

ANNOTATION

The defendant's release upon admission to bail and the subsequent filing of the complaint complied with the requirements of this section when properly read in conjunction with § 16-2-111. Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991).

By posting bail and executing an appearance bond the defendant waived service of the complaint on him until his appearance date and this procedure complied with this section and

related rules, which do not require that a person charged with a misdemeanor be given a copy of the complaint until at or before the time he is arraigned. Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991).

The statutes and procedural rules do not require that a person charged with a misdemeanor be given a copy of the complaint prior to being released on bail. Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991).

16-2-113. Appearance of defendant before judge - subsequent procedure.

(1) Upon appearance of the defendant before the judge in response to a summons or following arrest for a misdemeanor or a petty offense and in all proceedings thereafter unless otherwise provided in this code, the Colorado rules of criminal procedure are applicable. Prosecution may be conducted on the summons and complaint or the separate complaint if one has been filed. Trial may be held forthwith if the court calendar permits, immediate trial appears proper, and the parties do not request a continuance for good cause. Otherwise, the case shall be set for trial as soon as possible.

(2) Upon appearance before a judge for an offense under section 42-2-138 (1) (d) or 42-4-1301 (1) or (2) (a), C.R.S., the judge may order conditions of the summons, including but not limited to drug and alcohol evaluation and treatment. For a violation of an order entered pursuant to this subsection (2), a court may revoke the summons, issue a warrant for the defendant's arrest, and impose bail pursuant to the provisions of article 4 of this title.

Source: L. 72: R&RE, p. 195, § 1. C.R.S. 1963: § 39-2-113. L. 2008: Entire section amended, p. 785, § 2, effective July 1.

16-2-114. Appeals. (1) The defendant may appeal a judgment of the county court in a criminal action under simplified procedure to the district court of the county. To appeal, the defendant shall, within thirty-five days after the date of entry of the judgment or the denial of posttrial motions, whichever is later, file notice of appeal in the county court, post any advance costs that are required for the preparation of the record, and serve a copy of the notice of appeal upon the appellee. The defendant shall also, within such thirty-five days, docket the appeal in the district court and pay the docket fee. No motion for new trial or in arrest of judgment shall be required as a prerequisite to an appeal, but such motions may be made pursuant to applicable rule of the Colorado supreme court.

(2) The notice of appeal shall state with particularity the alleged errors of the county court or other grounds relied upon for the appeal and shall include a stipulation or designation of the evidence and other proceedings which the appellant desires to have included in the record certified to the district court. If the appellant intends to urge upon appeal that the judgment or a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to that finding or conclusion. The appellee shall have fourteen days after service upon him or her of the notice of appeal to file with the clerk of the county court and serve

upon the appellant a designation of any additional parts of the transcript or record which he or she deems necessary. The advance cost of preparing the additional record shall be posted by the appellant with the clerk of the county court within seven days after service upon him or her of the appellee's designation, or the appeal will be dismissed. If the district court finds that any part of the additional record designated by the appellee was unessential to a complete understanding of the questions raised by the appeal, it shall order the appellee to reimburse the appellant for the cost advanced for the preparation of that part without regard to the outcome of the appeal.

(3) Upon the filing of a notice of appeal and upon the posting of any advance costs by the appellant, as are required for the preparation of a record, unless the appellant is granted leave to proceed as an indigent, the clerk of the county court shall prepare and issue as soon as possible a record of the proceedings in the county court, including the summons and complaint or warrant, the separate complaint if any has been issued, and the judgment. The record shall also include a transcription or a joint stipulation of such part of the actual evidence and other proceedings as the parties designate. If the proceedings have been electrically recorded, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the court, either by him or her or under his or her supervision, within forty-two days after judgment or within such additional time as may be granted by the county court. The clerk shall notify in writing the opposing parties of the completion of the record, and such parties shall have fourteen days within which to file objections. If none are received, the record shall be certified forthwith by the judge. If objections are made, the parties shall be called for hearing and the objections settled by the county judge and the record then certified.

(4) When the record has been duly certified and any additional fees therefor paid, it shall be filed with the clerk of the district court by the clerk of the county court, and the opposing parties shall be notified by the clerk of the county court of the filing.

(5) A written brief setting out matters relied upon as constituting error and outlining any arguments to be made shall be filed in the district court by the appellant within twenty-one days after certification of the record. A copy of the appellant's brief shall be served upon the appellee. The appellee may file an answering brief within twenty-one days after such service. A reply brief may be filed within fourteen days after service of the answering brief. In the discretion of the district court, the time for filing briefs and answers may be extended.

(6) Pending the docketing of the appeal, a stay of execution shall be granted by the county court upon request. If a sentence of imprisonment has been imposed, the defendant may be required to post bail, and if a fine and costs have been imposed, a deposit of the amount thereof or the posting of a bond for the payment thereof may be required by the county court. Upon a request for stay of execution made anytime after the docketing of the appeal, this action may be taken by the district court. Stays of execution granted by the county court or district court and, with the written consent of the sureties if any, bonds posted with such courts shall remain in effect until after final disposition of the appeal, unless modified by the district court.

(7) If for any reason an adequate record cannot be certified to the district court, the case shall be tried de novo in that court. No action on appeal shall result in an increase in penalty.

(8) Unless there is further review by the supreme court upon writ of certiorari pursuant to the rules of that court, after final disposition of the appeal the judgment on appeal entered by the district court shall be certified to the county court for action as directed by the district court, except in cases tried de novo by the district court or in cases in which the district court modifies the county court judgment, and, in such cases, the judgment on appeal shall be that of the district court and so enforceable.

(9) Repealed.

Source: L. 72: R&RE, p. 195, § 1. C.R.S. 1963: § 39-2-114. L. 85: (9) repealed, p. 572, § 12, effective November 14, 1986. L. 2012: (1), (2), (3), and (5) amended, (SB 12-175), ch. 208, p. 842, § 58, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1), (2), (3), and (5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 16-2-114 is similar to repealed § 37-17-15, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

The function of a district court in acting as an appellate court is the same whether the case originates in a municipal court of record or a county court. *People v. Anderson*, 177 Colo. 84, 492 P.2d 844 (1972).

And this section requires a district court either to review a decision on the record, remand

the case for a new trial with instructions, or direct that trial de novo be had before the district court. *People v. Anderson*, 177 Colo. 84, 492 P.2d 844 (1972).

The appeal of misdemeanor cases, when tried de novo by a district court, results in the judgment being that of the district court and so enforceable. *Hylton v. City of Colo. Springs*, 32 Colo. App. 9, 505 P.2d 26 (1973).

PART 2

PENALTY ASSESSMENT PROCEDURE

16-2-201. Penalty assessment procedure. (1) When a person is arrested for a class 2 petty offense, the arresting officer may either give the person a penalty assessment notice and release him upon its terms or take him before a judge of the county court in the county in which the alleged offense occurred. The choice of procedures shall be based upon circumstances which reasonably persuade the officer that the alleged offender is likely or unlikely to comply with the terms of the penalty assessment notice. Such circumstances may include the officer accompanying the offender to a post office or mailbox and witnessing the deposit in the mail of the notice with payment of the fine attached.

(1.5) The provisions of subsection (1) of this section notwithstanding, when an officer comes upon an unattended vehicle which is parked in apparent violation of any county parking ordinance, the officer may place upon the vehicle a penalty assessment notice as specified in subsection (2) of this section; except that said notice shall contain the license plate number and state of registration of the vehicle and need not contain the identification of the alleged offender.

(2) The penalty assessment notice shall be a summons and complaint containing identification of the alleged offender, specification of the offense and applicable fine, a requirement that the alleged offender pay the fine or appear to answer the charge at a specified time and place, and any other matter reasonably adapted to effectuating the purposes of this section. A duplicate copy shall be sent to the clerk of the county court in the county in which the alleged offense occurred. The provisions of this section shall not apply to penalties assessed pursuant to authority of law outside this code unless this section is specifically referred to in such other law.

(3) If the person given a penalty assessment notice chooses to acknowledge his guilt, he may pay the specified fine in person or by mail at the place and within the time specified in the notice. If he chooses not to acknowledge his guilt, he shall appear as required in the notice. Upon trial, if the alleged offender is found guilty, the fine imposed shall be that specified in the notice for the offense of which he was found guilty, but customary court costs may be assessed against him in addition to the fine.

Source: L. 72: R&RE, p. 197, § 1. C.R.S. 1963: § 39-2-201. L. 73: p. 498, § 2. L. 91: Entire section amended, p. 423, § 1, effective March 11.

ANNOTATION

Section 16-3-102 permits a police officer to arrest a person who has committed a crime in the officer's presence. This section does not limit that authority. An officer may arrest when a crime occurs in his or her presence. When that crime is a class two petty offense, the arresting

officer may, pursuant to this section, either take the arrested suspect before a judge or release the suspect after issuing a penalty assessment. Police compliance with both statutes is achieved because, even though they conduct a full custodial arrest and search, police "may" still release

the offender without taking him before a judge. A custodial arrest and a discretionary release are not mutually exclusive under this section. People v. Triantos, 55 P.3d 131 (Colo. 2002).

An officer can decide, before or after a custodial arrest, to arrest or release a suspect, based upon whether the suspect is likely to

appear as required in a summons. The arresting officer can choose either to release the suspect or to take the suspect before a judge even after the officer has effectuated a custodial arrest and conducted a search of the suspect. People v. Triantos, 55 P.3d 131 (Colo. 2002).

ARTICLE 2.5

Peace Officers

PART 1

PEACE OFFICERS

16-2.5-101.	Peace officer - description - general authority.	16-2.5-122.	Auto industry investigator.
16-2.5-102.	Certified peace officer - P.O.S.T. certification required.	16-2.5-123.	Director of the division of gaming - gaming investigator.
16-2.5-103.	Sheriff - undersheriff - certified deputy sheriff - noncertified deputy sheriff.	16-2.5-124.	Liquor enforcement investigator.
16-2.5-104.	Coroner.	16-2.5-124.5.	Director of marijuana enforcement and medical marijuana enforcement investigator.
16-2.5-105.	Police officer.	16-2.5-125.	State lottery investigator.
16-2.5-106.	Southern Ute Indian police officer.	16-2.5-126.	Director of racing events - racing events supervisor - racing events investigator.
16-2.5-107.	Ute Mountain Ute Indian police officer.	16-2.5-127.	State student loan investigator.
16-2.5-108.	Town marshal - deputy.	16-2.5-128.	Colorado attorney general - chief deputy attorney general - solicitor general - assistant solicitor general - deputy attorney general - assistant attorney general of criminal enforcement - assistant attorney general and employee as designated.
16-2.5-109.	Fire arson investigator.	16-2.5-129.	Attorney general criminal investigator.
16-2.5-110.	Reserve police officer - reserve deputy sheriff - reserve deputy town marshal - definitions.	16-2.5-130.	P.O.S.T. director - P.O.S.T. board investigator.
16-2.5-111.	Executive director of the department of public safety - deputy executive director of the department of public safety - director of the division of criminal justice in the department of public safety.	16-2.5-131.	Chief security officer for the general assembly.
16-2.5-112.	Director of the division of homeland security and emergency management.	16-2.5-132.	District attorney - assistant district attorney - chief deputy district attorney - deputy district attorney - special deputy district attorney - special prosecutor.
16-2.5-113.	Colorado bureau of investigation director - agent.	16-2.5-133.	District attorney chief investigator - district attorney investigator.
16-2.5-114.	Colorado state patrol officer.	16-2.5-134.	Department of corrections inspector general - department of corrections investigator.
16-2.5-115.	Port of entry officer.	16-2.5-135.	Executive director of the department of corrections - warden - corrections officer.
16-2.5-116.	Colorado wildlife officer - special wildlife officer.	16-2.5-136.	Community parole officer.
16-2.5-117.	Colorado parks and recreation officer - special parks and recreation officer.	16-2.5-137.	Adult probation officer.
16-2.5-118.	Commissioner of agriculture.	16-2.5-138.	Juvenile probation officer - juvenile parole officer.
16-2.5-119.	State brand inspector.	16-2.5-139.	Police administrator - police officer employed by the Colorado mental health institute at Pueblo.
16-2.5-120.	Colorado state higher education security officer.		
16-2.5-121.	Executive director of the department of revenue - senior director of enforcement for the department of revenue.		

16-2.5-140.	Correctional security officer employed by the Colorado mental health institute at Pueblo.		chief deputy city attorney - deputy city attorney - special deputy city attorney - prosecuting attorney - senior prosecuting attorney - senior prosecutor - special prosecutor.
16-2.5-141.	Colorado state security guard.		
16-2.5-142.	Railroad peace officer.		
16-2.5-143.	Public utilities commission member.		
16-2.5-144.	Colorado National Guardsman.		PART 2
16-2.5-145.	Municipal court marshal.		
16-2.5-146.	Public transit officer - definitions.		SUNRISE REVIEW OF PEACE OFFICER STATUS
16-2.5-147.	Federal special agents.	16-2.5-201.	General assembly sunrise review of groups seeking statutory peace officer status.
16-2.5-148.	Colorado state higher education police officer.	16-2.5-202.	P.O.S.T. board review of peace officer status.
16-2.5-149.	City attorney - town attorney - senior assistant city attorney - assistant city attorney -	16-2.5-203.	Rules.

PART 1

PEACE OFFICERS

16-2.5-101. Peace officer - description - general authority. (1) A person who is included within the provisions of this article and who meets all standards imposed by law on a peace officer is a peace officer, and, notwithstanding any other provision of law, no person other than a person designated in this article is a peace officer. A peace officer may be certified by the peace officers standards and training board pursuant to part 3 of article 31 of title 24, C.R.S., and, at a minimum, has the authority to enforce all laws of the state of Colorado while acting within the scope of his or her authority and in the performance of his or her duties, unless otherwise limited within this part 1.

(2) A peace officer certified by the peace officers standards and training board shall have the authority to carry firearms at all times, concealed or otherwise, subject to the written firearms policy created by the agency employing the peace officer. All other peace officers shall have the authority to carry firearms, concealed or otherwise, while engaged in the performance of their duties or as otherwise authorized by the written policy of the agency employing the officer.

(3) As used in every statute, unless the context otherwise requires, "law enforcement officer" means a peace officer.

Source: L. 2003: Entire article added, p. 1605, § 2, effective August 6. L. 2006: (1) amended, p. 27, § 1, effective July 1, 2007.

ANNOTATION

Annotator's note. Since § 16-2.5-101 is similar to repealed § 18-1-901 (3)(l), relevant cases construing that provision have been included in the annotations to this section.

Jailer included as peace officer. The jailer is a deputy sheriff and as such is a peace officer within the definition of subsection (3)(l). *People v. Shockley*, 41 Colo. App. 515, 591 P.2d 589 (1978).

Fellow officer doctrine applicable to parole officer. By definition in the "Colorado Criminal Code", the parole officer is a "peace officer",

and there is no persuasive reason why a parole officer should not come within the fellow officer doctrine. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975).

Under the "fellow officer rule", a sheriff's deputies were entitled to rely upon and accept the information supplied by the parole officer. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975).

For purposes of the reference to subsection (3)(l)(I) made in § 24-31-302 (5), the certification requirement does not constitute a part of

that the referenced definition. Fraternal Order, No. 27 v. Denver, 914 P.2d 483 (Colo. App. 1995).

The phrase “has the authority to enforce all the laws of the state of Colorado while acting within the scope of his authority and in the performance of his duties”, does not con-

stitute a part of the definition of peace officer, level I. Fraternal Order, No. 27 v. Denver, 914 P.2d 483 (Colo. App. 1995).

Applied in People v. Roberts, 43 Colo. App. 100, 601 P.2d 654 (1979); People v. Herrera, 633 P.2d 1091 (Colo. App. 1981).

16-2.5-102. Certified peace officer - P.O.S.T. certification required. The following peace officers shall meet all the standards imposed by law on a peace officer and shall be certified by the peace officers standards and training board, referred to in this article as the “P.O.S.T. board”: A chief of police; a police officer; a sheriff; an undersheriff; a deputy sheriff; a Colorado state patrol officer; a town marshal; a deputy town marshal; a reserve police officer; a reserve deputy sheriff; a reserve deputy town marshal; the director of the Colorado bureau of investigation; a police officer or reserve police officer employed by a state institution of higher education; a Colorado wildlife officer; a Colorado parks and recreation officer; a Colorado police administrator or police officer employed by the Colorado mental health institute at Pueblo; an attorney general criminal investigator; a community parole officer; a public transit officer; a municipal court marshal; and the department of corrections inspector general.

Source: L. 2003: Entire article added, p. 1606, § 2, effective August 6. L. 2004: Entire section amended, p. 1162, § 2, effective May 27. L. 2008: Entire section amended, p. 85, § 1, effective March 18. L. 2010: Entire section amended, (HB 10-1422), ch. 419, p. 2069, § 26, effective August 11.

16-2.5-103. Sheriff - undersheriff - certified deputy sheriff - noncertified deputy sheriff. (1) A sheriff, an undersheriff, and a deputy sheriff are peace officers whose authority shall include the enforcement of all laws of the state of Colorado. A sheriff shall be certified by the P.O.S.T. board pursuant to section 30-10-501.6, C.R.S. An undersheriff and a deputy sheriff shall be certified by the P.O.S.T. board.

(2) A noncertified deputy sheriff or detention officer is a peace officer employed by a county or city and county whose authority is limited to the duties assigned by and while working under the direction of the chief of police, sheriff, an official who has the duties of a sheriff in a city and county, or chief executive of the employing law enforcement agency.

Source: L. 2003: Entire article added, p. 1606, § 2, effective August 6.

16-2.5-104. Coroner. A coroner is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to part 6 of article 10 of title 30, C.R.S.

Source: L. 2003: Entire article added, p. 1606, § 2, effective August 6.

16-2.5-105. Police officer. A police officer, including a chief of police employed by a municipality, is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who shall be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1606, § 2, effective August 6.

16-2.5-106. Southern Ute Indian police officer. A Southern Ute Indian police officer is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1606, § 2, effective August 6.

16-2.5-107. Ute Mountain Ute Indian police officer. A Ute Mountain Ute Indian police officer is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1606, § 2, effective August 6.

16-2.5-108. Town marshal - deputy. A town marshal or deputy town marshal is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who shall be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1607, § 2, effective August 6.

16-2.5-109. Fire arson investigator. A fire arson investigator authorized by a unit of local government is a peace officer while engaged in the performance of his or her duties whose authority shall be limited to the enforcement of arson and related laws and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1607, § 2, effective August 6. **L. 2008:** Entire section amended, p. 703, § 1, effective May 1.

16-2.5-110. Reserve police officer - reserve deputy sheriff - reserve deputy town marshal - definitions. (1) (a) A reserve police officer, a reserve deputy sheriff, and a reserve deputy town marshal are reserve officers.

(b) "Reserve officer" means a person authorized by a city, city and county, town, county, or state institution of higher education within this state to act as a reserve police officer, reserve deputy sheriff, or reserve town marshal for certain specific and limited periods of time while the person is authorized to be on duty and acting at the express direction or under the direct supervision of a fully P.O.S.T.-certified peace officer pursuant to section 16-2.5-103, 16-2.5-105, 16-2.5-108, or 16-2.5-120. A reserve officer is a peace officer while engaged in the performance of his or her duties whose authority shall be limited to the authority granted by his or her authorizing agency.

(c) A reserve officer:

(I) Shall obtain reserve certification by the P.O.S.T. board as a reserve officer; or

(II) May be a fully P.O.S.T.-certified peace officer serving as a volunteer and may be granted full peace officer status and authority at the discretion of the appointing authority.

(2) A city, city and county, town, county, or state institution of higher education assigning duties to a reserve officer beyond those duties included in the P.O.S.T. board training shall assume the responsibility for ensuring that the reserve officer is adequately trained for the duties. Any expenses associated with the additional training shall be authorized by the city, city and county, town, county, or state institution of higher education. If the jurisdiction allows or requires the reserve officer to carry or use a firearm while on duty, the reserve officer shall be certified for firearms proficiency with the same frequency and subject to the same requirements as a P.O.S.T.-certified peace officer in the jurisdiction. A reserve officer who does not comply with the training requirements set forth in this subsection (2) is not authorized to enforce the laws of the state of Colorado.

(3) (Deleted by amendment, L. 2007, p. 121, § 1, effective August 3, 2007.)

(3.5) If a police chief, sheriff, or town marshal determines that a reserve officer has been adequately trained to perform a law-enforcement function that the police chief, sheriff, or town marshal is required to perform, the police chief, sheriff, or town marshal may allow the reserve officer to perform the function either in uniform or in civilian clothes, whichever is appropriate.

(4) When performing extradition duties, the reserve officer shall be accompanied by a P.O.S.T.-certified officer.

(5) A reserve officer may be compensated for his or her time during a declared emergency or during a time of special need. In all other circumstances, a reserve officer shall serve without compensation, but may be reimbursed at the discretion of the city, city

and county, town, county, or state institution of higher education benefitting from the services of the reserve officer for any authorized out-of-pocket expenses incurred in the course of his or her duties. The city, city and county, town, county, or state institution of higher education shall pay the cost of workers' compensation benefits for injuries incurred by a reserve officer while on duty and while acting within the scope of his or her assigned duties. A reserve officer is an authorized volunteer for purposes of article 10 of title 24, C.R.S.

(6) For the purposes of this section:

(a) "Direct supervision" means an assignment given by a fully P.O.S.T.-certified peace officer to a reserve officer, which assignment is carried out in the personal presence of, or in direct radio or telephone contact with, and under the immediate control of, the fully P.O.S.T.-certified peace officer.

(b) "Express direction" means a defined, task-specific assignment given by a fully P.O.S.T.-certified peace officer to a reserve officer. The fully P.O.S.T.-certified peace officer need not be present while the reserve officer carries out the assignment.

(7) For the purposes of this section, a person serving as a citizen auxiliary is not a peace officer and the P.O.S.T. board shall not require the person to be certified.

Source: **L. 2003:** Entire article added, p. 1607, § 2, effective August 6. **L. 2004:** (3), (4), and (6) amended and (3.5) added, p. 678, § 1, effective August 4. **L. 2007:** (1), (3), and (6) amended, p. 121, § 1, effective August 3. **L. 2008:** (1)(b), (2), and (5) amended, p. 85, § 2, effective March 18.

16-2.5-111. Executive director of the department of public safety - deputy executive director of the department of public safety - director of the division of criminal justice in the department of public safety. The executive director and deputy executive director of the department of public safety and the director of the division of criminal justice in the department of public safety are peace officers whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: **L. 2003:** Entire article added, p. 1608, § 2, effective August 6. **L. 2012:** Entire section amended, (HB12-1079), ch. 21, p. 56, § 1, effective March 16.

16-2.5-112. Director of the division of homeland security and emergency management. The director of the division of homeland security and emergency management in the department of public safety is a peace officer whose authority includes the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: **L. 2003:** Entire article added, p. 1608, § 2, effective August 6. **L. 2012:** Entire section amended, (HB 12-1283), ch. 240, p. 1132, § 39, effective July 1.

Cross references: For the legislative declaration in the 2012 act amending this section, see section 1 of chapter 240, Session Laws of Colorado 2012.

16-2.5-113. Colorado bureau of investigation director - agent. The director of the Colorado bureau of investigation is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who shall be certified by the P.O.S.T. board. A Colorado bureau of investigation agent is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado pursuant to section 24-33.5-409, C.R.S., and who may be certified by the P.O.S.T. board.

Source: **L. 2003:** Entire article added, p. 1608, § 2, effective August 6.

16-2.5-114. Colorado state patrol officer. A Colorado state patrol officer is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado pursuant to section 24-33.5-212, C.R.S., and who shall be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1609, § 2, effective August 6.

16-2.5-115. Port of entry officer. A port of entry officer is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to section 42-8-104, C.R.S.

Source: L. 2003: Entire article added, p. 1609, § 2, effective August 6.

16-2.5-116. Colorado wildlife officer - special wildlife officer. (1) A Colorado wildlife officer employed by the Colorado division of parks and wildlife in the department of natural resources is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado pursuant to section 33-1-102 (4.3), C.R.S., and who shall be certified by the P.O.S.T. board. Each Colorado wildlife officer shall be required to complete a minimum of forty hours of continuing law enforcement education per calendar year, or such number of hours as may otherwise be required by law.

(2) A special wildlife officer is a peace officer whose authority is limited as defined by the director of the division of parks and wildlife pursuant to section 33-1-110 (5), C.R.S.

Source: L. 2003: Entire article added p. 1609, § 2, effective August 6; (2) amended, p. 1954, § 50, effective August 6.

16-2.5-117. Colorado parks and recreation officer - special parks and recreation officer. (1) A Colorado parks and recreation officer employed by the Colorado division of parks and wildlife in the department of natural resources is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado pursuant to section 33-10-102 (17), C.R.S., and who shall be certified by the P.O.S.T. board. Each Colorado parks and recreation officer shall be required to complete a minimum of forty hours of continuing law enforcement education per calendar year, or such number of hours as may otherwise be required by law.

(2) A special parks and recreation officer is a peace officer whose authority is limited as defined by the director of the division of parks and wildlife pursuant to section 33-10-109 (1) (f), C.R.S.

Source: L. 2003: Entire article added, p. 1609, § 2, effective August 6; (2) amended, p. 1954, § 51, effective August 6.

16-2.5-118. Commissioner of agriculture. The commissioner of agriculture or his or her designee is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to the "Farm Products Act", section 12-16-114, C.R.S., the "Commodity Handler Act", section 12-16-210, C.R.S., the "Animal Protection Act", section 35-42-107 (4), C.R.S., and the "Pet Animal Care and Facilities Act", section 35-80-109 (6), C.R.S.

Source: L. 2003: Entire article added, p. 1609, § 2, effective August 6.

16-2.5-119. State brand inspector. A state brand inspector is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to section 35-53-128, C.R.S.

Source: L. 2003: Entire article added, p. 1609, § 2, effective August 6.

16-2.5-120. Colorado state higher education security officer. A Colorado state higher education security officer employed by a state institution of higher education pursuant to sections 24-7-101 to 24-7-106, C.R.S., is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1610, § 2, effective August 6. **L. 2008:** Entire section amended, p. 86, § 3, effective March 18.

16-2.5-121. Executive director of the department of revenue - senior director of enforcement for the department of revenue. The executive director and the senior director of enforcement of the department of revenue are peace officers while engaged in the performance of their duties whose authority includes the enforcement of laws and rules regarding automobile dealers pursuant to section 12-6-105 (1) (d) (II), C.R.S., the lottery pursuant to sections 24-35-205 (3) and 24-35-206 (7), C.R.S., medical marijuana pursuant to article 43.3 of title 12, C.R.S., limited gaming pursuant to section 12-47.1-204, C.R.S., liquor pursuant to section 12-47-904 (1), C.R.S., and racing events pursuant to section 12-60-203 (1), C.R.S., and the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1610, § 2, effective August 6. **L. 2010:** Entire section amended, (HB 10-1284), ch. 355, p. 1685, § 4, effective July 1.

16-2.5-122. Auto industry investigator. An auto industry investigator is a peace officer while engaged in the performance of his or her duties whose authority shall be limited to the enforcement of section 12-6-105 (1) (d) (II), C.R.S.

Source: L. 2003: Entire article added, p. 1610, § 2, effective August 6.

16-2.5-123. Director of the division of gaming - gaming investigator. The director of the division of gaming in the department of revenue or a gaming investigator in the department of revenue is a peace officer while engaged in the performance of his or her duties whose primary authority shall be as stated in section 12-47.1-204, C.R.S., and shall also include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1610, § 2, effective August 6.

16-2.5-124. Liquor enforcement investigator. A liquor enforcement investigator is a peace officer while engaged in the performance of his or her duties and while acting under proper orders or regulations whose primary authority shall be as stated in sections 12-47-904 (1) and 24-35-504, C.R.S., and shall also include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1610, § 2, effective August 6.

16-2.5-124.5. Director of marijuana enforcement and medical marijuana enforcement investigator. A medical marijuana enforcement investigator is a peace officer while engaged in the performance of his or her duties and while acting under proper orders or rules pursuant to article 43.3 of title 12, C.R.S., and shall also include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2010: Entire section added, (HB 10-1284), ch. 355, p. 1685, § 5, effective July 1.

16-2.5-125. State lottery investigator. A state lottery investigator is a peace officer while engaged in the performance of his or her duties whose primary authority shall be as stated in sections 24-35-205 (3) and 24-35-206 (7), C.R.S., and shall also include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1610, § 2, effective August 6.

16-2.5-126. Director of racing events - racing events supervisor - racing events investigator. The director of racing events, a racing events supervisor, and a racing events investigator are peace officers while engaged in the performance of their duties whose primary authority shall be as stated in section 12-60-203 (1), C.R.S., and shall also include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1610, § 2, effective August 6.

16-2.5-127. State student loan investigator. A state student loan investigator is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to section 23-3.1-104 (2) (q), C.R.S.

Source: L. 2003: Entire article added, p. 1611, § 2, effective August 6.

16-2.5-128. Colorado attorney general - chief deputy attorney general - solicitor general - assistant solicitor general - deputy attorney general - assistant attorney general of criminal enforcement - assistant attorney general and employee as designated. The attorney general, chief deputy attorney general, solicitor general, assistant solicitors general, deputy attorneys general, assistant attorneys general of criminal enforcement, and certain other assistant attorneys general and employees of the department of law who are designated by the attorney general are peace officers whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1611, § 2, effective August 6. **L. 2011:** Entire section amended, (SB 11-020), ch. 39, p. 105, § 1, effective March 21.

16-2.5-129. Attorney general criminal investigator. An attorney general criminal investigator is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who shall be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1611, § 2, effective August 6.

16-2.5-130. P.O.S.T. director - P.O.S.T. board investigator. The director of the P.O.S.T. board and a P.O.S.T. board investigator are peace officers while engaged in the performance of their duties whose primary authority shall include the enforcement of laws and rules pertaining to the training and certification of peace officers and shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1611, § 2, effective August 6.

16-2.5-131. Chief security officer for the general assembly. The chief security officer for the general assembly is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to section 2-2-402, C.R.S.

Source: L. 2003: Entire article added, p. 1611, § 2, effective August 6.

16-2.5-132. District attorney - assistant district attorney - chief deputy district attorney - deputy district attorney - special deputy district attorney - special prosecutor. A district attorney, an assistant district attorney, a chief deputy district attorney, a

deputy district attorney, a special deputy district attorney, and a special prosecutor are peace officers whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1611, § 2, effective August 6.

16-2.5-133. District attorney chief investigator - district attorney investigator. A district attorney chief investigator and a district attorney investigator are peace officers whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1611, § 2, effective August 6.

16-2.5-134. Department of corrections inspector general - department of corrections investigator. The department of corrections inspector general and a department of corrections investigator are peace officers whose authority shall be pursuant to section 17-1-103.8, C.R.S., and whose authority shall include the enforcement of all the laws of the state of Colorado. A department of corrections investigator may be certified by the P.O.S.T. board. The inspector general shall be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1612, § 2, effective August 6.

16-2.5-135. Executive director of the department of corrections - warden - corrections officer. The executive director of the department of corrections, a warden, a corrections officer employed by the department of corrections, or other department of corrections employee assigned by the executive director, is a peace officer while engaged in the performance of his or her duties pursuant to title 17, C.R.S., whose primary authority is the supervision of persons in the custody or confinement of the department of corrections and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1612, § 2, effective August 6.

16-2.5-136. Community parole officer. A community parole officer employed by the department of corrections is responsible for supervising offenders in the community and supporting the division of adult parole in providing assistance to parolees to secure employment, housing, and other services to support their successful reintegration into the community while recognizing the need for public safety. A community parole officer is a peace officer whose authority shall be pursuant to section 17-27-105.5, C.R.S., and whose authority shall include the enforcement of all laws of the state of Colorado, and who shall be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1612, § 2, effective August 6. **L. 2010:** Entire section amended, (HB 10-1360), ch. 263, p. 1193, § 1, effective May 25.

16-2.5-137. Adult probation officer. An adult probation officer is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to part 2 of article 11 of this title.

Source: L. 2003: Entire article added, p. 1612, § 2, effective August 6.

16-2.5-138. Juvenile probation officer - juvenile parole officer. A juvenile probation officer and a juvenile parole officer are peace officers while engaged in the performance of their duties whose authority shall be limited pursuant to sections 19-2-926 and 19-2-1003, C.R.S.

Source: L. 2003: Entire article added, p. 1612, § 2, effective August 6.

16-2.5-139. Police administrator - police officer employed by the Colorado mental health institute at Pueblo. A police administrator and a police officer employed by the Colorado mental health institute at Pueblo are peace officers whose authority shall include the enforcement of all laws of the state of Colorado pursuant to article 7 of title 24, C.R.S., and who shall be certified by the P.O.S.T. board. Each police administrator or police officer employed by the Colorado mental health institute at Pueblo shall complete a minimum of forty hours of continuing law enforcement education per calendar year, or such number of hours as may otherwise be required by law.

Source: L. 2003: Entire article added, p. 1612, § 2, effective August 6. **L. 2009:** Entire section amended, (SB 09-097), ch. 110, p. 456, § 1, effective August 5.

16-2.5-140. Correctional security officer employed by the Colorado mental health institute at Pueblo. A correctional security officer employed by the Colorado mental health institute at Pueblo is a peace officer while engaged in the performance of his or her duties as provided in article 7 of title 24, C.R.S., and whose authority shall include the enforcement of all laws of the state of Colorado, and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1612, § 2, effective August 6. **L. 2009:** Entire section amended, (SB 09-097), ch. 110, p. 456, § 2, effective August 5.

16-2.5-141. Colorado state security guard. A Colorado state security guard is a peace officer while engaged in the performance of his or her duties pursuant to article 7 of title 24, C.R.S., whose authority shall be limited to the scope and authority of his or her assigned duties and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1613, § 2, effective August 6. **L. 2009:** Entire section amended, (SB 09-097), ch. 110, p. 456, § 3, effective August 5.

16-2.5-142. Railroad peace officer. A railroad peace officer is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to section 40-32-104.5, C.R.S., and who may be certified by the P.O.S.T. board.

Source: L. 2003: Entire article added, p. 1613, § 2, effective August 6.

16-2.5-143. Public utilities commission member. A public utilities commission member is a peace officer while engaged in the performance of his or her duties whose authority shall be limited pursuant to articles 1 to 17 of title 40, C.R.S.

Source: L. 2003: Entire article added, p. 1613, § 2, effective August 6.

16-2.5-144. Colorado National Guardsman. A Colorado National Guardsman is a peace officer while acting under call of the governor in cases of emergency or civil disorder. His or her authority shall be limited to the period of call-up specified by the governor and shall be exercised only if the executive order of the governor calling the National Guard to state duty specifies that enforcement of the laws of the state of Colorado is a purpose for the call-up.

Source: L. 2003: Entire article added, p. 1613, § 2, effective August 6.

16-2.5-145. Municipal court marshal. A municipal court marshal who is employed by a municipality and is specifically designated a peace officer by the municipality is a peace officer while engaged in the performance of his or her duties. The authority of such a

municipal court marshal shall be limited to providing security for the municipal court, transporting, detaining, and maintaining control over prisoners, executing all arrest warrants within the municipal court and its grounds, executing municipal court arrest warrants within the municipal limits, and serving legal process issued by the municipal court within the municipal limits. A municipal court marshal shall be certified by the P.O.S.T. board.

Source: **L. 2004:** Entire section added, p. 414, § 1, effective April 12. **L. 2006:** Entire section amended, p. 27, § 2, effective July 1, 2007.

16-2.5-146. Public transit officer - definitions. (1) A public transit officer who is employed by a public transportation entity, as defined in section 42-4-1416 (5) (b), C.R.S., and is specifically designated a peace officer by the public transportation entity is a peace officer while engaged in the performance of his or her duties. A public transit officer's authority shall be limited to the enforcement of all laws of the state of Colorado and the provision of security for passengers, employees, and property of the public transportation entity on public transportation vehicles, as defined in section 42-4-1416 (5) (c), C.R.S., and at public transportation facilities. A public transit officer's authority shall include the power of arrest based upon probable cause while engaged in the performance of his or her duties. A public transit officer shall be certified by the P.O.S.T. board.

(2) As used in this section, "public transportation facilities" means any movable or fixed facility operated by a transit authority and used primarily for mass transportation purposes, including but not limited to fixed guideway systems, parking lots, parking buildings, bus stops, transit stations, garages, and offices.

Source: **L. 2004:** Entire section added, p. 1162, § 1, effective May 27. **L. 2006:** (1) amended, p. 28, § 3, effective July 1, 2007. **L. 2012:** (1) amended, (SB 12-044), ch. 274, p. 1449, § 5, effective June 8.

16-2.5-147. Federal special agents. (1) A special agent of the federal bureau of investigation or the United States bureau of alcohol, tobacco, firearms, and explosives, a deputy or special deputy United States marshal, or an officer of the federal protective service of the United States department of homeland security immigration and customs enforcement, in any jurisdiction within the state of Colorado, is a peace officer whose authority is limited as provided in this section. The special agent, deputy or special deputy, or officer is authorized to act in the following circumstances:

(a) The special agent, deputy or special deputy, or officer is:

(I) Responding to a nonfederal felony or misdemeanor that has been committed in the presence of the special agent, deputy or special deputy, or officer;

(II) Responding to an emergency situation in which the special agent, deputy or special deputy, or officer has probable cause to believe that a nonfederal felony or misdemeanor involving injury or threat of injury to a person or property has been, or is being, committed and immediate action is required to prevent escape, serious bodily injury, or destruction of property;

(III) Rendering assistance at the request of a Colorado peace officer; or

(IV) Effecting an arrest or providing assistance as part of a bona fide task force or joint investigation with Colorado peace officers; and

(b) The agent, deputy or special deputy, or officer acts in accordance with the rules and regulations of his or her employing agency.

(2) A special agent of the federal bureau of investigation or the United States bureau of alcohol, tobacco, firearms, and explosives, a deputy or special deputy United States marshal, or an officer of the federal protective service of the United States department of homeland security immigration and customs enforcement is a person who is employed by the United States government, assigned to the federal bureau of investigation, the United States bureau of alcohol, tobacco, firearms, and explosives, the United States marshal service, or the federal protective service of the United States department of homeland security immigration and customs enforcement, empowered to effect an arrest with or

without a warrant for violations of the United States code, and authorized to carry a firearm and use deadly force in the performance of the special agent's, deputy's or special deputy's, or officer's official duties as a federal law enforcement officer.

(3) Upon effecting an arrest under the authority of this section, a special agent of the federal bureau of investigation or the United States bureau of alcohol, tobacco, firearms, and explosives, a deputy or special deputy United States marshal, or an officer of the federal protective service of the United States department of homeland security immigration and customs enforcement shall immediately surrender custody of the arrested individual to a Colorado peace officer.

(4) This section does not impose liability on or require indemnification or create a waiver of sovereign immunity by the state of Colorado for any action performed under this section by a special agent of the federal bureau of investigation or the United States bureau of alcohol, tobacco, firearms, and explosives, a deputy or special deputy United States marshal, or an officer of the federal protective service of the United States department of homeland security immigration and customs enforcement.

(5) Nothing in this section shall be construed to expand the authority of federal law enforcement officers to initiate or conduct an independent investigation into violations of Colorado law.

Source: L. 2006: Entire section added, p. 126, § 1, effective March 27. **L. 2008:** Entire section amended, p. 701, § 1, effective August 5. **L. 2011:** Entire section amended, (HB 11-1073), ch. 32, p. 90, § 1, effective August 10.

16-2.5-148. Colorado state higher education police officer. A Colorado state higher education police officer employed by a state institution of higher education pursuant to article 7.5 of title 24, C.R.S., is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who shall be certified by the P.O.S.T. board.

Source: L. 2008: Entire section added, p. 86, § 4, effective March 18. **L. 2009:** Entire section amended, (SB 09-097), ch. 110, p. 457, § 4, effective August 5.

16-2.5-149. City attorney - town attorney - senior assistant city attorney - assistant city attorney - chief deputy city attorney - deputy city attorney - special deputy city attorney - prosecuting attorney - senior prosecuting attorney - senior prosecutor - special prosecutor. (1) A city attorney, town attorney, senior assistant city attorney, assistant city attorney, chief deputy city attorney, deputy city attorney, special deputy city attorney, prosecuting attorney, senior prosecuting attorney, senior prosecutor, or special prosecutor employed or contracted by a municipality, city, town, statutory city or town, or city and county is a peace officer only while engaged in the performance of his or her duties as a prosecutor. Such peace officer's authority shall include the enforcement of all laws of the municipality, city, town, statutory city or town, or city and county and the state of Colorado, and the peace officer may be certified by the P.O.S.T. board.

(2) Notwithstanding the provisions of subsection (1) of this section, the peace officer status conferred by subsection (1) of this section shall not be available to an attorney specified in subsection (1) of this section who chooses to practice as a criminal defense attorney in the state of Colorado while also working as a prosecuting attorney or an attorney who contracts with a municipality, city, town, statutory city or town, or city and county, local government to serve as a city attorney, town attorney, senior assistant city attorney, assistant city attorney, chief deputy city attorney, deputy city attorney, special deputy city attorney, prosecuting attorney, senior prosecuting attorney, senior prosecutor, or special prosecutor on a less than a full-time basis.

Source: L. 2012: Entire section added, (HB 12-1026), ch. 76, p. 256, § 1, effective April 6.

PART 2

SUNRISE REVIEW OF PEACE OFFICER STATUS

16-2.5-201. General assembly sunrise review of groups seeking statutory peace officer status. (1) The general assembly finds that it is necessary to ensure that clear standards exist for obtaining peace officer status in the state of Colorado. The general assembly further finds it made statutory changes in 2003 to end the stratification of peace officers and ensure all peace officers receive a consistent level of statutory protection. The general assembly therefore declares, in order to maintain clear standards and consistent statutory protections for peace officers, it is necessary for the P.O.S.T. board to review a group that seeks peace officer status either for the group or for a specific position, prior to the group seeking authorization from the general assembly for the status.

(2) No later than July 1 of any year, a group, or political subdivision of the state that seeks peace officer status either for the group or for a specific position, shall submit to the P.O.S.T. board, for its review, a proposal containing the following information:

(a) A complete description of the position or a description of the group proposed for peace officer status and an estimate of the number of persons who hold the position or are in the group;

(b) A description of the specific need for the authority and protections required for the position or group;

(c) The benefit to the public that would result from granting the status;

(d) The costs associated with granting the status; and

(e) A resolution or letter of support for proposed change in status from the chief executive officer of the unit of government or political subdivision employing the group or overseeing the proposed position.

(3) After receiving the information specified in subsection (2) of this section, the P.O.S.T. board shall prepare an analysis, evaluation, and recommendation of the proposed status. The analysis, evaluation, and recommendation shall be based upon criteria established by the P.O.S.T. board in rules adopted pursuant to section 16-2.5-203.

(4) (a) The P.O.S.T. board shall conduct a hearing with the group seeking peace officer status for the group or for a specific position.

(b) At the hearing, the determination as to whether peace officer status is needed shall be based upon the criteria contained in the P.O.S.T. board rules.

(5) After the hearing, the P.O.S.T. board shall submit a report to the group seeking peace officer status for the group or specific position and to the judiciary committees of the house of representatives and the senate no later than October 15 of the year following the year in which the proposal was submitted.

(6) The group seeking peace officer status for the group or specific position may request members of the general assembly to present appropriate legislation to the general assembly during each of the two regular sessions that immediately succeed the date of the report required pursuant to subsection (2) of this section without having to comply again with the provisions of subsections (2) and (4) of this section. Bills introduced pursuant to this subsection (6) shall count against the number of bills to which members of the general assembly are limited by joint rule of the senate and the house of representatives. The general assembly shall not consider peace officer status of more than five positions or groups in any one session of the general assembly.

(7) This section is exempt from the provisions of section 24-1-136 (11), C.R.S., and the periodic reporting requirement of that section shall remain in effect until changed by the general assembly acting by bill.

Source: L. 2004: Entire part added, p. 1896, § 1, effective June 4.

16-2.5-202. P.O.S.T. board review of peace officer status. (1) For a position, group, or political subdivision that received peace officer status after July 1, 2003, and did not go through the process described in section 16-2.5-201, the P.O.S.T. board shall review the peace officer authority of the position, group, or political subdivision.

- (2) The P.O.S.T. board shall require the group that received the peace officer status or the group or political subdivision that oversees a position that received peace officer status to submit to the P.O.S.T. board the information required in section 16-2.5-201 (2).
- (3) After receiving the information, the P.O.S.T. board shall prepare an analysis, evaluation, and recommendation of the peace officer status. The analysis, evaluation, and recommendation shall be based upon the criteria established in P.O.S.T. board rule.
- (4) The P.O.S.T. board shall conduct a hearing concerning peace officer status for the group or the specific position, pursuant to the provisions of section 16-2.5-201 (4).
- (5) The P.O.S.T. board shall submit a report to the group or political subdivision seeking to retain peace officer status, either for the group or for a specific position, and to the judiciary committees of the house of representatives and the senate no later than October 15 of the year following the year in which the P.O.S.T. board began the review. The report may include legislative recommendations.

Source: L. 2004: Entire part added, p. 1898, § 1, effective June 4.

16-2.5-203. Rules. Pursuant to article 4 of title 24, C.R.S., the P.O.S.T. board shall promulgate rules establishing the criteria that shall be applied in determining whether to recommend peace officer status for a group or specific position as provided in section 16-2.5-201 (4).

Source: L. 2004: Entire part added, p. 1898, § 1, effective June 4.

ARTICLE 2.7

Missing Person Reports -
Unidentified Human Remains

16-2.7-101.	Definitions.		sponse.
16-2.7-102.	Missing person reports - ac-	16-2.7-104.	Unidentified human remains -
	ceptance.		reporting - DNA samples.
16-2.7-103.	Missing person reports - re-		

- 16-2.7-101. Definitions.** As used in this article, unless the context otherwise requires:
- (1) “DNA” means deoxyribonucleic acid.
- (2) “Missing person” means a person whose whereabouts are unknown and whose safety or welfare is the subject of concern.

Source: L. 2006: Entire article added, p. 394, § 1, effective April 6.

- 16-2.7-102. Missing person reports - acceptance.** (1) Any person with relevant, credible information suggesting that a person is missing may make a missing person report to a law enforcement agency.
- (2) A law enforcement agency shall accept without delay a missing person report that is submitted in person if:
- (a) The missing person resides, or was last known to reside, within the jurisdiction of the law enforcement agency and the missing person’s last-known location is the missing person’s residence or his or her location is unknown; or
- (b) There is credible information indicating that the missing person was last believed to be within the jurisdiction of the law enforcement agency.
- (3) Each law enforcement agency is encouraged to accept a missing person report submitted by telephone or by electronic or other media to the extent that:
- (a) The report meets the conditions of paragraph (a) or (b) of subsection (2) of this section; and
- (b) Acceptance of the report is consistent with law enforcement policies or practices.
- (4) A law enforcement agency shall not refuse to accept a missing person report on the basis that the missing person has not yet been missing for any length of time.

(5) Notwithstanding the provisions of subsections (2) and (3) of this section, a law enforcement agency is not required to accept a missing person report if the person is the subject of a missing person report under investigation by another law enforcement agency within this state.

Source: L. 2006: Entire article added, p. 394, § 1, effective April 6.

16-2.7-103. Missing person reports - response. Upon receiving a report of a missing person, a law enforcement agency shall assess the information received from the reporting person and other available information. The law enforcement agency shall then determine the best course of action based on the circumstances. If the missing person is eighteen years of age or older and has allegedly been missing for twenty-four hours or more, such action shall include entry of relevant information into state and national databases and appropriate communications with other law enforcement agencies that may assist in locating the missing person. If the missing person is under eighteen years of age, the law enforcement agency shall, within twenty-four hours after receiving the report, notify the Colorado bureau of investigation pursuant to section 24-33.5-415.1 (3), C.R.S.

Source: L. 2006: Entire article added, p. 395, § 1, effective April 6.

16-2.7-104. Unidentified human remains - reporting - DNA samples. (1) Except as provided in section 24-80-1303, C.R.S., with regard to anthropological investigations, a person who has custody of unidentified human remains shall immediately notify the coroner or medical examiner of the county in which the remains are located and the sheriff, police chief, or land managing agency official in accordance with section 24-80-1302 (1), C.R.S.

(2) If a coroner or medical examiner takes legal custody of unidentified human remains pursuant to section 24-80-1302 (2), C.R.S., or section 30-10-606 (1.2), C.R.S., the coroner or medical examiner shall make reasonable attempts to identify the human remains. These attempts may include, but need not be limited to, obtaining:

- (a) Photographs of the human remains prior to an autopsy;
- (b) Dental or skeletal X rays of the human remains;
- (c) Photographs of items found with the human remains;
- (d) Fingerprints from the human remains;
- (e) Samples of tissue suitable for DNA typing from the human remains;
- (f) Samples of whole bone or hair from the human remains suitable for DNA typing.

(3) If a coroner or medical examiner takes legal custody of unidentified human remains pursuant to section 24-80-1302 (2), C.R.S., or section 30-10-606 (1.2), C.R.S., the coroner or medical examiner shall:

(a) Enter information concerning the physical appearance and structure of the unidentified human remains, including DNA typing information, into the national crime information center database; or

(b) Work with law enforcement officials to ensure that information concerning the physical appearance and structure of the unidentified human remains, including DNA typing information, is entered into the national crime information center database.

(4) A coroner or medical examiner shall neither dispose of nor engage in actions that will materially affect unidentified human remains before the coroner or medical examiner:

(a) Obtains from the unidentified human remains samples suitable for DNA identification and archiving, if possible;

(b) Obtains photographs of the unidentified human remains; and

(c) Exhausts all other appropriate steps for identification of the human remains.

(5) Until all available information concerning the physical appearance and structure of unidentified human remains is entered into the national crime information center database, cremation of unidentified human remains is prohibited.

Source: L. 2006: Entire article added, p. 395, § 1, effective April 6.

ARTICLE 3

Arrest - Searches and Seizures

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1

AUTHORITY OF PEACE OFFICER
TO MAKE AN ARREST

- 16-3-101. Arrest - when and how made.
- 16-3-102. Arrest by peace officer.
- 16-3-103. Stopping of suspect.
- 16-3-104. Arrest by peace officer from another jurisdiction - definitions.
- 16-3-105. Release by arresting authority.
- 16-3-106. Peace officer may pursue offender.
- 16-3-107. Custodial care of prisoner in transit.
- 16-3-107.5. Transportation of prisoners - definitions.
- 16-3-108. Issuance of arrest warrant without information or complaint.
- 16-3-109. Peace officer - authority to make arrest while off duty.
- 16-3-110. Peace officers - duties.

PART 2

AUTHORITY OF PERSON
NOT A PEACE OFFICER
TO MAKE AN ARREST

- 16-3-201. Arrest by a private person.
- 16-3-202. Assisting peace officer - arrest - furnishing information - immunity.
- 16-3-203. Preventing a crime - reimbursement.

PART 3

SEARCHES AND SEIZURES

- 16-3-301. Search warrants - issuance - grounds.

- 16-3-301.1. Court orders for the production of records - definitions.
- 16-3-302. Search warrants - municipalities - inspections - grounds.
- 16-3-303. Search warrants - application.
- 16-3-304. Search warrants - contents.
- 16-3-305. Search warrants - direction - execution and return.
- 16-3-306. Search warrants - joinder.
- 16-3-307. Limiting clause.
- 16-3-308. Evidence - admissibility - declaration of purpose - definitions.
- 16-3-309. Admissibility of laboratory test results.
- 16-3-310. Oral advisement and consent prior to search of a vehicle or a person during a police contact.

PART 4

RIGHTS OF PERSONS IN CUSTODY

- 16-3-401. Treatment while in custody.
- 16-3-402. Right to communicate with attorney and family.
- 16-3-403. Right to consult with attorney.
- 16-3-404. Duty of officers to admit attorney.
- 16-3-405. Strip searches - when authorized or prohibited.

PART 5

WARRANTS AND BONDS FOR PERSONS
ILLEGALLY IN THE COUNTRY

- 16-3-501. Warrants issued for persons illegally in the country.
- 16-3-502. No dismissal of cases against persons illegally in the country.
- 16-3-503. Bonds recovered for persons illegally in the country.

PART 1

AUTHORITY OF PEACE OFFICER TO MAKE AN ARREST

16-3-101. Arrest - when and how made. (1) An arrest may be made on any day and at any time of the day or night.

(2) All necessary and reasonable force may be used in making an arrest.

(3) All necessary and reasonable force may be used to effect an entry upon any building or property or part thereof to make an authorized arrest.

Source: L. 72: R&RE, p. 197, § 1. C.R.S. 1963: § 39-3-101.

ANNOTATION

Persons and evidence may be protected. Police officers can, when in hot pursuit and when confronted with exigent circumstances, act to protect themselves and to prevent the destruction of evidence or injury to another.

People v. Vaughns, 175 Colo. 369, 489 P.2d 591 (1971) (decided prior to enactment of § 39-3-101, C.R.S. 1963, the earliest source of § 16-3-101).

16-3-102. Arrest by peace officer. (1) A peace officer may arrest a person when:

- (a) He has a warrant commanding that such person be arrested; or
- (b) Any crime has been or is being committed by such person in his presence; or
- (c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

Source: L. 72: R&RE, p. 198, § 1. C.R.S. 1963: § 39-3-102. L. 77: (1)(c) amended, p. 850, § 1, effective May 20.

ANNOTATION

- I. General Consideration.
- II. Arrest Pursuant to Warrant.
- III. Warrantless Arrest.
 - A. In General.
 - B. Commission of Crime.
 - C. Probable Cause.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "Highlights of the 1955 Legislative Session — Criminal Law and Procedure", see 28 Rocky Mt. L. Rev. 69 (1955). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment, "Payton v. New York: The Supreme Court Reverses the Common Law Warrantless Arrest Requirements", see 58 Den. L.J. 197 (1980). For article, "The Demise of the Aquilar-Spinelli Rule: A Case of Faulty Reception", see 61 Den. L.J. 431 (1984). For comment, "People v. Thomas: Furtive Gestures as an Element of Reasonable Suspicion — The Ongoing Struggle to Determine a Standard", see 61 Den. L.J. 579 (1984). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with stops and arrests, see 62 Den. U.L. Rev. 165 (1985). For article, "Using Local Police Powers to Protect the Environment", see 24 Colo. Law. 1063 (1995).

Annotator's note. Since § 16-3-102 is similar to repealed § 39-2-20, C.R.S. 1963, and CSA, C. 48, § 432, relevant cases construing those provisions have been included in the annotations to this section.

Unlawful arrest is not official act. If an arrest is not a lawful one, if it is made under a void warrant or without a warrant in a case where a warrant is required, or if it is not made

in such circumstances as justify the arrest without a warrant, the officer is not acting in his official capacity, either by virtue of, or under color of, office; and they are merely his private or personal acts for which his sureties are not liable. *Johnson v. Enlow*, 132 Colo. 101, 286 P.2d 630 (1955).

And question is for jury. Where there is a dispute in the evidence as to whether there was in fact an unlawful arrest, the question is for the jury. *McDaniel v. People*, 179 Colo. 153, 499 P.2d 613, cert. denied, 409 U.S. 1060, 93 S. Ct. 558, 34 L. Ed.2d 512 (1972).

The probable cause requirement is applicable whether the arrest is made with or without a warrant. *People v. Hoinville*, 191 Colo. 357, 553 P.2d 777 (1976).

An arrest with or without a warrant must stand on firmer ground than mere suspicion. *People v. Weinert*, 174 Colo. 71, 482 P.2d 103 (1971).

Applied in *People v. Apodaca*, 38 Colo. App. 395, 561 P.2d 351 (1976), aff'd, 194 Colo. 1324, 571 P.2d 1109 (1977); *People v. Conner*, 195 Colo. 525, 579 P.2d 1160 (1978); *People v. Lott*, 197 Colo. 78, 589 P.2d 945 (1979); *People v. Rothe*, 43 Colo. App. 274, 606 P.2d 79 (1979); *People v. Smith*, 620 P.2d 232 (Colo. 1980); *People v. Eichelberger*, 620 P.2d 1067 (Colo. 1980); *People v. Wolf*, 635 P.2d 213 (Colo. 1981); *People v. Bustam*, 641 P.2d 968 (Colo. 1982); *People v. Roybal*, 655 P.2d 410 (Colo. 1982); *People v. Hamilton*, 666 P.2d 152 (Colo. 1983); *People v. Florez*, 680 P.2d 219 (Colo. 1984).

II. ARREST PURSUANT TO WARRANT.

Even though an arrest warrant is invalid, the arrest may be upheld if the arresting officer

had probable cause to believe that an offense had been committed by the defendant apart from the complaint and the officer was confronted with exigent circumstances. *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971).

III. WARRANTLESS ARREST.

A. In General.

Law reviews. For note, "The Evolution of the Police Officer's Right to Arrest Without a Warrant in Colorado", see 43 Den. L.J. 366 (1966).

Annotator's note. For further annotations concerning warrantless arrests, see § 7 of art. II, Colo. Const.

Authority to arrest outside territorial jurisdictions. All Colorado police officers have the power to make arrests, even when outside of their territorial jurisdictions, when a crime has been committed in their presence. *People v. Bloom*, 195 Colo. 246, 577 P.2d 288 (1978).

A peace officer has authority to make arrests without a warrant of persons committing or attempting to commit offenses in his presence, whether the offense be a felony or a misdemeanor, of persons who have committed felonies out of his presence, of persons he has reasonable cause to believe guilty of a felony that has been committed, and of persons charged, upon reasonable cause, with having committed a felony. *Johnson v. Enlow*, 132 Colo. 101, 286 P.2d 630 (1955).

An officer may make an arrest for violation of a misdemeanor without a warrant if the officer has probable cause or reasonable grounds to believe that an offense has been committed and probable cause or reasonable grounds to believe that a certain individual committed that offense. *Beyer v. Young*, 32 Colo. App. 273, 513 P.2d 1086 (1973).

Only probable cause and exigent circumstances will excuse statutory warrant requirements. *People v. Henry*, 195 Colo. 309, 578 P.2d 1041, appeal dismissed, 439 U.S. 961, 99 S. Ct. 445, 58 L. Ed.2d 419 (1978).

Absent exigent circumstances, it is necessary to obtain arrest warrant in order to justify entry into private home to make an arrest. *People v. Williams*, 200 Colo. 187, 613 P.2d 879 (1980).

Even where probable cause exists. Although police officers have probable cause to believe a suspect committed a crime, nevertheless they may not enter a private residence to effect an arrest in the absence of exigent circumstances. *McCall v. People*, 623 P.2d 397 (Colo. 1981).

Exigent circumstances encompasses compelling need for immediate police action. The doctrine of exigent circumstances encompasses those situations where, due to an emergency, the compelling need for immediate police action

mitigates against the strict adherence to the warrant requirement. *McCall v. People*, 623 P.2d 397 (Colo. 1981).

People's burden to rebut presumption of unconstitutional arrest without warrant. An arrest without a warrant is presumed to have been unconstitutional, and the state has the burden of rebutting that presumption by showing both that the arrest was supported by probable cause and that it fell within a recognized exception to the warrant requirement. *People v. Burns*, 200 Colo. 387, 615 P.2d 686 (1980).

The lawfulness of an arrest without a warrant by state officers for a state offense must be determined by state law. *People v. Navran*, 174 Colo. 222, 483 P.2d 228 (1971).

Remedy for violation of arrest warrant requirement is the exclusion of evidence seized which is tainted as "fruit of the poisonous tree". *People v. Henry*, 195 Colo. 309, 578 P.2d 1041, appeal dismissed, 439 U.S. 961, 99 S. Ct. 445, 58 L. Ed.2d 419 (1978).

Officer not liable for false arrest and false imprisonment. Where police officer had both probable cause to believe that an offense had been committed and that the plaintiff was the person who had committed it, he was not civilly liable for false arrest and false imprisonment. *Beyer v. Young*, 32 Colo. App. 273, 513 P.2d 1086 (1973).

Failure of deputy to obtain arrest warrant was justified. *People v. Fratus*, 187 Colo. 52, 528 P.2d 392 (1974).

Voluntary consent by occupant may constitute valid waiver of warrant requirement. A voluntary consent by an occupant of premises authorizing entry by the police for the purpose of effecting an arrest inside the home may constitute, under appropriate circumstances, a valid waiver of the warrant requirement. *McCall v. People*, 623 P.2d 397 (Colo. 1981).

Entry into home by preconceived deception lacks consent. Where entry into the home is gained by a preconceived deception as to purpose, consent in the constitutional sense is lacking. *McCall v. People*, 623 P.2d 397 (Colo. 1981).

Appearance in open doorway may excuse warrant. Where defendant was arrested while standing in the open doorway of his apartment, the warrant requirement was excused. *People v. Burns*, 200 Colo. 387, 615 P.2d 686 (1980).

When detention by police permissible. The police may detain and require identification of a person if they have a reasonable suspicion, based on objective facts, that the person is involved in criminal conduct. *People v. Archuleta*, 616 P.2d 977 (Colo. 1980).

Applied in *Stubert v. County Court*, 163 Colo. 535, 433 P.2d 97 (1967).

B. Commission of Crime.

This section permits a police officer to arrest a person who has committed a crime in

the officer's presence. Section 16-2-201 does not limit that authority. An officer may arrest when a crime occurs in his or her presence. When that crime is a class two petty offense, the arresting officer may, pursuant to § 16-2-201, either take the arrested suspect before a judge or release the suspect after issuing a penalty assessment. Police compliance with both statutes is achieved because, even though they conduct a full custodial arrest and search, police "may" still release the offender without taking him before a judge. A custodial arrest and a discretionary release are not mutually exclusive under § 16-2-201. *People v. Triantos*, 55 P.3d 131 (Colo. 2002).

Arrest not limited to where crime has in fact been committed. The theory that under this section a lawful arrest without a warrant cannot be made unless a crime has in fact been committed and that the person arrested committed it is without merit. *Van Camp v. Gray*, 440 F.2d 777 (10th Cir. 1971).

However, a court must determine whether the facts available to a reasonably cautious officer at the moment of arrest would warrant his belief that an offense has been or is being committed. *People v. Navran*, 174 Colo. 222, 483 P.2d 228 (1971).

Warrant is unnecessary where breach of peace witnessed. *Schindelar v. Michaud*, 411 F.2d 80 (10th Cir.), cert. denied, 396 U.S. 956, 90 S. Ct. 426, 24 L. Ed.2d 420 (1969).

C. Probable Cause.

This section permits warrantless arrests by an officer when a criminal offense had in fact been committed and the officer had reasonable grounds for believing the person to be arrested had committed the offense. *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971); *People v. Pickett*, 194 Colo. 178, 571 P.2d 1078 (1977); *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978).

And such is "constitutional". This section, which authorizes an officer to make an arrest without a warrant when a criminal offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested has committed it, is consonant with the case law of the United States supreme court and the supreme court of Colorado. *People v. Nelson*, 172 Colo. 456, 474 P.2d 158 (1970).

The terms "probable cause" and "reasonable grounds" are substantially equivalent in meaning. *Gonzales v. People*, 156 Colo. 252, 398 P.2d 236, cert. denied, 381 U.S. 945, 85 S. Ct. 1788, 14 L. Ed.2d 709 (1965); *People v. Bueno*, 173 Colo. 69, 475 P.2d 702 (1970); *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971); *Glass v. People*, 177 Colo. 267, 493 P.2d 1347 (1972).

And so this section authorizing an arrest without a warrant is satisfied if the arresting officer has probable cause or reasonable grounds to believe that a crime has been committed and that the person arrested committed it. *Van Camp v. Gray*, 440 F.2d 777 (10th Cir. 1971).

For a warrantless arrest, officers must have probable cause to believe not only that an offense had been committed, but that the person to be arrested had committed it. *People v. Boileau*, 36 Colo. App. 157, 538 P.2d 484 (1975); *People v. Hoinville*, 191 Colo. 357, 553 P.2d 777 (1976).

Probable cause is the touchstone for measuring the right to arrest without a warrant. *People v. Fratus*, 187 Colo. 52, 528 P.2d 392 (1974).

And valid arrest by a peace officer must be supported by probable cause. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

Violation of municipal ordinance included. Since the violation of a municipal ordinance is a criminal offense, then as a matter of law, where the police have reasonable ground for believing that defendants have committed such offense, an attempted arrest is altogether lawful and the police would be derelict in the performance of their duty if they refuse to act. *Boyer v. Elkins*, 154 Colo. 294, 390 P.2d 460, appeal dismissed, 379 U.S. 47, 85 S. Ct. 208, 13 L. Ed.2d 183 (1964).

Flight does not solely justify warrantless arrest. Where the arresting officer knew that a burglary had been committed, his dispatcher had told him of the burglars' purported return, and when he arrived back at the scene he observed the hasty departure of a man who had been talking with the son-in-law, flight may legitimately give rise to suspicion, and evidence of flight may be admissible at trial to show consciousness of guilt, but defendant's running was not in and of itself sufficient to justify a warrantless arrest. *People v. Bates*, 190 Colo. 291, 546 P.2d 491 (1976).

Exigent circumstances. A police officer may make a warrantless arrest where he has probable cause to believe that the suspect has committed a crime and where the officer is confronted by exigent circumstances. *People v. Boileau*, 36 Colo. App. 157, 538 P.2d 484 (1975).

Exigent circumstances obviously exist when suspects are speeding from the scene of the crime. To require a warrant would impose an impracticable burden. *People v. Cox*, 190 Colo. 326, 546 P.2d 956 (1976).

Exigent circumstances sufficient to justify warrantless arrest. *People v. Litsey*, 192 Colo. 19, 555 P.2d 974 (1976).

Exigent circumstances sufficient to justify warrantless entry into home to make arrest. *People v. Williams*, 200 Colo. 187, 613 P.2d 879 (1980).

Public security may outweigh warrant preference. When immediate police action is essential to protect the public safety, the warrant preference expressed by this section must, and does, give way to the public security. *People v. Henry*, 195 Colo. 309, 578 P.2d 1041, appeal dismissed, 439 U.S. 961, 99 S. Ct. 445, 58 L. Ed.2d 419 (1978).

Failure to obtain arrest warrant justified whenever circumstances require immediate action to protect the public safety; this includes the situation where the police are faced with the choice of arresting a suspect without a warrant or allowing him to escape. *People v. Cardenas*, 42 Colo. App. 61, 592 P.2d 1348 (1979).

Fact that officers may have probable cause to arrest someone else is of no consequence, for, where a defendant is arrested without a warrant, the burden of proving the existence of probable cause in defendant's case is on the prosecution. *Mora v. People*, 178 Colo. 279, 496 P.2d 1045 (1972).

And physical presence with others, in and of itself, does not provide probable cause to arrest, for guilt by association has never been an acceptable rationale. *Mora v. People*, 178 Colo. 279, 496 P.2d 1045 (1972).

The mere association with one who commits or has committed crimes, standing alone, does not amount to probable cause for arrest. *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981).

Nor where one merely changes his direction upon seeing police. Where officers already had one suspect in their car and were questioning him when defendant approached, and at a distance of approximately one block from unmarked police car hesitated, then turned and walked the other way, disappearing around a corner, such circumstances did not show probable cause to arrest, especially where there was nothing in the testimony of the officer to indicate that he considered defendant a suspect in the crime in question or a suspect in any other known criminal act. *People v. Bueno*, 173 Colo. 69, 475 P.2d 702 (1970).

Probable cause deals with the probability that a crime has been or is being committed. *People v. Martinez*, 173 Colo. 17, 475 P.2d 340 (1970).

The burden of proving probable cause in justification of a warrantless arrest is upon the state. *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971); *People v. Vaughns*, 175 Colo. 369, 489 P.2d 591 (1971); *People v. Chacon*, 177 Colo. 368, 494 P.2d 79 (1972).

But a belief beyond a reasonable doubt is not required. *People v. Martinez*, 173 Colo. 17, 475 P.2d 340 (1970).

Rather, probable cause deals with probabilities which are not technical, but rather the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Gonzales v. People*, 156

Colo. 252, 398 P.2d 236, cert. denied, 381 U.S. 945, 85 S. Ct. 1788, 14 L. Ed.2d 709 (1965); *Lavato v. People*, 159 Colo. 223, 411 P.2d 328 (1966); *People v. Bueno*, 173 Colo. 69, 475 P.2d 702 (1970); *People v. Clark*, 173 Colo. 129, 476 P.2d 564 (1970); *People v. Weinert*, 174 Colo. 71, 482 P.2d 103 (1971); *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978).

Consequently, probable cause exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Gonzales v. People*, 156 Colo. 252, 398 P.2d 236, cert. denied, 381 U.S. 945, 85 S. Ct. 1788, 14 L. Ed.2d 709 (1965); *Lavato v. People*, 159 Colo. 223, 411 P.2d 328 (1966); *People v. Bueno*, 173 Colo. 69, 475 P.2d 702 (1970); *People v. Weinert*, 174 Colo. 71, 482 P.2d 103 (1971); *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971); *Glass v. People*, 177 Colo. 267, 493 P.2d 1347 (1972); *People v. Williams*, 186 Colo. 72, 525 P.2d 463 (1974); *People v. Boileau*, 36 Colo. App. 157, 538 P.2d 484 (1975).

Probable cause exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe an offense has been or is being committed. *People v. Rueda*, 649 P.2d 1106 (Colo. 1982); *People v. Martinez*, 689 P.2d 653 (Colo. App. 1984).

Probable cause arises only where the facts and circumstances within the officer's knowledge suffice to warrant a reasonably prudent person in the belief that the person to be arrested committed or is committing a criminal offense. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

Although precise point of officer's belief cannot be determined. If the circumstances at the time of an arrest are sufficient to justify a finding that probable cause existed, the court will so find even though the precise point at which the officer's hunch became suspicion and then progressed to reasonable belief is impossible to determine with certainty. *Lanford v. People*, 176 Colo. 109, 489 P.2d 210 (1971).

This level of probability must exist at the actual moment of arrest, and must be based on known facts, not on mere rumor or conjecture. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

Suspicion and rumor alone would fall short of probable cause. *Lucero v. People*, 165 Colo. 315, 438 P.2d 693, cert. denied, 393 U.S. 893, 89 S. Ct. 217, 21 L. Ed.2d 173 (1968); *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971).

It is basic that an arrest without a warrant must stand upon firmer ground than suspicion, though the arresting officer need not have in hand evidence which would suffice to convict.

People v. Vaughns, 182 Colo. 328, 513 P.2d 196 (1973); People v. Gonzales, 186 Colo. 48, 525 P.2d 1139 (1974).

More suspicion does not constitute probable cause for a warrantless arrest. People v. Montoya, 189 Colo. 106, 538 P.2d 1332 (1975).

Information relied upon to satisfy a warrantless arrest is sufficient if it warrants a reasonably cautious and prudent police officer in believing, in light of his training and experience, that an offense has been committed and that the person arrested probably committed it. However, it need not be of that quality and quantity necessary to satisfy beyond a reasonable doubt. People v. Nanes, 174 Colo. 294, 483 P.2d 958 (1971).

All evidence within knowledge of arresting officer may be considered. In assessing probable cause to arrest without a warrant, all evidence within the knowledge of the arresting officer may be considered even though it may not be competent evidence at trial. People v. Gonzales, 186 Colo. 48, 525 P.2d 1139 (1974).

As well as officer's training and experience. Whether or not the arresting officer reasonably believed a crime had been or was being committed such as to make a warrantless arrest is to be considered in light of the officer's training and experience. People v. Boileau, 36 Colo. App. 157, 538 P.2d 484 (1975).

Same standards for determining probable cause for search or arrest. The same constitutional standards for determining probable cause apply whether a search or an arrest is being effected by police officers, and whether or not the officers have obtained a judicially authorized warrant to arrest or search. People v. Vaughns, 182 Colo. 328, 513 P.2d 196 (1973).

Probable cause standards applicable with or without warrant. Probable cause standards for searches or arrests are applicable whether or not the police have obtained a warrant. People v. Burns, 200 Colo. 387, 615 P.2d 686 (1980).

Probable cause is measured by facts of particular case. The quantum of information which constitutes probable cause for a warrantless arrest must be measured by the facts of the particular case. People v. Vaughns, 182 Colo. 328, 513 P.2d 196 (1973).

The circumstances in each case of warrantless arrest must be considered to determine the reasonableness of police action and the existence of probable cause. People v. Fratus, 187 Colo. 52, 528 P.2d 392 (1974).

Even if the information received by an officer from an informer is hearsay, such information from a reliable informer corroborated by the officers' own observations is sufficient to support a reasonable belief that a crime is being committed. Gonzales v. People, 156 Colo. 252, 398 P.2d 236, cert. denied, 381 U.S. 945, 85 S. Ct. 1788, 14 L. Ed.2d 709 (1965).

For the reasonably trustworthy information relied on may be based upon hearsay and need not be evidence sufficiently competent for admission at the guilt-finding process. People v. Nanes, 174 Colo. 294, 483 P.2d 958 (1971).

In fact, either heavy or almost exclusive reliance on hearsay does not destroy the validity of an arrest without a warrant. Lucero v. People, 165 Colo. 315, 438 P.2d 693, cert. denied, 393 U.S. 893, 89 S. Ct. 217, 21 L. Ed.2d 173 (1968).

The "Aguilar" test for determining probable cause for arrest based upon information received from a police informer is as follows: First, the officer must know the underlying circumstances from which the informant concluded that a crime was being or had been committed by the accused; and second, there must be underlying circumstances from which the officer concluded that information received was reliable. (Based upon Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964)). People v. Martinez, 173 Colo. 17, 475 P.2d 340 (1970).

The test to measure probable cause to arrest, which is based upon information provided by a confidential informant, is met by setting forth the underlying circumstances which established that the informant had a basis in fact for his information and also provided facts which supported the reliability of the informant. People v. Fratus, 187 Colo. 52, 528 P.2d 392 (1974).

First prong of "Aguilar" met. Where informer was not just relying on suspicion or rumor but stated with particularity details of stolen check, such as, amount, payee, maker, and endorsement, and also stated that defendant had talked with him, showed him the check, and told him of defendant's own attempt to cash it, these underlying circumstances were sufficient to lead a reasonable person to believe that a crime had been or was being committed, as they met the first prong of the "Aguilar test" for determining probable cause for arrest. People v. Martinez, 173 Colo. 17, 475 P.2d 340 (1970).

And the second prong of the test was met by virtue of the following evidence: (1) That the informant had previously given reliable information to police; (2) verification by the officer that the stolen check was missing by talking to the payee before defendant's arrest; (3) defendant was riding in the same car described by the informant; and (4) prior to arrest defendant was seen by the officer putting an envelope in a small paper sack. Hence, when such evidence was considered as a whole, it was sufficient for the officer to reasonably believe that informant's information was reliable. People v. Martinez, 173 Colo. 17, 475 P.2d 340 (1970).

Totality of circumstances test. Since the Aguilar-Spinelli two-pronged test for determining probable cause has been abandoned by the United States supreme court in Illinois v. Gates

(462 U.S. 213, 103 S.Ct. 2317, 76 L. Ed.2d 527 (1983)) in favor of the totality of the circumstances test, such test was used by the court to make the probable cause determination. *People v. Gallegos*, 680 P.2d 1294 (Colo. App. 1983); *People v. Sullivan*, 680 P.2d 851 (Colo. App. 1983).

No factor alone is conclusive in establishing exigent circumstances necessary for a warrantless arrest, as the totality of the circumstances must be examined. *People v. Henry*, 195 Colo. 309, 578 P.2d 1041, appeal dismissed, 439 U.S. 961, 99 S. Ct. 445, 58 L. Ed.2d 419 (1978).

Informant's information must be reliable. When a tip is received from a confidential informant, there must also be information supplied which establishes the credibility of the informant or indicates that the information was reliable. *People v. Hubbard*, 184 Colo. 225, 519 P.2d 951 (1974).

Uncorroborated accusation by an informant whose identity and reliability remains untested cannot constitute probable cause. *People v. Williams*, 186 Colo. 72, 525 P.2d 463 (1974).

When the source of the information is a citizen-informant who was an eyewitness to the crime and is identified, the information is presumed to be reliable, and the prosecution is not required to establish either the credibility of the informant or the reliability of his information. *People v. Hubbard*, 184 Colo. 225, 519 P.2d 951 (1974); *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978).

Presumption as to trustworthiness of citizen-informant. Although one who qualifies as a "citizen-informant" is presumed trustworthy, this presumption only relates to the likelihood of truthfulness, not to the weight to be accorded the information provided. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

Report to authorities does not make uncorroborated speculation probable. Uncorroborated speculation and conjecture by an inexperienced citizen is not transformed into probability by a report to the authorities. Different standards govern observations by experienced peace officers. *People v. Severson*, 39 Colo. App. 45, 561 P.2d 373 (1977).

Where there is conflicting evidence as to several critical points regarding an informant's information, the prerogative for deciding whether or not probable cause for arrest without a warrant is established is within the domain of the trial judge and, absent a showing of abuse of this prerogative, a reviewing court will not overturn a trial court's ruling. *People v. Trujillo*, 179 Colo. 428, 500 P.2d 1176 (1972).

Furthermore, details of the crime given to investigating officers by the victim of the crime can be relied upon by the officers and can furnish the basis for their conclusion that a crime had been committed and that certain de-

scribed persons probably committed it. *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971).

And where, after investigation, an officer, by his own knowledge, knows that an offense has been committed and corroboration of the suspect's name is obtained by identifying photographs, the officer has probable cause for arrest without a warrant. *Lucero v. People*, 165 Colo. 315, 438 P.2d 693, cert. denied, 393 U.S. 893, 89 S. Ct. 217, 21 L. Ed.2d 173 (1968).

But it is not necessary for the arresting officer to know of the reliability of the informer or to be himself in possession of information sufficient to constitute probable cause, if he acts upon the direction of, or as a result of, communication with a brother officer or that of another police department and provided the police as a whole are in possession of information sufficient to constitute probable cause to make the arrest. *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971).

Thus, a police officer has the right to rely upon information relayed to him by his fellow law enforcement officers. *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971).

As the fellow-officer rule permits a police officer to rely upon and accept information provided by another officer in determining whether there is probable cause for warrantless arrest. *People v. Vaughns*, 175 Colo. 369, 489 P.2d 591 (1971).

So when police officers are informed by a telephone call from officers in another jurisdiction from which a package of contraband was sent, the officers have probable cause to arrest a person without a warrant when he claims the package. *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

All officers at arrest need not be informed. Where the officer who made the arrest had talked to the informant and had knowledge of all of the facts comprising probable cause, whether another officer who was present at the arrest was aware of the information given by the informant is immaterial. *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981).

Illegal arrest cannot be justified. Neither the fellow-officer rule nor the validity of an exchange of information between police officers can justify an otherwise illegal arrest. *People v. Hubbard*, 184 Colo. 225, 519 P.2d 951 (1974); *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978).

By claiming package, defendant becomes an active participant. Where officers had probable cause to believe that a course of criminal conduct involving packaged contraband had been initiated in another state in which defendant was likely to become involved and defendant appears to claim the package, then, under the circumstances, the defendant became an active participant in the criminal conduct for which his arrest could be lawfully effected with-

out a warrant. *People v. Hively*, 173 Colo. 485, 480 P.2d 558 (1971).

Moreover, evidence in plain view can be relied on. Where police officers are in a place where they have a right to be, they are not required to close their eyes to evidence in plain view, and the sight of such evidence can properly form the basis for a determination of probable cause to make an arrest. *People v. McGahey*, 179 Colo. 401, 500 P.2d 977 (1972); *Avalos v. People*, 179 Colo. 88, 498 P.2d 1141 (1972).

And in a situation involving an "arrangement" by the police to purchase drugs, where an officer, by prearranged signal, flashed his brake lights to indicate to other officers hiding nearby that the deal was completed, whereupon the officers approached a vehicle which had previously pulled up to the scene and ordered its driver to come out, and where, after arresting defendant as he stepped from the vehicle, the officer noticed that a package on the front seat was in plain view, which he seized and which later proved to contain additional quantities of illegal drugs, then, under the circumstances, the officer had probable cause to arrest the driver. *People v. Clark*, 173 Colo. 129, 476 P.2d 564 (1970).

Also, probable cause existed where marijuana seen while validly checking registration in vehicle. Where an officer detained defendant for an admitted traffic violation and while performing his duties in this regard inquired for the auto registration, which by statute must be either in the possession of the operator or in the vehicle, then, upon the defendant's failure to produce the registration, the officer had the right to look in the vehicle for the registration to inspect it, and when at this time he observed a plastic bag containing what he suspected was, and which turned out to be, marijuana, the officer had probable cause to believe a crime was being committed in his presence and had the right and duty to make an arrest. *Marquez v. People*, 168 Colo. 219, 450 P.2d 349 (1969).

However, facts must be available prior to arrest. The arrest of a defendant can only be justified by the information available to the officer immediately prior to the arrest, and the discovery of contraband on the person of one who is unlawfully arrested does not validate an arrest. *People v. Nelson*, 172 Colo. 456, 474 P.2d 158 (1970).

Hence, where the mistaken suspicion of an informant on one matter triggered a police investigation which discovered other illegal matters during a search, the officer had no knowledge of any offense being committed in his presence which would have justified the arrest and he had had no report of any crime having been committed in the area by anyone resembling the defendant, and so, since the courts have a responsibility to guard against

police conduct which is overbearing or harassing in order to protect the constitutional rights of the individual, the arrest of the defendant was "unreasonable" when tested by the need to arrest under the exigencies of the situation against the invasion of privacy which the arrest entailed, and any evidence obtained was not admissible. *People v. Nelson*, 172 Colo. 456, 474 P.2d 158 (1970).

Probable cause for arrest without warrant held to exist. *Gonzales v. People*, 156 Colo. 252, 398 P.2d 236, cert. denied, 381 U.S. 945, 85 S. Ct. 1788, 14 L. Ed.2d 709 (1965)(marijuana); *People v. Bengston*, 174 Colo. 131, 482 P.2d 989 (1971)(marijuana); *People v. Ramey*, 174 Colo. 250, 483 P.2d 374 (1971); *People v. Vaughns*, 175 Colo. 369, 489 P.2d 591 (1971); *People v. Vigil*, 175 Colo. 421, 489 P.2d 593 (1971)(marijuana); *Lanford v. People*, 176 Colo. 109, 489 P.2d 210 (1971); *Hafer v. People*, 177 Colo. 52, 492 P.2d 847 (1972); *People v. Duncan*, 179 Colo. 253, 500 P.2d 137 (1972); *People v. Lucero*, 182 Colo. 39, 511 P.2d 468 (1973); *People v. Vaughns*, 182 Colo. 328, 513 P.2d 196 (1973); *People v. Duleff*, 183 Colo. 213, 515 P.2d 1239 (1973)(marijuana); *People v. Marquez*, 183 Colo. 231, 516 P.2d 1134 (1973); *People v. Hubbard*, 184 Colo. 225, 519 P.2d 951 (1974); *People v. Cruz*, 186 Colo. 295, 526 P.2d 1315 (1974); *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981).

If probable cause for arrest does in fact exist, the officer is entitled to make a reasonable search incident to arrest. *People v. Bueno*, 173 Colo. 69, 475 P.2d 702 (1970); *People v. Hively*, 173 Colo. 485, 480 P.2d 558 (1971); *People v. Nanes*, 174 Colo. 294, 483 P.2d 958 (1971); *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

And may seize evidence. In a search conducted incident to warrantless arrest, the arresting officers have authority to search for instrumentalities or evidence of the specific crime for which they had probable cause to arrest. *People v. Valdez*, 182 Colo. 80, 511 P.2d 472 (1973).

If probable cause to arrest is present, evidence can be seized as incident to a lawful arrest. *People v. Boileau*, 36 Colo. App. 157, 538 P.2d 484 (1975).

An officer conducting a reasonable search, incident to a valid arrest, may seize contraband or articles, the possession of which gives the police officer reason to believe a crime has been committed, even though such articles do not relate to the crime for which the defendant was initially arrested. *People v. Ortega*, 181 Colo. 223, 508 P.2d 784 (1973).

Following *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the search incident to arrest exception does not apply in this case, and the search of the passenger compartment of defendant's car was unconstitutional. Because statements defen-

dant made following the discovery of drugs were the fruit of the unlawful search, the evidentiary use of the statements must also be suppressed. *Perez v. People*, 231 P.3d 957 (Colo. 2010).

Probable cause for arrest for burglary without warrant not shown. *People v. Trujillo*, 179 Colo. 428, 500 P.2d 1176 (1972).

Where the court finds that probable cause for arrest without a warrant is not shown, the subsequent search and seizures are invalid. *People v. Trujillo*, 179 Colo. 428, 500 P.2d 1176 (1972).

Evidence obtained subsequent to illegal arrest need not be suppressed, if the taint of the official misconduct has been purged. *People v. Henry*, 195 Colo. 309, 578 P.2d 1041, appeal dismissed, 439 U.S. 961, 99 S. Ct. 445, 58 L. Ed.2d 419 (1978).

When persons are arrested for minor traffic violations or minor municipal offenses, the instrumentalities or evidence of such crimes is minimal or nonexistent, and thus the scope of a search incident to such a warrantless arrest would be quite limited. *People v. Valdez*, 182 Colo. 80, 511 P.2d 472 (1973).

16-3-103. Stopping of suspect. (1) A peace officer may stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime and may require him to give his name and address, identification if available, and an explanation of his actions. A peace officer shall not require any person who is stopped pursuant to this section to produce or divulge such person's social security number. The stopping shall not constitute an arrest.

(2) When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects that his personal safety requires it, he may conduct a pat-down search of that person for weapons.

Source: L. 72: R&RE, p. 198, § 1. C.R.S. 1963: § 39-3-103. L. 83: (1) amended, p. 663, § 2, effective July 1. L. 2001: (1) amended, p. 941, § 9, effective July 1.

Cross references: For the stopping of persons suspected of alcohol- or drug-related traffic offenses, see § 42-4-1302.

ANNOTATION

Law reviews. For comment, "People v. Thomas: Furtive Gestures as an Element of Reasonable Suspicion — The Ongoing Struggle to Determine a Standard", see 61 Den. L.J. 579 (1984). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with stops and arrests, see 62 Den. U.L. Rev. 165 (1985). For article, "A DUI Primer", see 16 Colo. Law. 2179 (1987).

Different standards govern full-scale arrest and investigatory stops. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

Limited, temporary detention permissible though no probable cause to arrest exists. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigation of possible criminal behavior even though there is no probable cause for arrest. *People v. Lucero*, 182 Colo. 39, 511 P.2d 468 (1973); *People v. Martineau*, 185 Colo. 194, 523 P.2d 126 (1974).

There is an area of proper police procedure in which an officer having less than probable cause to arrest may temporarily detain an individual for limited purposes. *People v. Marquez*, 183 Colo. 231, 516 P.2d 1134 (1973); *People v. Schreyer*, 640 P.2d 1147 (Colo. 1982).

A temporary police detention in the nature of "field investigation" can be justified by less

than probable cause for arrest. *People v. Stevens*, 183 Colo. 399, 517 P.2d 1336 (1973).

Police officers may make a limited stop on less than probable cause. *People v. Montoya*, 185 Colo. 299, 524 P.2d 76 (1974).

In certain circumstances a police officer having less than probable cause to arrest may stop an individual for identification purposes and not violate the fourth amendment prohibition against unreasonable search and seizure. *People v. Mascarenas*, 726 P.2d 644 (Colo. 1986).

Where officer has a reasonable suspicion that an automobile temporary sticker has been altered, officer has authority to make a stop under this section since such alteration would constitute a misdemeanor traffic offense. *People v. Thomas*, 839 P.2d 1174 (Colo. 1992).

In order to lawfully detain an individual for questioning: (1) A police officer must have a reasonable suspicion that the individual has committed, or is about to commit, a crime; (2) the purpose of the detention must be reasonable; and (3) the character of the detention must be reasonable when considered in light of the purpose. *People v. Stevens*, 183 Colo. 399, 517 P.2d 1336 (1973); *People v. Montoya*, 185 Colo. 299, 524 P.2d 76 (1974); *People v. Mascarenas*, 726 P.2d 644 (Colo. 1986); *People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989); *People v. Wilson*,

784 P.2d 325 (Colo. 1989); *People v. Sutherland*, 886 P.2d 681 (Colo. 1994); *People v. Rodriguez*, 924 P.2d 1100 (Colo. App. 1996), *aff'd*, 945 P.2d 1351 (Colo. 1997).

The first of these requirements is determined by whether there were specific and articulable facts known to the officer, which taken together with rational inferences from these facts, created a reasonable suspicion of criminal activity to justify the intrusion into the defendant's personal security. *People v. Mascarenas*, 726 P.2d 644 (Colo. 1986); *People v. Wilson*, 784 P.2d 325 (Colo. 1989).

Permissible purposes for investigatory stops. Investigatory stops constitute an intermediate response by the police between nondetention and arrest. These procedures are permissible only for the purpose of questioning a suspect, who might otherwise escape, regarding his identity or observed behavior in order temporarily to maintain the status quo while seeking to procure more information regarding possible wrongdoing. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

Police may detain and require identification if reasonable suspicion of criminal conduct. The police may detain and require identification of a person if they have a reasonable suspicion, based on objective facts, that the person is involved in criminal conduct. *People v. Archuleta*, 616 P.2d 977 (Colo. 1980).

The reasonableness of an officer's suspicion is determined from the totality of the circumstances in which the suspicion arose. *People v. Bell*, 698 P.2d 269 (Colo. 1985); *People v. Mascarenas*, 726 P.2d 644 (Colo. 1986); *People v. Coca*, 829 P.2d 385 (Colo. 1992).

Officer's suspicion that the defendant's were connected to the reported criminal activity held reasonable given the defendants' evasive actions and their proximity to the location of the reported burglary shortly after the officer received the dispatch call. *People v. Mascarenas*, 726 P.2d 644 (Colo. 1986); *People v. Sosbe*, 789 P.2d 1113 (Colo. 1990).

Investigatory stops. A police officer, lacking probable cause to arrest, may stop a person for investigatory purposes if the officer has a reasonable suspicion that the person stopped is involved in criminal activity. *People v. Sosbe*, 789 P.2d 1113 (Colo. 1990).

An investigatory stop implicates a seizure that is based on less than probable cause and so it must be brief in duration, limited in scope, and narrow in purpose. *People v. Tottenhoff*, 691 P.2d 340 (Colo. 1984); *Outlaw v. People*, 17 P.3d 150 (Colo. 2001).

Construction of § 42-2-113 inconsistent with this section. A construction of § 42-2-113, which requires that drivers' licenses be displayed to peace officers upon demand, which would give to a police officer unlimited discretionary authority to stop any car at any time for

any reason as long as he asked contemporaneously for display of a driver's license would be inconsistent with this section, which specifically limits an officer's authority to stop persons for investigation in the absence of probable cause to arrest. *People v. McPherson*, 191 Colo. 81, 550 P.2d 311 (1976).

Limited searches of a person for weapons during an investigative detention, when probable cause for arrest is lacking, is permissible, but there must be: (1) Some reason for the officer to confront the citizen in the first place; (2) something in the circumstances, including the citizen's reaction to the confrontation, must give the officer reason to suspect that the citizen may be armed and, thus, dangerous to the officer or others; and (3) the search must be limited to a frisk directed at discovery and appropriation of weapons and not at evidence in general. *People v. Martineau*, 185 Colo. 194, 523 P.2d 126 (1974); *People v. Shackelford*, 37 Colo. App. 317, 546 P.2d 964 (1976).

In determining the reasonableness of a search in the situation where the search is not full blown but is rather just a protective search for weapons, the inquiry is a dual one: (1) Was the officer's action justified at its inception; and (2) was the search reasonably related in scope to the circumstances which justified the interference in the first place. *People v. Burley*, 185 Colo. 224, 523 P.2d 981 (1974).

So long as the officer is entitled to make a forcible stop and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose. *People v. Burley*, 185 Colo. 224, 523 P.2d 981 (1974).

Protective search for weapons is justified only when circumstances of an otherwise valid stop provides the officer with a reasonable basis to suspect person stopped may be armed and dangerous. *People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989); *People v. Sutherland*, 886 P.2d 681 (Colo. 1994).

Based not on hunches and limited in scope. In order to uphold the stop and frisk as reasonable, both the initial confrontation and the subsequent search must have been prompted by the officers' reliance on particular facts, rather than on inarticulable hunches, and the scope of the frisk must be limited to that necessary for the discovery of weapons. *People v. Shackelford*, 37 Colo. App. 317, 546 P.2d 964 (1976).

Sufficient basis for weapons search to be excepted from warrant requirement. The reasonable apprehension of danger or injury to the police officers — judged by objective standards — provides a sufficient basis for a search to fall within the search for weapons exception to the fourth amendment's warrant requirement. *People v. Burley*, 185 Colo. 224, 523 P.2d 981 (1974).

Based on the totality of the circumstances, the trial court properly denied defendant's motion to suppress evidence obtained during a vehicle search. Trial court properly found that police officer had reasonable suspicion that defendant was engaged in drug trafficking sufficient to justify the investigatory stop. *People v. Ramirez*, 1 P.3d 233 (Colo. App. 1999).

Even if seizure of person is unconstitutional, evidence abandoned prior to that seizure is not the fruit of the seizure and should not be suppressed. *People v. McClain*, 149 P.3d 787 (Colo. 2007).

Even if the totality of police officers' conduct rose to the level of a show of authority to constitute a seizure, evidence abandoned prior to the seizure cannot be suppressed. *People v. McClain*, 149 P.3d 787 (Colo. 2007).

Reasonable grounds to fear suspect armed. Where the arresting officers stopped defendant because he matched description of a suspect who had allegedly committed an act of violence, these circumstances constituted reasonable grounds to fear that the suspect might well be armed, and thus, be potentially dangerous. The officers therefore acted properly in initiating a pat-down search for weapons. *People v. Shackelford*, 37 Colo. App. 317, 546 P.2d 964 (1976).

Doctrine of allowing investigative stops based upon "reasonable cause" was extended to include information supplied by informants' tips as well as the personal observations of police officers. *People v. Lucero*, 182 Colo. 39, 511 P.2d 468 (1973).

Stop, search, and seizure of evidence reasonable and justified under circumstances even though conduct was compatible with innocent activity. Informant told police there were three males in the area and that one was wearing a poncho and possibly carrying a rifle. When officers spotted three males, one wearing a poncho, they stopped them for questioning. *People v. D.F.*, 933 P.2d 9 (Colo. 1997).

Officers do not have to observe criminal conduct to corroborate anonymous tip. *People v. D.F.*, 933 P.2d 9 (Colo. 1997).

The record revealed no circumstances which could legitimate the stopping of defendant's vehicle as a temporary detention within the contemplation of this section, where the officers had never seen or heard of defendant before, did not even know if drug trafficking actually had taken place in the house under surveillance, and had no reason to believe the sack defendant carried contained drugs, and where defendant did not violate any traffic laws as he drove away. *People v. McPherson*, 191 Colo. 81, 550 P.2d 311 (1976).

Stopping of defendant held not arrest but proper temporary detention in nature of field investigation. *People v. Cruz*, 186 Colo. 295, 526 P.2d 1315 (1974).

Detention held a full-scale arrest. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

Discovery of evidence of crime while searching for weapons. Where the search was limited to a frisk directed at the discovery and appropriation of weapons, and not to uncover evidence as such, evidence of a crime having thus been lawfully uncovered, it is competent and admissible in evidence as relevant proof of the charges of which defendant is accused. *People v. Martineau*, 185 Colo. 194, 523 P.2d 126 (1974).

Where police officer obtained probable cause to search a vehicle and seize evidence in the process of making a lawful stop for threshold investigatory purposes, the defendant's motion to suppress this evidence was properly denied. *People v. Lucero*, 182 Colo. 39, 511 P.2d 468 (1973).

Police officers are entitled to conduct an investigatory stop of a motorist if they have reasonable suspicion that the motorist has committed a traffic violation. Because the defendant had committed a traffic violation and that offense alone was sufficient to justify the police encounter, the trial court did not err in denying the defendant's motion to suppress. *People v. Valencia-Alvarez*, 101 P.3d 1112 (Colo. App. 2004).

Discovery of evidence of crime while responding to taxicab driver's plea. Where the search was the result of police responding to the plea of a taxicab driver who thought he was about to be robbed, but the search revealed that the defendant, who was the passenger, was in possession of narcotics, the defendant's motion to suppress was properly denied. *People v. McNeal*, 191 Colo. 490, 553 P.2d 757 (1976).

Seizure of heroin under plain-view doctrine held proper. Where police officer, who had legitimately stopped defendant, observed what he believed to be heroin in plain view on seat of automobile which defendant had just exited, he could seize the heroin under the "plain-view doctrine". *People v. Montoya*, 185 Colo. 299, 524 P.2d 76 (1974).

Trial court properly suppressed evidence seized during search of defendant when fact that defendant ran in opposite direction from companions did not satisfy constitutional requirement of reasonable suspicion for investigatory stop and scope of resulting search exceeded a pat down for weapons. *People v. Wilson*, 784 P.2d 325 (Colo. 1989).

There was no probable cause to stop defendant's vehicle where the officer observed a crack in the windshield but could not recall the severity or position of the crack and did not issue a citation for the crack. Evidence that defendant was driving on a suspended license obtained as a result of the unwarranted stop was

therefore suppressed. *People v. Cerda*, 819 P.2d 502 (Colo. 1991).

Trial court properly denied motion to suppress statements made by the defendant between the time he was detained and the time he was actually placed under arrest. The record supported a finding that the defendant was not in custody at the time he was detained as part of a proper investigatory stop, but that he was placed in custody after the arresting officer had probable cause for the arrest based on identification of the defendant by the victim and the finding of an outstanding warrant for the defendant's arrest. *People v. Young*, 923 P.2d 145 (Colo. App. 1995).

Following *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the search incident to arrest exception does not apply in this case, and the search of the passenger compartment of defendant's car was unconstitutional. Because statements defendant made following the discovery of drugs were the fruit of the unlawful search, the evidentiary use of the statements must also be suppressed. *Perez v. People*, 231 P.3d 957 (Colo. 2010).

Applied in *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975); *People v. Derrera*, 40 Colo. App. 86, 570 P.2d 558 (1977).

16-3-104. Arrest by peace officer from another jurisdiction - definitions. (1) As used in this section:

- (a) "State" means any state of the United States and the District of Columbia;
 - (b) "Peace officer" means any officer of another state having powers of arrest in that state;
 - (c) "Fresh pursuit" means the pursuit without unnecessary delay of a person who has committed a crime or who is reasonably believed to have committed a crime.
- (2) Any peace officer of another state who enters this state in fresh pursuit and continues within this state in fresh pursuit of a person in order to arrest him on the ground that he has committed a crime in the other state has the same authority to arrest and hold such person in custody as a peace officer of this state has to arrest and hold a person in custody.
- (3) Except as otherwise provided by law, if an arrest is made in this state by a peace officer of another state in accordance with the provisions of this section, he shall without unnecessary delay take the person arrested before the nearest available judge of a court of record. Such judge shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the judge determines that the arrest was lawful, he shall commit the person arrested to await the time provided by law for issuance of an extradition warrant by the governor of this state, or the waiver thereof, and shall set bail if the offense is bailable under the laws of the state of Colorado. If the judge determines that the arrest was unlawful, he shall order the discharge of the person arrested.

Source: L. 72: R&RE, p. 198, § 1. C.R.S. 1963: § 39-3-104.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary, and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950)(written under repealed CSA, C 48, § 564).

Three criteria used in determining "fresh pursuit". Three criteria are to be utilized in analyzing what police activity can be categorized as fresh pursuit. They are: (1) The police must act without unnecessary delay; (2) the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect or uninterrupted knowledge of his whereabouts; and (3) the relationship between the commission of the offense, the commence-

ment of the pursuit, and the apprehension of the suspect — the greater the length of time, the less likely the police action constituted fresh pursuit. *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979).

Characterization as "fresh pursuit" not precluded even though officer does not follow suspect's route. Where the police responded immediately to a call concerning a hit-and-run accident and promptly pursued the only lead available, the address of the owner of the vehicle, the fact that the officer did not follow the suspect's route did not preclude the characterization of his action as fresh pursuit. *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979).

16-3-105. Release by arresting authority. (1) When a person has been arrested without a warrant, he may be released by the arresting authority on its own authority if:

(a) The arresting officer or a responsible command officer of the arresting authority is satisfied that there are no adequate grounds for criminal complaint against the person arrested; or

(b) The offense for which the person was arrested and is being held is a misdemeanor or petty offense and the arresting officer or a responsible command officer of the arresting authority is satisfied that the person arrested will obey a summons commanding his appearance at a later date.

(1.5) No person arrested for any crime or offense, the underlying factual basis of which includes an act of domestic violence as defined in section 18-6-800.3 (1), C.R.S., shall be released at the scene of the alleged crime pursuant to subsection (1) of this section.

(2) If the person is released in accordance with subsection (1) (b) of this section, he shall be given a summons and complaint as provided for in sections 16-2-104 and 16-2-106 and shall sign a written acknowledgment of its receipt and a promise to appear at the time and place specified.

Source: L. 72: R&RE, p. 199, § 1. C.R.S. 1963: § 39-3-105. L. 94: (1.5) added, p. 2034, § 12, effective July 1.

ANNOTATION

The statutes and procedural rules do not require that person charged with a misdemeanor be given a copy of the complaint prior to being released on bail. *Weld County Court v. Richards*, 812 P.2d 650 (Colo. 1991).

Applied in *People v. Rothe*, 43 Colo. App. 274, 606 P.2d 79 (1979).

16-3-106. Peace officer may pursue offender. When any peace officer is in fresh pursuit of any alleged offender, having a warrant for his arrest or having knowledge that such warrant has been issued, or, in the absence of an arrest warrant, when the offense was committed in the officer's presence or the officer has reasonable grounds to believe that the alleged offender has committed a criminal offense, and the alleged offender crosses a boundary line marking the territorial limit of his authority, such peace officer may pursue him beyond such boundary line and make the arrest, issue a summons and complaint, or issue a notice of penalty assessment.

Source: L. 72: R&RE, p. 199, § 1. C.R.S. 1963: § 39-3-106.

ANNOTATION

Purpose of section. The general assembly, in enacting this section, intended to limit peace officers to exercising their arrest powers and making their law enforcement efforts within the territorial limits of their authority and to require that local peace officers be advised of, and participate in, the extraterritorial law enforcement activities of other peace officers. *People v. Wolf*, 635 P.2d 213 (Colo. 1981); *People v. Florez*, 680 P.2d 219 (Colo. 1984).

This section, by negative inference, limits peace officers' authority to arrest to the territorial boundaries of their jurisdiction unless they are in fresh pursuit or are accompanied by officers of the jurisdiction in which the arrest is made. *People v. Lindsey*, 805 P.2d 1134 (Colo. App. 1990).

Violations of this section are not per se violations of constitutionally protected rights. *People v. Thiret*, 685 P.2d 193 (Colo. 1984); *People v. Vigil*, 729 P.2d 360 (Colo. 1986); *People v. Ray*, 109 P.3d 996 (Colo. App. 2004).

When this section has been violated by a peace officer, evidence obtained as a result of the violation should be suppressed if the violation also infringes a constitutional right of the defendant, such as the right to be free from unreasonable searches and seizures. *People v. Vigil*, 729 P.2d 360 (Colo. 1986).

An arrest in violation of the statute does not mandate suppression of evidence obtained therefrom unless the violation is willful or so egregious as to violate the defendant's constitutional rights. *People v. Lindsey*, 805 P.2d

1134 (Colo. App. 1990); *People v. Loggins*, 981 P.2d 630 (Colo. App. 1998).

This section held not to require the suppression of evidence where police officer accompanied injured person to a hospital outside his jurisdiction, emergency room personnel discovered cocaine on the injured person, and the cocaine was delivered to the officer. *People v. Loggins*, 981 P.2d 630 (Colo. App. 1998).

Statutory violation not willful where undercover narcotics detective was directed by co-defendant to travel to adjacent county, detective did so in good faith, and failure to have done so could have compromised detective's cover and sting operation. *People v. Ray*, 109 P.3d 996 (Colo. App. 2004).

The departure by an officer from the scene of the crime to get the assistance of other officers, returning 45 minutes later, did not constitute such a break in the chain of events that at the time of the ensuing arrest he would have been required to have had a warrant, inasmuch as an arrest incidental to fresh pursuit need not be immediate, recognizing that considerable time may be needed to procure necessary assistance; the peace officers had probable cause to arrest, acted without unreasonable delay, and thus a warrant was not required. *Schindelar v. Michaud*, 411 F.2d 80 (10th Cir.), cert. denied, 396 U.S. 956, 90 S. Ct. 426, 24 L. Ed.2d 420 (1969) (decided under repealed § 39-14-5, C.R.S. 1963).

Where the police officer began chasing the defendant in Denver and remained in fresh pursuit until the automobile was finally stopped in Aurora, his authority to partake in the arrest and related matters in the form of an inventory search existed beyond the boundaries of his original jurisdiction by virtue of this section. *People v. Roddy*, 188 Colo. 55, 532 P.2d 958 (1975).

"Fresh pursuit" defined as in section 16-3-104. Although the definition in § 16-3-104(1)(c) was promulgated by the general assembly to define "fresh pursuit" as used in that

section, it is persuasive in defining the same term as used in this section. *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979).

Three criteria used in determining "fresh pursuit". Three criteria are to be utilized in analyzing what police activity can be categorized as fresh pursuit. They are: (1) The police must act without unnecessary delay; (2) the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect or uninterrupted knowledge of his whereabouts; and (3) the relationship between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect — the greater the length of time, the less likely the police action constituted fresh pursuit. *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979).

Characterization as "fresh pursuit" not precluded even though officer does not follow suspect's route. Where the police responded immediately to a call concerning a hit-and-run accident and promptly pursued the only lead available, the address of the owner of the vehicle, the fact that the officer did not follow the suspect's route did not preclude the characterization of his action as fresh pursuit. *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979).

Execution of arrest warrant where no fresh pursuit. Where the element of "fresh pursuit" is not present, it is immaterial who executes an arrest warrant provided that individuals with lawful authority to make an arrest are actually present at the scene of the arrest and participate in the arrest process. *People v. Schultz*, 200 Colo. 47, 611 P.2d 977 (1980).

Court interpreted "reasonable grounds" to mean that a police officer in fresh pursuit can only make an extra-territorial warrantless arrest if, at the time the party crosses the boundary, the officer has "probable cause" to believe a crime has been committed. *People v. McKay*, 10 P.3d 704 (Colo. App. 2000).

Applied in *People v. Lott*, 197 Colo. 78, 589 P.2d 945 (1979).

16-3-107. Custodial care of prisoner in transit. It is lawful for any peace officer who has the custody of any alleged offender following an arrest to pass through any counties which lie on his route between the place of arrest and the county to which he is taking the alleged offender and to lodge him in any jail on his route for safe custody for one night or more, as the occasion requires.

Source: L. 72: R&RE, p. 199, § 1. C.R.S. 1963: § 39-3-107.

16-3-107.5. Transportation of prisoners - definitions. (1) As used in this section, unless the context otherwise requires:

(a) "Contracting entity" means any person or entity contracting with this state, another state, or a political subdivision of this or another state to transport a prisoner; except that "contracting entity" shall not include the department of corrections, any community corrections program operated pursuant to this title, or a county sheriff of a county located within the state of Colorado.

(b) "Prisoner" means any person convicted of an offense in Colorado or any other state or any person under arrest for suspicion of the commission of a crime in Colorado or any other state.

(c) "Secure facility" means a county, city and county, or municipal jail or a nonstate-owned prison facility, as defined in section 17-24-125 (1) (b), C.R.S.

(d) "Supervising individual" means a person employed by a contracting entity to transport prisoners from one location to another.

(e) "Transport" means to move a prisoner within, into, out of, or through the state of Colorado.

(2) (a) A supervising individual in each vehicle in which one or more prisoners are being transported by a contracting entity shall maintain a log book that documents for each prisoner:

(I) His or her name, date of birth, social security number, and any prescribed medication;

(II) The name of the jurisdictional authority authorizing the transportation, the date and time that the prisoner was first picked up, and the date and time that the prisoner was released to the jurisdictional authority;

(III) The date, time, length, and purpose of any stop made by the vehicle transporting any prisoner; and

(IV) Information concerning any injuries suffered by the prisoner while being transported.

(b) Upon request, a supervising individual shall surrender for inspection the log book required by paragraph (a) of this subsection (2) to any federal, state, county, or municipal law enforcement officer.

(3) Whenever a prisoner is transported by a contracting entity, the prisoner:

(a) At a minimum, shall be shackled and placed in a transport belt or chains with handcuffs and shall be under the observation of at least one supervising individual who shall remain awake;

(b) (Deleted by amendment, L. 2000, p. 852, § 59, effective May 24, 2000.)

(c) Shall not be shackled to another prisoner; and

(d) Shall have available in the vehicle in which the prisoner is being transported appropriate attire for the season, including footwear.

(3.5) Any vehicle in which one or more prisoners are being transported by a contracting entity shall only contain as many individuals as the vehicle was designed to carry.

(4) (a) At least once every twenty-four hours that a prisoner is being transported by a contracting entity, the prisoner shall be housed unshackled in a cell at a secure facility for a period of not less than six hours and permitted to shower and sleep.

(b) The contracting entity or the supervising individual shall, if practicable, notify the chief law enforcement officer in charge of the secure facility in which the prisoner is to be housed, at least twenty-four hours prior to the delivery of the prisoner to the secure facility, of each prisoner's name, date of birth, criminal history, and any special medical needs.

(5) Whenever a vehicle transporting one or more prisoners for a contracting entity stops for more than two hours for any reason:

(a) The supervising individual shall promptly notify, if practicable, the law enforcement agency of the local jurisdiction in which the vehicle is stopped; and

(b) All prisoners shall be housed in a secure facility unless, according to the chief law enforcement officer of the secure facility, it would be impractical to do so.

(6) Whenever a vehicle transporting prisoners for a contracting entity enters the state, a supervising individual shall promptly notify the Colorado bureau of investigation of the number of prisoners and the location or locations within the state where the vehicle is scheduled to stop.

(7) Whenever a prisoner is housed in a secure facility, the contracting entity shall pay to the operator of the secure facility providing the housing the actual cost of housing the prisoner.

(8) Any individual or entity who violates any provision of subsections (2) to (5) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five thousand dollars.

(9) If any prisoner being transported escapes due to the negligence of the contracting entity or a supervising individual, the contracting entity shall be held liable for all actual costs incurred by any governmental entity in recapturing the escaped prisoner and all actual damages caused by the escaped prisoner while at large.

Source: **L. 98:** Entire section added, p. 699, § 1, effective May 18. **L. 2000:** (3)(b) amended and (3.5) added, p. 852, § 59, effective May 24.

16-3-108. Issuance of arrest warrant without information or complaint. A court shall issue an arrest warrant only on affidavit sworn to or affirmed before the judge or a notary public and relating facts sufficient to establish probable cause that an offense has been committed and probable cause that a particular person committed that offense. The court shall issue a warrant for the arrest of such person commanding any peace officer to arrest the person so named and to take the person without unnecessary delay before the nearest judge of a court of record. Once a person is brought before the judge, the Colorado rules of criminal procedure are applicable.

Source: **L. 72:** R&RE, p. 199, § 1. **C.R.S. 1963:** § 39-3-108. **L. 95:** Entire section amended, p. 463, § 3, effective July 1.

ANNOTATION

Law reviews. For article, “One Year Review of Criminal Law and Procedure”, see 39 Dicta 81 (1962).

Annotator’s note. Since § 16-3-108 is similar to repealed § 39-2-3, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

This section does not authorize a private citizen to seek an arrest warrant. *Kailey v. Chambers*, 261 P.3d 792 (Colo. App. 2011).

An arrest warrant is not appropriate where there are no facts to show that the arrestee has yet committed a criminal offense. *People v. Hively*, 173 Colo. 485, 480 P.2d 558 (1971).

But federal warrants supported by affidavits provide basis for arrest. Even though the complaint filed by a district attorney, standing alone, would not support an arrest warrant because no facts were set forth to establish probable cause, where federal warrants were supported by affidavits which complied with all constitutional requirements, they provided a legitimate basis for an arrest. *Sergeant v. People*, 177 Colo. 354, 497 P.2d 983 (1972).

Applied in *People v. Schultz*, 200 Colo. 47, 611 P.2d 977 (1980).

16-3-109. Peace officer - authority to make arrest while off duty. A peace officer, as described in section 16-2.5-101, who, while off duty, is employed in a capacity specifically permitted by policies and procedures adopted by such officer’s governmental entity employer shall possess the status and authority which would otherwise be afforded an on-duty peace officer as described in section 16-2.5-101, acting within the course and scope of such officer’s employment. To be within the scope of this section, a peace officer employed by a nongovernmental entity must be in uniform with the peace officer’s public entity badge plainly visible, or such peace officer must have been approved for plain clothes work by the peace officer’s governmental employer.

Source: **L. 92:** Entire section added, p. 438, § 1, effective June 3. **L. 93:** Entire section amended, p. 1776, § 36, effective June 6. **L. 2003:** Entire section amended, p. 1621, § 35, effective August 6.

16-3-110. Peace officers - duties. (1) For the purposes of this section, “peace officer” means:

- (a) A peace officer as described in section 16-2.5-101; or
- (b) A federal law enforcement officer who, pursuant to federal statutes and the policy of the agency by which the officer is employed, is authorized to use deadly physical force in the performance of his or her duties.

(2) A peace officer shall have the authority to act in any situation in which a felony or misdemeanor has been or is being committed in such officer's presence, and such authority shall exist regardless of whether such officer is in the jurisdiction of the law enforcement agency that employs such officer or in some other jurisdiction within the state of Colorado or whether such officer was acting within the scope of such officer's duties when he or she observed the commission of the crime, when such officer has been authorized by such agency to so act. The local law enforcement agency having jurisdiction shall be immediately notified of the arrest and any person arrested shall be released to the custody of the local law enforcement agency.

(3) This section shall not be construed to authorize any federal officer to use deadly physical force in excess of that authorized in section 18-1-707, C.R.S.

Source: **L. 93:** Entire section added, p. 703, § 1, effective July 1. **L. 96:** Entire section amended, p. 735, § 4, effective July 1. **L. 2003:** (1)(a) amended, p. 1624, § 43, effective August 6.

ANNOTATION

When officers stopped driver for a traffic infraction outside their jurisdiction, they violated subsection (2). Turning without a signal is a traffic infraction, not a felony or misde-

meanor, under Colorado law. *United States v. Gonzales*, 535 F.3d 1174 (10th Cir.), cert. denied, 555 U.S. 1077, 129 S. Ct. 743, 172 L. Ed. 2d 740 (2008).

PART 2

AUTHORITY OF PERSON NOT A PEACE OFFICER TO MAKE AN ARREST

16-3-201. Arrest by a private person. A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest.

Source: **L. 72:** R&RE, p. 199, § 1. **C.R.S. 1963:** § 39-3-201.

ANNOTATION

Law reviews. For comment, "Leake v. Cain: Abrogation of Public Duty Doctrine in Colorado?", see 59 U. Colo. L. Rev. 383 (1988).

Annotator's note. Since § 16-3-201 is similar to repealed § 39-2-20, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

A private citizen may arrest for any crime committed in his presence. *Schiffner v. People*, 173 Colo. 123, 476 P.2d 756 (1970).

Officer outside of jurisdiction arrests with authority of private citizen. A peace officer acting outside the territorial limits of his jurisdiction does not have any less authority to arrest than does a person who is a private citizen. *People v. Wolf*, 635 P.2d 213 (Colo. 1981).

When "in presence" requirement met. The "in presence" requirement of this section is met

if the arrestor observes acts which are in themselves sufficiently indicative of a crime in the course of commission. *People v. Olguin*, 187 Colo. 34, 528 P.2d 234 (1974).

F.B.I. agent had authority as private citizen to arrest one escaping from police station in his presence. *Schiffner v. People*, 173 Colo. 123, 476 P.2d 756 (1970).

Hospital security guards, like any other citizens, have the power to make a citizen's arrest. *People v. Olguin*, 187 Colo. 34, 528 P.2d 234 (1974).

An arrest must be first authorized under this section before a private person can use physical force to effect the arrest. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Applied in *People v. Lott*, 197 Colo. 78, 589 P.2d 945 (1979).

16-3-202. Assisting peace officer - arrest - furnishing information - immunity.
(1) A peace officer making an arrest may command the assistance of any person who is in the vicinity.

(2) A person commanded to assist a peace officer has the same authority to arrest as the officer who commands his assistance.

(3) A person commanded to assist a peace officer in making an arrest shall not be civilly or criminally liable for any reasonable conduct in aid of the officer or for any acts expressly directed by the officer.

(4) Private citizens, acting in good faith, shall be immune from any civil liability for reporting to any police officer or law enforcement authority the commission or suspected commission of any crime or for giving other information to aid in the prevention of any crime.

Source: L. 72: R&RE, p. 200, § 1. C.R.S. 1963: § 39-3-202. L. 77: (4) added, p. 851, § 1, effective July 1.

Cross references: For refusing to aid a peace officer, see § 18-8-107; for authority of sheriffs to command aid, see § 30-10-516.

ANNOTATION

Aid of citizen does not make him agent of state in state action cases. The mere existence of the common-law right of a private citizen to aid in an arrest is not such significant state involvement as to make him an agent of the state, for in state action cases it has been required that the state enforce or require adherence to some unconstitutional private act and the

mere fact that the state common law or custom permits the act is not sufficient to support a finding of state action under the federal civil rights act. *Warren v. Cummings*, 303 F. Supp. 803 (D. Colo. 1969) (decided under repealed § 39-2-20, C.R.S. 1963).

Applied in *People v. Lott*, 197 Colo. 78, 589 P.2d 945 (1979).

16-3-203. Preventing a crime - reimbursement. Any person who is not a peace officer as defined in section 24-31-301 (5), C.R.S., who is made the defendant in any civil action as a result of having sought to prevent a crime being committed against any other person, and who has judgment entered in his favor shall be entitled to all his court costs and to reasonable attorney fees incurred in such action.

Source: L. 77: Entire section added, p. 852, § 1, effective June 19. L. 83: Entire section amended, p. 962, § 6, effective July 1, 1984. L. 92: Entire section amended, p. 1097, § 5, effective March 6.

Cross references: (1) For awarding of attorney fees in civil actions generally, see § 13-17-102. (2) For the legislative declaration contained in the 1992 act amending this section, see section 12 of chapter 167, Session Laws of Colorado 1992.

ANNOTATION

This section shifts payment of the defendant's court costs and reasonable attorney fees to the plaintiff when the defendant prevails and the court finds that the defendant acted in

good faith to prevent what he or she thought was a current or future crime. *Schwankl v. Davis*, 85 P.3d 512 (Colo. 2004).

PART 3

SEARCHES AND SEIZURES

16-3-301. Search warrants - issuance - grounds. (1) A search warrant authorized by this section may be issued by any judge of a court of record.

(2) A search warrant may be issued under this section to search for and seize any property:

(a) Which is stolen or embezzled; or

- (b) Which is designed or intended for use as a means of committing a criminal offense; or
- (c) Which is or has been used as a means of committing a criminal offense; or
- (d) The possession of which is illegal; or
- (e) Which would be material evidence in a subsequent criminal prosecution in this state or in another state; or
- (f) The seizure of which is expressly required, authorized, or permitted by any statute of this state; or
- (g) Which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a statute of this state, under circumstances involving a serious threat to public safety or order or to public health; or
- (h) Which would aid in the detection of the whereabouts of or in the apprehension of a person for whom a lawful arrest warrant is outstanding.
- (3) A search warrant may be issued under this section to search for any person for whom a lawful arrest warrant is outstanding.

Source: **L. 72:** R&RE, p. 200, § 1. **C.R.S. 1963:** § 39-3-301. **L. 85:** (2)(g) amended and (2)(h) and (3) added, p. 615, §§ 1, 2, effective June 2.

Cross references: For provisions concerning search and seizure other than the provisions of this section and rule 41 of the Colorado Rules of Criminal Procedure, see § 7 of article II of the Colorado Constitution; for the issuance of search warrants under the "Colorado Children's Code", see §§ 19-1-112, 19-2-504, and 19-2-505.

ANNOTATION

Law reviews. For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with searches, see 61 Den. L.J. 281 (1984). For article, "Criminal Procedure", which discusses Tenth Circuit decisions dealing with searches, see 62 Den. U.L. Rev. 159 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to warrant requirements and protection from searches, see 15 Colo. Law. 1564 and 1966

(1986). For article, "Criminal Procedure", which discusses Tenth Circuit decisions dealing with unreasonable searches and seizures, see 65 Den. U. L. Rev. 535 (1988). For a discussion of Tenth Circuit decisions dealing with search and seizure, see 66 Den. U. L. Rev. 813 (1989).

Annotator's note. For further annotations concerning search and seizure, see § 7 of art. II, Colo. Const., and Crim. P. 41.

Applied in *People v. Stoppel*, 637 P.2d 384 (Colo. 1981).

16-3-301.1. Court orders for the production of records - definitions. (1) A judge of a court of record may order the production of records.

(2) A court may order the production of records under this section to require the production of records in the actual or constructive control of a business entity:

- (a) That have been stolen or embezzled;
- (b) That are designed or intended for use as a means of committing a criminal offense;
- (c) That are or have been used as a means of committing a criminal offense;
- (d) The possession of which is illegal;
- (e) That would be material evidence in a subsequent criminal prosecution in this state, another state, or federal court;
- (f) The seizure of which is expressly required, authorized, or permitted by a statute of this state or the United States; or
- (g) That would aid in the detection of the whereabouts of or in the apprehension of a person for whom a lawful arrest order is outstanding.

(3) (a) A court shall order the production of records only on receipt of an affidavit sworn to or affirmed before the judge and relating facts sufficient to:

- (I) Identify or describe, as nearly as may be, the business entity that is in actual or constructive control of the records;
- (II) Identify or describe, as nearly as may be, the records that shall be produced;

(III) Establish the grounds for issuance of the court order for production of records or probable cause to believe the grounds exist; and

(IV) Establish probable cause that the records described are in the actual or constructive control of the business entity.

(b) The affidavit required by paragraph (a) of this subsection (3) may include sworn testimony reduced to writing and signed under oath by the witness giving the testimony before the issuance of the court order for the production of records. A copy of the affidavit and a copy of the transcript of testimony taken in support of the request for a court order for the production of records shall be attached to the court order for the production of records filed with the court.

(4) (a) If the court is satisfied that grounds for the application exist or that there is probable cause to believe that the grounds exist, the court shall issue a court order for the production of records, which shall:

(I) Identify or describe, as nearly as may be, the business entity that is in actual or constructive control of the records;

(II) Identify or describe, as nearly as may be, the records that shall be produced;

(III) State the grounds or probable cause for its issuance; and

(IV) State the names of the persons whose affidavits or testimony have been taken in support of the motion.

(b) The court order for the production of records may also contain other and further orders that the court deems necessary to comply with the provisions of this statute, or to provide for the custody or delivery to the proper person of the records produced and seized under the order, or otherwise to accomplish the purpose of the order.

(c) Unless the court otherwise directs, every court order for the production of records shall authorize a Colorado criminal investigator or peace officer:

(I) To serve the order during normal business hours of the business entity or at any other convenient time for the business entity that is in actual or constructive control of the records; and

(II) To receive the records during normal business hours of the business entity that is in the actual or constructive control of the records.

(5) (a) A court order for the production of records may be granted to a Colorado criminal investigator or peace officer whose affidavit supports the issuance of the order. The Colorado criminal investigator or peace officer granted the order need not have authorization to execute a search warrant in the jurisdiction in which the business entity is located.

(b) A court order for the production of records shall be served upon the business entity to whom it is directed within fourteen days after its date.

(c) A court order for production of records may be served in the same manner as a summons in a civil action or by personal service on a manager or supervisor of the business entity that is in actual or constructive control of the records or through any electronic or other means established and utilized by the business to receive service of process.

(6) (a) A business entity that is properly served with a court order for the production of records shall deliver the records, or copies of the records, identified in the court order to the officer who is designated in the court order within thirty-five days after the date the court order is served. The business entity shall also provide a notarized attestation of accuracy that the records produced represent complete and accurate copies of all records identified in the court order that are in the actual or constructive control of the business entity. If the business entity does not produce all records identified in the court order for production of records, the records not produced shall be identified. The attestation of accuracy shall be signed by the records custodian, or an officer or director of the business entity, who shall attest to the truth of the attestation to the best of the person's knowledge, information, and belief. The attestation may also attest to any one or all of the following: That the records were made at or near the time by, or from information transmitted by, a person with knowledge; that the records were kept in the course of a regular business activity; and that it was the regular practice of the business to record the information contained in the records. The business entity need only provide a copy of the attestation at the time of providing the records to the officer and may provide the original of the attestation to the officer within fourteen days after providing the records. The records and attestation of accuracy shall be

sufficient to establish the authenticity of the records produced, without further necessity of extrinsic evidence.

(b) A business entity that is served with a court order for the production of records may file a motion in the court that issued the court order to allow for an extension of time in which to comply with the court order. The motion shall be filed within the time period required to produce the records. The motion shall state with particularity the reasons why the business entity cannot comply with the court order. The motion shall be served upon the Colorado criminal investigator or peace officer named in the court order.

(c) Upon the filing of a motion for an extension of time, the court shall hold a hearing within fourteen days, unless the business entity and the Colorado criminal investigator or peace officer named in the court order agree to a later time. The court may grant an extension for a reasonable time for the business to produce the records upon good cause shown or by agreement with the Colorado criminal investigator or peace officer named in the court order.

(d) Failure of the business entity to comply with the requirements of a court order for the production of records shall support a finding of contempt of court.

(e) Upon receiving the records from the business entity, the criminal investigator or peace officer named in the court order shall file a return and inventory with the court indicating the records that have been received and the date upon which the records were received. The criminal investigator or peace officer named in the court order may also file with the court the original of the attestation of authenticity and completeness.

(7) Records produced pursuant to a court order for the production of records may be supplied in any form or format that is convenient for the business entity and that may be accessed by the Colorado criminal investigator or peace officer named in the court order or his or her agency or department. Production of records using proprietary software or another method that is not accessible shall not constitute compliance with the requirements of the court order. The court may order the defendant pay the cost of production of records.

(8) A cause of action shall not lie against a business entity or an officer, director, or employee, for providing records pursuant to a court order for the production of records.

(9) Nothing in this section shall preclude a Colorado criminal investigator or peace officer from seeking a search warrant.

(10) The provisions of this section shall govern the procedures for court orders for the production of records. Motions to suppress evidence seized pursuant to a court order for the production of records shall be governed by the rules of criminal procedure.

(11) As used in this section, unless the context otherwise requires:

(a) "Actual or constructive control" means the records are maintained or stored in any form or format on the premises of the business entity or at another location or facility under the custody or control of the business entity or a parent or subsidiary business, including pursuant to an agreement or contract with the business entity or any parent or subsidiary business and third-party service provider, in Colorado or elsewhere.

(b) "Business entity" means a corporation or other entity that is subject to the provisions of title 7, C.R.S.; a foreign corporation qualified to do business in this state pursuant to article 115 of title 7, C.R.S., specifically including a federally chartered or authorized financial institution; a corporation or other entity that is subject to the provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of individuals doing business in the state.

(c) "Colorado criminal investigator" means an employee of the Colorado department of regulatory agencies, the Colorado department of labor and employment, or the Colorado department of revenue who has been classified as a criminal investigator by the director of the employing department.

(d) "Peace officer" means a peace officer as described in section 16-2.5-101.

(e) "Records" shall include all documents, electronic notations, journal entries, data, reports, statements, financial documentation, correspondence, electronic mail, or other information retained by a business entity in connection with business activity, but shall not include an item that is privileged pursuant to section 13-90-107, C.R.S., unless the person who possesses the privilege gives consent.

Source: L. 2003: Entire section added, p. 978, § 17, effective April 17. **L. 2004:** (4)(a)(I), (6)(e), (11)(a), (11)(b), and (11)(d) amended, p. 1377, § 2, effective July 1. **L. 2010:** (4)(c)(I), (5)(c), (6)(a), and (11)(c) amended, (HB 10-1132), ch. 122, p. 406, § 1, effective August 11. **L. 2012:** (5)(b), (6)(a), and (6)(c) amended, (SB 12-175), ch. 208, p. 843, § 59, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (5)(b), (6)(a), and (6)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-3-302. Search warrants - municipalities - inspections - grounds. A search warrant may be issued by a judge of any municipal court by compliance with the applicable rule of the Colorado municipal court rules.

Source: L. 72: R&RE, p. 200, § 1. **C.R.S. 1963:** § 39-3-302.

16-3-303. Search warrants - application. (1) A search warrant shall issue only on affidavit sworn to or affirmed before the judge and relating facts sufficient to:

(a) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(b) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(c) Establish the grounds for issuance of the warrant or probable cause to believe that such grounds exist; and

(d) Establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched.

(2) The affidavit required by this section may include sworn testimony reduced to writing and signed under oath by the witness giving the testimony before issuance of the warrant. A copy of the affidavit and a copy of the transcript of testimony taken in support of the request for a search warrant shall be attached to the search warrant filed with the court.

(3) Procedures governing application for and issuance of search warrants consistent with this section may be established by rule of the supreme court.

(4) A no-knock search warrant shall be issued only if the affidavit for such warrant:

(a) Complies with the provisions of subsections (1), (2), and (3) of this section;

(b) Specifically requests the issuance of a no-knock search warrant; and

(c) Has been reviewed and approved for legal sufficiency and signed by a district attorney pursuant to section 20-1-106.1 (1) (b), C.R.S. Such review and approval may take place as allowed by statute or court rule or by means of facsimile transmission, telephonic transmission, or other electronic transfer.

(5) If the grounds for the issuance of a no-knock search warrant are established by a confidential informant, the affidavit for such warrant shall contain a statement by the affiant concerning when such grounds became known or were verified by the affiant. The statement shall not identify the confidential informant.

(6) For the purposes of this section, unless the context otherwise requires, "no-knock search warrant" means a search warrant served by entry without prior identification.

Source: L. 72: R&RE, p. 200, § 1. **C.R.S. 1963:** § 39-3-303. **L. 2000:** (4), (5), and (6) added, p. 650, § 1, effective July 1. **L. 2001:** (4)(c) amended, p. 1270, § 19, effective June 5.

ANNOTATION

- I. General Consideration.
- II. Content and Sufficiency of Affidavit.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Veracity Challenges in Colorado: A Primer", see 14 Colo. Law. 227 (1985).

Annotator's note. (1) Since § 16-3-303 is similar to repealed § 39-2-6, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

(2) For further annotations concerning search and seizure, see § 7 of art. II of the Colo. Const., and Crim. P. 41.

Unreasonable searches and seizures forbidden. Section 7 of art. II, Colo. Const., as well as the fourth and fourteenth amendments to the United States constitution, forbids unreasonable searches and seizures and further requires that searches and seizures be made only pursuant to a warrant based upon probable cause and supported by oath or affirmation. *People v. Thompson*, 185 Colo. 208, 523 P.2d 128 (1974).

Search authorized only upon showing of probable cause. It is only upon a showing of probable cause that the legal doors are opened to allow the police to gain official entry into an individual's domain of privacy for the purpose of conducting a search or to make an official seizure under the constitution. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Probable cause defined. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. In dealing with probable cause, one deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971); *People v. Thompson*, 185 Colo. 208, 523 P.2d 128 (1974).

Probable cause is an elusive term and is incapable of any precise definition which would permit a mechanical application under all circumstances. *Flesher v. People*, 174 Colo. 355, 484 P.2d 113 (1971).

Totality of circumstances test adopted for determining probable cause. *People v. Pennebaker*, 714 P.2d 904 (Colo. 1986).

Anticipatory warrants are barred by statutory language and identical language in Crim. P. 41 requiring that property to be searched for, seized, or inspected "is located at, in, or upon" premise, person, place, or thing to be searched. *People v. Poirez*, 904 P.2d 880 (Colo. 1995).

For evidence constituting probable cause, see *People v. Lindholm*, 197 Colo. 270, 591 P.2d 1032 (1979).

Mere suspicion does not by itself constitute probable cause. *People v. Thompson*, 185 Colo. 208, 523 P.2d 128 (1974).

Mere conclusory belief or suspicion by an affiant officer is not enough upon which to base the issuance of a search warrant. *People v. Clavey*, 187 Colo. 305, 530 P.2d 491 (1975).

Determination of probable cause is a judicial function to be performed by the issuing magistrate, which in Colorado may be any judge of the supreme, district, county, superior, or justice of the peace court under Crim. P. 41, and is not a matter to be left to the discretion of a law enforcement officer who is employed to apprehend criminals and to bring before the courts for trial those who would violate the law. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

The role of the police officer in search warrant practice is limited solely to providing the judge with facts and trustworthy information upon which he, as a neutral and detached judicial officer, may make a proper determination. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

And mere affirmation of belief or suspicion of an officer is not enough. To hold otherwise would attach controlling significance to the officer's belief rather than to the magistrate's judicial determination. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Independent determination of probable cause. The fact that the police did not request a warrant to search additional places likely to contain incriminating evidence is irrelevant to the independent determination of probable cause to search the place specified in the warrant. *People v. Chase*, 675 P.2d 315 (Colo. 1984).

A court may sever deficient portions of a search warrant without invalidating the entire warrant. When a warrant lists several locations to be searched, a court may suppress evidence recovered at a location for which police lacked probable cause but admit evidence recovered at locations for which probable cause was established. Under this severability doctrine, items that are illegally seized during the execution of a valid search warrant do not affect admissibility of evidence legally obtained while executing the warrant. *People v. Eirish*, 165 P.3d 848 (Colo. App. 2007).

Applied in *People v. Conwell*, 649 P.2d 1099 (Colo. 1982).

II. CONTENT AND SUFFICIENCY OF AFFIDAVIT.

Affidavit need not be attached to warrant served. There is nothing which requires that a

person given a warrant must receive a copy of the underlying affidavit or that a copy thereof must be attached to the copy of the warrant which is served at the time of the search. *People v. Papez*, 652 P.2d 619 (Colo. App. 1982).

But documents attached to and incorporated in an affidavit by reference need not be sworn to separately and may thus fall within the four corners of the affidavit. *People v. Campbell*, 678 P.2d 1035 (Colo. App. 1983).

Probable cause must be affirmed in writing. The fourth amendment to the United States constitution requires probable cause supported by oath or affirmation as a condition precedent to the valid issuance of a search warrant. Section 7 of art. II, Colo. Const., is even more restrictive and provides that probable cause must be supported by oath or affirmation reduced to writing. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Under both the fourth amendment of the United States constitution and § 7 of art. II, Colo. Const., no search warrants may issue without a showing of probable cause, which, under the Colorado constitution, must be affirmed in writing before a search warrant may issue. *Flesher v. People*, 174 Colo. 355, 484 P.2d 113 (1971).

A search warrant may properly issue only upon written affidavit establishing probable cause for the belief that the items sought are or will be located on the premises to be searched at the time at which the warrant is procured, or within a reasonable time thereafter. *People v. Erthal*, 38 Colo. App. 245, 556 P.2d 1228 (1976), *aff'd*, 194 Colo. 147, 570 P.2d 534 (1977).

While an officer's "training and experience" may be considered in determining probable cause, such training and experience cannot substitute for an evidentiary nexus, prior to the search, between the place to be searched and any criminal activity. *People v. Eirish*, 165 P.3d 848 (Colo. App. 2007).

Probable cause exists when an affidavit for a search warrant alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. *People v. Delgado*, 832 P.2d 971 (Colo. App. 1991).

During a controlled drug transaction, probable cause exists to search the location to which the seller went before selling the drugs to the police. *People v. Eirish*, 165 P.3d 848 (Colo. App. 2007).

Judge must look within the four corners of the affidavit to determine whether there are grounds for the issuance of a search warrant in determining whether the affidavit is sufficient. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971); *People v. Woods*, 175 Colo. 34, 485 P.2d 491 (1971); *People v. Lindholm*, 197 Colo. 270,

591 P.2d 1032 (1979); *People v. Atley*, 727 P.2d 376 (Colo. 1986).

In determining whether an affidavit is sufficient to support the issuance of a search warrant, the magistrate must look only within the four corners of the affidavit, and verbal communications to the magistrate of additional supporting information cannot correct an affidavit which is basically deficient in its statement of the underlying facts and the circumstances relied upon. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

The court is restricted to the information contained within the four corners of the affidavit. Thus, it cannot bolster the insufficient affidavit with additional information not conveyed to the magistrate in the application for the warrant. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

Existence of information outside affidavit is immaterial. The fact that the police might have had additional information which could have provided a basis for the issuance of the warrant is of no consequence. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Verbal communication of facts, as contrasted with written communication, will not suffice to establish probable cause. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

Nor will the affiant's conclusory declaration that he has probable cause add strength to the showing made. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

Technical requirements and elaborate specificity are not required in the drafting of affidavits for search warrants. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

Affidavit interpreted with common sense. In interpreting an affidavit for a search warrant and the execution of the warrant, a common sense interpretation must be applied. *People v. Del Alamo*, 624 P.2d 1304 (Colo. 1981).

Task of magistrate is to make practical, common-sense decision as to whether, given all circumstances stated in affidavit, there is fair probability that contraband or evidence of a crime will be found in a particular place. *People v. Pennebaker*, 714 P.2d 904 (Colo. 1986); *People v. Atley*, 727 P.2d 376 (Colo. 1986).

Affidavit must supply underlying fact. Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause to believe that proper grounds for the issuance of the warrant exist. If a search warrant is to be sustained, the Colorado supreme court must find that the affidavit complied with the standards set forth in *Aguilar v. Texas* (378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1966)) and in *Spinelli v. United States* (393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969)). *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971); *People v.*

Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979); *People v. Dailey*, 639 P.2d 1068 (Colo. 1982).

The United States supreme court, in attempting to define the area of probable cause with certainty and to provide guidelines for proper investigation, has provided a two-prong test. First, the affidavit upon which the warrant is based must set forth the underlying circumstances necessary to enable an independent judicial determination to be made, and, second, the information upon which the conclusion is based must come from a reliable or credible source. *Flesher v. People*, 174 Colo. 355, 484 P.2d 113 (1971).

The affidavit for search warrant must meet the two-pronged test requiring that the officer establish: (1) The underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. *People v. Glaubman*, 175 Colo. 41, 485 P.2d 711 (1971).

The test for determining probable cause for issuance of a search warrant based on information provided by an unidentified informant is that the affidavit in support of the warrant must allege facts from which the issuing magistrate can independently determine whether there is probable cause to believe that illegal activity is being carried on in the place to be searched. *People v. Ward*, 181 Colo. 246, 508 P.2d 1257 (1973).

An affidavit based on information provided in large part by an unidentified informant must, in order to establish probable cause for issuance of a search warrant: (1) Allege facts from which the issuing magistrate could independently determine whether there were reasonable grounds to believe that illegal activity was being carried on in the place to be searched; and (2) set forth sufficient facts to allow the magistrate to determine independently if the informer is credible or the information reliable. *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973); *People v. Baird*, 182 Colo. 284, 512 P.2d 629 (1973); *People v. Masson*, 185 Colo. 65, 521 P.2d 1246 (1974).

In order to support the issuance of a search warrant the issuing magistrate must be apprised of sufficient underlying facts and circumstances, reduced to writing, under oath, from which he may reasonably conclude that probable cause exists for the issuance of the warrant. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

In testing the sufficiency of affidavits in support of search warrants, Colorado has followed the mandate of the United States supreme court in applying the two-pronged Aguilar-Spinelli test. An affidavit which relies on information supplied by a confidential informant must allege sufficient underlying facts from which the issuing magistrate can make an independent deter-

mination that illegal activity is being carried on in the place to be searched. In addition, the affidavit must set forth sufficient information so that the magistrate can determine independently that the informant is credible or that his information is reliable. *People v. Arnold*, 186 Colo. 372, 527 P.2d 806 (1974).

The two-pronged test which emphasizes the basis upon which an informer's tip will provide a foundation for the issuance of a search warrant requires that the affidavit set forth: (1) The underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusion, and (2) support of the affiant's claim that the informant was credible or his information reliable. *People v. McGill*, 187 Colo. 65, 528 P.2d 386 (1974).

An issuing magistrate must be properly apprised of the underlying facts and circumstances which show that there is probable cause to believe that grounds for the issuance of a search warrant exist. *People v. Clavey*, 187 Colo. 305, 530 P.2d 491 (1975).

Affidavit contained sufficient underlying facts. Where the affiant states that the informant personally observed marijuana in the premises to be searched, this statement is sufficient to permit the issuing magistrate to determine independently that there were reasonable grounds to believe that illegal activity was being carried on in the place to be searched. *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973).

Where it appears that the informant personally saw an illegal narcotic on the premises, that he was given two marijuana cigarettes by someone on the premises on September 20, 1972, and that he observed other illegal narcotics at the time he left the premises on September 20, 1972, these facts are sufficient to allow a magistrate to determine whether there was probable cause to determine presence of illegal activity. *People v. Baird*, 182 Colo. 284, 512 P.2d 629 (1973).

Where informant personally observed that apartment was used solely to grow mushrooms and observations were consistent with cultivation of psilocybin mushrooms, the totality of the affidavit established probable cause and supported the issuance of a search warrant. *People v. Atley*, 727 P.2d 376 (Colo. 1986).

Information contained in the affidavit established probable cause to search premises, when analyzed under the totality of the circumstances test, where corroborating circumstances of the same license plate on the vehicle and the presence of a pregnant woman and small child accompanying the defendant in the car at the time of the arrest, and a high volume of short term visitors at the trailer shortly before the defendant's arrest for selling cocaine to an undercover officer established a reasonable probability that contraband or evidence of a crime

would be found at the defendant's trailer. *People v. Delgado*, 832 P.2d 971 (Colo. App. 1991).

Information regarding results of a previous search which were suppressed in a previous action must be stricken from the affidavit supporting a search warrant. But the court will not strike down the warrant if there are sufficient facts remaining in the affidavit to support the issuance of the warrant. *People v. Wilson*, 819 P.2d 510 (Colo. App. 1991).

Information regarding defendant's description that was omitted from an affidavit for a search warrant did not render the affidavit substantially misleading to the judge who issued the warrant. *People v. Delgado*, 832 P.2d 971 (Colo. App. 1991).

Regardless of whether facts were omitted with a reckless disregard for the truth in the affidavit submitted in support of a search warrant, the information was not material such that its omission rendered the affidavit substantially misleading as to the existence of probable cause. *People v. Kerst*, 181 P.3d 1167 (Colo. 2008).

Failure to include a complete list of the indicators of marijuana cultivation in the affidavit did not render the affidavit misleading where the affidavit listed the only two indicators of marijuana cultivation which were present in the office which was to be searched. *People v. Wilson*, 819 P.2d 510 (Colo. App. 1991).

Identification of wrong street not dispositive of affidavit's efficacy. Fact that the affidavit identified the wrong street, which was less than one block away from the actual location of the truck to be searched, was not dispositive of an affidavit's efficacy. *People v. Del Alamo*, 624 P.2d 1304 (Colo. 1981).

Information in sheriff deputy's affidavit, when considered separately and as a whole, failed to establish a substantial basis for the magistrate's determination that probable cause existed to issue the warrant. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Deputy who conducted the search and who was the same officer who prepared the deficient affidavit either knew or should have known that the warrant he obtained based on his own affidavit was lacking in probable cause, and thus it was objectively unreasonable for him to rely on it. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Trial court erred when it concluded that (1) probable cause existed to issue the search warrant, and, (2) even absent probable cause, the officers acted in good faith in executing the warrant. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Affidavit must support finding of probable cause as to each place to be searched. While more than one search warrant may be issued on the basis of a single affidavit, the affidavit must support a finding of probable cause as to each

separate warrant or each separate place to be searched. *People v. Arnold*, 181 Colo. 432, 509 P.2d 1248 (1973).

Fact that the places to be searched were apartments rather than single-family residences does not alter the rule that an affidavit must support a finding of probable cause as to each separate place to be searched. *People v. Arnold*, 181 Colo. 432, 509 P.2d 1248 (1973).

Personal observation by an informant of the objects of the search within the place to be searched satisfied the first prong of the Aguilar-Spinelli test. *People v. Ward*, 181 Colo. 246, 508 P.2d 1257 (1973); *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973).

The direct observations of the informant are sufficient to satisfy the first prong of the Aguilar-Spinelli test. *People v. Arnold*, 186 Colo. 372, 527 P.2d 806 (1974).

Requirement that the affidavit for a search warrant set forth underlying circumstances so as to enable a magistrate to independently judge the validity of the informant's conclusion that criminal activity exists can be satisfied by the assertion of personal knowledge of the informant. *People v. Montoya*, 189 Colo. 106, 538 P.2d 1332 (1975).

An informer need not relate to police officers the specific address of the place in which he observed the unlawful activity. It is enough if the informant describes the location and provides the officers sufficient information so that they can accurately determine such address. *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973).

Details from informant must support independent court determination. If officer seeking the warrant is relying upon a tip by another person, then the information contained in the affidavit upon which the informant based his conclusion must be of sufficient detail as to permit the making of an independent determination by the court of the credibility of the informant and his information. *Flesher v. People*, 174 Colo. 355, 484 P.2d 113 (1971).

Statement that informant is reliable is insufficient. An affidavit does not establish the credibility of an informant by merely stating that the informant is known to be reliable. Nor does an affidavit establish the credibility of an informant by merely stating that the informant is known to be reliable based on past information supplied by the informer which has proved to be accurate. Although the words "past information" might conjure up in the mind of the officer some knowledge of the underlying circumstances from which the officer might conclude that the informant was reliable, the judge has not been apprised of such facts, and consequently, he cannot make a disinterested determination based upon such facts. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

As a basis for issuing a search warrant, the mere assertion of reliability is not sufficient to establish an informant's credibility. There must be a more comprehensive statement of underlying facts upon which the magistrate can make an independent determination that the informant is credible or his information reliable. *People v. Aragon*, 187 Colo. 206, 529 P.2d 644 (1974).

An affidavit for a search warrant seeking to show an informant's credibility is not satisfactory by merely stating that the informant is reliable, or that he has supplied information in the past which proved to be accurate. Nor are irrelevant, albeit correct, details sufficient. *People v. Montoya*, 189 Colo. 106, 538 P.2d 1332 (1975).

Where the only recital in the affidavit for a search warrant bearing upon the informant's credibility or the reliability of the information supplied was "That the confidential informant has related information to the affiant regarding several previous narcotics and dangerous drugs sellers and users which has been confirmed and proven reliable by the affiant", this was totally conclusory and devoid of details sufficient to support an independent finding of credibility or reliability. *People v. Bowen*, 189 Colo. 126, 538 P.2d 1336 (1975).

An affidavit must contain sufficient facts to allow the magistrate to determine how the informant obtained the information upon which the affiant relies. Bare assertions of knowledge are insufficient to establish the informer's knowledge. Statements as to the informer's reliability must not be conclusory, but must contain information upon which the magistrate could independently determine the informant's veracity and reliability. *People v. Pacheco*, 175 P.3d 91 (Colo. 2006).

There are at least three ways in which an affidavit might allow a magistrate to determine the reliability of an informant's information so as to issue a search warrant: (1) By stating that the informant had previously given reliable information; (2) by presenting the information in detail which clearly manifests its reliability; and (3) by presenting facts which corroborate the informant's information. *People v. Masson*, 185 Colo. 65, 521 P.2d 1246 (1974).

The reliability of the informant is established if the information resulted in arrests. The issue involved is the reliability of the informant; this reliability is satisfactorily established if the previous information led to arrests. *People v. Arnold*, 186 Colo. 372, 527 P.2d 806 (1974).

And not in convictions. To impose the more stringent requirement that the information led to convictions would impose an undue restriction on law enforcement officers. *People v. Arnold*, 186 Colo. 372, 527 P.2d 806 (1974).

Or it is asserted informant previously furnished information of specified criminal activity. Requirement that the affiant-police officer

support his request for a search warrant with information showing that the informant was credible, or his information was reliable, may be satisfied by an assertion that the informant has previously furnished solid material information of specified criminal activity. *People v. Montoya*, 189 Colo. 106, 538 P.2d 1332 (1975).

Statement sufficient to establish informant's reliability. Where search warrant affidavit indicated that previous information supplied by the informant had led to narcotics arrests and seizures, such statement was sufficient to establish the reliability of the informant. *People v. Ward*, 181 Colo. 246, 508 P.2d 1257 (1973).

Where the affidavit related that the informant had, within the past 14 months, supplied information which led to the arrest and conviction of an individual for possession of a narcotic drug, and that the informant had, within the past 24 hours, supplied information which resulted in arrests and the seizure of a quantity of marijuana, this information was sufficient to permit the issuing magistrate to find that the informant was reliable. *People v. Harris*, 182 Colo. 75, 510 P.2d 1374 (1973).

Affidavit set forth sufficient facts to permit a determination that the informant was reliable and the information provided therewith was sufficient to justify issuance of a search warrant. *People v. Treadway*, 182 Colo. 239, 512 P.2d 275 (1973).

Where the affidavit alleged that the informant had furnished information which "has been the cause of approximately 20 narcotic and dangerous drug arrests in the past year", the magistrate could independently conclude that the police would not repeatedly accept information from one who has not proven by experience to be reliable, and hence, the magistrate could determine that the informant was credible. *People v. Baird*, 182 Colo. 284, 512 P.2d 629 (1973).

The second prong of the Aguilar-Spinelli test is satisfied by the statement in the affidavit that the information was received from "a previously reliable confidential informant whose information has resulted in narcotics arrest and seizures on at least two past occasions". *People v. Arnold*, 186 Colo. 372, 527 P.2d 806 (1974).

Informant's means of obtaining information need not be recited in the affidavit if there is stated such detail given by the informant as would corroborate his assertions of criminal activity. *Flesher v. People*, 174 Colo. 355, 484 P.2d 113 (1971).

Citizen-informer rule. Colorado will follow the citizen-informer rule and will recognize that a citizen who is identified by name and address and was a witness to criminal activity cannot be considered on the same basis as the ordinary informant. *People v. Glaubman*, 175 Colo. 41, 485 P.2d 711 (1971).

Affidavit need not contain statement of facts showing reliability of citizen-informant. Where the citizen-informant rule applies to information contained in an affidavit for issuance of a search warrant, it is not necessary that the affidavit contain a statement of facts showing the reliability of the citizen-informant, as is the case when the informant is confidential and unidentified. *People v. Schamber*, 182 Colo. 355, 513 P.2d 205 (1973).

A police officer's factual statements in an affidavit that are erroneous and false must be stricken and may not be considered in determining whether the affidavit will support the issuance of a search warrant. *People v. Malone*, 175 Colo. 31, 485 P.2d 499 (1971).

Deletion of inaccuracies not fatal if sufficient material facts remain. Where the affidavit still contains material facts sufficient as a matter of law to support the issuance of a warrant after deletion of erroneous statements, the supreme court will not strike down a warrant because the affidavit is not completely accurate. *People v. Malone*, 175 Colo. 31, 485 P.2d 499 (1971).

The fact that some portions of an affidavit must be stricken because they are erroneous, or that a portion of the evidence relied on for a finding of probable cause is not properly recorded and may not be considered, does not require the issuing magistrate to ignore the other information supplied by the affidavit. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Likewise, affidavit may be amended by sworn testimony before issuance of warrant. Should the judge to whom application has been made for the issuance of a search warrant determine that the affidavit is insufficient, he can require that sworn testimony be offered to supplement the affidavit or can demand that the affidavit be amended to disclose additional facts. The testimony taken would have to be reduced to writing and signed by the witness or witnesses that offered testimony, under oath, to supplement the affidavit. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

A search warrant may be based on hearsay, as long as a substantial basis for crediting the hearsay exists. *People v. Woods*, 175 Colo. 34, 485 P.2d 491 (1971); *People v. Lindholm*, 197 Colo. 270, 591 P.2d 1032 (1979).

Affidavit not insufficient though based on double hearsay. Affidavit in support of search warrant was not insufficient although it was predicated upon double hearsay, where the information is conveyed by one police officer to another police officer. *People v. Quintana*, 183 Colo. 81, 514 P.2d 1325 (1973).

Fruits of search supported by defective affidavit are inadmissible. Where the affidavits were fatally defective, the warrants issued thereon were nullities, any search conducted under them was unlawful, and the fruits of such

a search are inadmissible in evidence. *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971).

Affidavit did not recite sufficient facts which could enable the court to make an independent determination that there is probable cause to believe that the defendants were keeping marijuana in their safe deposit box, where the first six paragraphs of the affidavit merely provide the information that the two college students, one of whom reportedly had engaged at some previous time in selling marijuana, had rented a safe deposit box, and paragraph seven states that the treasury department had received information that one of the defendants kept marijuana in a safe deposit box in a local bank, since there is no basis to test the credibility or reliability of the actual source of the incriminating information. *Flesher v. People*, 174 Colo. 355, 484 P.2d 113 (1971).

The affidavit is not sufficient if no explanation appears as to how the county sheriff's office obtained the information, nor did the affidavit set forth who made the observation, or whether the information was obtained from an eyewitness or from a person who received the information indirectly. *People v. Myers*, 175 Colo. 109, 485 P.2d 877 (1971).

Statement in affidavit for issuance of search warrant that informant was present in two apartments located in the same building and observed marijuana did not have "plain meaning" to indicate that informant had seen marijuana in both apartments and would not support the issuance of search warrants for both apartments. *People v. Ward*, 181 Colo. 246, 508 P.2d 1257 (1973).

Although the affidavit related that the informant did observe marijuana and "speed" somewhere in the building at 2018 Ogden Street, there is nothing in the affidavit to indicate specifically where in that multiple-occupancy structure the drugs were located. This being so, the affidavit failed to relate sufficient facts from which the issuing magistrate could find probable cause to believe that the marijuana and "speed" were located within the places to be searched, i.e., within each of the defendants' apartments. *People v. Arnold*, 181 Colo. 432, 509 P.2d 1248 (1973).

Affidavit was not sufficient to establish probable cause for issuance of warrant authorizing search of automobile where owner of automobile was suspected of selling marijuana. *People v. Padilla*, 182 Colo. 101, 511 P.2d 480 (1973).

Because of the long lapse of time, the information in the affidavit pertaining to the probable location of the sought items was insufficient for the issuance of a search warrant. *People v. Erthal*, 38 Colo. App. 245, 556 P.2d 1228 (1976), *aff'd*, 194 Colo. 147, 570 P.2d 534 (1977).

Good faith basis required to challenge warrant affidavits. As conditions to a veracity hearing testing the truth of averments contained in a

warrant affidavit, a motion to suppress must be supported by one or more affidavits reflecting a good faith basis for the challenge and contain a specification of the precise statements challenged. *People v. Dailey*, 639 P.2d 1068 (Colo. 1982).

Affidavit containing stale information. Where the only information upon which the search warrant issued had been obtained nearly two months prior to issuance of the warrant and the staleness of the information in the affidavit was not remedied by later information, the warrant was invalid and not supported by sufficient affidavit. *People v. Erthal*, 194 Colo. 147, 570 P.2d 534 (1977).

The warrant was not based on probable cause, and the police could not have reasonably relied on it, because the information regarding drug manufacturing at defendant's home was stale when the police applied for the warrant. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

Although crimes were perpetrated eight months prior to application for search warrant, because officers proceeded with all due diligence upon discovery of information upon which to base request for a search warrant, the affidavit was sufficient to establish probable cause. *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984).

Probable cause is typically lacking for issuance of a warrant where no relatively current information of criminal activity or contraband at the location to be searched is available. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

Warrant issued day after probable cause established is not invalid. A warrant issued one day after evidence establishing probable cause is obtained is not invalid as being predicated on "stale information". *People v. Thrower*, 670 P.2d 1251 (Colo. App. 1983).

16-3-304. Search warrants - contents. (1) If the judge is satisfied that grounds for the application exist or that there is probable cause to believe that such grounds exist, he shall issue a search warrant, which shall:

(a) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(b) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(c) State the grounds or probable cause for its issuance; and

(d) State the names of the persons whose affidavits or testimony have been taken in support thereof.

(2) The search warrant may also contain such other and further orders as the judge deems necessary to comply with the provisions of a statute, charter, or ordinance, or to provide for the custody or delivery to the proper officer of any property seized under the warrant, or otherwise to accomplish the purposes of the warrant.

(3) Unless the court otherwise directs, every search warrant authorizes the officer executing the same:

(a) To execute and serve the warrant at any time; and

(b) To use and employ such force as is reasonably necessary in the performance of the duties commanded by the warrant.

Source: L. 72: R&RE, p. 201, § 1. C.R.S. 1963: § 39-3-304.

ANNOTATION

I. General Consideration.

II. Description of Premises, Place, Etc.

III. Description of Property.

I. GENERAL CONSIDERATION.

Annotator's note. (1) Since § 16-3-304 is similar to repealed § 39-2-6, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

(2) For further annotations concerning search and seizure, see § 7 of art. II, Colo. Const., and Crim. P. 41.

A search warrant should not be broader than the justifying basis of facts. *People v. Clavey*, 187 Colo. 305, 530 P.2d 491 (1975).

Standard for compliance with constitutional requirements is one of practical accuracy. The standard for determining whether a search warrant complies with constitutional requirements is one of practical accuracy rather than technical nicety. *People v. Ragulsky*, 184 Colo. 86, 518 P.2d 286 (1974); *People v. Martinez*, 898 P.2d 28 (Colo. 1995); *People v. Schrader*, 898 P.2d 33 (Colo. 1995).

The test for determining whether the sufficiency of a description in a search warrant

is **adequate** is if the officer executing the warrant can with reasonable effort ascertain and identify the place intended to be searched. *People v. Ragulsky*, 184 Colo. 86, 518 P.2d 286 (1974).

Omission of affiant's name on the face of a search warrant was an immaterial variance which did not invalidate warrant where proper affidavit had been executed by an officer and reviewed by a judge prior to issuance. *People v. McKinstry*, 843 P.2d 18 (Colo. 1993).

II. DESCRIPTION OF PREMISES, PLACE, ETC.

Warrant describing house as within Denver when in fact the house lay one-half block outside Denver was not for that reason invalid. *People v. Martinez*, 898 P.2d 28 (Colo. 1995).

Technical perfection not required. Where warrant specified a street address that was adjacent to defendant's residence and owned by the same owner, and defendant's residence was not itself searched, both the warrant and the search were valid. *People v. Schrader*, 898 P.2d 33 (Colo. 1995).

Not every violation of this section requires suppression of evidence under the exclusionary rule. Where search warrant was executed one-half block outside officers' jurisdiction, but city boundaries were not clear and officers promptly notified the proper authorities when the error was discovered, no violation of defendant's constitutional rights occurred. *People v. Martinez*, 898 P.2d 28 (Colo. 1995).

This section requires that a warrant particularly describe the place to be searched. *People v. Lucero*, 174 Colo. 278, 483 P.2d 968 (1971).

Warrant must describe apartment unit by number or name of tenant. When authority is desired to search a particular apartment or apartments within an apartment building, or a particular room or rooms within a multiple-occupancy structure, the warrant must sufficiently describe the apartment or subunit to be searched, either by number or other designation, or by the name of the tenant or occupant. *People v. Alarid*, 174 Colo. 289, 483 P.2d 1331 (1971).

And description by street address is insufficient. When the officers knew or should have known that the house was not a one-family residence, and the fact that the officers had notice of the separate dwelling facilities located in the basement is evident from the affidavit of an officer, the general rule as to multiple-occupancy structures is applicable, and a warrant describing the entire house by street address only, without reference to the particular dwelling unit or units sought to be searched, is constitutionally insufficient since no facts were presented which would show that there was

probable cause to believe that criminal activity was occurring in both dwelling places. *People v. Alarid*, 174 Colo. 289, 483 P.2d 1331 (1971).

Exception if officers unaware house is multifamily and if search confined. The general rule of law when dealing with searches made in rooming houses or apartment houses is subject to an exception, among others, where the officers did not know, nor had reason to know, that they were dealing with a multifamily dwelling when obtaining the warrant, and providing that they confine the search to the area which was occupied by the person or persons named in the affidavit. *People v. Lucero*, 174 Colo. 278, 483 P.2d 968 (1971).

Search warrant failing to designate subunits of multiple-occupancy structure to be searched met the requirement that place to be searched be described with particularity where it was reasonable for the police to conclude that the structure was not divided into subunits. *People v. McGill*, 187 Colo. 65, 528 P.2d 386 (1974).

III. DESCRIPTION OF PROPERTY.

The description in a search warrant of items to be seized must be specific. *People v. Clavey*, 187 Colo. 305, 530 P.2d 491 (1975).

Search warrant reasonably specific under circumstances. *People v. Lindholm*, 197 Colo. 270, 591 P.2d 1032 (1979).

In determining whether warrant is too general, the nature of the property to be seized must be considered. *People v. Lindholm*, 197 Colo. 270, 591 P.2d 1032 (1979); *People v. Ball*, 639 P.2d 1078 (Colo. 1982); *People v. Hill*, 690 P.2d 856 (Colo. 1984).

Burden of connecting articles not described with crime is upon the state. When a defendant demonstrates that an article is not specifically described in the search warrant, and when it is not per se connected with criminal activity, the burden of showing that it is so connected falls upon the state. *People v. Lujan*, 174 Colo. 554, 484 P.2d 1238 (1971).

Failure to show connection requires their return. Money seized belonging to the defendant must be returned, when it was not mentioned in the warrant and was not per se connected with criminal activity, when the state failed to show a nexus between the money seized and criminal activity, and when the defendant testified that the money had been lent to him by family members and friends to defray the cost of his daughter's funeral. *People v. Lujan*, 174 Colo. 554, 484 P.2d 1238 (1971).

Currency was described with reasonable certainty. Where the search warrant correctly described a \$20 bill with the exception of the last character of the serial number which was illegible, the likelihood of defendant's possession of another bill with nine identical charac-

ters, all in the same sequential order, and having a different tenth character from the bill described in the search warrant was highly improbable, and hence, there was probable cause to seize the bill as there was reasonable certainty of description. *People v. Piwtorak*, 174 Colo. 525, 484 P.2d 1227 (1971).

Effects intermingled with drugs were validly seized. Where objection was made to the seizure of the particular personal effects which serve to identify the person or persons residing at and in control of the premises searched and the record indicates that these personal effects were intermingled with the suspected narcotics and dangerous drugs found on the premises, it was held that these personal effects, which bore the names of the defendants, were validly seized since these items might well serve to establish

elements of the crimes for which defendants were charged and for which the search warrant was issued. *People v. Piwtorak*, 174 Colo. 525, 484 P.2d 1227 (1971).

Warrant not insufficient on its face. Command portion of search warrant which read: "you are therefore commanded to search forthwith the _____ above described property for the property described" did not render the warrant insufficient on its face where the property to be searched had been specifically described "above" two times and where the property to be seized likewise had been described above as "amphetamines, barbiturates, opium, opium derivatives, and other synthetic narcotics and implements used in the traffic and in the use of narcotic drugs". *People v. Ragulsky*, 184 Colo. 86, 518 P.2d 286 (1974).

16-3-305. Search warrants - direction - execution and return. (1) Except as otherwise provided in this section, a search warrant shall be directed to any officer authorized by law to execute it in the county wherein the property is located.

(2) A search warrant issued by a judge of a municipal court shall be directed to any officer authorized by law to execute it in the municipality wherein the property is located.

(3) Any judge issuing a search warrant, on the grounds stated in section 16-3-301, for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported may make an order authorizing a peace officer to be named in the warrant to execute the same, and the person named in such order may execute the warrant anywhere in the state. All sheriffs, coroners, police officers, and officers of the Colorado state patrol, when required, in their respective counties, shall aid and assist in the execution of such warrant. The order authorized by this subsection (3) may also authorize execution of the warrant by any officer authorized by law to execute it in the county wherein the property is located.

(4) When any officer, having a warrant for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported is in pursuit thereof and the person, motor vehicle, aircraft, or other object crosses or enters into another county, such officer is authorized to execute the warrant in the other county.

(5) It is the duty of all peace officers into whose hands any search warrant comes to execute the same, in their respective counties or municipalities, and make due return thereof. Procedures consistent with this section for the execution and return of search warrants may be provided by rule of the supreme court.

(6) A search warrant shall be executed within fourteen days after its date.

Source: L. 72: R&RE, p. 201, § 1. C.R.S. 1963: § 39-3-305. L. 2012: (6) amended, (SB 12-175), ch. 208, p. 844, § 60, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (6) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. For further annotations concerning search and seizure, see § 7 of art. II of the Colo. Const., and Crim. P. 41.

Evidence seized in violation of a statutory provision may be suppressed only if the unauthorized search and seizure violated constitu-

tional restraints on unreasonable searches and seizures. *People v. Hamer*, 689 P.2d 1147 (Colo. App. 1984).

Warrant describing house as within Denver when in fact the house lay one-half block outside Denver was not for that reason invalid.

People v. Martinez, 898 P.2d 28 (Colo. 1995).

A warrant is not rendered stale or the resulting search unconstitutional if probable cause contin-

ued to exist when executed within the 10-day limit prescribed by subsection (6). People v. Russom, 107 P.3d 986 (Colo. App. 2004).

16-3-306. Search warrants - joinder. The search of one or more persons, premises, places, or things, or any combination of persons, premises, places, or things, may be commanded in a single warrant or in separate warrants, if compliance is made with section 16-3-303 (1) (d).

Source: L. 72: R&RE, p. 202, § 1. C.R.S. 1963: § 39-3-306.

16-3-307. Limiting clause. Nothing in this part 3 shall be construed to require the issuance of a search warrant in cases in which such warrant is not required by law. This statute does not modify any statute inconsistent with it, regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made.

Source: L. 72: R&RE, p. 202, § 1. C.R.S. 1963: § 39-3-307.

ANNOTATION

Annotator's note. Since § 16-3-307 is similar to repealed § 39-2-6, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

In order for a warrantless search to be excused under exigent circumstances, probable cause must exist at the moment the arrest or the search is made. People v. Thompson, 185 Colo. 208, 523 P.2d 128 (1974).

Strictness of probable cause requirements. Although the constitutional warrant requirement may be excused under exigent circumstances, the probable cause requirements are at least as strict in warrantless searches as in those pursuant to a warrant. People v. Thompson, 185 Colo. 208, 523 P.2d 128 (1974).

Because both probable cause and exigent circumstances must be present in order to justify a warrantless search into a defendant's home and trial court found only that police entered defendant's home in the absence of exigent circumstances without first making a probable cause determination, case was remanded to trial court to determine first whether defendant informed detective that drugs were in his home, giving detective probable cause, and then to determine whether exigent circumstances justified warrantless entry into the defendant's home. People v. Mendoza-Balderama, 981 P.2d 168 (Colo. 1999).

A consent search is outside the ambit of traditional fourth amendment warrant requirements. People v. Hancock, 186 Colo. 30, 525 P.2d 435 (1974).

But officers may not coerce occupant into waiving constitutional rights. To secure a consent search, however, the officers may not use

any methods which coerce the occupant into waiving fourth amendment rights. People v. Hancock, 186 Colo. 30, 525 P.2d 435 (1974).

Whether or not the consent which is given in a particular case is voluntary is a question to be determined by the court in light of the totality of the circumstances surrounding that consent, and the overriding inquiry is whether the consent is intelligently and freely given. People v. Hancock, 186 Colo. 30, 525 P.2d 435 (1974).

That defendant's wife was told a warrant would be sought if her consent to search their home was not obtained does not negate the evidence which strongly supports the trial court's finding of consent. People v. Hancock, 186 Colo. 30, 525 P.2d 435 (1974).

Where trial court evaluated conflicting testimony and evidence relevant to the issue of consent to search home without a warrant and determined that defendant did not consent to a search of his home, absent lack of evidence in the record to support the trial court's factual findings, reviewing court is bound to uphold the trial court's conclusion of lack of consent and unlawful search. People v. Mendoza-Balderama, 981 P.2d 168 (Colo. 1999).

The search of a vehicle which is made substantially contemporaneously with an arrest is permissible as an incident to such arrest. People v. Olson, 175 Colo. 140, 485 P.2d 891 (1971).

For, if there is probable cause to obtain a warrant to search a car, police officers have the right to stop and search it without a warrant. People v. Chavez, 175 Colo. 25, 485 P.2d 708 (1971).

Contraband discovered in defendant's car during inventory procedure was lawfully

seized. *People v. Roddy*, 188 Colo. 55, 532 P.2d 958 (1975).

16-3-308. Evidence - admissibility - declaration of purpose - definitions. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as described in section 16-2.5-101, C.R.S., as a result of a good faith mistake or of a technical violation.

(2) As used in subsection (1) of this section:

(a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts or law which if true would be sufficient to constitute probable cause.

(b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

(3) Evidence which is otherwise admissible in a criminal proceeding and which is obtained as a result of a confession voluntarily made in a noncustodial setting shall not be suppressed by the trial court.

(4) (a) It is hereby declared to be the public policy of the state of Colorado that, when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper, and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

(b) It shall be prima facie evidence that the conduct of the peace officer was performed in the reasonable good faith belief that it was proper if there is a showing that the evidence was obtained pursuant to and within the scope of a warrant, unless the warrant was obtained through intentional and material misrepresentation.

Source: **L. 81:** Entire section added, p. 922, § 1, effective July 1. **L. 85:** (2)(a) and (4) amended, p. 615, §§ 3, 4, effective July 1. **L. 2003:** (1) amended, p. 1614, § 7, effective August 6.

Cross references: For the admissibility of evidence in proceedings under the "Colorado Children's Code", see § 19-2-803.

ANNOTATION

Law reviews. For article, "Colorado's Good-Faith Exception to the Exclusionary Rule", see 11 Colo. Law. 410 (1982). For article, "Good-Faith Exception to the Exclusionary Rule: The Fourth Amendment is Not a Technicality", see 11 Colo. Law. 704 (1982). For article, "Attacking the Seizure — Over-coming Good Faith", see 11 Colo. Law. 2395 (1982). For note, "The Colorado Statutory Good-Faith Exception to the Exclusionary Rule : A Step Too Far?" see 53 U. Colo. L. Rev. 809 (1982). For comment, "Privacy Rights v. Law Enforcement Difficulties: The Clash of Competing Interests in New York v. Belton", see 59 U. Den. L.J. 793 (1982). For article, "Warrant Requirement — The Burger Court Approach", see 53 U. Colo. L. Rev. 691 (1982). For article, "Search Warrants, Hearsay and Probable Cause — The Supreme Court Rewrites the Rules", see 12 Colo. Law 1250 (1983). For article, "Criminal Procedure",

which discusses a Tenth Circuit decision dealing with the exclusionary rule, see 61 Den. L.J. 291 (1984). For comment, "The Good Faith Exception: The Seventh Circuit Limits the Exclusionary Rule in the Administrative Context", see 61 Den. L.J. 597 (1984). For article, "United States v. Leon and Its Ramifications", see 56 U. Colo. L. Rev. 247 (1985). For article, "People v. Mitchell: The Good Faith Exception in Colorado", see 62 Den. L.J. 841 (1985). For article, "The 'Bare Bones' Affidavit Under Colorado's Good Faith Exception to the Exclusionary Rule", see 40 Colo. Law. 27 (May 2011).

Annotator's note. For annotations concerning the exclusionary rule, see § 7 of art. II, Colo. Const., and Crim. P. 26 and 41.

The link between the place to be searched and the existence of criminal activity or contraband is at the heart of fourth amendment protections. Applying the exclusionary rule to

suppress the evidence seized has the salutary effect of requiring the police to use in the affidavit for the search warrant current information they have available or may obtain to establish the link. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

However, even if affidavit is insufficient to establish link between the place to be searched and the existence of criminal activity, if the affidavit contains objectively reasonable probable cause, as enumerated by the federal circuit courts, the good faith exception to exclusionary rule applies. *People v. Hagos*, 250 P.3d 596 (Colo. App. 2009).

Whether an individual conducting a search or seizure is an agent of the government is determined by the totality of the circumstances. In order to establish agency, one must show that the government encouraged, initiated, and instigated a search or seizure or that the person conducting the search acted only to assist law enforcement efforts. *People v. Pilkington*, 156 P.3d 477 (Colo. 2007).

A private actor's independent motive to investigate creates a strong presumption that he or she is not an agent of the government, and therefore the fourth amendment does not apply to the search. *People v. Pilkington*, 156 P.3d 477 (Colo. 2007).

Section inapplicable to mistaken judgment of law. A mistaken judgment of law, such as the mistaken judgment by an officer that the facts known to him are sufficient to warrant a full custodial arrest of the defendant, is insufficient to cause the application of this statute. *People v. Quintero*, 657 P.2d 948 (Colo. 1983), cert. granted, 463 U.S. 1206, 104 S. Ct. 62, 77 L. Ed. 2d 1386, cert. dismissed, 464 U.S. 1014, 104 S. Ct. 543, 78 L. Ed. 2d 719 (1983) (decided under subsection (2)(a) prior to 1985 amendment).

Search by police of tenant's premises based on consent by landlord is mistake of law since it is well settled that a landlord cannot give such consent. *People v. Brewer*, 690 P.2d 860 (Colo. 1984).

Where no warrant was ever issued and an arrest occurred as a result of incorrect information in the National Crime Information Computer (NCIC) after the period of parole had expired, an arrest was illegal, and any evidence seized as a result of such arrest cannot be covered by the good faith exception and must be suppressed. *People v. Fields*, 785 P.2d 611 (Colo. 1990).

Violation of fourth amendment rights found when court failed to review affidavits in support of both wiretap applications and search warrants to determine if they established probable cause after certain evidence contained in said affidavits had been struck, the court having determined that there was no statutory technical violation exception to the exclusionary rule suppressing such evidence. *People v. Vazquez*, 768

P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. 1990).

Telephone toll records held admissible under good faith exception to exclusionary rule where affidavit underlying search warrant was insufficient because affidavit not so lacking in indicia of probable cause as to render official belief unreasonable. *People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

Admission of evidence seized from a defendant's residence pursuant to a defective warrant did not constitute reversible error, even though warrant was issued based on an affidavit inadvertently failing to allege facts linking defendant to the residence to be searched. *People v. Deitchman*, 695 P.2d 1146 (Colo. 1985).

Section does not apply to an arrest based on a warrant void from its inception due to the absence of any cause whatever for its issuance. *People v. Mitchell*, 678 P.2d 990 (Colo. 1984).

No technical violation where court precedent relied on was based on different facts. Technical violation was not found for good faith reliance of prior court decision where such precedent was based on different factual situation. *People v. Corr*, 682 P.2d 20 (Colo. 1984), cert. denied, 469 U.S. 855, 105 S. Ct. 181, 83 L. Ed.2d 115 (1984).

Statutory good faith exception to exclusionary rule inapplicable where mistaken information, even if true, along with other information relied on by officer, did not constitute reasonable grounds to believe defendant committed or was committing a crime. *People v. Foster*, 788 P.2d 825 (Colo. 1990).

Statutory good faith exception to exclusionary rule does not exclude evidence that federal jurisprudence would admit. This section was intended to incorporate the federal exception to the exclusionary rule, it does not create a narrower rule. *People v. Saint-Veltri*, 935 P.2d 34 (Colo. App. 1996).

Statutory good faith exception to exclusionary rule inapplicable to evidence seized after search incident to arrest where arrest warrant is not supported by probable cause to arrest the defendant. *People v. Woods*, 885 P.2d 287 (Colo. App. 1994).

Good faith exception to exclusionary rule does not apply where a detective's reliance on a warrant is not objectively reasonable. Where an affidavit contains no facts that would allow a reasonable officer to conclude that probable cause for a search exists, the illegally obtained evidence is not admissible under the good faith exception to the exclusionary rule. *People v. Leftwich*, 869 P.2d 1260 (Colo. 1994); *People v. Pacheco*, 175 P.3d 91 (Colo. 2006); *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Information in deputy's affidavit, considered separately and as a whole, failed to establish a substantial basis for the magistrate's determination that probable cause existed to issue the

warrant. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Because the information regarding drug manufacturing at defendant's home was stale when the police applied for the warrant, no reasonable police officer would have relied on it. Accordingly, the exclusionary rule operates, not the good faith exception to it. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

Thus, good faith exception does not apply when the police submit a defective affidavit to the county judge and continue to rely on that defective affidavit. Officers involved in obtaining and executing a search warrant have a continuing duty to exercise reasonable professional judgment. Even though a reviewing magistrate has executed the warrant, the officer must still read the affidavit and warrant carefully and must be objectively persuaded that the warrant is sufficient. *People v. Randolph*, 4 P.3d 477 (Colo. 2000).

Neither Colorado nor federal law purports to recognize a "good faith" exception to the exclusionary remedy for statements taken in violation of *Miranda*. *People v. Mangum*, 48 P.3d 568 (Colo. 2002).

The statute creates a presumption that an officer was acting in good faith if he or she was acting pursuant to a warrant, but the ultimate question must still be whether the officer undertook the search in the reasonable, good faith belief that it was proper. *People v. Altman*, 960 P.2d 1164 (Colo. 1998); *People v. Hagos*, 250 P.3d 596 (Colo. App. 2009).

Police must act in objective good faith when applying for a warrant; the fact that a magistrate ultimately approved the warrant is not controlling. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

The court is restricted to the information contained within the four corners of the affidavit. Thus, it cannot bolster the insufficient affidavit with additional information not conveyed to the magistrate in the application for the warrant. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

Good faith exception applies when police are acting in reasonable reliance on search warrant issued by detached and neutral magistrate or judge, and the warrant is later found to be unsupported by probable cause. Exception is applicable only when such reliance is "objectively reasonable". *People v. Titus*, 880 P.2d 148 (Colo. 1994).

The fact that same officer filed bare bones affidavit for warrant and executed warrant bolsters trial court's conclusion that the officer's reliance on the defective affidavit was not objectively reasonable, and, consequently, the good faith exception to the exclusionary rule did not apply to shield the evidence obtained in the search. *People v. Pacheco*, 175 P.3d 91 (Colo. 2006).

But, it is not necessarily sufficient grounds to apply the exclusionary rule if same officer who filed bare bones affidavit for warrant also executed warrant so long as the officer could show his or her reliance on the warrant was objectively reasonable. *People v. Hagos*, 250 P.3d 596 (Colo. App. 2009).

The determination by an appellate court that a warrant is invalid does not mean a police officer's reliance upon that warrant was objectively unreasonable. *People v. Altman*, 960 P.2d 1164 (Colo. 1998).

The fact that the affidavit details activities that are lawful does not cause it to be a bare bones affidavit; a combination of otherwise lawful circumstances may well lead to a legitimate inference of criminal activity. *People v. Altman*, 960 P.2d 1164 (Colo. 1998).

Arrest of a person other than the one named on the warrant does not automatically preclude application of the good faith mistake exception to the exclusionary rule. If the police have reasonable grounds to believe the suspect is the intended arrestee and the warrant is constitutionally valid, the arrest of the suspect is generally valid. *People v. Lewis*, 813 P.2d 813 (Colo. App. 1991).

Applied in *People v. Reed*, 56 P.3d 96 (Colo. 2002).

16-3-309. Admissibility of laboratory test results. (1) When evidence is seized in so small a quantity or unstable condition that qualitative laboratory testing will not leave a sufficient quantity of the evidence for independent analysis by the defendant's expert and when a state agent, in the regular performance of his duties, can reasonably foresee that the evidence might be favorable to the defendant, the trial court shall not suppress the prosecution's evidence if the court determines that the testing was performed in good faith and in accordance with regular procedures designed to preserve the evidence which might have been favorable to the defendant.

(2) The trial court shall consider the following factors in determining, pursuant to subsection (1) of this section, whether the state has met its obligation to preserve the evidence:

(a) Whether or not a suspect has been identified and apprehended and whether or not the suspect has retained counsel or has had counsel appointed for him at the time of testing;

(b) Whether the state should have used an available test method more likely to preserve the results of seized evidence;

(c) Whether, when the test results are susceptible to subjective interpretation, the state should have photographed or otherwise documented the test results as evidence;

(d) Whether the state should have preserved the used test samples;

(e) Whether it was necessary for the state agency to conduct quantitative analysis of the evidence;

(f) Whether there is a sufficient sample for the defendant's expert to utilize for analysis and the suspect or defendant has made a specific request to preserve such sample;

(g) If paragraph (f) of this subsection (2) cannot be complied with, in view of the small amount of evidence, or when the state's duty to preserve the evidence would otherwise be enhanced, whether it was reasonable for the state to have contacted the defendant to determine if he wished his expert to be present during the testing.

(3) With regard to testing performed on blood, urine, and breath samples which form the basis for a conclusion upon which a statutory presumption arises, it is hereby declared to be the public policy of the state of Colorado that when the prosecution's evidence of test results is sought to be excluded from the trier of fact in a criminal proceeding because the testing destroyed evidence which might have been favorable to the defense, it shall be open to the proponent of the evidence to urge that the testing in question was performed in good faith and in accordance with regular procedures designed to preserve the evidence which might have been favorable to the defense, and, in such instances, the evidence so discovered should not be kept from the trier of fact if otherwise admissible.

(4) For all other types of blood analysis, breath analysis, and urine analysis and for laboratory testing, such as serial number restoration, firearms testing, and gunpowder pattern testing, it is hereby declared to be the public policy of the state of Colorado that, when the prosecution's evidence of test results is sought to be excluded from the trier of fact in a criminal proceeding because of the destruction of evidence upon which the test was performed, it shall be open to the proponent of the evidence to urge that the testing in question was performed in a reasonable, good faith belief that it was proper and, in such instances, the evidence so discovered should not be kept from the trier of fact if otherwise admissible.

(5) Any report or copy thereof or the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, or grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least fourteen days before the date of such criminal trial.

(6) In no event shall evidence be suppressed which results from laboratory testing performed before identification of a suspect for the sole reason that the later identified suspect or his attorney was not present at the time of the testing.

(7) This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

Source: L. 84: Entire section added, p. 483, § 1, effective July 1. L. 2012: (5) amended, (SB 12-175), ch. 208, p. 844, § 61, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For statutory presumptions in alcohol-related traffic offenses, see §§ 18-3-106, 18-3-205, and 42-4-1301.

ANNOTATION

Annotator's note. For cases dealing with lost or destroyed evidence decided prior to the enactment of this section, see § 25 of art. II, Colo. Const., "Criminal trials".

Subsection (5) is constitutional on its face. Subsection (5), which requires a defendant to affirmatively request a laboratory technician's presence at trial, is an acceptable precondition to a defendant's exercise of his right to confrontation and is therefore not unconstitutional. A defendant's right to confrontation is not denied as he can preserve that right, pursuant to this section, with minimal effort. *People v. Mojica-Simental*, 73 P.3d 15 (Colo. 2003); *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011).

The procedure provided in subsection (5) for ensuring the presence of the laboratory technician at trial does not deny defendant the opportunity to cross-examine the technician but simply requires that the defendant decide prior to trial whether defendant will conduct a cross-examination. Subsection (5) provides the opportunity for confrontation; only the timing of the defendant's decision is changed. *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007); *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011).

Burden placed on defendant by subsection (5) to request the presence of the person who prepared the report prior to trial was minimal and did not render subsection (5) facially unconstitutional. *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007); *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011).

Criminal laboratory reports are testimonial statements subject to the U.S. supreme court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007).

The laboratory report was introduced at trial to establish the elements of the offense with which defendant was charged, and, under such circumstances, the report is testimonial in nature. *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007).

The plain meaning of "accomplish" in subsection (5) is "to execute fully: perform, achieve, fulfill", thus the prosecution should provide the person, regardless of title, who was qualified and authorized to perform, and did perform, the tests; observed the results and interpreted them; and rendered expert conclusions regarding the identity of the controlled substances present in the sample or specimen. *People v. Hill*, 228 P.3d 171 (Colo. App. 2009).

Nothing in the language of this section, its history, or in its purpose limits the applicability of this section to "state-run" or "local law enforcement" laboratories as defendant suggests. The reference to "the criminalistics laboratory" in this section is only a reference to

the forensic laboratory that performed the test, the results of which are submitted into evidence. *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011).

The limited application proposed by defendant is not a reasonable interpretation of the statutory language. Nothing in the definition limits the practice of "criminalistics" to state-run or local law enforcement laboratories. *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011).

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By not complying with the procedural requirements of subsection (5), defense counsel waived defendant's right to confront technician who prepared laboratory report. The right to confrontation falls into the class of rights that defense counsel can waive through strategic decisions. Waiver of this right does not require a voluntary, knowing, and intentional waiver by the defendant personally. *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007); *Coleman v. People*, 169 P.3d 659 (Colo. 2007); *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011).

A defense counsel's erroneous and unreasonable interpretation of this section does not render involuntary a defendant's waiver of his confrontation rights. *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011).

Defendant's attorney's failure to comply with subsection (5) waived defendant's right to confront technician who prepared forensic report that was introduced without technician's testimony. Defendant's attorney's ignorance of the statute's requirements does not affect the waiver of the right to confrontation. Defendant received sufficient notice of the existence of the report and its possible introduction at trial. *Cropper v. People*, 251 P.3d 434 (Colo. 2011).

Before admitting a laboratory report pursuant to subsection (5), some factors the trial court might consider include: Whether an attorney or a pro se litigant actually knew that he was required to notify the opposing party of his desire to have the witness present; the reasons why notice was late or was not given at all; the difficulty of acquiring the presence of the witness; the significance to the case of the report and of the testimony that would be elicited from the technician; and any other pertinent circumstances. *People v. Mojica-Simental*, 73 P.3d 15 (Colo. 2003).

Forensic laboratory reports are admissible in criminal proceedings without establishing the usual foundation, absent a request that the technician be made available at trial. Testimony about the reports without admitting the reports into evidence does not deny defendant any

rights to confrontation or cross-examination. *People v. Moses*, 64 P.3d 904 (Colo. App. 2002).

Specific requirement in subsection (5) of this section that laboratory testing technician be made available at trial upon timely request overrides general hearsay exception of C.R.E. 803(6). When timely request had been made, trial court erred in admitting laboratory report without technician's testimony as a business record. *People v. Williams*, 183 P.3d 577 (Colo. App. 2007).

A criminalistics laboratory report may be admitted in evidence in a driving under the influence (DUI) trial without the laboratory technician's testimony because there is no conflict with the general DUI statute, and the constitutional right to confrontation is not violated on its face by requiring the defendant to affirmatively assert such right by requesting the technician to testify. However, a lack of actual notice of the opportunity to require the technician to testify or a mistaken failure to request the

testimony may not constitute a voluntary waiver of the right to confrontation. *People v. Mojica-Simental*, 73 P.3d 15 (Colo. 2003).

Court abused its discretion when it committed to suppress results for tests that had not yet been conducted unless the prosecution allowed the testing to be videotaped or agreed to pay the cost of the defense expert to view the testing. The court was in no position to assess the reasonableness of future conduct. *People v. Wartena*, 156 P.3d 469 (Colo. 2007).

Court did not err in admitting the lab test through a police officer. The defendant did not file the statutorily required request for the technician to testify in person, so the report could be introduced through another person familiar with the report. The officer did not provide expert testimony in introducing the lab test, so the admission of the report was appropriate. *People v. Santana*, 240 P.3d 302 (Colo. App. 2009), rev'd on other grounds, 255 P.3d 1126 (Colo. 2011).

16-3-310. Oral advisement and consent prior to search of a vehicle or a person during a police contact. (1) (a) Prior to conducting a consensual search of a person who is not under arrest, the person's effects, or a vehicle, a peace officer shall comply with paragraph (b) of this subsection (1).

(b) A peace officer may conduct a consensual search only after articulating the following factors to, and subsequently receiving consent from, the person subject to the search or the person with the apparent or actual authority to provide permission to search the vehicle or effects. The factors are:

- (I) The person is being asked to voluntarily consent to a search; and
- (II) The person has the right to refuse the request to search.

(c) After providing the advisement required in paragraph (b) of this subsection (1), a peace officer may conduct the requested search only if the person subject to the search voluntarily provides verbal or written consent. Other evidence of knowing and voluntary consent may be acceptable, if the person is unable to provide written or verbal consent.

(2) A peace officer providing the advisement required pursuant to subsection (1) of this section need not provide a specific recitation of the advisement; substantial compliance with the substance of the factors is sufficient to comply with the requirement.

(3) If a defendant moves to suppress any evidence obtained in the course of the search, the court shall consider the failure to comply with the requirements of this section as a factor in determining the voluntariness of the consent.

(4) This section shall not apply to a search conducted pursuant to section 16-3-103, a valid search incident to or subsequent to a lawful arrest, or a search for which there is a legal basis other than voluntary consent. This shall include, but not be limited to, a search in a correctional facility or on correctional facility property, a detention facility, county detention facility, custody facility, juvenile correctional facility or any mental health institute or mental health facility operated by or under a contract with the department of human services, a community corrections facility, or a jail or a search of a person subject to probation or parole by a community supervision or parole officer when the person has consented to search as a term and condition of any probation or parole.

Source: L. 2010: Entire section added, (HB 10-1201), ch. 176, p. 638, § 1, effective April 29.

PART 4

RIGHTS OF PERSONS IN CUSTODY

16-3-401. Treatment while in custody. (1) No unlawful means of any kind shall be used to obtain a statement, admission, or confession from any person in custody.

(2) Persons arrested or in custody shall be treated humanely and provided with adequate food, shelter, and, if required, medical treatment. Anyone receiving medical treatment while held in custody may be assessed a medical treatment charge as provided in section 17-26-104.5, C.R.S.

Source: L. 72: R&RE, p. 202, § 1. C.R.S. 1963: § 39-3-401. L. 97: (2) amended, p. 192, § 2, effective April 1.

ANNOTATION

Law reviews. For note, "The Admissibility of Confessions Obtained Before Arraignment — Federal Rule", see 21 Rocky Mt. L. Rev. 98 (1948). For note, "Involuntary Confessions — Fourth Stage in Colorado", see 31 Dicta 133 (1954).

The duty imposed by subsection (2) on a detaining governmental entity to provide

medical treatment implies an inherent obligation on the part of the entity to pay the costs of such treatment. Poudre Valley Health Care, Inc. v. City of Loveland, 85 P.3d 558 (Colo. App. 2003).

16-3-402. Right to communicate with attorney and family. (1) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or by communicating in any other reasonable manner. Such communication shall be permitted at the earliest possible time after arrival at the police station, sheriff's office, jail, or other like confinement facility to which such person is first taken after arrest.

(2) If the accused is transferred to a new place of custody, his right to communicate with an attorney and a member of his family is renewed.

(2.5) If the victim is able to demonstrate through the use of caller identification or other credible evidence that the incarcerated defendant has called the victim from the jail or correctional facility in violation of the protection order issued pursuant to section 18-1-1001, C.R.S., or in violation of any other valid protection order or emergency protection order in effect, the defendant shall not be entitled to further telephone calls except to such defendant's attorney, which calls shall be placed by a jail or correctional facility staff member. If the defendant was arrested for violating an order not to contact certain family members, the right to contact those family members by telephone shall be prohibited, and the jail or correctional facility staff shall place all outgoing telephone calls that the defendant wishes to make that are not identified in the protection order as prohibited.

(3) (a) Consistent with the provisions of section 21-1-103, C.R.S., if any person in custody indicates in any manner his desire to speak with an attorney or the court determines that an inquiry into the matter of indigency should occur, the public defender shall be permitted to communicate with that person to determine whether that person has counsel and, if the person desires that the public defender represent him, to make an initial determination as to whether the person is indigent. If the public defender determines that the person is indigent, such person shall apply for representation by the public defender in accordance with section 21-1-103, C.R.S.

(b) The public defender, upon his request and with due regard for reasonable law enforcement administrative procedures, shall be permitted to determine whether or not any person in custody has been taken without unnecessary delay before the nearest available county or district judge.

Source: L. 72: R&RE, p. 202, § 1. C.R.S. 1963: § 39-3-402. L. 81: Entire section R&RE, p. 924, § 1, effective May 26. L. 86: (3)(a) amended, p. 731, § 1, effective July

1. **L. 88:** (3)(a) amended, p. 663, § 1, effective July 1. **L. 94:** (2.5) added, p. 2035, § 13, effective July 1. **L. 2003:** (2.5) amended, p. 1013, § 19, effective July 1. **L. 2008:** (2.5) amended, p. 1883, § 20, effective August 5.

ANNOTATION

Annotator's note. For further annotations concerning the right to counsel, see § 16 of art. II, of the Colo. Const.

Section codifies constitutional right to counsel. This section was enacted in 1972 as a part of the Colorado code of criminal procedure, and as such, the statute is merely a codification of the constitutional right to counsel in criminal cases. *Cooper v. Dir. of Dept. of Rev.*, 42 Colo. App. 109, 593 P.2d 1382 (1979).

Statement during process of booking was voluntary. The identification, during the process of booking of defendants, of a baggage locker key as part of personal property, with the added statement, "Go see for yourself", cannot

be challenged as not voluntary merely because defendant's father was not called before defendant was booked; nor can the failure to take defendant before a judge before defendant was booked affect the voluntariness of the identification of his personal belongings. *Hubbard v. Patterson*, 374 F.2d 856 (10th Cir.), cert. denied, 389 US 868, 88 S. Ct. 142, 19 L. Ed.2d 144 (1967) (decided under repealed § 39-1-1, C.R.S. 1963).

Suppression of evidence is not the proper remedy for an alleged violation of this statute. Suppression is generally a remedy for only constitutional violations not statutory violations. *People v. Clayton*, 207 P.3d 831 (Colo. 2009).

16-3-403. Right to consult with attorney. Any person committed, imprisoned, or arrested for any cause, whether or not such person is charged with an offense, shall be allowed to consult with an attorney-at-law of this state whom such person desires to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. Except where extradition proceedings have been completed or are not required by law, when any such person is about to be moved beyond the limits of this state, the person to be moved shall be entitled to a reasonable delay for the purpose of obtaining counsel and of availing himself of the laws of this state for the security of personal liberty.

Source: **L. 72:** R&RE, p. 203, § 1. **C.R.S. 1963:** § 39-3-403.

ANNOTATION

Annotator's note. Since § 16-3-403 is similar to repealed laws antecedent to CSA, C 48, § 560, relevant cases construing those provisions have been included in the annotations to this section.

Language of this section and § 16-3-404 does not confer a statutory right to private attorney-client consultation which is broader than the corollary constitutional right. *People v. Dehmer*, 931 P.2d 460 (Colo. App. 1996).

Under this section any person restrained of his liberty for any cause whatever has the right to consult counsel. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

And the person denied rights of such paramount importance must of necessity be the

person aggrieved, for this section cannot well be held to refer to any other. *McPhail v. Delaney*, 48 Colo. 411, 110 P. 64 (1910).

Commitment to state hospital does not deny right. The commitment of a defendant adjudged not guilty by reason of insanity to the state hospital cannot be construed to deny the right given by this section. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Only remedy for violation of statutory provision is the fine provided for in § 16-3-404 (2). *People v. Parsons*, 15 P.3d 799 (Colo. App. 2000).

16-3-404. Duty of officers to admit attorney. (1) All peace officers or persons having in custody any person committed, imprisoned, or arrested for any alleged cause shall forthwith admit any attorney-at-law in this state, upon the demand of the prisoner or of a friend, relative, spouse, or attorney of the prisoner, to see and consult the person so imprisoned, alone and in private, at the jail or other place of custody, if such person so imprisoned expressly consents to see or to consult with the attorney.

(2) Any peace officer or person violating the duty imposed by this section or section

16-3-403 shall forfeit and pay not less than one hundred dollars nor more than one thousand dollars to the person imprisoned or to his attorney for the benefit of the person imprisoned, to be recovered in any court of competent jurisdiction.

Source: L. 72: R&RE, p. 203, § 1. C.R.S. 1963: § 39-3-404.

Cross references: For the crime of official oppression for denial of opportunity to consult an attorney, see § 18-8-403 (1)(b).

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

Annotator's note. Since § 16-3-404 is similar to repealed laws antecedent to CSA, C 48, § 560, relevant cases construing those provisions have been included in the annotations to this section.

Language of this section and § 16-3-403 does not confer a statutory right to private attorney-client consultation which is broader than the corollary constitutional right. *People v. Dehmer*, 931 P.2d 460 (Colo. App. 1996).

This section is a general statute, and in an action against a sheriff for refusing to permit counsel to consult a prisoner, it is not necessary to specifically declare upon the statute, but a complaint which states the facts is sufficient.

McConathy v. Deck, 34 Colo. 232, 82 P. 702 (1905).

It is intended for benefit of prisoner. There is but one aggrieved person, either the attorney or the prisoner, and the section is plainly intended for the exclusive protection and benefit of the prisoner. The object is to give the individual restrained of his liberty the opportunity to see and consult an attorney, to determine whether he is unlawfully imprisoned, and to prepare for and properly make defense against whatever charge is preferred. *McPhail v. Delaney*, 48 Colo. 411, 110 P. 64 (1910).

Only remedy for violation of statutory provision is the fine provided for in subsection (2). *People v. Parsons*, 15 P.3d 799 (Colo. App. 2000).

Applied in *Nees v. Bishop*, 524 F. Supp. 1310 (D. Colo. 1981).

16-3-405. Strip searches - when authorized or prohibited. (1) No person arrested for a traffic or a petty offense shall be strip searched, prior to arraignment, unless there is reasonable belief that the individual is concealing a weapon or a controlled substance or that the individual, upon identification, is a parolee or an offender serving a sentence in any correctional facility in the state or that the individual is arrested for driving while under the influence of drugs.

(2) As used in this section, "strip search" means having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, or female breasts of such person.

(3) Any strip search that is conducted shall be performed by a person of the same sex as the arrested person and on premises where the search cannot be observed by persons not physically conducting the search.

(4) Every peace officer or employee of a police department or sheriff's department conducting a strip search shall obtain the written permission of the police commander or an agent thereof or a sheriff or an agent thereof designated for the purposes of authorizing a strip search in accordance with this section.

(5) No search of any body cavity other than the mouth shall be conducted without the written permission of the police commander or an agent thereof or a sheriff or an agent thereof authorizing a body cavity search. The search must be performed under sanitary conditions and conducted by a licensed physician or nurse.

(6) Any peace officer or employee of a police department or a sheriff's department who knowingly or intentionally fails to comply with any provision of this section commits second degree official misconduct, as defined in section 18-8-405, C.R.S. Nothing contained in this section shall preclude prosecution of a peace officer or employee of a police department or sheriff's department under any other provision of the law.

(7) Nothing in this section shall be construed as limiting the statutory or common-law rights of any person for the purposes of any civil action or injunctive relief.

(8) The provisions of subsections (1) to (6) of this section shall not apply when, following arraignment and pursuant to a court order, the person is taken into custody by or remanded to a sheriff or a correctional facility.

Source: L. 82: Entire section added, p. 305, § 1, effective April 5.

Cross references: For definition of “controlled substance”, see § 12-22-303 (7); for “driving under the influence” of any drug, see § 42-4-1301.

PART 5

WARRANTS AND BONDS FOR PERSONS ILLEGALLY IN THE COUNTRY

Cross references: (1) For the legislative declaration contained in the 2007 act enacting this part 5, see section 1 of chapter 397, Session Laws of Colorado 2007.

(2) For the legislative declaration stating the purpose of and the provision directing legislative staff agencies to conduct a post-enactment review pursuant to § 2-2-1201 scheduled in 2009, see sections 1 and 4 of chapter 397, Session Laws of Colorado 2007. To obtain a copy of the review, once completed, view Colorado Legislative Council’s web site.

16-3-501. Warrants issued for persons illegally in the country. (1) If a person has posted a bond in a criminal case, at any stage of a criminal proceeding, and the person is released to the United States immigration and customs enforcement agency, the court shall issue a warrant commanding the arrest of the person when contacted anywhere within the United States and shall set the amount of the bond on the warrant. The warrant shall be entered in the Colorado crime information center and the national crime information center databases. The criminal case shall remain active for an indefinite period of time; except that the case may be dismissed upon a motion by the district attorney.

(2) A bond issued pursuant to this section shall include all known aliases for the person and the person’s date of birth.

Source: L. 2007: Entire part added, p. 1770, § 2, effective June 1.

16-3-502. No dismissal of cases against persons illegally in the country. (1) A court shall not dismiss criminal charges against a person because the person has been removed or is facing removal from the United States prior to a conviction or other disposition of all criminal charges against the person; except that the court may dismiss the criminal charges upon a motion of the district attorney.

(2) A court shall not dismiss criminal charges against a person who has been convicted or pled guilty to a crime because the person has been removed or is facing removal from the United States. The defendant shall serve his or her sentence and pay all restitution prior to removal.

(3) If the provisions of part 3 of article 4.1 of title 24, C.R.S., apply, the victim shall be consulted pursuant to the provisions of sections 24-4.1-302.5 and 24-4.1-303, C.R.S.

Source: L. 2007: Entire part added, p. 1771, § 2, effective June 1.

16-3-503. Bonds recovered for persons illegally in the country. (1) (a) When a law enforcement agency holding a defendant charged with a felony or a class 1 or class 2 misdemeanor determines that, based on investigation, including consideration of the defendant’s inability to produce one of the identifying documents listed in subsection (3) of this section, there is probable cause to find that the defendant is likely illegally present in the United States, the law enforcement agency shall notify the defendant’s bail bonding agent in writing before the bond is posted. Prior to posting a bond for a defendant charged with a felony or a class 1 or class 2 misdemeanor, a defendant or person other than a

professional bonding agent shall execute a waiver that states the person understands that the bond or fees shall be forfeited if the defendant is removed from the country.

(b) Except as provided in paragraph (a) of this subsection (1), a defendant or person other than a professional bonding agent who posts bond on a felony or a class 1 or class 2 misdemeanor, either pre-trial or post-conviction, for a defendant who is determined to be illegally present in the country shall not be entitled to recover the posted bond or fees if the defendant is removed from the country, and the bond or fees shall be forfeited.

(c) If it is determined that a defendant is illegally present in the country after an appearance bond is posted on a felony or a class 1 or class 2 misdemeanor, the jail or court shall return all documents concerning the defendant that are signed by the bail bonding agent to the agent, and the agent shall return any premium, commission, or fee, not including premium financing fees, bond filing fees charged by a court or law enforcement agency, and the actual cost of storing collateral in a secure, self-service public storage facility, to the court for forfeiture under subsection (2) of this section.

(2) Fifty percent of the amount of bonds and fees forfeited pursuant to subsection (1) of this section shall be credited to the capital construction fund created in section 24-75-302, C.R.S., for appropriation to the corrections expansion reserve fund created in section 17-1-116, C.R.S., for the purpose of prison bed construction and prison operations. Fifty percent of the amount of bonds and fees forfeited pursuant to subsection (1) of this section shall be credited to the county jail assistance fund created in section 17-26-137, C.R.S.

(3) For purposes of this section, an identifying document includes the following:

(a) A certified birth certificate issued within the United States or a state or federal government-issued identification card with a photograph;

(b) A valid military identification card issued by the United States government;

(c) A valid military dependent's identification card issued by the United States government;

(d) A valid native American tribal identification document with a photograph;

(e) A certificate of United States citizenship, form N-560 or N-561;

(f) A certificate of naturalization, form N-550 or N-570;

(g) A passport issued by the United States government;

(h) A valid foreign passport showing lawful presence in the United States;

(i) A permanent resident card or alien registration receipt card with photograph, form I-551;

(j) An unexpired temporary resident card, form I-688;

(k) An unexpired employment authorization card, form I-688A;

(l) An unexpired reentry permit, form I-327;

(m) An unexpired refugee travel document, form I-571; or

(n) An unexpired employment authorization document, form I-688B.

Source: L. 2007: Entire part added, p. 1771, § 2, effective June 1. L. 2008: (2) amended, p. 923, § 2, effective July 1; (3)(n) amended, p. 1884, § 21, effective August 5. L. 2012: (1)(c) amended, (HB 12-1266), ch. 280, p. 1525, § 43, effective July 1.

Editor's note: Section 52 of chapter 280, Session Laws of Colorado 2012, provides that the act amending subsection (1)(c) applies to offenses committed and applications submitted on or after July 1, 2012.

Cross references: For the legislative declaration contained in the 2008 act amending subsection (2), see section 1 of chapter 248, Session Laws of Colorado 2008.

ANNOTATION

Subsection (1)(c) does not apply retroactively because it substantively changed prior

law. *People v. Chavarria-Sanchez*, 207 P.3d 902 (Colo. App. 2009).

Section limits forfeiture to fees collected by professional bonding agents, rather than the entire posted bond, in case where a non-appear-

ing defendant is later determined to have not been in the country legally. *People v. Chavarria-Sanchez*, 207 P.3d 902 (Colo. App. 2009).

ARTICLE 4

Release from Custody Pending
Final Adjudication

Editor’s note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor’s note before the article 1 heading.

PART 1

RELEASE ON BAIL

- 16-4-101. Bailable offenses.
- 16-4-102. Right to bail - before conviction.
- 16-4-103. Fixing of bail and conditions of bail bond.
- 16-4-104. Bail bond - alternatives.
- 16-4-105. Selection by judge of the amount of bail and type of bond - criteria.
- 16-4-106. When original bond continued.
- 16-4-107. Reduction or increase of bail - change in type of bond.
- 16-4-108. Exoneration from bond liability.
- 16-4-109. Disposition of security deposits upon forfeiture or termination of bond.
- 16-4-110. Enforcement when forfeiture not set aside.
- 16-4-111. Type of bond in certain misdemeanor cases.
- 16-4-112. Enforcement procedures for compensated sureties - definitions.

PART 2

BAIL AFTER CONVICTION

- 16-4-201. Bail after conviction.
- 16-4-201.5. Right to bail after a conviction - exceptions.
- 16-4-202. Appeal bond hearing - factors to be considered.
- 16-4-203. Appeal bond hearing - order.
- 16-4-204. Appellate review of terms and conditions of bail or appeal bond.
- 16-4-205. When appellate court may fix appeal bond.

PART 3

UNIFORM RENDITION
OF ACCUSED PERSONS ACT

- 16-4-301. Short title.
- 16-4-302. Arrest of person illegally in state.
- 16-4-303. Hearing and right to counsel.
- 16-4-304. Order of return to demanding court.

PART 1

RELEASE ON BAIL

16-4-101. Bailable offenses. (1) All persons shall be bailable by sufficient sureties except:

- (a) For capital offenses when proof is evident or presumption is great; or
- (b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, the court finds that the proof is evident or the presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases:
 - (I) A crime of violence alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence;
 - (II) A crime of violence alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found;
 - (III) A crime of violence alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the

laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony;

(IV) A crime of possession of a weapon by a previous offender alleged to have been committed in violation of section 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), or (5), C.R.S.; or

(c) When a person has been convicted of a crime of violence or a crime of possession of a weapon by a previous offender, as described in section 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), or (5), C.R.S., at the trial court level and such person is appealing such conviction or awaiting sentencing for such conviction and the court finds that the public would be placed in significant peril if the convicted person were released on bail.

(2) For purposes of this section, "crime of violence" shall have the same meaning as that set forth in section 18-1.3-406 (2), C.R.S.

(3) In any capital case, the defendant may make a written motion for admission to bail upon the ground that the proof is not evident or that presumption is not great, and the court shall promptly conduct a hearing upon such motion. At such hearing, the burden shall be upon the people to establish that the proof is evident or that the presumption is great. The court may combine in a single hearing the questions as to whether the proof is evident or the presumption great with the determination of the existence of probable cause to believe that the defendant committed the crime charged.

(4) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced not more than ninety-one days after the date on which bail is denied. If the trial is not commenced within ninety-one days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person.

(5) When a person is arrested for a crime of violence, as defined in section 16-1-104 (8.5), or a criminal offense alleging the use or possession of a deadly weapon or the causing of bodily injury to another person, or a criminal offense alleging the possession of a weapon by a previous offender, as described in section 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), or (5), C.R.S., and such person is on parole, the law enforcement agency making the arrest shall notify the department of corrections within twenty-four hours. The person so arrested shall not be eligible for bail to be set until at least seventy-two hours from the time of his or her arrest has passed.

Source: L. 72: R&RE, p. 203, § 1. C.R.S. 1963: § 39-4-101. L. 79: Entire section amended, p. 662, § 1, effective July 1. L. 87: Entire section R&RE, p. 613, § 1, effective July 1; (5) added, p. 657, § 16, effective July 1. L. 2000: (1)(b)(III), (1)(c), and (5) amended and (1)(b)(IV) added, p. 634, § 5, effective July 1. L. 2002: (2) amended, p. 1489, § 129, effective October 1. L. 2012: (4) amended, (SB 12-175), ch. 208, p. 844, § 62, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (4) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: (1) For right to bail and exceptions thereto, see § 19 of article II of the state constitution; for prohibition against excessive bail, see § 20 of article II of the state constitution.

(2) For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "The Use of 'No Bond' Holds in Colorado", see 32 Colo. Law. 81 (November 2003).

Annotator's note. Since § 16-4-101 is similar to repealed § 39-2-3, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Purpose of bail is to insure the defendant's presence at the time of trial and not to punish a defendant before he has been convicted. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

Proviso refers to proof of guilt. The requirement in the constitution that capital offenses are

nonbailable when "the proof is evident or the presumption great" simply goes to the proof of guilt, not to the kind of proof needed for the imposition of the death penalty. *Corbett v. Patterson*, 272 F. Supp. 602 (D. Colo. 1967).

Offense does not cease to be capital where death penalty may not be imposed. Although by statute the death penalty cannot be imposed on the basis of only circumstantial evidence, the petitioner does not cease to be charged with a capital offense and thus become entitled to bail as a matter of right where the prosecution probably did not have the direct evidence necessary to seek the death penalty. The offense with which he was charged was still a capital one, even if it should later develop that the type of evidence adduced did not support a verdict imposing the death penalty. *Corbett v. Patterson*, 272 F. Supp. 602 (D. Colo. 1967).

And denial of bail unaffected by constitutionality of death penalty. The United States supreme court decision prohibiting imposition of death penalty in the circumstances then before it did not preclude denial of bail pursuant to state constitutional provision that bail may be denied where capital offense is charged when the proof is evident, or the presumption great, that defendant has committed the charged offense. *People ex rel. Dunbar v. District Court*, 179 Colo. 304, 500 P.2d 358 (1972).

Standard which the constitution requires before bail may be denied is greater than probable cause though less than that required for a conviction. *Gladney v. District Court*, 188 Colo. 365, 535 P.2d 190 (1975).

Guilt or innocence of the accused is not the issue in a bail hearing. *Gladney v. District Court*, 188 Colo. 365, 535 P.2d 190 (1975).

Burden on prosecution to show nonbailable case. If bail is to be denied, it is incumbent upon the prosecution to come forward and show that the proof is evident or the presumption great that the crime set forth was committed by the defendant, but if evidence is not presented by the prosecution, it is incumbent upon the court, looking to the guidelines laid down by statute, to set reasonable bail in compliance with the Colorado constitution and the eighth amendment of the constitution of the United States. *People ex rel. Dunbar v. District Court*, 179 Colo. 304, 500 P.2d 358 (1972).

The burden is upon the prosecution to show that the exception to the right to bail is applicable, and only with that showing can the conditional freedom secured by bail properly be de-

nied. *Gladney v. District Court*, 188 Colo. 365, 535 P.2d 190 (1975).

Denial of bail not foreclosed by fact that defendant was minor. The fact that defendant was 16 years of age, a minor, who could not be subjected to the death penalty, would not have foreclosed the denial of bail. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

Mere filing of an information or the production of evidence which would establish probable cause that the crimes charged were committed will not meet the Colorado constitutional standard for denying bail in capital cases. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

Trial judge exceeded jurisdiction but did not lose right to revoke or modify bail. The trial judge exceeded his jurisdiction by equating probable cause to the Colorado constitutional standard for denying bail in capital cases and by imposing an impermissible condition on the defendant at the time bail was granted. However, the right of the court to revoke or modify bail which has been previously granted after notice is given to the defendant was not negated. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

Only criminal defendants vested with legal rights in bail. Statutory provisions concerning bail do not purport to vest any persons other than criminal defendants with any legal rights in the determination of the terms, amount, or conditions of bail. *Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977).

Child does not have absolute constitutional or statutory right to bail pending adjudication of the charges filed against him in juvenile court. *L.O.W. v. District Court*, 623 P.2d 1253 (Colo. 1981).

When juvenile detainable without bail. A trial court may detain a juvenile without bail only after giving due weight to the presumption that a juvenile should be released pending a dispositional hearing except in narrowly defined circumstances where the state establishes that detention is necessary to protect the child from imminent harm or to protect others in the community from serious bodily harm which the child is likely to inflict. *L.O.W. v. District Court*, 623 P.2d 1253 (Colo. 1981).

Applied in *Stephenson v. District Court*, 629 P.2d 1078 (Colo. 1981); *People v. Turman*, 659 P.2d 1368 (Colo. 1983); *People v. Walker*, 665 P.2d 154 (Colo. App. 1983), *aff'd sub nom. Yording v. Walker*, 683 P.2d 788 (Colo. 1984).

16-4-102. Right to bail - before conviction. Any person who is in custody and for whom no bail has been set pursuant to the applicable rule of criminal procedure, and who is not subject to the provisions of section 16-4-101 (5), may advise any judge of a court of record in the county where he is being held of that fact with a request that bail be set. Upon receiving the request, the judge shall cause the district attorney to be notified immediately of the arrested person's request, and said district attorney shall have the right to attend and

advise the court of matters pertinent to the amount of bail to be set. The judge shall also order the appropriate law enforcement agency having custody of the prisoner to bring him before the court forthwith, and the judge shall set bail if the offense for which the person was arrested is bailable. It shall not be a prerequisite to bail that a criminal charge of any kind has been filed.

Source: L. 72: R&RE, p. 203, § 1. C.R.S. 1963: § 39-4-102. L. 87: Entire section amended, p. 657, § 17, effective July 1.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

Annotator's note. Since § 16-4-102 is similar to repealed § 39-2-1, CRS 53, and laws antecedent to CSA, C. 48, § 426, relevant cases construing those provisions have been included in the annotations to this section.

The power to grant bail derives not from the constitution, but from the common law. People v. Sanders, 185 Colo. 153, 522 P.2d 735 (1974).

The manifest policy of this section is to encourage the giving of bail in proper cases, rather than to hold in custody at the state's expense persons accused of bailable offenses. The court should so administer cases arising under this statute as to give effect to this manifest policy. Allison v. People, 132 Colo. 156, 286 P.2d 1102 (1955).

The power to fix bail cannot be delegated. In the absence of a statute providing otherwise, the court or judicial officer vested with the power to fix bail cannot delegate such power to another. But where such power has been exercised by the proper court or officer, the act of

taking and approving the bail bond is a ministerial act which may be delegated without statutory authority. Bottom v. People, 63 Colo. 114, 164 P. 697 (1917).

Hearsay evidence is admissible in bail hearings. Gladney v. District Court, 188 Colo. 365, 535 P.2d 190 (1975).

But denial of bail may not be predicated upon hearsay alone, but such evidence may be admitted in corroboration. Gladney v. District Court, 188 Colo. 365, 535 P.2d 190 (1975).

Child does not have absolute constitutional or statutory right to bail pending adjudication of the charges filed against him in juvenile court. L.O.W. v. District Court, 623 P.2d 1253 (Colo. 1981).

When child detainable without bail. A trial court may detain a juvenile without bail only after giving due weight to the presumption that a juvenile should be released pending a dispositional hearing except in narrowly defined circumstances where the state establishes that detention is necessary to protect the child from imminent harm or to protect others in the community from serious bodily harm which the child is likely to inflict. L.O.W. v. District Court, 623 P.2d 1253 (Colo. 1981).

16-4-103. Fixing of bail and conditions of bail bond. (1) (a) At the first appearance of a person in custody before a judge of a court of record, the amount of bail and type of bond shall be fixed by the judge, unless the person is subject to the provisions of section 16-4-101 (5), or an indictment, information, or complaint has theretofore been filed and the amount of bail and type of bond has been fixed upon the return of the indictment, or filing of the information or complaint, in which event the propriety of the bond shall be subject to reappraisal. The amount of bail and type of bond shall be sufficient to assure compliance with the conditions set forth in the bail bond.

(b) If a person is arrested under section 42-2-138 (1) (d) (I), C.R.S., for driving while such person's driver's license or privilege to drive, either as a resident or nonresident, is restrained solely or partially because of a conviction of a driving offense pursuant to section 42-4-1301 (1) or (2) (a), C.R.S., then the bail for such person shall be ten thousand dollars or such amount as is set at a bail hearing.

(b.5) If a person is arrested for vehicular eluding under section 18-9-116.5, C.R.S., and driving under the influence under section 42-4-1301, C.R.S., arising out of the same incident, the bail for such person shall be fifty thousand dollars or such amount as is set by the court after consideration of all relevant factors.

(c) Because of the danger posed to the person and to others, a person who is arrested for an offense under section 42-4-1301 (1) or (2) (a), C.R.S., may not attend a bail hearing

until such person is no longer intoxicated or under the influence of drugs. Such person shall be held in custody until such person may safely attend such hearing.

(d) (I) If a person is arrested for distribution of a schedule I or schedule II controlled substance pursuant to section 18-18-405, C.R.S., then the court shall set bail for such person at fifty thousand dollars; except that, upon the motion of the district attorney or defendant and a showing of good cause, the court may set bail at an amount other than the specified amount.

(II) The bail amount specified in subparagraph (I) of this paragraph (d) shall be adjusted for inflation on January 1, 2018, and on January 1 every ten years thereafter. The adjustment shall be based on the cumulative annual adjustment for inflation for each year since July 1, 2008. The adjustments made pursuant to this subparagraph (II) shall be rounded upward or downward to the nearest ten-dollar increment.

(III) As used in this paragraph (d), "inflation" means the annual percentage change of inflation indicated in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder, all items, all urban consumers, or its successor index.

(IV) The state court administrator shall certify the adjusted bail amount within fourteen days after the appropriate information is available. The adjusted bail amount shall be applicable to all pending cases one month after its certification.

(e) (I) If a person is arrested for driving under the influence or driving while ability impaired, pursuant to section 42-4-1301, C.R.S., and the person has one or more previous convictions for an offense in section 42-4-1301, C.R.S., or one or more convictions in any other jurisdiction that would constitute a violation of section 42-4-1301, C.R.S., as a condition of any bail bond, the court shall order that the defendant abstain from the use of alcohol or the illegal use of drugs, and such abstinence shall be monitored.

(II) A defendant seeking relief from any of the conditions imposed pursuant to subparagraph (I) of this paragraph (e) shall file a motion with the court, and the court shall conduct a hearing upon the motion. The court shall consider whether the condition from which the defendant is seeking relief is in the interest of justice and whether public safety would be endangered if the condition were not enforced. When determining whether to grant relief pursuant to this subparagraph (II), the court shall consider whether the defendant has voluntarily enrolled in and is participating in an appropriate substance abuse treatment program.

(2) (a) A condition of every bail bond, and the only condition for a breach of which a surety or security on the bail bond may be subjected to forfeiture, is that the released person appear to answer the charge against such person at a place and upon a date certain and at any place or upon any date to which the proceeding is transferred or continued.

(b) For a defendant who has been arrested for a felony offense, a condition of bail bond shall be that the court shall require the defendant to execute or subscribe a written prior waiver of extradition stating that the defendant consents to extradition to this state and waives all formal procedures incidental to extradition proceedings in the event that he or she is arrested in another state while at liberty on such bail bond and acknowledging that he or she shall not be admitted to bail in any other state pending extradition to this state.

(c) Further conditions of every bail bond shall be that the released person not commit any felony while at liberty on such bail bond and that the court in which the action is pending have the power to revoke the release of the defendant, to increase the bail bond, or to change any bail bond condition if it is shown that a competent court has found probable cause to believe that the defendant has committed a felony while released pending adjudication of a prior felony charge.

(d) A further condition of every bail bond in cases of domestic violence as defined in section 18-6-800.3 (1), C.R.S., or in cases of stalking pursuant to section 18-3-602, C.R.S., shall be that the released person acknowledge the protection order as provided in section 18-1-1001 (5), C.R.S.

(e) A further condition of every bail bond in a case of an offense under section 42-2-138 (1) (d) (I), C.R.S., of driving while such person's driver's license or privilege to drive, either as a resident or nonresident, is restrained solely or partially because of a conviction of a

driving offense pursuant to section 42-4-1301 (1) or (2) (a), C.R.S., shall be that such person not drive any motor vehicle during the period of such driving restraint.

(f) In addition to the conditions specified in this subsection (2), the judge may impose such additional conditions upon the conduct of the defendant as will, in the judge's opinion, render it more likely that the defendant will fulfill the other bail bond conditions. These additional conditions may include submission of the defendant to the supervision of some qualified person or organization.

(3) In any instance of bond forfeiture or judgment ordered by the court where bond is made by persons other than a compensated surety, as defined in section 16-4-112 (2) (c), or the defendant, the judge shall issue notice of declared forfeiture or judgment and afford an opportunity for hearing under section 16-4-110 to all persons pledging security for the defendant's appearance, to show cause, if any, why their security should not be declared forfeit and due the court. No judicial order or disposition of security pledged by third parties shall affect an order of forfeiture entered against a defendant except as may be expressly provided by the court.

Source: L. 72: R&RE, p. 204, § 1. C.R.S. 1963: § 39-4-103. L. 79: (2) amended, p. 662, § 2, effective July 1. L. 81: (3) added, p. 677, § 5, effective May 13. L. 87: (1) amended, p. 658, § 18, effective July 1. L. 94: (2) amended, p. 2035, § 14, effective July 1. L. 97: (2) amended, p. 1553, § 5, effective July 1. L. 98: (1) and (2) amended, p. 1241, § 8, effective July 1. L. 99: (3) amended, p. 137, § 7, effective July 1. L. 2003: (2) amended, p. 1013, § 20, effective July 1. L. 2005: (2) amended, p. 423, § 1, effective April 29. L. 2006: (2) amended, p. 340, § 2, effective July 1. L. 2008: (1)(b.5) added, p. 841, § 1, effective May 14; (1)(d) added, p. 924, § 4, effective July 1. L. 2011: (1)(e) added, (HB 11-1189), ch. 99, p. 290, § 1, effective April 8. L. 2012: (2)(d) amended, (HB 12-1114), ch. 176, p. 631, § 2, effective May 11.

Cross references: For the legislative declaration contained in the 1998 act amending subsections (1) and (2), see section 1 of chapter 295, Session Laws of Colorado 1998. For the legislative declaration contained in the 2008 act enacting subsection (1)(d), see section 1 of chapter 248, Session Laws of Colorado 2008.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962).

Annotator's note. Since § 16-4-103 is similar to repealed § 39-2-17, C.R.S. 1963, and laws antecedent to CSA, C. 48, § 443, relevant cases construing those provisions have been included in the annotations to this section.

The sole purpose and function of a bail bond is to produce the defendant in court then and there to answer unto a certain information herein pending against him. *Herbertson v. People*, 160 Colo. 139, 415 P.2d 53 (1966).

Conditions not specified in this section are not binding upon the surety. The condition that the principal "abide the order of the court" is of this character. *Tanquary v. People*, 25 Colo. App. 531, 139 P. 1118 (1914).

Proper imposition of conditions. The imposition of conditions relating to the defendant's right to remain at liberty on bail that comply with the constitution is in keeping with the recommendations of the standards for criminal justice. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

However, the trial judge imposed an improper and unconstitutional condition where the bail order included the following condition: "If probable cause shall be shown to this court that any of the above offenses shall have been committed by either defendant, bond for that particular defendant shall be immediately terminated." However, the right of the court to revoke or modify bail which has been previously granted after notice is given to the defendant was not negated. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

The trial judge imposed an improper and unconstitutional condition where bail bond included condition that defendant arrested on domestic violence charges and alcohol-related misdemeanors and his agents could have no contact with victim. Although the condition was reasonably related to the statutory criterion that the court protect possible witnesses and victims from intimidation or harassment by the defendant, it also interfered with defendant's right to have his counsel effectively represent him at trial by investigating the facts surrounding the alleged event and preparing for trial. Defendant

does not, however, have the right to personally contact the victim, her family, or witnesses. *Martell v. County Court of Summit County*, 854 P.2d 1327 (Colo. App. 1992).

The trial judge erred in ordering defendant arrested on domestic violence charges and alcohol-related misdemeanors to attend counseling for abusive men as a condition of bond since such counseling may encourage or even require participants to admit their abusive behavior. Such counseling before conviction implicates defendant's fifth amendment privilege against self-incrimination and the presumption of innocence. *Martell v. County Court of Summit County*, 854 P.2d 1327 (Colo. App. 1992).

Statute provides accelerated docket for defendants held in custody. The plain intent of the statute is to provide for an accelerated docket for those defendants who are being held in jail pending trial as a result of the revocation of their prior release on bond, for certain specified reasons, or as a result of an increase in the amount of bond, which would cause them to remain in custody. *People v. Olds*, 656 P.2d 705 (Colo. 1983) (disapproved in *People v. Mascarenas*, 706 P.2d 404 (Colo. 1985)).

By this section, the legislature meant to enhance speedy trial rights of those who are kept in jail due to revoked bail or increased bail after the issue of their guilt has been raised by a plea of not guilty. *People v. Olds*, 656 P.2d 705 (Colo. 1983) (disapproved in *People v. Mascarenas*, 706 P.2d 404 (Colo. 1985)); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

And is not to benefit one who misses preliminary hearing. The general assembly did not intend that one accused of the commission of an offense should be permitted to profit from his failure to appear at the preliminary hearing and be in a better position than those other defendants who were released on bond and who had not violated the terms of their bond, or those defendants who had been unable to post bail initially and who had remained incarcerated for

the entire pretrial period after arrest. *People v. Olds*, 656 P.2d 705 (Colo. 1983) (disapproved in *People v. Mascarenas*, 706 P.2d 404 (Colo. 1985)).

A second bail bond entered after the defendant was returned to the custody of the court was not an increase of the first bond, which was forfeited and ceased to exist after the defendant failed to appear at his preliminary hearing. Therefore, the defendant's speedy trial rights were not violated when he was not brought to trial within ninety days after entry of the second bond. *People v. Armendariz*, 684 P.2d 252 (Colo. App. 1983).

Defendant whose bail was revoked following finding that proof was evident and presumption great in capital offense case pursuant to Art. II, § 19, Colo. Const., had no right to trial within 90 days of revocation. *People v. Avery*, 736 P.2d 1233 (Colo. App. 1986).

Defendant on bond may leave jurisdiction unless ordered otherwise. Generally, unless the court orders or the surety stipulates otherwise, nothing prevents a defendant on bond from leaving the jurisdiction so long as he appears at all proceedings in his case. *People v. Rincon*, 43 Colo. App. 155, 603 P.2d 953 (1979).

Subsection (2) modifications permitted only after arraignment. The bail modifications which are the subject of subsection (2) relate only to those bail proceedings which occur after arraignment. *People v. Olds*, 656 P.2d 705 (Colo. 1983) (disapproved in *People v. Mascarenas*, 706 P.2d 404 (Colo. 1985)); *People v. Armendariz*, 684 P.2d 252 (Colo. App. 1983).

The term "supervision" used in subsection (2) does not include mandatory counseling as a condition of bond for defendant arrested on domestic violence charges and alcohol-related misdemeanors. *Martell v. County Court of Summit County*, 854 P.2d 1327 (Colo. App. 1992).

Applied in *Stephenson v. District Court*, 629 P.2d 1078 (Colo. 1981); *People v. Moye*, 635 P.2d 194 (Colo. 1981); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

16-4-104. Bail bond - alternatives. (1) When the amount of bail is fixed by the judge of a court of record, the judge shall also determine which of the following kinds of bond shall be required for the pretrial release of the defendant:

(a) The defendant may be released from custody upon execution by him of a personal recognizance. The court may require additional obligors on the bond as a condition of granting the same.

(b) The defendant may be released from custody upon execution of bond in the full amount of the bail to be secured in any one or more, or any combination of, the following ways:

(I) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds of a kind in which trustees are authorized to invest trust funds under the laws of this state; or

(II) By real estate situated in this state with unencumbered equity not exempt from execution owned by the accused or any other person acting as surety on the bond, which unencumbered equity shall be at least one and one-half the amount of the bail set in the bond; or

(III) By cash or securities worth at least one and one-half the amount of bail set in the bond or by a bail bonding agent.

(2) If the bond is secured by stocks or bonds, the accused or sureties shall deposit the stock and bond certificates with the clerk of the court and also file with the bond a sworn schedule which shall be approved by the clerk of the court and shall contain the following:

(a) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified; and

(b) The market value of each stock and bond; and

(c) The total market value of the stocks and bonds listed; and

(d) A statement that the affiant is the owner of the stocks and bonds listed and they are not exempt from execution; and

(e) A statement that such stocks and bonds are security for compliance by the accused with the primary condition of the bond; and

(f) A signed blank stock power for each stock certificate or registered bond deposited.

(3) (a) (I) If the bond is to be secured by real estate, the bail bonding agent shall provide the property owner with a written disclosure statement in the following form at the time an initial application is filed:

Disclosure of lien against real property

Do not sign this document until you read and understand it! This bail bond will be secured by real property you own or in which you have an interest. Failure to pay the bail bond premiums when due or the defendant's failure to comply with the conditions of bail could result in the loss of your property!

(II) The disclosure required in subparagraph (I) of this paragraph (a) shall be printed in fourteen-point bold-faced type either:

(A) On a separate and specific document attached to or accompanying the application; or

(B) In a clear and conspicuous statement on the face of the application.

(III) Before a property owner executes any instrument creating a lien against real property, the bail bonding agent shall provide the property owner with a completed copy of the instrument creating the lien against real property and the disclosure statement described in subparagraph (II) of this paragraph (a). If a bail bonding agent fails to comply fully with the requirements of subparagraphs (I) and (II) of this paragraph (a) and this subparagraph (III), any instrument creating a lien against real property shall be voidable.

(IV) The bonding agent shall deliver to the property owner a fully executed and notarized reconveyance of title, a certificate of discharge, or a full release of any lien against real property that secures performance of the conditions of a bail bond within thirty-five days after receiving notice that the time for appealing an order that exonerated the bail bond has expired. The bonding agent shall also deliver to the property owner the original cancelled note as evidence that the indebtedness secured by any lien instrument has been paid or that the purposes of said instrument have been fully satisfied and the original deed of trust, security agreement, or other instrument which secured the bail bond obligation. If a timely notice of appeal is filed, the thirty-five-day period shall begin on the day the appellate court's affirmation of the order becomes final. If the bonding agent fails to comply with the requirements of this subparagraph (IV), the property owner may petition the district court to issue an order directing the clerk of such court to execute a full reconveyance of title, a certificate of discharge, or a full release of any lien against real property created to secure performance of the conditions of the bail bond. The petition shall be verified and shall allege facts showing that the bonding agent has failed to comply with the provisions of this subparagraph (IV).

(V) Any bail bonding agent who violates this paragraph (a) shall be liable to the property owner for all damages which may be sustained by reason of the violation, plus statutory damages in the sum of three hundred dollars. The property owner shall be entitled to recover court costs and reasonable attorney fees, as determined by the court, upon prevailing in any action brought to enforce the provisions of this paragraph (a).

(b) If the bond is secured by real estate, the amount of the owner's unencumbered equity shall be determined by deducting the amount of all encumbrances listed in the owner and encumbrances certificate from the actual value of such real estate as shown on the current notice of valuation. The owner of the real estate shall file with the bond the following, which shall constitute a material part of the bond:

(I) The current notice of valuation for such real estate prepared by the county assessor pursuant to section 39-5-121, C.R.S.; and

(II) Evidence of title issued by a title insurance company or agent licensed pursuant to article 11 of title 10, C.R.S., within thirty-five days after the date upon which the bond is filed; and

(III) A sworn statement by the owner of the real estate that the real estate is security for the compliance by the accused with the primary condition of the bond; and

(IV) A deed of trust to the public trustee of the county in which such real estate is located which shall be executed and acknowledged by all record owners of such real estate which shall name as beneficiary the clerk of the court approving such bond and which shall secure an amount equal to one and one-half times the amount of the bond.

(c) (I) If the bond is secured by real estate, such bond shall not be accepted by the clerk of the court unless the record owner of such property has presented to the clerk of such court the original deed of trust as set forth in subparagraph (IV) of paragraph (b) of this subsection (3) and the applicable recording fee. Upon receipt of such deed of trust and fee, the clerk of the court shall cause the deed of trust to be recorded with the clerk and recorder for the county in which the property is located.

(II) Upon satisfaction of the terms of the bond, the clerk of the court shall, within fourteen days after such satisfaction, execute a release of the deed of trust and an affidavit which states that the obligation for which the deed of trust had been recorded has been satisfied, either fully or partially, and that the release of such deed of trust may be recorded at the expense of the record owner of the property described in such deed of trust.

(III) If there is a forfeiture of the bond pursuant to sections 16-4-103 and 16-4-109, and if the forfeiture is not set aside pursuant to section 16-4-109 (3), the deed of trust may be foreclosed as provided by law.

(IV) If there is a forfeiture of the bond pursuant to sections 16-4-103 and 16-4-109, but the forfeiture is set aside pursuant to section 16-4-109 (3), the clerk of the court shall execute a release of the deed of trust and an affidavit which states that the obligation for which the deed of trust had been recorded has been satisfied, either fully or partially, and that the release of such deed of trust may be recorded at the expense of the record owner of the real estate described in such deed of trust.

Source: **L. 72:** R&RE, p. 204, § 1. **C.R.S. 1963:** § 39-4-104. **L. 89:** (1)(b)(II) amended and (3) R&RE, pp. 864, 865, §§ 9, 10, effective April 12. **L. 92:** (3) amended, p. 441, § 3, effective July 1. **L. 93:** (1)(b)(III) and (3) amended, pp. 924, 922, §§ 2, 1, effective May 28. **L. 95:** IP(1), (1)(b)(III), (3)(a)(I), (3)(a)(III), and (3)(a)(V) amended, p. 289, § 14, effective July 1. **L. 96:** (1)(b)(III) amended, p. 1186, § 14, effective June 1. **L. 2012:** (1)(b)(III) amended, (HB 12-1266), ch. 280, p. 1526, § 44, effective July 1; (3)(a)(IV), (3)(b)(II), and (3)(c)(II) amended, (SB 12-175), ch. 208, p. 844, § 63, effective July 1.

Editor's note: (1) Section 52 of chapter 280, Session Laws of Colorado 2012, provides that the act amending subsection (1)(b)(III) applies to offenses committed and applications submitted on or after July 1, 2012.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (3)(a)(IV), (3)(b)(II), and (3)(c)(II) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 16-4-104 is similar to repealed laws antecedent to CSA, C. 48,

§ 443, relevant cases construing those provisions have been included in the annotations to

this section.

The purpose of a recognizance is not to enrich the treasury, but to serve the convenience of the party accused but not convicted, without interfering with or defeating the administration of justice. *People v. Pollock*, 65 Colo. 275, 176 P. 329 (1918); *Allison v. People*, 132 Colo. 156, 286 P.2d 1102 (1955).

A bail bond with but one surety is sufficient, notwithstanding the fact that § 19 of art. I, Colo. Const., provides for sureties, this being one of the cases where the plural includes the singular. *Van Gilder v. People*, 75 Colo. 515, 227 P. 386 (1924).

Sureties should be persons of sufficient financial ability and of sufficient vigilance to secure the appearance and prevent the absconding of the accused. *People v. Pollock*, 65 Colo. 275, 176 P. 329 (1918).

For the form and content of recognizance instrument, see *Waters v. People*, 4 Colo. App. 97, 35 P. 56 (1893).

For the form of bond, see *People v. Mellor*, 2 Colo. 705 (1875).

Deposit of percentage of full amount of bail not permitted. This section does not expressly or impliedly authorize courts to permit 10 percent cash bail deposits, and the requirement in subsection (1)(b) that the "full amount of bail" be secured negates the contention that courts may permit the deposit of a percentage of the full amount of the bail before releasing a defendant from custody. *People v. District Court*, 196 Colo. 116, 581 P.2d 300 (1978).

This section does not govern bail for defendants awaiting extradition. Questions of bail for defendants awaiting extradition prior to service of a governor's warrant are governed exclusively by § 16-19-117. *Fullerton v. County Court*, 124 P.3d 866 (Colo. App. 2005).

Applied in *People v. Lepik*, 629 P.2d 1080 (Colo. 1981).

16-4-105. Selection by judge of the amount of bail and type of bond - criteria.
(1) In determining the amount of bail and the type of bond to be furnished by the defendant, the judge fixing the same shall consider and be governed by the following criteria:

- (a) The amount of bail shall not be oppressive;
- (b) When a person is charged with an offense punishable by fine only, the amount of bail shall not exceed the amount of the maximum penalty;
- (c) The defendant's employment status and history and his financial condition;
- (d) The nature and extent of his family relationships;
- (e) His past and present residences;
- (f) His character and reputation;
- (g) Identity of persons who agree to assist him in attending court at the proper time;
- (h) The nature of the offense presently charged and the apparent probability of conviction and the likely sentence;
- (i) The defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;
- (j) Any facts indicating the possibility of violations of law if the defendant is released without restrictions;
- (k) Any facts indicating a likelihood that there will be an intimidation or harassment of possible witnesses by the defendant;
- (k.5) The fact that the defendant is accused of unlawfully using or distributing controlled substances on the grounds of any public or private elementary, middle, or secondary school, or within one thousand feet of the perimeter of any such school grounds on any street, alley, parkway, sidewalk, public park, playground, or other area of premises that is accessible to the public, or within any private dwelling that is accessible to the public for the purpose of the sale, distribution, use, or exchange of controlled substances in violation of article 18 of title 18, C.R.S., or in any school vehicle, as defined in section 42-1-102 (88.5), C.R.S., engaged in the transportation of persons who are students;
- (k.7) The fact that the defendant is accused of soliciting, inducing, encouraging, intimidating, employing, or procuring a child to act as his agent to assist in the unlawful distribution, manufacture, dispensing, sale, or possession for the purposes of sale of any controlled substance;
- (l) Any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction;
- (m) Unless the district attorney consents, no person shall be released on personal recognizance if he is presently at liberty on another bond of any kind in another criminal action involving a felony or a class 1 misdemeanor;

(n) Unless the district attorney consents, no person shall be released on personal recognizance if he has a record of conviction of a class 1 misdemeanor within two years, or a felony within five years, prior to the release hearing;

(n.5) Unless the district attorney consents, no person who is eighteen years of age or older or is being charged as an adult pursuant to section 19-2-517, C.R.S., or transferred to the district court pursuant to section 19-2-518, C.R.S., shall be released on personal recognizance if the person's criminal record indicates that he or she failed to appear on bond in any case involving a felony or class 1 misdemeanor charge in the preceding five years;

(o) No person shall be released on personal recognizance until and unless the judge ordering the release has before him reliable information concerning the accused, prepared or verified by a person designated by the court, or substantiated by sworn testimony at a hearing before the judge, from which an intelligent decision based on the criteria set forth in this section can be made. Such information shall be submitted either orally or in writing without unnecessary delay.

(p) No person shall be released on personal recognizance if, at the time of such application, the person is presently on release under surety bond for felony or class 1 misdemeanor charges unless the surety thereon is notified and afforded an opportunity to surrender the person into custody on such terms as the judge deems just under the provisions of section 16-4-108;

(p.5) Any defendant who fails to appear while free on bond in conjunction with a class 1 misdemeanor or a felony and who is subsequently arrested shall not be eligible for a personal recognizance bond for that case in which such defendant failed to appear; except that, if the defendant can provide satisfactory evidence to the court that the failure to appear was due to circumstances or events beyond the control of the defendant, the court shall have the discretion to grant a personal recognizance bond;

(q) If a pretrial services program as described in subsection (3) of this section exists in the judicial district in which the defendant is being held, the judge fixing the amount of bail and the type of bond to be furnished by the defendant may utilize the services provided by such program in entering an order concerning such defendant.

(2) If a defendant has been required by the judge to furnish a secured bond and he is unable within two days to furnish security, if he believes that, upon the presentation of evidence not heard or considered by the judge, he would be entitled to release on personal recognizance, such defendant may file a written motion for reconsideration in which he shall set forth the matters not theretofore considered by the judge who entered the order for bond in the first instance. The judge may summarily deny the motion or promptly conduct a hearing thereon.

(3) (a) The chief judge of any judicial district may order any persons who are applying for pretrial release to be evaluated by a pretrial services program established pursuant to this subsection (3) which shall make a recommendation regarding whether there should be a pretrial release of any particular defendant. Such chief judge may make such order in any or all of the counties of such chief judge's district.

(b) Any county or city and county may establish a pretrial services program which may be utilized by the district court of such county or city and county. Any pretrial services program shall be established pursuant to a plan formulated by a community advisory board created for such purpose and appointed by the chief judge of the judicial district. Membership upon such community advisory board shall include, but shall not be limited to, a representative of a local law enforcement agency, a representative of the district attorney, a representative of the public defender, and a representative of the citizens at large. The plan formulated by such community advisory board shall be approved by the chief judge of the judicial district prior to the establishment and utilization of the pretrial services program. The requirement contained in this paragraph (b) that any pretrial services program be established pursuant to a plan formulated by a community advisory board shall not apply to any pretrial services program which exists prior to May 31, 1991.

(c) Any pretrial services program approved pursuant to paragraph (b) of this subsection (3) shall meet the following criteria:

(I) Such program shall establish a procedure for the screening of persons who are detained due to an arrest for the alleged commission of a crime so that such information

may be provided to the judge who is setting the amount of bail and type of bond. The program shall provide such information as will provide the court with the ability to make a more appropriate initial bond decision which is based upon facts relating to the defendant's risk of danger to the community and the defendant's risk of failure to appear for court.

(II) Such program shall make all reasonable attempts to provide the court with such information delineated in subsection (1) of this section as is appropriate to each defendant.

(d) Any pretrial services program may also include different methods and levels of community-based supervision as a condition of pretrial release. The program may use established supervision methods for defendants who are released prior to trial in order to decrease unnecessary pretrial incarceration. The program may include any of the following conditions for pretrial release or any combination thereof:

- (I) Periodic telephone contact with the defendant;
- (II) Periodic office visits by the defendant to the pretrial services program;
- (III) Periodic home visits to the defendant's home;
- (IV) Periodic drug testing of the defendant;
- (V) Mental health or substance abuse treatment for the defendant, including residential treatment;
- (VI) Domestic violence counseling for the defendant;
- (VII) Electronic or global position monitoring of the defendant; and
- (VIII) Pretrial work release of the defendant.

(e) Commencing July 1, 2012, each pretrial services program established pursuant to this subsection (3) shall provide an annual report to the state judicial department no later than November 1 of each year, regardless of whether the program existed prior to May 31, 1991. The judicial department shall present an annual combined report to the house and senate judiciary committees, or any successor committees, of the general assembly. The report to the judicial department shall include, but is not limited to, the following information:

- (I) The total number of pretrial assessments performed by the program and submitted to the court;
- (II) The total number of closed cases by the program in which the defendant was released from custody and supervised by the program;
- (III) The total number of closed cases in which the defendant was released from custody, was supervised by the program, and, while under supervision, appeared for all scheduled court appearances on the case;
- (IV) The total number of closed cases in which the defendant was released from custody, was supervised by the program, and was not charged with a new criminal offense that was alleged to have occurred while under supervision and that carried the possibility of a sentence to jail or imprisonment;
- (V) The total number of closed cases in which the defendant was released from custody and was supervised by the program, and the defendant's bond was not revoked by the court due to a violation of any other terms and conditions of supervision; and
- (VI) Any additional information the state judicial department may request.

(f) For the reports required in paragraph (e) of this subsection (3), the pretrial services program shall include information detailing the number of persons released on a commercial surety bond in addition to pretrial supervision, the number of persons released on a cash, private surety, or property bond in addition to pretrial supervision, and the number of persons released on any form of a personal recognizance bond in addition to pretrial supervision.

Source: L. 72: R&RE, p. 205, § 1. C.R.S. 1963: § 39-4-105. L. 81: (1)(p) added, p. 677, § 6, effective May 13; IP(1) amended, p. 926, § 1, effective July 1. L. 90: (1)(k.5) and (1)(k.7) added, p. 990, § 3, effective April 16. L. 91: (1)(q) and (3) added, p. 425, §§ 1, 2, effective May 31. L. 92: (1)(p.5) added, p. 442, § 4, effective July 1. L. 97: (1)(n.5) and (3)(e) added, pp. 329, 330, §§ 1, 2, effective August 6. L. 2000: (3)(e) amended and (3)(f) added, pp. 1994, 1995, §§ 2, 3, effective June 2. L. 2006: (3)(d)(VII)

amended, p. 18, § 1, effective March 8. **L. 2010:** (1)(k.5) amended, (HB 10-1232), ch. 163, p. 568, § 1, effective April 28. **L. 2012:** (3)(e) and (3)(f) amended, (HB 12-1310), ch. 268, p. 1392, § 4, effective June 7.

ANNOTATION

The primary function of bail is to assure the presence of the accused. *People v. Sanders*, 185 Colo. 153, 522 P.2d 735 (1974).

And this end should be met by means which impose the least possible hardship upon the accused. *People v. Sanders*, 185 Colo. 153, 522 P.2d 735 (1974).

Subsection (1)(m) is not unconstitutional as vesting judicial powers in the prosecutor. The limitations imposed by subsection (1)(m) are reasonable and not in violation of the doctrine of separation of powers. *People v. Sanders*, 185 Colo. 153, 522 P.2d 735 (1974).

District attorney's consent required in certain cases. In adopting subsection (1)(m), the general assembly determined that in certain cases the district attorney's consent to release on personal recognizance should be required. *People v. Sanders*, 185 Colo. 153, 522 P.2d 735 (1974).

When court to set bail. The Colorado constitution grants a defendant charged with a capital offense the right to bail unless the district attorney meets the burden of establishing at the bail hearing that the "proof is evident or the presumption great". If evidence of the proper nature and kind is not presented by the district attorney, it is incumbent upon the court, looking to the guidelines laid down in subsection (1)(h) and in the case of *Stack v. Boyle* (342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951)) to set reasonable bail in compliance with the Colorado constitution and the eighth amendment of the constitution of the United States. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

Subsection (1)(o) permits a court to designate persons to prepare information concerning the accused in order to assist the judge in deciding whether to order release on personal recognizance. Pursuant to this statutory authority, the judges of the first judicial district authorized the pretrial service officers, as bond commissioners, to implement the bond schedule of the district. Although the bond schedule did not address temporary restraining orders specifically, in cases involving allegations of domestic violence, the pretrial service officers, acting as bond commissioners, were expected to deliver to the defendant a temporary restraining order pursuant to § 18-1-1001. The court concluded that, as a matter of law, these are judicial acts integral to the judicial process and therefore are cloaked in absolute quasi-judicial immunity. *Whitesel v. Sengenberger*, 222 F.3d 861 (10th Cir. 2000).

Notification of sureties when bail converted to personal recognizance. Subsection (1)(p)

applies to a person for whom bail has not yet been fixed and who is on release under a surety bond on a pending charge different from the charge from which he seeks release on personal recognizance. *People v. Anderson*, 789 P.2d 1115 (Colo. App. 1990).

Subsection (1)(p) does not require the court to notify a surety of the possibility of release on an additional surety bond for new charges. *People v. Soto-Gallegos*, 953 P.2d 946 (Colo. App. 1997).

Relief under subsection (1)(p) not available to surety after defendant failed to appear where: A count was added charging defendant with an offense while defendant was free on a bond previously posted, trial court required no new bond, and defendant was allowed to remain free on the existing bond. The action by trial court did not materially increase the surety's risk of non-appearance by defendant. *People v. Nishikawa*, 32 P.3d 630 (Colo. App. 2001).

Pretrial services program exceeded its statutory authority when it imposed a condition barring defendant from possessing weapons. This statute does not anticipate or permit the court to delegate authority to set conditions of bond to a pretrial services program. *People v. Rickman*, 178 P.3d 1202 (Colo. 2008).

Pretrial services program did not exceed its statutory authority when it imposed a condition barring defendant from committing a felony while on bail. Section 16-4-103 (2)(c) requires that, as a condition of every bail bond, "the released person not commit any felony while at liberty on such bail bond". Because this prohibition is statutorily mandated, it constitutes a condition of every bail bond regardless of any action by the court or pretrial services program. *People v. Rickman*, 178 P.3d 1202 (Colo. 2008).

Sureties' obligation on bond posted for defendant on certain drug charges terminated as a matter of law by trial court's continuation and application of the bond following the filing of habitual criminal charges without the knowledge and consent of sureties. *People v. Jones*, 873 P.2d 36 (Colo. App. 1994).

The substantial increase in length of mandatory minimum sentence facing defendant by subsequent filing of habitual criminal charges materially increased the risk that defendant would fail to appear for trial and materially increased the risk that sureties had contractually agreed to undertake on the drug charges. *People v. Jones*, 873 P.2d 36 (Colo. App. 1994).

Surety's obligations on the bond are not terminated where trial court continued the ex-

isting bond after allowing the filing of an additional felony charge in the same case without surety's knowledge and consent, and defendant did not face a substantial increase in the length of a minimum mandatory sentence. *People v. Nishikawa*, 32 P.3d 630 (Colo. App. 2001).

Guilty plea constitutes conviction. In the context of the bail bond statute, a plea of guilty, when accepted by the court which grants a

deferred judgment and sentence, constitutes a "conviction". Evidence of the guilty plea is no longer admissible, however, after successful completion of the period of the deferred sentence. *Hafelfinger v. District Court*, 674 P.2d 375 (Colo. 1984).

Applied in *People v. Lepik*, 629 P.2d 1080 (Colo. 1981).

16-4-106. When original bond continued. Once a bond has been executed and the person released from custody thereon, whether a charge is then pending or is thereafter filed or transferred to a court of competent jurisdiction, the original bond shall continue in effect until final disposition of the case in the trial court. If a charge filed in the county court is dismissed and the district attorney states on the record that the charge will be refiled in the district court or that the dismissal by the county court will be appealed to the district court, the county court before entering the dismissal shall fix a return date, not later than sixty-three days thereafter, upon which the defendant must appear in the district court and continue the bond. Any bond continued pursuant to this section is subject to the provisions of section 16-4-107.

Source: **L. 72:** R&RE, p. 207, § 1. **C.R.S. 1963:** § 39-4-106. **L. 90:** Entire section amended, p. 924, § 3, effective March 27. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 845, § 64, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 16-4-106 is similar to repealed § 39-2-17, CRS 53, and laws antecedent to CSA, C. 48, § 444, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of section. The purpose of § 16-4-201 concerning bail after conviction and this section is to authorize the court to exercise discretion rather than follow a fixed policy and to permit a recognizance to remain in effect, without the necessity of a new bond, after conviction and until disposition of the case in the trial court. *Trujillo v. District Court*, 131 Colo. 428, 282 P.2d 703 (1955).

This section and § 16-4-201 must be read together and reconciled if possible. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

Where defendant entered plea of guilty, surety's obligation under recognizance bond is terminated. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

And trial court could not continue bond without first obtaining surety's consent. *Ro-*

driguez v. People, 191 Colo. 540, 554 P.2d 291 (1976).

Although the trial judge may continue the original bond to final disposition, he must obtain the consent of the surety to continue it beyond conviction. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

Increase of surety's risk without his consent terminates obligation. When one undertakes a surety obligation, the surety undertakes a calculated risk, and events which materially increase that risk without consent of the surety terminate the obligation of the bond. *People v. Smith*, 645 P.2d 864 (Colo. App. 1982).

Effect of resetttings of the case. Where there were resetttings of a criminal case for trial at the same term, the contention of a surety on defendant's bond that he was discharged by these continuances without his consent was overruled. *Van Gilder v. People*, 75 Colo. 515, 227 P. 386 (1924).

Applied in *Stephenson v. District Court*, 629 P.2d 1078 (Colo. 1981).

16-4-107. Reduction or increase of bail - change in type of bond. (1) Upon application by the district attorney or the defendant, the court before which the proceeding is pending may increase or decrease the amount of bail, may require additional security for a bond, may dispense with security theretofore provided, or may alter any condition of the bond.

(2) Reasonable notice of an application for modification of a bond by the defendant shall be given to the district attorney.

(3) Reasonable notice of application for modification of a bond by the district attorney shall be given to the defendant, except as provided in subsection (4) of this section.

(4) (a) Upon verified application by the district attorney or a bonding commissioner stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bond, the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. Upon issuance of the warrant, the bonding commissioner shall notify the bail bond agent of record, if applicable. At the conclusion of the hearing, the court may enter an order authorized by subsection (1) of this section. If a bonding commissioner files an application for a hearing pursuant to this subsection (4), the bonding commissioner shall notify the district attorney, for the jurisdiction in which the application is made, of the application within twenty-four hours following the filing of the application.

(b) As used in this subsection (4), "bonding commissioner" means a person employed by a pretrial services program as described in section 16-4-105 (3), and so designated as a bonding commissioner by the chief or presiding judge of the judicial district.

(5) The district attorney has the right to appear at all hearings seeking modification of the terms and conditions of bail and may advise the court on all pertinent matters during the hearing.

Source: L. 72: R&RE, p. 207, § 1. C.R.S. 1963: § 39-4-107. L. 2008: (4) amended, p. 520, § 1, effective August 5.

ANNOTATION

Equal protection not violated. Persons detained pursuant to this section are not similarly situated to persons detained pursuant to § 16-4-103 and the difference in treatment accorded the two classes of detainees is rationally related to a legitimate state interest. *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

It is not incumbent upon defendant to affirmatively show validity of bond after the bond is executed. *Stephenson v. District Court*, 629 P.2d 1078 (Colo. 1981).

This section provides for notice where the amount or conditions of bail are to be altered. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977).

Court not to modify executed bond sua sponte. This section makes no provision for a trial court, sua sponte, to modify a defendant's bond once that bond has been executed. *Ste-*

phenson v. District Court, 629 P.2d 1078 (Colo. 1981).

There is no prior notice requirement for exoneration of the surety when the principal is surrendered in open court. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977).

Notification of sureties when bail converted to personal recognizance. The notice provision for sureties in § 16-4-105 (1)(p) applies to a person for whom bail has not yet been fixed and who is on release under a surety bond on a pending charge different from the charge from which he seeks release on personal recognizance. Since defendant is not seeking release, but rather simply seeking to modify the type of bond on which he has already been released, the provisions of this section also do not apply. *People v. Anderson*, 789 P.2d 1115 (Colo. App. 1990).

16-4-108. Exoneration from bond liability. (1) Any person executing a bail bond as principal or as surety shall be exonerated as follows:

- (a) When the condition of the bond has been satisfied; or
- (b) When the amount of the forfeiture has been paid; or

(b.5) (I) When the surety appears and provides satisfactory evidence to the court that the defendant is unable to appear before the court due to such defendant's death or the detention or incarceration of such defendant in a foreign jurisdiction if the defendant is incarcerated for a period in excess of ninety-one days and the state of Colorado has refused to extradite such defendant; except that, if the state extradites such defendant, all costs associated with such extradition shall be borne by the surety up to the amount of the bond.

(II) For the purposes of this paragraph (b.5), "costs associated with extradition" shall be calculated as and limited to the round-trip mileage between the Colorado court of

jurisdiction and the location of the defendant's incarceration at the rate allowed for reimbursement pursuant to section 24-9-104, C.R.S., up to the amount of the bond.

(c) Upon surrender of the defendant into custody at any time before a judgment has been entered against the sureties for forfeiture of the bond, upon payment of all costs occasioned thereby. A surety may seize and surrender the defendant to the sheriff of the county wherein the bond is taken, and it is the duty of the sheriff, on such surrender and delivery to him of a certified copy of the bond by which the surety is bound, to take the person into custody and, by writing, acknowledge the surrender. If a compensated surety is exonerated by surrendering a defendant prior to the initial appearance date fixed in the bond, the court, after a hearing, may require the surety to refund part or all of the bond premium paid by the defendant if necessary to prevent unjust enrichment.

(d) Repealed.

(e) After three years have elapsed from the posting of the bond, unless a judgment has been entered against the surety or the principal for the forfeiture of the bond, or unless the court grants an extension of the three-year time period for good cause shown, upon motion by the prosecuting attorney.

(1.5) If, within fourteen days after the posting of a bond by a defendant, the terms and conditions of said bond are changed or altered either by order of court or upon the motion of the district attorney or the defendant, the court, after a hearing, may order a compensated surety to refund a portion of the premium paid by the defendant, if necessary, to prevent unjust enrichment. If more than fourteen days have elapsed after posting of a bond by a defendant, the court shall not order the refund of any premium.

(2) Upon entry of an order for deferred prosecution or deferred judgment as authorized in sections 18-1.3-101 and 18-1.3-102, C.R.S., sureties upon any bond given for the appearance of the defendant shall be released from liability on such bond.

Source: L. 72: R&RE, p. 207, § 1. C.R.S. 1963: § 39-4-108. L. 85: (1)(d) added and (2) amended, p. 621, §§ 1, 2, effective July 1. L. 86: (1)(d) repealed and (1.5) added, p. 1218, §§ 15, 16, effective May 30. L. 2000: (1)(e) added, p. 311, § 1, effective August 2. L. 2002: (2) amended, p. 1490, § 130, effective October 1. L. 2004: (1)(b.5) and (1)(c) amended, p. 1757, § 16, effective July 1. L. 2012: (1)(b.5)(I) and (1.5) amended, (SB 12-175), ch. 208, p. 845, § 65, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(b.5)(I) and (1.5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For note, "One Year Review of Colorado Law-1964", see 42 Den. L. Ctr. J. 140 (1965).

Annotator's note. Since § 16-4-108 is similar to repealed § 39-2-18, C.R.S. 1963, § 39-2-18, CRS 53, CSA, C. 48, § 444, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

For compensated sureties, the framework for forfeiture proceedings is provided by § 16-4-112 and not this section. *People v. Diaz-Garcia*, 159 P.3d 679 (Colo. App. 2006).

An accused person released on bail, is, in contemplation of law, in the custody of his sureties. *People v. Loomis*, 60 Colo. 202, 152 P. 143 (1915).

In the case of exoneration of a surety, the common law considers the principal to be within the custody of the surety. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977).

When surety can avail himself of section. The surety has the right to avail himself of the exoneration provisions of the statute for any reason sufficient to himself. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977).

Where denial of motion for exoneration deemed error. Where a defendant fails to appear at a scheduled hearing, then, through the surety's efforts, is located, apprehended, and taken into custody in another state, but, through the failure of the states, the defendant is not extradited and returned to custody in Colorado, a trial judge abuses his discretion in denying the

surety's motion for exoneration. *People v. Campbell*, 633 P.2d 509 (Colo. App. 1981).

Surety not entitled to exoneration where the defendant was temporarily in the state's custody on later charges but was not surrendered into custody on the earlier charges for which the bond was posted and he was not prevented from making the appearances required on those charges. *People v. Soto-Gallegos*, 953 P.2d 946 (Colo. App. 1997).

No requirement of actual or threatened breach of bail conditions in requirements for exoneration. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977).

Subsection (1)(b.5) does not apply to postjudgment motions for exoneration from bond liability. *People v. Diaz-Garcia*, 159 P.3d 679 (Colo. App. 2006).

There is no prior notice requirement for exoneration of the surety when the principal is surrendered in open court. *Vaughn v. District Court*, 192 Colo. 348, 559 P.2d 222 (1977).

When sureties may seize and surrender. Sureties may seize and surrender an accused person to the sheriff of the county in which the recognizance was taken, at any time before forfeiture and execution is ordered against them. If, at the same time, a certified copy of the recognizance is delivered to the sheriff, it is his duty to take the accused into custody, and, in writing, acknowledge the surrender. *People v. Loomis*, 60 Colo. 202, 152 P. 143 (1915).

Surety who surrenders his principal before final judgment is exonerated under this section. *Scott v. People ex rel. Bd. of Comm'rs*, 64 Colo. 396, 172 P. 9 (1918).

No common law bonding agent's privilege. Based on the requirement in § 18-1-103 (1) that all defenses to defined offenses must be codified, the common law bonding agent's privilege has been abrogated by the general assembly in the general provisions of the criminal code and the burglary statutes. *Oram v. People*, 255 P.3d 1032 (Colo. 2011); *Weinstein v. People*, 255 P.3d 1057 (Colo. 2011).

Surrender effective before final disposition of the case. A surety on a criminal recognizance may be released from liability thereon by the surrender of the principal, even after forfeiture and judgment against him on the bond, if he acts before final disposition of the case, extending to a review on error. *Van Gilder v. City & County of Denver*, 104 Colo. 76, 89 P.2d 529 (1939).

But appearance for trial is not a surrender. The appearance of the defendant in a criminal case in court for trial is not equivalent to a surrender of his person by a surety on his bond. *Van Gilder v. People*, 75 Colo. 515, 227 P. 386 (1924).

Nor is incarceration after appearance date. The rule that incarceration of a principal on the return date of his bond permits relief from forfeiture of the bond has no application where the

principal was at large and was not imprisoned until 30 days after the date he was to appear in Colorado, and the surety, through its agent, had the opportunity to return the principal to Colorado before judgment was entered and thus be absolved under our statutes of any liability other than costs incurred by the people by reason of the principal's failure to appear. *Union Benefit Fire Ins. Co. v. People*, 160 Colo. 211, 416 P.2d 368 (1966).

However, surety not liable if principal is arrested and jailed for another offense. Under this section where, after forfeiture but before judgment against the sureties, their principal was arrested and placed in the jail of the county under a different charge than that for which the bond was given, the sureties were entitled to a discharge from liability upon their formal offer to surrender and the payment of the costs, although they did nothing towards the rearresting and returning to custody of the prisoner. And they were not liable for costs incurred in arresting and returning their principal under a different charge than the one in which the bond was given. *Huston v. People ex rel. Collins*, 12 Colo. App. 271, 55 P. 262 (1898).

Or if a cause brought by the state is in fact abandoned by the state, by reason of which the presence of the accused in court is no longer required or desired for trial or matters incident thereto, the purpose of the bail bond has been served, its function fulfilled and performed, and it should thenceforth be regarded as *functus officio* and the formal discharge of defendant and of his sureties therefrom should be entered upon application. *Herbertson v. People*, 160 Colo. 139, 415 P.2d 53 (1966).

Surety needs not personally accomplish the seizure and surrender. Where defendant was stopped for a traffic offense and was taken into custody by sheriff's deputies on the outstanding warrant, surety was entitled to exoneration under this section. *People v. Madison*, 909 P.2d 551 (Colo. App. 1995).

The term "costs", as used in this section, includes whatever the law officers may legitimately pay out, or have a right to charge, in connection with the return of the criminal for trial. *Ayres v. People*, 3 Colo. App. 117, 32 P. 77 (1893).

Liability of surety for costs. Sureties must pay the expenses incurred by the county in procuring the return of their principal from another state upon a requisition. *Ayres v. People*, 3 Colo. App. 117, 32 P. 77 (1893).

To accomplish the purpose of giving bail, courts have been liberal in vacating judgments entered on bail bonds, exercising always a broad discretion and in proper cases preserving the equities of the public by deducting such costs and expenses as may have been incurred by the state. To hold otherwise would discourage the giving of bail and defeat the manifest purpose of

the statute. *Allison v. People*, 132 Colo. 156, 286 P.2d 1102 (1955).

When court may require return of premium. A court has the discretion to require a surety to return all or a portion of the premium paid for a bail bond where the bond is terminated by court order. *People v. Walker*, 665 P.2d 154 (Colo. App. 1983), *aff'd sub. nom. Yording v. Walker*, 683 P.2d 788 (Colo. 1984) (decided prior to enactment of subsection (1)(d) in 1985).

Subsection (1)(c) takes precedence over bond provisions. The language of subsection (1)(c) protecting against unjust enrichment takes precedence over, and nullifies, a provision in a bond purporting to make a bond premium non-refundable. *People v. Walker*, 665 P.2d 154 (Colo. App. 1983), *aff'd sub. nom. Yording v. Walker*, 683 P.2d 788 (Colo. 1984) (decided prior to enactment of subsection (1)(d) in 1985).

Subsection (1.5) is broader than the rule in Yording in that it permits a refund under circumstances other than an error of law, subject to the time limitation. *People v. Goldsmith*, 955 P.2d 561 (Colo. App. 1997).

Reincarceration of the defendant on separate charges is not included among the additional grounds for exoneration of the surety. *People v. Goldsmith*, 955 P.2d 561 (Colo. App. 1997).

Even though both subsections (1)(c) and (1.5) were inapplicable, court had common law authority to order bond premium refund where the bond at issue did not involve a defendant, but rather a nonparty, and surety would

have been unjustly enriched if allowed to retain the bond premium. *People v. Gonzales*, 28 P.3d 967 (Colo. App. 2001).

The 30-day limitation referred to in subsection (1.5) applies only to the interval between the posting of the bond and any changes in its terms or conditions, and not to the time within which an order for refund of bond premium must be entered. *People v. Perse*, 750 P.2d 923 (Colo. App. 1988).

Determination of amount of premium refund due to defendant in case of conversion of bond into release on personal recognizance. The determination of the amount of premium refund due to the defendant is a matter within the trial court's discretion, and the court may not be reversed absent an abuse of discretion. *People v. Anderson*, 789 P.2d 1115 (Colo. App. 1990).

"Appearance date", as used in this subsection (1)(c), includes appearance up to the date of conviction. Thus, surety was required to refund a bond premium to a defendant whom surety surrendered prior to such date. *People v. Carrethers*, 867 P.2d 189 (Colo. App. 1993).

Trial court correctly entered judgment of forfeiture of bond posted by surety where, even if the notice of order of forfeiture was mailed several days late, nothing in the record indicated that surety suffered any resulting prejudice or that surety asserted any grounds under this section or § 16-4-109 for setting aside the order of forfeiture or vacating the judgment. *People v. King*, 924 P.2d 1092 (Colo. App. 1996).

16-4-109. Disposition of security deposits upon forfeiture or termination of bond.

(1) (a) If a defendant is released upon deposit of cash in any amount or upon deposit of any stocks or bonds and the defendant is later discharged from all liability under the terms of the bond, the clerk of the court shall return the deposit to the person who made the deposit.

(b) (I) Notwithstanding the provisions of paragraph (a) of this subsection (1), if the depositor of the cash bond is the defendant and the defendant owes court costs, fees, fines, restitution, or surcharges at the time the defendant is discharged from all liability under the terms of the bond, the court may apply the deposit toward any amount owed by the defendant in court costs, fees, fines, restitution, or surcharges. If any amount of the deposit remains after paying the defendant's outstanding court costs, fees, fines, restitution, or surcharges, the court shall return the remainder of the deposit to the defendant.

(II) Notwithstanding the provisions of paragraph (a) of this subsection (1), if the depositor of the cash bond is not the defendant, but the defendant owes court costs, fees, fines, restitution, or surcharges at the time the defendant is discharged from all liability under the terms of the bond, the court may apply the deposit toward the amount owed by the defendant in court costs, fees, fines, restitution, or surcharges if the depositor agrees in writing to the use of the deposit for such purpose. If any amount of the deposit remains after paying the defendant's outstanding court costs, fees, fines, restitution, or surcharges, the court shall return the remainder of the deposit to the depositor.

(2) Where the defendant has been released upon deposit of cash, stocks, bonds, or property or upon a surety bond secured by property, if the defendant fails to appear in accordance with the primary condition of the bond, the court shall declare a forfeiture. Notice of the order of forfeiture shall be mailed by the court to the defendant, all sureties, and all depositors or assignees of any deposits of cash or property if such sureties,

depositors, or assignees have direct contact with the court, at their last known addresses. Such notice shall be sent within fourteen days after the entry of the order of forfeiture. If the defendant does not appear and surrender to the court having jurisdiction within thirty-five days from the date of the forfeiture or within that period satisfy the court that appearance and surrender by the defendant is impossible and without fault by such defendant, the court may enter judgment for the state against the defendant for the amount of the bail and costs of the court proceedings. Any cash deposits made with the clerk of the court shall be applied to the payment of costs. If any amount of such cash deposit remains after the payment of costs, it shall be applied to payment of the judgment.

(3) The court may order that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice so requires.

(4) If, within one year after judgment, the person who executed the forfeited bond as principal or as surety effects the apprehension or surrender of the defendant to the sheriff of the county from which the bond was taken or to the court which granted the bond, the court may vacate the judgment and order a remission less necessary and actual costs of the court.

(5) The provisions of this section shall not apply to appearance bonds written by compensated sureties, as defined in section 16-4-112 (2) (c), which bonds shall be subject to the provisions of section 16-4-112.

(6) On and after July 1, 2008, all moneys collected from payment toward a judgment entered for the state pursuant to subsection (2) of this section shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

Source: **L. 72:** R&RE, p. 208, § 1. **C.R.S. 1963:** § 39-4-109. **L. 73:** p. 1403, § 31. **L. 92:** (2) amended and (4) added, p. 443, § 7, effective July 1. **L. 99:** (5) added, p. 135, § 3, effective July 1. **L. 2007:** (6) added, p. 1537, § 28, effective May 31. **L. 2008:** (6) amended, p. 2146, § 20, effective June 4. **L. 2010:** (1) amended, (HB 10-1215), ch. 127, p. 421, § 1, effective August 11. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 846, § 66, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2008 act amending subsection (6), see section 1 of chapter 417, Session Laws of Colorado 2008.

ANNOTATION

Annotator's note. Since § 16-4-109 is similar to repealed § 39-2-18, C.R.S. 1963, § 39-2-18, CRS 53, and CSA, C. 48, § 444, relevant cases construing those provisions have been included in the annotations to this section.

There must be due process before any judgment may issue in connection with a bond forfeiture, and want of conformance to the procedure outlined by law is a violation of the surety's rights. *Herbertson v. People*, 160 Colo. 139, 415 P.2d 53 (1966).

"Forthwith" means promptly and without unnecessary delay. Notices of orders of forfeiture which were mailed to sureties 34 days and 43 days after the entry of such orders did not comply with the "forthwith" standard. *Moreno v. People*, 775 P.2d 1184 (Colo. 1989).

A trial court's failure to give surety "forthwith" notice does not result in a presumption

of prejudice to the surety. *Moreno v. People*, 775 P.2d 1184 (Colo. 1989).

Forfeiture of a bond based on a defendant's failure to appear is not disfavored. *Moreno v. People*, 775 P.2d 1184 (Colo. 1989).

Judgment cannot be entered same day as forfeiture. In a bail bond forfeiture proceeding at a hearing to determine whether the principal is in default, judgment against the surety cannot be entered on the same day. *Herbertson v. People*, 160 Colo. 139, 415 P.2d 53 (1966).

Section does not authorize setting aside a judgment on a forfeiture; it only authorizes setting aside a forfeiture prior to judgment. *People v. Caro*, 753 P.2d 196 (Colo. 1988).

Judgment for penal sum or costs allowed. When it appears that the defendant was pursued, apprehended, and returned by the state, without any assistance from those answerable for his

appearance, judgment should be entered for the penal sum of the bond, unless the court, in light of all of the circumstances surrounding defendant's failure to appear in the exercise of its sound discretion may see fit to enter judgment for a lesser amount. In no event should judgment be entered for an amount less than the full amount of costs occasioned by the defendant's failure to appear. *People v. Johnson*, 155 Colo. 392, 395 P.2d 19 (1964).

A judgment based on forfeiture of a criminal recognizance is final. *Van Gilder v. City & County of Denver*, 104 Colo. 76, 89 P.2d 529 (1939).

Surety should act promptly where recognizance forfeited. A surety on a criminal recognizance which has been forfeited who wishes to obtain relief from liability should act promptly and while evidence against the defendant is still available. *Van Gilder v. City & County of Denver*, 104 Colo. 76, 89 P.2d 529 (1939).

Acts of God, of the state, or of law relieve a surety from liability. A trial court has no jurisdiction to relieve the surety from liability on a bail bond except on grounds generally recognized by the law as excusing the performance of the undertaking, and such grounds exist only when the appearance of accused is made impossible by an act of God, an act of the state which is the beneficiary of the bond, or an act of law. Where the principal in a bail bond dies before the day of performance or is prevented by illness from appearing, the case is within the first category. Where the principal in a bail bond is in prison within the state, pursuant to a judgment of a court of competent jurisdiction of the state, the case comes within the second category. Where the party has been turned over to the federal court within the state by a prior bondsman and is serving a sentence by that court, or if the party has been arrested in the state where the obligation is given and sent out of the state by the governor upon requisition from another state or foreign jurisdiction, the case falls within the third category. *Allison v. People*, 132 Colo. 156, 286 P.2d 1102 (1955).

Where the defendant in a criminal case is imprisoned in another state at the time his case is called for trial and cannot appear pursuant to the conditions of his bond, and the surety thereon offers to defray the costs and expenses involved in returning the defendant to Colorado upon completion of the imprisonment which prevented his attendance in the trial court, the surety is relieved from a forfeiture. *Allison v. People*, 132 Colo. 156, 286 P.2d 1102 (1955).

Where the defendant is not produced at all, or turns up only after a long lapse of time, the courts will ordinarily deny remission without regard to the mitigating factors asserted in connection with his nonappearance, except in cases of death, insanity, or imprisonment. *People v. Johnson*, 155 Colo. 392, 395 P.2d 19 (1964).

Defendant who is transferred from the state's custody to a federal agency pursuant to a detainer has never been released into the legal custody of the surety who is consequently discharged from any liability on the bond. *People v. Gonzales*, 745 P.2d 263 (Colo. App. 1987).

Hospitalization is valid excuse for failure to appear. The defendant's hospitalization following an automobile accident is a valid excuse for his failure to appear at a scheduled hearing. *People v. Smith*, 673 P.2d 1026 (Colo. App. 1983).

The standard in subsection (3) is essentially an appeal to the conscience of the court. No clear rule can be set down which will guide the trial court in every case since the facts and circumstances of each individual case must be considered in their totality. No one factor will be determinative in all cases. *Owens v. People*, 194 Colo. 389, 572 P.2d 837 (1977).

And court has discretion to relieve forfeiture for other reasons. Following the rule that the discretion is in the court to do as it sees fit about forfeiting a bond, matters which would appeal to the sympathy of the ordinary individual, even if not to a judge, should be put in evidence. *Allison v. People*, 132 Colo. 156, 286 P.2d 1102 (1955).

The decision as to whether or not a forfeited bond should be remitted is entrusted to the trial court's discretion by subsection (3) of this section and *Crim. P.* 46. *Owens v. People*, 194 Colo. 389, 572 P.2d 837 (1977).

Trial court abused its discretion where the sureties made substantial efforts to locate, seize, and surrender defendant to authorities, and defendant was in custody in the adjoining county due principally to the efforts of the sureties. *People v. Mendez*, 708 P.2d 126 (Colo. App. 1985).

Forfeiture proceeding not to enrich public treasury. The enriching of the public treasury is not part of the object at which a forfeiture proceeding is aimed. *People v. Campbell*, 633 P.2d 509 (Colo. App. 1981).

Effect of material increase of risk to bondsman. When a bondsman enters into a surety agreement, he undertakes a calculated risk, so that events which materially increase that risk have the effect of terminating the obligation. *People v. Calloway*, 40 Colo. App. 543, 577 P.2d 1109 (1978).

Court not required to notify surety of defendant's permitted absence. Neither the case law nor subsection (2) imposes a duty on the court to give a surety notice of the permitted absence of a defendant from a hearing. *People v. Smith*, 673 P.2d 1026 (Colo. App. 1983).

By approving defendant's departure from state without notice to surety, the court terminates any control the surety might have had over the defendant and the court's action discharges the surety from any obligation under a bail bond.

People v. Calloway, 40 Colo. App. 543, 577 P.2d 1109 (1978).

Words "without leave" in the bond do not include departure from the jurisdiction of the court. But where the defendant given permission to absent himself only from the court and not from the court's jurisdiction, the court complies with the existing conditions of the bond contract, rather than changing them, materially or otherwise. People v. Smith, 673 P.2d 1026 (Colo. App. 1983).

Considerations in determining whether to order remission of forfeited bond. In exercising its discretion as to whether to order remission of a forfeited bond, the trial court may consider whether the defendant has been produced within a reasonable time after forfeiture, whether the people have lost any rights against the defendant, whether the defendant's failure to appear was wilful, and whether a forfeiture will subject the surety to an extreme hardship. People v. Schliesser, 39 Colo. App. 54, 563 P.2d 377, rev'd sub nom. on other grounds Owens v. People, 194 Colo. 389, 572 P.2d 837 (1977).

Such as hardship to surety. When state incurred no expenses and lost no legal rights due to defendant's nonappearance and guarantor of bond was subjected to extreme hardship due to monthly payments on the bond, the trial court abused its discretion in denying a motion for return of the forfeited bond. Owens v. People, 194 Colo. 389, 572 P.2d 837 (1977).

The only factor which the courts of this state have considered as basis for remission where the principal disappears is whether the surety will thereby suffer extreme hardship, such hardships as will cause destitution to a family, deprive children of support and education, or creditors of their just debts. People v. Johnson, 155 Colo. 392, 395 P.2d 19 (1964).

Where defendant is produced within reasonable time after forfeiture, remission will be granted to a surety if the people have not lost any rights as a result of his nonappearance, especially if his failure to appear was other than deliberate and wilful. People v. Johnson, 155 Colo. 392, 395 P.2d 19 (1964).

Where the accused had not been returned to custody at the time of the hearing on the motion to remit the bond, and where the guarantor did not establish that he would suffer extreme hard-

ship as a result of the forfeiture, the trial court did not abuse its discretion by denying the motion for reimbursement. People v. Gossett, 680 P.2d 1323 (Colo. App. 1984).

One of the functions of a bond is to relieve state of burden of securing appearance in court by giving bondsman a strong incentive to insure such attendance. Where person posting bond made money available to the court and did all that could be expected in attempting to secure defendant's attendance in court, purposes of bond were served and state will not be penalized by bond's remittance. People v. Saviano, 677 P.2d 414 (Colo. App. 1983).

Setting aside of bond forfeitures not warranted by this section where the defendant, released on bail after posting of bond, failed to appear at her hearing because police had told her that she would be arrested on another charge as soon as the arrest warrant for her was located. People v. Rothe, 43 Colo. App. 274, 606 P.2d 79 (1979).

Limitation on reversal of decision not to order remission. The decision not to order remission of a forfeited bond may be reversed only if it appears that the trial court has abused its discretion. People v. Schliesser, 39 Colo. App. 54, 563 P.2d 377, rev'd sub nom. on other grounds Owens v. People, 194 Colo. 389, 572 P.2d 837 (1977); People v. Rothe, 43 Colo. App. 274, 606 P.2d 79 (1979); People v. Saviano, 677 P.2d 414 (Colo. App. 1983).

Determination of "material increase of risk" to bondsman dependent upon terms of bond agreement. The court must look to the bond agreement to determine whether a trial court's action in allowing withdrawal of a guilty plea materially increases the risk of the bondsman and terminates the bondsman's surety obligation. Rodriguez v. People, 191 Colo. 540, 554 P.2d 291 (1976); People v. Tyler, 797 P.2d 22 (Colo. 1990).

Failure of district attorney to seek international extradition of defendant does not exonerate surety from liability where the defendant, a Mexican national, is located by surety in Mexico and it is known that Mexico does not extradite its nationals. People v. Bustamante-Payan, 856 P.2d 42 (Colo. App. 1993).

Applied in Walker, 665 P.2d 154 (Colo. App. 1983), aff'd sub. nom. Yording v. Walker, 683 P.2d 788 (Colo. 1984).

16-4-110. Enforcement when forfeiture not set aside. By entering into a bond, each obligor, whether he or she is the principal or a surety, submits to the jurisdiction of the court. His or her liability under the bond may be enforced, without the necessity of an independent action, as follows: The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered against him or her forthwith and execution issue thereon. Said citation may be served personally or by certified mail upon the obligor directed to the address given in the bond. Hearing on the citation shall be held not less than twenty-one days after service. The defendant's attorney and the prosecuting attorney shall be given notice of the hearing. At the conclusion of the hearing,

the court may enter a judgment for the state and against the obligor, and execution shall issue thereon as on other judgments. The district attorney shall have execution issued forthwith upon the judgment and deliver it to the sheriff to be executed by levy upon the stocks, bond, or real estate which has been accepted as security for the bond.

Source: L. 72: R&RE, p. 208, § 1. C.R.S. 1963: § 39-4-110. L. 73: p. 1403, § 32. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 846, § 67, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 16-4-110 is similar to repealed § 39-2-18, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Following proper forfeiture, the court should issue a citation, or other process in the nature of scire facias, directing those against whom judgment is sought to appear and answer within a reasonable time. *People v. Johnson*, 155 Colo. 392, 395 P.2d 19 (1964).

Following an order declaring a bond forfeited, the court should issue a citation or other process in the nature of scire facias, as provided in this section and Crim. P. 46, ordering the surety to show cause why judgment should not be entered against him. *E. & E. Bonding Co. v. People*, 160 Colo. 185, 415 P.2d 860 (1966).

Bond is not debt until forfeiture. Where no order is ever entered by the trial court in a criminal case declaring a bail bond forfeited nor a citation or other process issued as provided in this section and Crim. P. 46, it follows that the defense that a civil complaint against the sureties for a debt on the bond failed to state a claim

upon which relief could be granted is good. *E & E Bonding Co. v. People*, 160 Colo. 185, 415 P.2d 860 (1966).

Unnecessary to grant delay while surety searches for principal. To grant delay in order that sureties have time to search for, produce, and surrender the defendant would be without warrant. *People v. Johnson*, 155 Colo. 392, 395 P.2d 19 (1964).

Effect of material increase of risk to bondsman. When a bondsman enters into a surety agreement, he undertakes a calculated risk, so that events which materially increase that risk have the effect of terminating the obligation. *People v. Calloway*, 40 Colo. App. 543, 577 P.2d 1109 (1978).

By approving defendant's departure from state without notice to surety, the court terminates any control the surety might have had over the defendant and the court's action discharges the surety from any obligation under a bail bond. *People v. Calloway*, 40 Colo. App. 543, 577 P.2d 1109 (1978).

16-4-111. Type of bond in certain misdemeanor cases. (1) In exercising the discretion mentioned in section 16-4-104, the judge shall release the accused person upon personal recognizance if the charge is a class 3 misdemeanor or a petty offense, or any unclassified offense for a violation of which the maximum penalty does not exceed six months' imprisonment, and he shall not be required to supply a surety bond, or give security of any kind for his appearance for trial other than his personal recognizance, unless one or more of the following facts are found to be present:

- (a) The arrested person fails to sufficiently identify himself; or
- (b) The arrested person refuses to sign a personal recognizance; or
- (c) The continued detention or posting of a surety bond is necessary to prevent imminent bodily harm to the accused or to another; or
- (d) The arrested person has no ties to the jurisdiction of the court reasonably sufficient to assure his appearance, and there is substantial likelihood that he will fail to appear for trial if released upon his personal recognizance; or
- (e) The arrested person has previously failed to appear for trial for an offense concerning which he had given his written promise to appear; or
- (f) There is outstanding a warrant for his arrest on any other charge or there are pending proceedings against him for suspension or revocation of parole or probation.

Source: L. 72: R&RE, p. 208, § 1. C.R.S. 1963: § 39-4-111.

16-4-112. Enforcement procedures for compensated sureties - definitions.

(1) (a) The general assembly hereby finds, determines, and declares that the simplicity, effectiveness, and uniformity of bail forfeiture procedures applicable to compensated sureties who are subject to the regulatory authority of the Colorado division of insurance are matters of statewide concern.

(b) It is the intent of the general assembly in adopting this section to:

(I) Adopt a board system that will simplify and expedite bail bond forfeiture procedures by authorizing courts to bar compensated sureties who fail to pay forfeiture judgments from writing further bonds;

(II) Minimize the need for day-to-day involvement of the division of insurance in routine forfeiture enforcement; and

(III) Reduce court administrative workload.

(2) As used in this section, unless the context otherwise requires:

(a) "Bail insurance company" means an insurer as defined in section 10-1-102 (13), C.R.S., engaged in the business of writing appearance bonds through bonding agents, which company is subject to regulation by the division of insurance in the department of regulatory agencies.

(b) "Board system" means any reasonable method established by a court to publicly post or disseminate the name of any compensated surety who is prohibited from posting bail bonds.

(c) "Compensated surety" means any person who is in the business of writing appearance bonds and who is subject to regulation by the division of insurance in the department of regulatory agencies, including bonding agents and bail insurance companies. Nothing in this paragraph (c) authorizes bail insurance companies to write appearance bonds except through bail bonding agents.

(d) "On the board" means that the name of a compensated surety has been publicly posted or disseminated by a court as being ineligible to write bail bonds pursuant to paragraph (e) or (f) of subsection (5) of this section.

(3) Each court of record in this state shall implement a board system for the recording and dissemination of the names of those compensated sureties who are prohibited from posting bail bonds in the state due to an unpaid judgment as set forth in this section.

(4) By entering into a bond, each obligor, including the bond principal and compensated surety, submits to the jurisdiction of the court and acknowledges the applicability of the forfeiture procedures set forth in this section.

(5) Liability of bond obligors on bonds issued by compensated sureties may be enforced, without the necessity of an independent action, as follows:

(a) In the event a defendant does not appear before the court and is in violation of the primary condition of an appearance bond, the court may declare the bond forfeited.

(b) (I) If a bond is declared forfeited by the court, notice of the bail forfeiture order shall be served on the bonding agent by certified mail and on the bail insurance company by regular mail within fourteen days after the entry of said forfeiture. If the compensated surety on the bond is a cash bonding agent, only the cash bonding agent shall be notified of the forfeiture. Service of notice of the bail forfeiture on the defendant is not required.

(II) The notice described in subparagraph (I) of this paragraph (b) shall include, but need not be limited to:

(A) A statement intended to inform the compensated surety of the entry of forfeiture;

(B) An advisement that the compensated surety has the right to request a show cause hearing pursuant to subparagraph (III) of this paragraph (b) within fourteen days after receipt of notice of forfeiture, by procedures set by the court; and

(C) An advisement that if the compensated surety does not request a show cause hearing pursuant to subparagraph (III) of this paragraph (b), judgment shall be entered upon expiration of thirty-five days following the entry of forfeiture.

(III) A compensated surety, upon whom notice of a bail forfeiture order has been served, shall have fourteen days after receipt of notice of such forfeiture to request a hearing to show cause why judgment on the forfeiture should not be entered for the state against the compensated surety. Such request shall be granted by the court and a hearing shall be set within thirty-five days after entry of forfeiture or at the court's earliest convenience. At the

conclusion of the hearing requested by the compensated surety, if any, the court may enter judgment for the state against the compensated surety, or the court may in its discretion order further hearings. Upon expiration of thirty-five days after the entry of forfeiture, the court shall enter judgment for the state against the compensated surety if the compensated surety did not request within fourteen days after receipt of notice of such forfeiture a hearing to show cause.

(IV) If such a show cause hearing was timely set but the hearing did not occur within thirty-five days after the entry of forfeiture, any entry of judgment at the conclusion of the hearing against the compensated surety shall not be vacated on the grounds that the matter was not timely heard. If judgment is entered against a compensated surety upon the conclusion of a requested show cause hearing, and such hearing did not occur within thirty-five days after the entry of forfeiture, execution upon said judgment shall be automatically stayed for no more than one hundred twenty-six days after entry of forfeiture.

(V) (A) If at any time prior to the entry of judgment, the defendant appears in court, either voluntarily or in custody after surrender or arrest, the court shall on its own motion direct that the bail forfeiture be set aside and the bond exonerated at the time the defendant first appears in court; except that, if the state extradites such defendant, all necessary and actual costs associated with such extradition shall be borne by the surety up to the amount of the bond.

(B) If, at a time prior to the entry of judgment, the surety provides proof to the court that the defendant is in custody in any other jurisdiction within the state, the court shall on its own motion direct that the bail forfeiture be set aside and the bond exonerated; except that, if the court extradites the defendant, all necessary and actual costs associated with the extradition shall be borne by the surety up to the amount of the bond. If the court elects to extradite the defendant, any forfeiture will be stayed until such time the defendant appears in the court where the bond returns.

(C) A compensated surety shall be exonerated from liability upon the bond by satisfaction of the bail forfeiture judgment, surrender of the defendant, or order of the court. If the surety provides proof to the court that the defendant is in custody in any other jurisdiction within the state, within ninety-one days after the entry of judgment, the court shall on its own motion direct that the bail forfeiture judgment be vacated and the bond exonerated; except that, if the court extradites the defendant, all necessary and actual costs associated with the extradition shall be borne by the surety up to the amount of the bond. If the court elects to extradite the defendant, any judgment will be stayed until the time the defendant appears in the court where the bond returns.

(c) Execution upon said bail forfeiture judgment shall be automatically stayed for ninety-one days from the date of entry of judgment; except that, if judgment is entered against a compensated surety upon the conclusion of a requested show cause hearing, and such hearing did not occur within thirty-five days after the entry of forfeiture, the judgment shall be automatically stayed as set forth in subparagraph (IV) of paragraph (b) of this subsection (5).

(d) Upon the expiration of the stay of execution described in paragraph (c) of this subsection (5), the bail forfeiture judgment shall be paid forthwith by the compensated surety, if not previously paid, unless the defendant appears in court, either voluntarily or in custody after surrender or arrest, or the court enters an order granting an additional stay of execution or otherwise vacates the judgment.

(e) If a bail forfeiture judgment is not paid on or before the expiration date of the stay of execution described in paragraph (c) of this subsection (5), the name of the bonding agent shall be placed on the board of the court that entered the judgment. The bonding agent shall be prohibited from executing any further bail bonds in this state until the judgment giving rise to placement on the board is satisfied, vacated, or otherwise discharged by order of the court.

(f) If a bail forfeiture judgment remains unpaid for thirty-five days after the name of the bonding agent is placed on the board, the court shall send notice by certified mail to the bail insurance company for whom the bonding agent has executed the bond that if said judgment is not paid within fourteen days after the date of mailing of said notice, the name of the bail insurance company shall be placed on the board and such company shall be prohibited from

executing any further bail bonds in this state until the judgment giving rise to placement on the board is satisfied, vacated, or otherwise discharged by order of the court.

(g) A compensated surety shall be removed forthwith from the board only after every judgment for which the compensated surety was placed on the board is satisfied, vacated, or discharged or stayed by entry of an additional stay of execution. No compensated surety shall be placed on the board in the absence of the notice required by paragraph (b) or (f) of this subsection (5).

(h) The court may order that a bail forfeiture judgment be vacated and set aside or that execution thereon be stayed upon such conditions as the court may impose, if it appears that justice so requires.

(i) A compensated surety shall be exonerated from liability upon the bond by satisfaction of the bail forfeiture judgment, surrender of the defendant, or by order of the court. If the defendant appears in court, either voluntarily or in custody after surrender or arrest, within ninety-one days after the entry of judgment, the court, at the time the defendant first appears in court, shall on its own motion direct that the bail forfeiture judgment be vacated and the bond exonerated; except that, if the state extradites such defendant, all necessary and actual costs associated with such extradition shall be borne by the surety up to the amount of the bond.

(j) If, within one year after payment of the bail forfeiture judgment, the compensated surety effects the apprehension or surrender of the defendant and provides reasonable notice to the court to which the bond returns that the defendant is available for extradition, the court shall vacate the judgment and order a remission of the amount paid on the bond less any necessary and actual costs incurred by the state and the sheriff who has actually extradited the defendant.

(k) Bail bonds shall be deemed valid notwithstanding the fact that a bond may have been written by a compensated surety who has been placed on the board pursuant to paragraph (e) or (f) of this subsection (5) and is otherwise prohibited from writing bail bonds. The ineligibility of a compensated surety to write bonds because the name of the compensated surety has been placed on the board pursuant to paragraph (e) or (f) of this subsection (5) shall not be a defense to liability on any appearance bond accepted by a court.

(l) The automatic stay of execution upon a bail forfeiture judgment as described in paragraph (c) of this subsection (5) shall expire pursuant to its terms unless the defendant appears and surrenders to the court having jurisdiction or satisfies the court that appearance and surrender by the defendant was impossible and without fault by such defendant. The court may order that a forfeiture be set aside and judgment vacated as set forth in paragraph (h) of this subsection (5).

(6) A bail insurance company shall not write bail bonds unless through a licensed bail bonding agent.

Source: **L. 99:** Entire section added, p. 131, § 2, effective July 1. **L. 2003:** (2)(a) amended, p. 623, § 39, effective July 1. **L. 2004:** (5)(b)(V) amended, p. 1755, § 12, effective July 1. **L. 2012:** (2)(a) and (2)(c) amended and (6) added, (HB 12-1266), ch. 280, p. 1526, § 45, effective July 1; (5)(b)(I), (5)(b)(II)(B), (5)(b)(II)(C), (5)(b)(III), (5)(b)(IV), (5)(b)(V)(C), (5)(c), (5)(f), and (5)(i) amended, (SB 12-175), ch. 208, p. 847, § 68, effective July 1.

Editor's note: (1) Section 52 of chapter 280, Session Laws of Colorado 2012, provides that the act amending subsections (2)(a) and (2)(c) and adding subsection (6) applies to offenses committed and applications submitted on or after July 1, 2012.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (5)(b)(I), (5)(b)(II)(B), (5)(b)(II)(C), (5)(b)(III), (5)(b)(IV), (5)(b)(V)(C), (5)(c), (5)(f), and (5)(i) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Subsection (5)(h) authorizes a trial court to order that a bail forfeiture judgment be set aside upon such conditions as the court may impose, "if it appears that justice so requires". This standard is essentially an appeal to the conscience of the court. No clear rule can be set down that will guide the trial court in every instance, because the court must consider the totality of facts and circumstances in each individual case. *People v. Escalera*, 121 P.3d 306 (Colo. App. 2005); *People v. Diaz-Garcia*, 159 P.3d 679 (Colo. App. 2006).

Factors the court should consider include: (1) The willfulness of the defendant's violations of the conditions of bail; (2) the surety's participation in locating or apprehending the defendant; (3) the cost, inconvenience, and prejudice suffered by the state resulting from the violation;

(4) any intangible costs; (5) the public interest in ensuring the defendant's appearance; and (6) any other mitigating factors. These factors encompass the principle that generally only acts of God, of the state, or of law will relieve a surety from liability. *People v. Bustamante-Payan*, 856 P.2d 42 (Colo. App. 1993) (decided under former § 16-4-109 (3)); *People v. Escalera*, 121 P.3d 306 (Colo. App. 2005); *People v. Diaz-Garcia*, 159 P.3d 679 (Colo. App. 2006).

In exercising its discretion, a trial court should be mindful of the policies concerning bail, including the policy that sureties should not be penalized when it appears they are unable, through no fault of their own, to perform the condition of the bond. *People v. Escalera*, 121 P.3d 306 (Colo. App. 2005).

PART 2

BAIL AFTER CONVICTION

16-4-201. Bail after conviction. (1) (a) After conviction, either before or after sentencing, the defendant may orally, or in writing, move for release on bail pending determination of a motion for a new trial or motion in arrest of judgment or during any stay of execution or pending review by an appellate court, and, except in cases where the defendant has been convicted of a capital offense, the trial court, in its discretion, may continue the bond given for pretrial release, or may release the defendant on increased bail, or require bond under one or more of the alternatives set forth in section 16-4-104.

(b) The district attorney must be present at the time the court passes on a defendant's motion for release on bail after conviction.

(c) Bond shall not be continued in effect following a plea of guilty or of nolo contendere or following conviction unless the written consents of the sureties, if any, are filed with the court. In the initial bond documents filed with the court, a surety shall indicate, in writing and at the time of the posting of bond, if the surety consents to the continuance of the bond through sentencing of the defendant. If the surety does not provide written consent at the time of the initial posting of bond, the surety may provide written consent at the time of the plea of guilty or nolo contendere or within a reasonable time thereafter as determined by the court. A court shall not require the posting of any form of bond that allows for the continuance of said bond after a plea of guilty or of nolo contendere or following conviction without filing with the court the written consents of the sureties, if any.

(d) For a defendant who has been convicted of a felony offense, a condition of bail bond shall be that the court shall require the defendant to execute or subscribe a written prior waiver of extradition stating that the defendant consents to extradition to this state and waives all formal procedures incidental to extradition proceedings in the event that he or she is arrested in another state while released on such bail bond and acknowledging that he or she shall not be admitted to bail in any other state pending extradition to this state.

(2) After conviction, a defendant who is granted probation pursuant to section 18-1.3-202, C.R.S., may orally, or in writing, move for a stay of probation pending determination of a motion for a new trial or a motion in arrest of judgment or pending review by an appellate court. The trial court, in its discretion, may grant a stay of probation and require the defendant to post an appeal bond under one or more of the alternatives set forth in section 16-4-104. The district attorney shall be present at the time the court passes on a defendant's motion for stay of probation after conviction.

Source: L. 72: R&RE, p. 209, § 1. C.R.S. 1963: § 39-4-201. L. 85: Entire section amended, p. 621, § 3, effective July 1. L. 94: Entire section amended, p. 97, § 2, effective

July 1. **L. 2002:** (2) amended, p. 1490, § 131, effective October 1. **L. 2006:** (1) amended, p. 341, § 3, effective July 1. **L. 2012:** (1)(c) amended, (HB 12-1310), ch. 268, p. 1393, § 5, effective June 7.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 16-4-201 is similar to repealed § 39-2-19, CRS 53, and laws antecedent to CSA, C. 48, § 443, relevant cases construing those provisions have been included in the annotations to this section.

The court had authority at common law to admit to bail after conviction. *People v. Junes*, 77 Colo. 38, 233 P. 1109 (1925).

The trial court retains jurisdiction to grant or deny an appeal bond even after the defendant has filed a notice of appeal. The trial court retains jurisdiction to act with respect to matters which are not relative to or do not affect the order or judgment on appeal. Since the granting or denial of an appeal bond has no impact or bearing upon the underlying conviction or related issues pending on appeal, the trial court retains jurisdiction. *People v. Stewart*, 26 P.3d 17 (Colo. App. 2000), rev'd on other grounds, 55 P.3d 107 (Colo. 2002).

Purpose of section. The purpose of § 16-4-106 and this section is to authorize the court to exercise discretion rather than follow a fixed policy and to permit a recognizance to remain in effect, without the necessity of a new bond, after conviction and until disposition of the case in the trial court. *Trujillo v. District Court*, 131 Colo. 428, 282 P.2d 703 (1955).

Section 16-4-106 and this section must be read together and reconciled if possible. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

Power to admit to bail after conviction is discretionary with the trial court; it is not a matter of right. *People v. Junes*, 77 Colo. 38, 233 P. 1109 (1925).

Entry of guilty verdict or acceptance of guilty plea completes conviction. For purposes of the bail bond statute, a "conviction" occurs and is complete either upon the entry of a guilty verdict following trial or upon the acceptance of a plea of guilty, either to the original charge or to a lesser included charge. *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975).

"Conviction" occurs upon entry of a plea of guilty. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

The word "conviction" in this section cannot include sentencing; it must refer to an occurrence before sentence. *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975).

Misdescription of crime in recognizance, after conviction, is not fatal. *People v. Junes*, 77 Colo. 38, 233 P. 1109 (1925).

Where defendant entered plea of guilty, surety's obligation under recognizance bond was terminated. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

And trial court could not continue bond without first obtaining surety's consent. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

Although the trial judge may continue the original bond to final disposition, he must obtain the consent of the surety to continue it beyond conviction. *Rodriguez v. People*, 191 Colo. 540, 554 P.2d 291 (1976).

This section does not require separate or renewed consent of sureties at various stages of the proceeding. *O'Neil v. People*, 198 Colo. 9, 595 P.2d 235 (1979).

Statutes relating to bail constitute part of the surety's contract. *People v. Hampton*, 662 P.2d 498 (Colo. App. 1983).

Applicability of pretrial bond to post-trial period. While the terms of the original pretrial bond may also cover the post-trial period, without such a provision, this section is controlling as to post-trial continuances of a bond. Where the language and terms of the original bond do not provide the court with the requisite written consent to continue liability beyond conviction, oral statements to the court, after the defendant fails to appear, do not bind the surety. *People v. Hampton*, 662 P.2d 498 (Colo. App. 1983).

Where contract deemed to impose postconviction liability. By executing bail bond contracts containing language binding them until the final sentence or order of the court, sureties are deemed to have given the statutorily required written consent to continue their liability on the bonds after conviction and until sentencing. *O'Neil v. People*, 198 Colo. 9, 595 P.2d 235 (1979).

Defendant's tender of signed petition and stipulation constituted a "plea of guilty" within the meaning of the bond statute, and a formal statement by the court accepting the guilty plea was not necessary. *People v. Hernandez*, 902 P.2d 846 (Colo. App. 1995).

A conviction is not necessary to exonerate the surety; a plea of guilty suffices. *People v. Hernandez*, 902 P.2d 846 (Colo. App. 1995).

Entry of a guilty plea constitutes an "answer" to the charges and satisfies the terms of a bond that bound the surety until the defendant

“answered” the charges against him. *People v. Hernandez*, 902 P.2d 846 (Colo. App. 1995). **Applied** in *People v. Tyler*, 784 P.2d 815 (Colo. App. 1989).

16-4-201.5. Right to bail after a conviction - exceptions. (1) The court may grant bail after a person is convicted, pending sentencing or appeal, only as provided by this part 2; except that no bail is allowed for persons convicted of:

- (a) Murder;
- (b) Any felony sexual assault involving the use of a deadly weapon;
- (c) Any felony sexual assault committed against a child who is under fifteen years of age;
- (d) A crime of violence, as defined in section 18-1.3-406, C.R.S.;
- (e) Any felony during the commission of which the person used a firearm;
- (f) A crime of possession of a weapon by a previous offender, as described in section 18-12-108 (2) (b), (2) (c), (4) (b), (4) (c), or (5), C.R.S.; or
- (g) Child abuse, as described in section 18-6-401 (7) (a) (I), C.R.S.

(2) The court shall not set bail that is otherwise allowed pursuant to subsection (1) of this section unless the court finds that:

- (a) The person is unlikely to flee and does not pose a danger to the safety of any person or the community; and
 - (b) The appeal is not frivolous or is not pursued for the purpose of delay.
- (3) The provisions of this section shall apply to offenses committed on or after January 1, 1995.

Source: **L. 99:** Entire section added, p. 57, § 8, effective March 15. **L. 2000:** (1) amended, p. 635, § 6, effective July 1. **L. 2002:** (1)(d) amended, p. 1490, § 132, effective October 1. **L. 2007:** (1)(e) and (1)(f) amended and (1)(g) added, p. 1686, § 2, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(d), see section 1 of chapter 318, Session Laws of Colorado 2002.

16-4-202. Appeal bond hearing - factors to be considered. (1) The court shall consider the following factors in deciding whether or not an appeal bond should be granted and determining the amount of bail and the type of bond to be required:

- (a) The nature and circumstances of the offense before the court and the sentence imposed for that offense;
- (b) The defendant's length of residence in the community;
- (c) The defendant's employment, family ties, character, reputation, and mental condition;
- (d) The defendant's past criminal record and record of appearance at court proceedings;
- (e) Any showing of intimidation or harassment of witnesses or potential witnesses, or likelihood that the defendant will harm or threaten any person having a part in the trial resulting in conviction;
- (f) Any other criminal charges pending against the defendant and the potential sentences should the defendant be convicted of those charges;
- (g) The circumstances of, and sentences imposed in, any criminal case in which the defendant has been convicted but execution stayed pending appeal;
- (h) The likelihood that the defendant will commit additional criminal offenses during the pendency of such defendant's appeal; and
- (i) The defendant's likelihood of success on appeal.

Source: **L. 72:** R&RE, p. 209, § 1. **C.R.S. 1963:** § 39-4-202. **L. 93:** Entire section amended, p. 1726, § 3, effective July 1.

ANNOTATION

Trial court must hold hearing and make findings on defendant's motion for an appeal bond. *People v. Yi*, 741 P.2d 1264 (Colo. App. 1987).

But defendant not entitled to a hearing on a motion for an appeal bond pending appeal of a

postconviction order, since defendant had already had the opportunity for and the benefit of a meaningful appellate review of his conviction. *People v. Roca*, 17 P.3d 835 (Colo. App. 2000).

16-4-203. Appeal bond hearing - order. (1) After considering the factors set forth in section 16-4-202, the court may enter one of the following orders:

- (a) Deny the defendant appeal bond; or
- (b) Repealed.
- (c) Grant the defendant appeal bond.

(2) If the court determines that an appeal bond should be granted, the court shall set the amount of bail and order either:

(a) An appeal bond in the amount of the bail to be executed and secured by depositing cash or property as provided by statute or by an approved surety or sureties; or

(b) An appeal bond in the amount of the bail to be executed on the personal recognizance of the defendant.

(2.5) If the court determines that an appeal bond should be granted, the court shall provide as an explicit condition of the appeal bond that the defendant not harass, molest, intimidate, retaliate against, or tamper with the victim of or any prosecution witnesses to the crime, unless the court makes written findings that such condition is not necessary.

(3) In addition to the above, the court may:

(a) Place the defendant in the custody of the probation department or a designated person who agrees to supervise him;

(b) Place restrictions on the travel, activities, associations, or place of abode of the defendant during the pendency of the appeal;

(c) Impose any other condition deemed necessary to assure defendant's appearance as required.

(4) Upon written motion of the state or the defendant, the sentencing court may increase or reduce the amount of appeal bond, alter the security for or conditions of the appeal bond, or revoke the appeal bond. Notice of hearing on the motion shall be given in the manner provided in section 16-4-107.

(5) If the defendant has been charged with committing another felony or class 1 misdemeanor while he is at liberty on an appeal bond, and probable cause has been found with respect to such other felony or class 1 misdemeanor or the defendant has waived his right to a probable cause determination as to the felony or class 1 misdemeanor, the court shall revoke his appeal bond on motion of the attorney general or district attorney.

Source: **L. 72:** R&RE, p. 210, § 1. **C.R.S. 1963:** § 39-4-203. **L. 82:** (1)(a) amended and (1)(b) repealed, p. 307, §§ 1, 2, effective March 17. **L. 94:** (2.5) added, p. 2022, § 1, effective June 3.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Imposition of a "cash only" appeal bond is within a trial court's authority and discretion.

People v. Hoover, 119 P.3d 564 (Colo. App. 2005).

16-4-204. Appellate review of terms and conditions of bail or appeal bond.

(1) After entry of an order pursuant to section 16-4-107 or 16-4-201, the defendant or the state may seek review of said order by filing a petition for review in the appellate court. If an order has been entered pursuant to section 16-4-104, 16-4-107, or 16-4-201, the petition

shall be the exclusive method of appellate review.

(2) The petition shall be in writing, shall be served as provided by court rule for service of motions, and shall have appended thereto a transcript of the hearing held pursuant to section 16-4-107 or 16-4-203. The opposing party may file a response thereto within seven days or as provided by court rule.

(3) After review, the appellate court may:

(a) Remand the petition for further hearing if it determines that the record does not disclose the findings upon which the court entered the order; or

(b) Order the trial court to modify the terms and conditions of bail or appeal bond; or

(c) Order the trial court to modify the terms and conditions of bail or appeal bond and remand for further hearing on additional conditions of bail or appeal bond; or

(d) Dismiss the petition.

(4) Nothing contained in this section shall be construed to deny any party the rights secured by section 21 of article II of the Colorado constitution.

Source: L. 72: R&RE, p. 211, § 1. C.R.S. 1963: § 39-4-204. L. 2012: (2) amended, (SB 12-175), ch. 208, p. 848, § 69, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 16-4-204 is similar to repealed § 39-2-17, CRS 53, relevant cases construing that provision have been included in the annotations to this section.

Review of excessive bail. Where the bond fixed by the trial court in a criminal case is so grossly excessive as to amount to a denial of the right of accused to be admitted to bail in a reasonable amount, the supreme court will direct that the accused be admitted to bail in reasonable amount. *Altobella v. District Court*, 153 Colo. 143, 385 P.2d 663 (1963).

If the bail is deemed excessive, relief may be sought by suitable proceedings, but not through appeal after conviction of the crime charged. *Corbett v. People*, 153 Colo. 457, 387 P.2d 409 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1346, 12 L. Ed.2d 302 (1964).

Review of refusal to admit prisoner to bail. Where a petitioner is adjudged guilty of con-

tempt of court for refusal to answer questions before the grand jury and is sentenced to four months in jail, refusal of the trial court to stay execution or admit the petitioner to bail pending review by the supreme court is an abuse of discretion. *Smaldone v. People*, 153 Colo. 208, 385 P.2d 127 (1963).

A claim of error that court refused to admit defendant to bail may be raised by appropriate proceedings, but not by appeal after conviction of the crime charged. *Corbett v. People*, 153 Colo. 457, 387 P.2d 409 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1346, 12 L. Ed.2d 302 (1964).

Applied in *People v. Velasquez*, 641 P.2d 943 (Colo. 1982), appeal dismissed, 459 U.S. 805, 103 S. Ct. 28, 74 L. Ed.2d 43 (1982), reh'g denied, 459 U.S. 1138, 103 S. Ct. 774, 74 L. Ed.2d 986 (1983).

16-4-205. When appellate court may fix appeal bond. If a trial court fails or refuses to grant or deny an appeal bond within forty-eight hours following application for such bond, the defendant may move the appellate court for such an order, and that court shall promptly hear and rule upon the motion.

Source: L. 72: R&RE, p. 211, § 1. C.R.S. 1963: § 39-4-205.

PART 3

UNIFORM RENDITION OF ACCUSED PERSONS ACT

16-4-301. Short title. This part 3 shall be known and may be cited as the "Uniform Rendition of Accused Persons Act", and shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Source: L. 72: R&RE, p. 213, § 1. C.R.S. 1963: § 39-4-304.

16-4-302. Arrest of person illegally in state. (1) If a person who has been charged with crime in another state and released from custody prior to final judgment, including the final disposition of any appeal, is alleged to have violated the terms and conditions of his release, and is present in this state, a designated agent of the court, judge, or magistrate who authorized the release may request the issuance of a warrant for the arrest of the person and an order authorizing his return to the demanding court, judge, or magistrate. Before the warrant is issued, the designated agent shall file with the judge of a court of record of this state the following documents:

(a) An affidavit stating the name and whereabouts of the person whose return is sought, the crime with which the person was charged, the time and place of the crime charged, and the status of the proceedings against him; and

(b) A certified copy of the order or other document specifying the terms and conditions under which the person was released from custody; and

(c) A certified copy of an order of the demanding judge, court, or magistrate stating the manner in which the terms and conditions of the release have been violated and designating the affiant its agent for seeking the return of the person.

(2) Upon initially determining that the affiant is a designated agent of the demanding judge, court, or magistrate, and that there is probable cause for believing that the person whose return is sought has violated the terms and conditions of his release, the judge of this state shall issue a warrant to a peace officer of this state for the person's arrest.

(3) The judge of this state shall notify the district attorney of his action and shall direct him to investigate the case and to ascertain the validity of the affidavits and documents required by subsection (1) of this section and the identity and authority of the affiant.

Source: L. 72: R&RE, p. 211, § 1. C.R.S. 1963: § 39-4-301.

16-4-303. Hearing and right to counsel. (1) The person whose return is sought shall be brought before the judge of this state immediately upon arrest pursuant to the warrant; whereupon the judge shall set a time and place for hearing and shall advise the person of his right to have the assistance of counsel, to confront the witnesses against him, and to produce evidence in his own behalf at the hearing.

(2) The person whose return is sought may at this time in writing waive the hearing and agree to be returned to the demanding court, judge, or magistrate. If a waiver is executed, the judge shall issue an order pursuant to section 16-4-304.

(3) The judge may impose conditions of release authorized by the laws of this state which will reasonably assure the appearance at the hearing of the person whose return is sought.

Source: L. 72: R&RE, p. 212, § 1. C.R.S. 1963: § 39-4-302.

16-4-304. Order of return to demanding court. The district attorney shall appear at the hearing and report to the judge the results of his investigation. If the judge finds that the affiant is a designated agent of the demanding court, judge, or magistrate, and that the person whose return is sought was released from custody by the demanding court, judge, or magistrate, and that the person has violated the terms or conditions of his release, the judge shall issue an order authorizing the return of the person to the custody of the demanding court, judge, or magistrate forthwith.

Source: L. 72: R&RE, p. 212, § 1. C.R.S. 1963: § 39-4-303.

ARTICLE 5

Commencement of Criminal Action

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1

16-5-208.

Information not filed - reasons.

16-5-209.

Judge may require prosecution.

GENERAL PROVISIONS

PART 3

16-5-101. Commencement of prosecution.

PRELIMINARY HEARING

16-5-102. Summons to corporate defendant.

16-5-301.

Preliminary hearing or waiver - dispositional hearing.

16-5-103. Identity theft victims - definitions.

PART 4

PART 2

STATUTE OF LIMITATIONS

INDICTMENTS AND INFORMATIONS

16-5-401.

Limitation for commencing criminal proceedings and juvenile delinquency proceedings.

16-5-201. Indictments - allegations - form.

16-5-401.1.

Legislative intent in enacting section 16-5-401 (6) and (7).

16-5-202. Requisites of information - form.

16-5-402.

Limitation for collateral attack upon trial judgment.

16-5-203. Furnishing witnesses' names.

16-5-204. Witnesses before a grand jury - procedure.

PART 5

16-5-205. Informations - authority to file - indictments - warrants and summons.

INCARCERATION

16-5-205.5. Grand jury reports.

16-5-501.

Prosecuting attorney - incarceration - legal representation and supporting services at state expense.

16-5-206. Summons in lieu of warrant.

16-5-207. Standards and criteria relating to issuance of summons in lieu of warrant.

PART 1

GENERAL PROVISIONS

16-5-101. Commencement of prosecution. (1) Unless otherwise provided by law, a criminal action for violation of any statute may be commenced in one of the following ways:

- (a) By the return of an indictment by a grand jury;
- (b) By the filing of an information in the district court;
- (c) By the filing of a felony complaint in the county court;
- (d) Prosecution of a misdemeanor or petty offense may be commenced in the county court by:

- (I) The issuance of a summons and complaint;
- (II) The issuance of a summons following the filing of a complaint;
- (III) The filing of a complaint following an arrest; or
- (IV) The filing of a summons and complaint following arrest; or, in the event that the offense is a class 2 petty offense, by the issuance of a notice of penalty assessment pursuant to section 16-2-201.

(2) The procedures governing felony complaints filed in the county court and warrants or summons issued in connection therewith shall be in accordance with and as required by the applicable provisions of the rules of criminal procedure promulgated by the supreme court of Colorado.

(3) Where the offense charged is a misdemeanor or petty offense, the action may be commenced in the county court as provided in subsection (1) (d) of this section, and the issues shall then be tried in the county court. As to misdemeanors or petty offenses thus filed and tried in the county court, the simplified procedures enumerated in part 1 of article 2 of this title shall be applicable.

Source: L. 72: R&RE, p. 213, § 1. C.R.S. 1963: § 39-5-101.

ANNOTATION

Prosecution may seek a grand jury indictment after dismissal by a county court on a preliminary hearing for lack of probable cause as an alternative to appealing to or filing a direct information in the district court. *People v. Noline*, 917 P.2d 1256 (Colo. 1996).

One charged with crime must be brought into court on a complaint, information, or indictment made, or found, according to the requirements of the law. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957) (decided under repealed § 39-4-1, CRS 53).

It was not essential for all members of a grand jury who issued a true bill to specifi-

cally observe the formal charging paper and approve its formal language. *People v. Campbell*, 194 Colo. 451, 573 P.2d 557 (1978).

Grand jury may properly return an indictment even after the prosecution has filed a criminal complaint. Defendant is not entitled to a preliminary hearing after a grand jury returned an indictment. *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004).

Applied in *People v. Lopez*, 41 Colo. App. 75, 587 P.2d 792 (1978); *Thomas v. County Court*, 198 Colo. 87, 596 P.2d 768 (1979); *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

16-5-102. Summons to corporate defendant. (1) When a corporation is charged with the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(2) The summons for the appearance of a corporation may be served by a peace officer in the manner provided for service of summons upon a corporation in a civil action.

Source: L. 72: R&RE, p. 213, § 1. C.R.S. 1963: § 39-5-102.

16-5-103. Identity theft victims - definitions. (1) (a) A person whose identifying information has been mistakenly associated with an arrest, summons, summons and complaint, felony complaint, information, indictment, or conviction is a victim of identity theft for the purposes of this section.

(b) If a criminal charge is not pending, a victim of identity theft may, with notice to the prosecutor, petition the court with jurisdiction over the arrest, summons, summons and complaint, felony complaint, information, indictment, or conviction to judicially determine the person's factual innocence. Alternatively, the court, on its own motion, may make such a determination in the case. If a criminal charge is pending, the prosecuting attorney may request the court to make such a determination. A judicial determination of factual innocence made pursuant to this section may be determined, with or without a hearing, upon declarations, affidavits, or police reports or upon any other relevant, material, reliable information submitted by the parties and records of the court.

(c) If the court determines that there is no reasonable cause to believe that a victim of identity theft committed the offense for which the victim's identity has been mistakenly associated with an arrest, summons, summons and complaint, felony complaint, information, indictment, or conviction, the court shall find the victim factually innocent of that offense. If the victim is found factually innocent, the court shall issue an order certifying this determination.

(2) After the court has determined that a person is factually innocent, the court may order the name and associated identifying information contained in court records, files, or a criminal justice record to be labeled to show that the information is not accurate and does not reflect the perpetrator's identity because the victim of identity theft was impersonated.

- (3) A person who knows or reasonably suspects that his or her identifying information has been unlawfully used by another person may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over the victim’s residence or over the place where a crime was committed. Such agency shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts. If the suspected crime was committed in a different jurisdiction, the local law enforcement agency may refer the matter to the local law enforcement agency where the suspected crime was committed for investigation of the facts.
- (4) A court that has issued a determination of factual innocence pursuant to this section may at any time vacate that determination if the petition, or information submitted in support of the petition, contains a material misrepresentation or fraud. If the court vacates a determination of factual innocence, the court shall issue an order rescinding any orders made pursuant to subsection (2) of this section.
- (5) For the purposes of this section:
- (a) “Biometric data” means data, such as fingerprints, voice prints, or retina and iris prints, that capture, represent, or enable the reproduction of the unique physical attributes of an individual.
- (b) “Identifying information” means information that, alone or in conjunction with other information, identifies an individual, including but not limited to such individual’s:
- (I) Name;
 - (II) Address;
 - (III) Birth date;
 - (IV) Telephone, social security, taxpayer identification, driver’s license, identification card, alien registration, government passport, or checking, savings, or deposit account number;
 - (V) Biometric data;
 - (VI) Unique electronic identification device;
 - (VII) Telecommunication identifying device.
- (c) “Telecommunication identifying device” means a number, code, or magnetic or electronic device that enables the holder to use telecommunications technology to access an account; obtain money, goods, or services; or transfer funds.

Source: L. 2004: Entire section added, p. 1736, § 2, effective July 1.

PART 2

INDICTMENTS AND INFORMATIONS

16-5-201. Indictments - allegations - form. Every indictment or accusation of the grand jury shall be deemed sufficient technically and correct which states the offense in the terms and language of the statute defining it, including either conjunctive or disjunctive clauses, or so plainly that the nature of the offense may be easily understood by the jury. Pleading in either the conjunctive or the disjunctive shall place a defendant on notice that the prosecution may rely on any or all of the alternatives alleged. The commencement of the indictment shall be in substance as follows:

STATE OF COLORADO)
) ss.
County of.....)

Of the term of the court, in the year The grand jurors chosen, selected, and sworn, in and for the county of, in the name and by the authority of the people of the state of Colorado, upon their oaths, present. (Here insert the offense, the name of the person charged, and the time and place of committing the same, with reasonable certainty.) Every indictment shall be signed by the foreman of the grand jury returning it and by the prosecuting attorney, his or her assistant, or his or her deputy.

Source: L. 72: R&RE, p. 214, § 1. C.R.S. 1963: § 39-5-201. L. 2003: Entire section amended, p. 972, § 1, effective April 17.

ANNOTATION

- I. General Consideration.
- II. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "Being Specific", see 29 Dicta 195 (1952).

Annotator's note. Since § 16-5-201 is similar to repealed § 39-3-1, C.R.S. 1963, CSA, C. 48, § 447, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

It is the province of the general assembly to provide what elements of an offense must be set forth in an indictment or information. Edwards v. People, 176 Colo. 478, 491 P.2d 566 (1971).

Purpose of section. This section and § 16-10-202, dealing with variance between allegations and proof, undoubtedly were adopted by the general assembly with a view of removing from consideration those technical rules of pleading long the bane of criminal procedure at common law and the occasion of many miscarriages of justice in antiquated times. Helser v. People, 100 Colo. 371, 68 P.2d 543 (1937).

One purpose of the requirements of this section is to provide sufficient notice to defendants to permit the preparation of defenses prior to trial. People v. Thimmes, 643 P.2d 780 (Colo. App. 1981).

Purposes of criminal indictment by grand jury are twofold: First, it must give the defendant sufficient notice of the crime that has allegedly been committed so that a defense may be prepared; second, it must define the acts which constitute the crime with sufficient definiteness so that the defendant may plead the resolution of the indictment as a bar to subsequent proceedings. People v. Tucker, 631 P.2d 162 (Colo. 1981).

This section does not encourage subtleties and hypertechnical refinements in criminal cases. Sweek v. People, 85 Colo. 479, 277 P. 1 (1929).

An information or indictment charging offense in language of the statute is sufficient. Schneider v. People, 30 Colo. 493, 71 P. 369 (1903); Knepper v. People, 63 Colo. 396, 167 P. 779 (1917); Balfe v. People, 66 Colo. 94, 179 P. 137 (1919); People v. Maestas, 199 Colo. 143, 606 P.2d 849 (1980).

An indictment or information is sufficient which describes an offense either in the lan-

guage of the statute or so plainly that the nature of the crime may be readily and easily understood by a jury. Albert v. People, 90 Colo. 219, 7 P.2d 822 (1932).

A charge so worded that it is "sufficient technically and correct", sufficiently sets forth the substance of the offense. If an indictment is correct when it charges in the words of the statute, then it must contain the substance of the offense. Papas v. People, 98 Colo. 306, 55 P.2d 1330 (1936).

It need not follow the exact language of the statute. Sarno v. People, 74 Colo. 528, 223 P. 41 (1924); Albert v. People, 90 Colo. 219, 7 P.2d 822 (1932).

It must be so charged that it may be readily understood by accused and jury. Tracy v. People, 65 Colo. 226, 176 P. 280 (1918); Junes v. People, 72 Colo. 86, 209 P. 512 (1922); McConnell v. People, 73 Colo. 99, 213 P. 674 (1923); Sarno v. People, 74 Colo. 528, 223 P. 41 (1924); Cliff v. People, 84 Colo. 254, 269 P. 907 (1928); Compton v. People, 84 Colo. 106, 268 P. 577 (1928); Albert v. People, 90 Colo. 219, 7 P.2d 822 (1932); Updike v. People, 92 Colo. 125, 18 P.2d 472 (1933); Schreiner v. People, 95 Colo. 392, 36 P.2d 764 (1934).

But it need not furnish such detail as to bar further prosecution. An indictment or information need not plead an offense in such detail as to be self-sufficient as a bar to further prosecution for the same offense for the judgment constitutes the bar. Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

The ultimate test of the sufficiency of an indictment is whether it is sufficiently definite to inform the defendant of the charges against him so as to enable him to prepare a defense and to plead the judgment in bar of any further prosecutions for the same offense. People v. Westendorf, 37 Colo. App. 111, 542 P.2d 1300 (1975); People v. Donachy, 196 Colo. 289, 586 P.2d 14 (1978).

An indictment must be definite enough to give defendant sufficient notice of the crime alleged to prepare a defense. People v. Gable, 647 P.2d 246 (Colo. App. 1982).

Right to be informed of nature of charges. It is a defendant's right to be informed with reasonable certainty of the nature of the charges against him by requiring that an indictment answer the questions of "who, what, where and how" in cases where the acts constituting the offense are not adequately described by the statute. People v. Donachy, 196 Colo. 289, 586 P.2d 14 (1978).

Exceptions to general rule. If, as is not uncommon, the court by construction restricts a statute to a narrower application than its general words would indicate, an indictment on it in the statutory words will be ill; it must follow the court's narrower construction. *Schneider v. People*, 30 Colo. 493, 71 P. 369 (1903).

If the statute does not sufficiently set out the facts which constitute the offense so that the defendant may have notice of what he is charged, or if the words of the statute by their generality embrace cases which fall within the terms but not within the spirit or meaning of the statute, then a more particular statement of facts is necessary, and the specific facts to bring the defendant precisely within the inhibition of the law must be alleged. *Schneider v. People*, 30 Colo. 493, 71 P. 369 (1903); *Knepper v. People*, 63 Colo. 396, 167 P. 779 (1917); *Balfe v. People*, 66 Colo. 94, 179 P. 137 (1919).

Where the acts constituting the offense are not described by the statute, an indictment merely reciting the statutory words is insufficient. *People v. Xericos*, 186 Colo. 21, 525 P.2d 415 (1974).

Bill of particulars not part of indictment. Although the purpose of a bill of particulars is to define more specifically the offense charged, a bill of particulars is not a part of an indictment nor an amendment thereto. It cannot in any way aid an indictment fundamentally bad. *People v. Westendorf*, 37 Colo. App. 111, 542 P.2d 1300 (1975).

Defendant is not legally charged by ineffective indictment. Where indictment is ineffective because it charges petitioner with offense alleged to have occurred at time subsequent to filing of indictment, defendant is not legally charged or subject to jurisdiction of court as to that transaction until reindicted. *Rowse v. District Court*, 180 Colo. 44, 502 P.2d 422 (1972).

An insufficient indictment does not legally charge a crime or subject defendant to the jurisdiction of the court. *People v. Westendorf*, 37 Colo. App. 111, 542 P.2d 1300 (1975).

And omission of essential ingredient of offense may be taken advantage of at any stage. If any essential ingredient of an offense is omitted, advantage thereof may be taken, at any stage of the proceedings, even after sentence has been pronounced. *Iwerks v. People*, 88 Colo. 578, 298 P. 644 (1931).

Defective indictment may be asserted on appeal. Although defendant did not raise the insufficiency of the indictment at trial or in his motion for new trial, he is not thereby precluded from asserting that defect now on appeal. *People v. Westendorf*, 37 Colo. App. 111, 542 P.2d 1300 (1975).

But technicalities not affecting substantial

rights will not be considered on review. *Updike v. People*, 92 Colo. 125, 18 P.2d 472 (1933); *Helser v. People*, 100 Colo. 371, 68 P.2d 543 (1937).

Charging an impossible date as time of occurrence of alleged offense is matter of substance, not form, and attempt to indict a person for an offense alleged to have occurred subsequent to filing of indictment is a nullity. *Rowse v. District Court*, 180 Colo. 44, 502 P.2d 422 (1972).

Jeopardy does not attach by indictment defective in substance. An indictment which is defective in substance merely prevents prosecution on the basis of that particular pleading. No jeopardy attaches, and the defendant may be charged by any appropriate and sufficient pleading. *People v. Thimmes*, 643 P.2d 780 (Colo. App. 1981).

Date of offense is material allegation. Allegations specifying the date on which an accused allegedly committed an offense are always material when the offense charged is one which may be barred by an applicable statute of limitations. *People v. Thimmes*, 643 P.2d 780 (Colo. App. 1981).

Value need not be alleged if not essential. Where the value is not essential to the punishment, as in indictments for robbery, it need not be distinctly alleged or proved. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

Applied in *Stoltz v. People*, 59 Colo. 342, 148 P. 865 (1915); *Bridge v. People*, 63 Colo. 319, 165 P. 778 (1917); *People v. Horkans*, 109 Colo. 177, 123 P.2d 824 (1942).

II. ILLUSTRATIVE CASES.

Assault with intent to rob. An indictment for assault with intent to rob which alleges, as to the assault, that the defendant "did make an assault", without stating all of the particulars comprehended by the statutory definition of that term is sufficient. *McNamara v. People*, 24 Colo. 61, 48 P. 541 (1897).

Conspiracy. In an indictment for conspiracy, unless the crime which it is alleged defendants conspired to commit is named, the indictment must allege facts constituting every element necessary to establish that offense as fully as if the indictment was for its perpetration. *Imboden v. People*, 40 Colo. 142, 90 P. 608 (1907).

An indictment for conspiracy need not aver the means by which the conspiracy was to be carried out. *Imboden v. People*, 40 Colo. 142, 90 P. 608 (1907).

Because of the veil of secrecy surrounding most conspiracies, considerable latitude is allowed in drafting a conspiracy indictment. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Forgery. An indictment drawn upon the section relating to forgery is framed in the language of the act, and hence it was not essential to use the words “falsely make” or to set out the instrument. *Cohen v. People*, 7 Colo. 274, 3 P. 385 (1883).

Murder. In an indictment for murder it is not necessary to state more than the statute provides in order to sustain a conviction of murder in the first degree. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905).

An indictment which simply charged that the defendant murdered the victim was upheld as constitutional. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff’d*, 316 F.2d 284 (10th Cir. 1963).

Perjury. A perjury indictment which does not set forth the alleged false statements, either ver-

batim or in substance, is insufficient to charge the crime. *People v. Westendorf*, 37 Colo. App. 111, 542 P.2d 1300 (1975).

A perjury indictment which tracks the language of § 18-8-502(1) and included a verbatim partial transcript of the defendant’s grand jury testimony which was asserted to be materially false, together with the additional averment that the defendant did not believe the testimony to be true, is sufficient to advise the defendant of the charges against him. *People v. Maestas*, 199 Colo. 143, 606 P.2d 849 (1980).

For the sufficiency of indictment in prosecution for embezzlement of public property, see *People v. Donachy*, 196 Colo. 289, 586 P.2d 14 (1978).

16-5-202. Requisites of information - form. (1) The information is sufficient if it can be understood therefrom:

- (a) That it is presented by the person authorized by law to prosecute the offense;
- (b) That the defendant is identified therein, either by name or by the defendant’s patterned chemical structure of genetic information, or described as a person whose name is unknown to the informant;
- (c) That the offense was committed within the jurisdiction of the court or is triable therein;
- (d) That the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction.

(2) The information may be in the following form:

STATE OF COLORADO)
) ss.
County of.....)

In the Court The People of the State of Colorado, against A B C D, district attorney within and for the judicial district of the state of Colorado, in the county of in the state aforesaid, in the name and by the authority of the people of the state of Colorado, informs the court that A B on the day of A.D. 20, at the said county of, did (here state the offense) against the peace and dignity of the people of the state of Colorado.

C D
District Attorney.
or C D, District Attorney,
by H M, Deputy.

(3) An information may be filed using the language of the statute defining the offense, including either conjunctive or disjunctive clauses. Pleading in either the conjunctive or the disjunctive shall place a defendant on notice that the prosecution may rely on any or all of the alternatives alleged.

(4) A court shall not refuse to accept a complaint or information that contains the requirements of this section.

ANNOTATION

- I. General Consideration.
- II. Sufficiency of Information.
- III. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "By Leave of Court First Had", see 8 Dicta 14 (June 1931).

Annotator's note. Since § 16-5-202 is similar to repealed § 39-4-4, C.R.S. 1963, § 39-4-4, CRS 53, CSA, C. 48, § 457, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of section. The requirement of the signature on the information is for the protection of the defendant as a guarantee that the prosecution is being conducted in good faith. *Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951).

General effect of section. This section means what it says and applies it to all informations except where in so doing it fails to give the defendant the nature and cause of the accusation as required by the constitution. *Highley v. People*, 65 Colo. 497, 177 P. 975 (1918).

This section is not in conflict with the bill of rights provision that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation. *Jordan v. People*, 19 Colo. 417, 36 P. 218 (1894).

Attorney general has same powers as district attorney. The attorney general may subscribe, present, and prosecute an information against a public offender with the same powers as the district attorney of the proper district. *People v. Gibson*, 53 Colo. 231, 125 P. 531 (1912).

Signature by deputy is proper. Signature of the prosecuting officer, typewritten, but followed by the name of his deputy, written with his own hand, is a compliance with this section. *Almond v. People*, 55 Colo. 425, 135 P. 783 (1913).

Additions to special prosecutor's name in information are treated as surplusage. Where the district attorney is disqualified from prosecuting a case and the court appoints a special prosecutor, the prosecutor so appointed is authorized to sign an information in the case in his own name, and the fact that he placed before his name the name of the district attorney and added to his own signature the words "special deputy" neither added to, nor detracted from, the proper authentication in his own name. The additions are treated as surplusage. *Williams v. People*, 26 Colo. 272, 57 P. 701 (1899).

Failure to sign information is not jurisdictional, but should be pointed out so that the trial court might direct the parties to comply with the

statute. *Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951).

Phrase "against the peace and dignity" of people. An information concluding "against the peace and dignity of the same people of the state of Colorado", is in substantial conformity with the requirement of the constitution that all prosecutions shall be carried on in the name and by the authority of the people of the state of Colorado, and conclude against the peace and dignity of the same. *Holt v. People*, 23 Colo. 1, 45 P. 374 (1896).

The omission from a criminal information of the concluding phrase "and against the peace and dignity of the same" goes to matter of form, and in no degree impairs the jurisdiction of the court. *Chemgas v. Tynan*, 51 Colo. 35, 116 P. 1045 (1911); *People v. Hunter*, 666 P.2d 570 (Colo. 1983).

Use of words "feloniously" and "unlawfully". Appellant complains that the information does not charge that the accused knowingly and wilfully committed the offense. Since the information charges the act as "unlawfully and feloniously" done, the objection does not affect the real merits. *McConnell v. People*, 73 Colo. 99, 213 P. 674 (1923).

The use of both the words "unlawfully" and "feloniously" in the statute does not require that the former must appear in indictment or information if the latter does. *Bridge v. People*, 63 Colo. 319, 165 P. 778 (1917).

Separate infractions of same law should be distinguished. In every information or indictment charging a criminal offense, good pleading required that sufficient facts be set forth to identify the crime from another infraction of the same law by the same defendant. This would seem essential in order to safeguard the accused against a second prosecution for the same offense, as well as to acquaint him with what he must meet on trial. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

No substitution for section identified as subject of prosecution. Where a count of an information in a criminal case identifies with particularity the exact section of the statute upon which a prosecution is based, no other statute can be substituted for the one actually selected as forming the subject matter of the prosecution. *Skidmore v. People*, 154 Colo. 363, 390 P.2d 944 (1964).

Amendment of minor irregularities only permitted. Generally, a criminal complaint or affidavit may be amended so as to correct minor irregularities or defects but major defects such as a material misnomer of accused or an omission of essential allegations cannot be cured by amendment on the examination. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

Any conviction based on an information requiring major amendment is void, for the court is without jurisdiction. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

When information fails to charge crime, court acquires no jurisdiction. *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980).

Objections to form of information must be made before trial or they are waived. *People v. Hunter*, 666 P.2d 570 (Colo. 1983); *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995); *People v. Russell*, 36 P.3d 92 (Colo. App. 2001).

Authority of district attorney is a technical matter subject to waiver. Just as a defendant may waive objections to venue, he or she may also waive any objection to the authority of the district attorney to bring a criminal charge. *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

Even if defendant did not waive objection to the form of the information, defendant must demonstrate how any errors prejudiced him in order for a defect in the form to dictate reversal of a conviction. *People v. Russell*, 36 P.3d 92 (Colo. App. 2001).

Applied in *Albert v. People*, 90 Colo. 219, 7 P.2d 822 (1932); *Carter v. People*, 161 Colo. 10, 419 P.2d 654 (1966); *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *People v. Shortt*, 192 Colo. 183, 557 P.2d 388 (1976).

II. SUFFICIENCY OF INFORMATION.

This section governs the sufficiency of informations in criminal cases. *Critchfield v. People*, 91 Colo. 127, 13 P.2d 270 (1932).

The requisites of information form are set forth by this section. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

The sufficiency of an information is not to be determined from the evidence. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

An information must show the nature and cause of the accusation, that is, it must set out the crime charged. *Jordan v. People*, 19 Colo. 417, 36 P. 218 (1894); *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

Indictment must clearly state essential facts and answer questions of who, what, where, and how. *People v. Tucker*, 631 P.2d 162 (Colo. 1981).

Time when offense committed. The general rule is that, where time is not a material element of the offense, the precise time at which the crime is charged to have been committed is not material. *Kogan v. People*, 756 P.2d 945 (Colo. 1988).

If, however, information about the time is necessary to enable the defendant to prepare his defense or to guard against a subsequent prosecution for the same crime, such information must be provided. *Kogan v. People*, 756 P.2d 945 (Colo. 1988).

Standard of review for bill of particulars is whether the bill of particulars as produced sufficiently informs the defendant of the particular charges at issue so that he is given a fair opportunity to properly prepare his defense. *Kogan v. People*, 756 P.2d 945 (Colo. 1988).

Bill of particulars held insufficient. Bill of particulars which alleged that certain acts had been committed sometime during a nine-month period and the absence of any accompanying detail describing the defendant's alleged acts resulted in clear prejudice to the defendant. *Kogan v. People*, 756 P.2d 945 (Colo. 1988).

It must advise defendant of charge. An information is sufficient if it advises the defendant of the charge he is facing so that he can adequately defend himself and be protected from another prosecution for the same offense. *Digiallonardo v. People*, 175 Colo. 560, 488 P.2d 1109 (1971); *Loggins v. People*, 178 Colo. 439, 498 P.2d 1146 (1972); *People v. Morones*, 39 Colo. App. 451, 569 P.2d 336 (1977); *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978); *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. Rubanowitz*, 688 P.2d 231 (Colo. 1984); *People v. Chavez*, 730 P.2d 321 (Colo. 1986); *People v. Baker*, 45 P.3d 753 (Colo. App. 2001).

The ultimate test is that an information is sufficient if it advises a defendant of the charge he is facing. *Edwards v. People*, 176 Colo. 478, 491 P.2d 566 (1971).

An information is sufficient if it informs the defendant of the charges against him so as to enable him to prepare a defense and plead the judgment in bar of any further prosecutions for the same offense. *People v. Flanders*, 183 Colo. 268, 516 P.2d 418 (1973); *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973); *People v. Baker*, 45 P.3d 753 (Colo. App. 2001).

And must set forth essential elements of crime. An information is sufficient to apprise a defendant of the charge he faces if it sets forth the essential elements charging the crime. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

But it need not set out the mode or manner of its perpetration, or the instrument or agency employed to accomplish the result. *Jordan v. People*, 19 Colo. 417, 36 P. 218 (1894); *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

Information need not specify lesser included offenses which may have been committed in commission of the described act. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

An information is sufficient if it states the offense in language that can be easily understood. *Whitfield v. People*, 79 Colo. 108, 244 P. 470 (1926).

Or in language of statute defining offense. The allegations of an information which follow

the language of the statute defining the offense are sufficient to satisfy constitutional requirements, and the offense charged is set forth with such degree of certainty that the court could lawfully pronounce judgment upon conviction. *Lewis v. People*, 109 Colo. 89, 123 P.2d 398 (1942).

An information is sufficient if the charge is in the language of the applicable statute. *People v. Morones*, 39 Colo. App. 451, 569 P.2d 336 (1977).

An information is sufficient if the charge is in the language of the statute, however, an information need not follow the exact wording of the statute. *Loggins v. People*, 178 Colo. 439, 498 P.2d 1146 (1972); *People v. Russell*, 36 P.3d 92 (Colo. App. 2001).

Or with certainty that will support judgment. Statement of offense in the information is sufficient when set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

But information need not furnish such detail as to bar further prosecution. An indictment or information need not plead an offense in such detail as to be self-sufficient as a bar to further prosecution for the same offense, for the judgment constitutes the bar. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Information need not include every element of the offense that must be proved at trial. Information charging possession of marijuana that failed to include "knowing" possession nevertheless provided sufficient notice to defendant for trial preparation and was adequate to bar further prosecution for the same offense. *People v. Flockhart*, ___ P.3d ___ (Colo. App. 2009).

The statutory reference in an information is an immaterial part of the information. *People v. Marion*, 182 Colo. 435, 514 P.2d 327 (1973).

Incorrect statutory reference not fatal. The incorrect citation of a specific statutory reference in an information is not grounds for reversal, absent substantial prejudice. *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981).

Failure of charges to identify the particular statement or assertion alleged to be false is not a fatal defect. Information was sufficient to allow defendant to prepare a defense, defendant did not object to the charges or request a bill of particulars, and defendant did not demonstrate or even allege prejudice. *People v. Vigil*, 251 P.3d 442 (Colo. App. 2010).

Technical defects in information do not support reversal. The supreme court, in accordance with the spirit and intent of this section, has consistently refused to reverse criminal convictions for technical defects in the information or indictment which do not tend to prejudice the

substantial rights of the defendants on the merits. *Helser v. People*, 100 Colo. 371, 68 P.2d 543 (1937); *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

If an information is sufficient to state a charge and to assure fundamental fairness to a defendant, objections both to formal defects and to defects relating to geographical deficiencies involving improper venue or to the district attorney's authority to bring or prosecute a charge must be timely made or they will be deemed waived. *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

Technical defects in an information do not require reversal unless the substantial rights of the defendant are prejudiced. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Factual error regarding venue will not make an information insufficient, so long as the information gives defendant notice of factual circumstances surrounding the charges and alleges that the crimes occurred within this state. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

The defendant is entitled to reversal if he was prejudiced, surprised, or hampered in his defense. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Each count of information must be independent of others. Absent a clear and specific incorporation by reference, each count of an information, to be valid, must be independent of the others and, in itself, charge the defendant with a distinct and different offense. *People v. Moore*, 200 Colo. 481, 615 P.2d 726 (1980).

When identity of victim immaterial. While the name of the victim of an offense should be alleged in an information, failure to do so is an immaterial defect, where the identity of the victim is not an essential element of the offense. *People v. Hunter*, 666 P.2d 570 (Colo. 1983).

III. ILLUSTRATIVE CASES.

Omission of such words as "at" or "within" is not fatal. The information charged that the defendant "on to wit — the county of Arapahoe", etc. The omission of any preposition as "at" or "within" before the name of the county was held not to impair the effect of the allegation as to venue. *Balfe v. People*, 66 Colo. 94, 179 P. 137 (1919).

An information charging a crime necessarily charges an attempt to commit such crime. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

Information for murder in the first degree includes all the lower degrees of criminal homicide. *Harris v. People*, 55 Colo. 407, 135 P. 785 (1913).

Intent to murder sufficiently charged in an information which charges defendant with making an assault with intent "to kill and murder".

Hockley v. People, 30 Colo. 119, 69 P. 512 (1902).

An indictment charging that defendant unlawfully, feloniously, wilfully, purposely, and of his malice aforethought, did kill and murder the deceased, is sufficient to warrant a verdict finding that the homicide was committed with deliberation and premeditation. Redus v. People, 10 Colo. 208, 14 P. 323 (1887).

Unnecessary to allege homicide occurred incident to felony. To sustain a conviction for murder in the first degree committed in an attempt to perpetrate robbery, it is not necessary that the information should allege that the murder was committed in an attempt to perpetrate robbery. Andrews v. People, 33 Colo. 193, 79 P. 1031 (1905).

Defendant was convicted of felony murder on an information charging that on a certain date, he "did feloniously, wilfully, and of his premeditated malice aforethought, kill and murder" a named person. Due process was not violated where the information contained every essential element demanded by the Colorado statutes and by generally approved principles of criminal pleading, apprised the defendant of the nature of the charge, the date, and the place, described the victim, and further alleged that the killing was with malice aforethought, but failed to pinpoint the allegation that the homicide occurred incident to a known felony. Bizup v. Tinsley, 211 F. Supp. 545 (D. Colo. 1962), aff'd, 316 F.2d 284 (10th Cir. 1963).

Burglary. Information in prosecution for burglary with force and larceny held sufficient as complying with this section, although the street and number of place burglarized was not given. Hoskins v. People, 119 Colo. 88, 200 P.2d 932 (1948).

An information is sufficient when it charges that on a certain day defendant unlawfully and willfully, feloniously, and maliciously attempted to break and without force enter a building which was not defendant's property, with the intent to commit theft contrary to the form of the

statute in such case made and provided. Loggins v. People, 178 Colo. 439, 498 P.2d 1146 (1972).

Criminal trespass count that fails to specify the underlying crime that defendant allegedly intended to commit is defective in form, but not in substance; however, since defendant did not pursue a bill of particulars and had notice of the underlying crimes defendant was not prejudiced. People v. Williams, 984 P.2d 56 (Colo. 1999).

Information charging defendant with possession of burglary tools held sufficient. People v. Gnout, 183 Colo. 366, 517 P.2d 394 (1973).

Information charging interference with a headgate held sufficient. Lambert v. People, 78 Colo. 313, 241 P. 533 (1925).

Information charging transporting intoxicating liquors held sufficient. Highley v. People, 65 Colo. 497, 177 P. 975 (1918).

Information charging defendants with entering into a contract in restraint of trade held sufficient. Campbell v. People, 72 Colo. 213, 210 P. 841 (1922).

Information charging failure to pay income taxes held sufficient. People v. Vickers, 199 Colo. 305, 608 P.2d 808 (1980).

Information charging defendant with crime of violence held sufficient. People v. Chavez, 730 P.2d 321 (Colo. 1986).

Information that charged defendant with criminal attempt, specified the ulterior crime, and cited to both criminal attempt and first degree murder statutes was substantively sufficient, even though better practice would have been to include the culpability element directly in the charge. People v. Russell, 36 P.3d 92 (Colo. App. 2001).

Information charging violation of bail bond conditions held sufficient. People v. Baker, 45 P.3d 753 (Colo. App. 2001).

Information held sufficient. Stoltz v. People, 59 Colo. 342, 148 P. 865 (1915); Moynahan v. People, 63 Colo. 433, 167 P. 1175 (1917); Whitfield v. People, 79 Colo. 108, 244 P. 470 (1926); Cliff v. People, 84 Colo. 254, 269 P. 907 (1928).

16-5-203. Furnishing witnesses' names. Whether a prosecution is commenced by indictment, information, or felony complaint, the district attorney shall make available to the defendant not later than twenty-one days after the defendant's first appearance at the time of or following the filing of charges a written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call upon at trial. The district attorney shall also furnish the defendant in writing prior to trial the names and addresses of any additional witnesses who have become known to him or her prior to trial and whom he or she intends to call upon at trial, but this shall not preclude the calling of witnesses whose names or the materiality of whose testimony are first learned by the district attorney upon the trial. However, the court may, in its discretion, enter an order that denies the disclosure to the defendant of the names and addresses of witnesses, or that requires the defense counsel not to disclose such information to the defendant, subject to rule 16 part I (d) (2) and part III (d) of the Colorado rules of criminal procedure. The names and addresses of witnesses who are the subject of the order may be withheld pending a ruling of the court, but the prosecution shall notify the defense counsel in writing that a motion to withhold

witness information has been filed and that such information will be withheld pending the court's order. Where the defendant has not had or waived a preliminary hearing, there shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of the affiant that the offense was committed.

Source: **L. 72:** R&RE, p. 215, § 1. **C.R.S. 1963:** § 39-5-203. **L. 90:** Entire section amended, p. 985, § 5, effective April 24. **L. 95:** Entire section amended, p. 464, § 8, effective July 1. **L. 96:** Entire section amended, p. 737, § 10, effective July 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 848, § 70, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

- I. General Consideration.
- II. List of Witnesses.
- III. Verification and Preliminary Hearing.

I. GENERAL CONSIDERATION.

Law reviews. For article, "By Leave of Court First Had", see 8 Dicta 14 (June 1931). For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963).

Annotator's note. Since § 16-5-203 is similar to repealed §§ 39-3-6 and 39-4-2, C.R.S. 1963, §§ 39-3-6 and 39-4-2, CRS 53, CSA, C. 48, §§ 452 and 455, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

II. LIST OF WITNESSES.

Purpose of witness list. The requirement of this section that the district attorney list his witnesses is to advise the defendant of the witnesses for the people and to give the defendant an opportunity to contact, examine, and question those witnesses. *Kelly v. People*, 121 Colo. 243, 215 P.2d 336 (1950).

The requirement of listing the names of witnesses is for the protection of the defendant as a guarantee that the prosecution is being conducted in good faith by the state, and to enable the defendant to find out what the testimony against him will be, and to investigate the character of the witness against him. *Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951).

This section is mandatory, and it is the duty of the district attorney to comply with it. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907).

However, the names of rebuttal witnesses for the people are not required to be listed. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931); *Schreiner v. People*, 95 Colo. 392, 36 P.2d 764 (1934).

Neither Crim. P. 16, nor this section specifically require the prosecution to endorse or to disclose which of the endorsed witnesses it will call for rebuttal. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), aff'd, 624 P.2d 1320 (Colo. 1981); *People v. Avila*, 944 P.2d 673 (Colo. App. 1997).

District attorney may list additional names. It is not reversible error to allow, on the day before a case was set for trial, the district attorney to list the names of additional witnesses said to have been known to him when the information was filed, where defendant did not apply for a continuance nor make a showing of surprise or prejudice, and where no such showing is made on appeal. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907).

List may be given after arraignment but before witnesses testify. It is not error to permit the examination of witnesses in chief whose names were not furnished the accused prior to his arraignment, a list of such witnesses being given before they were called to testify, and no objection being made to them upon this ground. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885).

Names of witnesses first learned upon the trial may be listed by order of the court. The names of witnesses, the materiality of whose testimony is first learned by the district attorney upon the trial, may be properly listed by order of court. *Stone v. People*, 71 Colo. 162, 204 P. 897 (1922).

Such permission being discretionary with the court. Permission for listing of the names of witnesses at the trial is discretionary with the court. *Baker v. People*, 72 Colo. 207, 210 P. 323 (1922).

And when granted will not constitute reversible error in the absence of a request for a continuance or showing of surprise by the defense. *Baker v. People*, 72 Colo. 207, 210 P. 323 (1922); *Stone v. People*, 71 Colo. 162, 204 P. 897 (1922).

The endorsement of a codefendant as a witness during the trial, being in no way prejudicial

to the defendant, was not an abuse of discretion. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955).

Noncompliance does not require reversal where a continuance has not been requested and surprise or prejudice has not been shown. *People in Interest of B.R.M.*, 653 P.2d 77 (Colo. App. 1982).

Failure to list witnesses is not jurisdictional. Failure in listing the names of witnesses is not jurisdictional, but should be pointed out so that the trial court might direct the parties to comply with the statute. *Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951).

Defect may be waived. By failure to timely object to noncompliance with section requiring witnesses' names the defect is waived. *Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951).

And will not constitute reversible error if nonprejudicial. Omission to furnish a defendant with a list of witnesses prior to arraignment, where no objection was made to such omission at the time of such arraignment, and there is no showing of prejudice resulting therefrom, does not constitute reversible error. *Goldsberry v. People*, 149 Colo. 431, 369 P.2d 787 (1962).

But testimony of unlisted witnesses in chief was erroneously admitted. Testimony of witnesses not listed as to the entire transaction was not confined to rebuttal matters and was erroneously admitted where the district attorney did not learn of the existence of the witnesses by anything that occurred at the trial. *Eckhardt v. People*, 126 Colo. 18, 247 P.2d 673 (1952).

Failure to require prosecution to furnish addresses on list of witnesses not reversible error in a town of 9,000 people in which the defense should be able to locate witnesses. *People v. Smith*, 685 P.2d 786 (Colo. App. 1984).

Trial court properly allowed witness endorsed as a perceiving witness to testify as an expert witness after defense raised the issue related to the expertise at trial. *People v. Jowell*, 199 P.3d 38 (Colo. App. 2008).

III. VERIFICATION AND PRELIMINARY HEARING.

Information must be supported by oath or affirmation. A prosecution and conviction under an information, not supported by the oath or affirmation of any person, is in violation of the bill of rights, § 7 of art. II, Colo. Const. *Lustig v. People*, 18 Colo. 217, 32 P. 275 (1893).

Summons and complaint charging misdemeanor needs no verification. This section, which specifically requires verification, is to this extent modified by § 16-2-106, which does not require a verification of a summons and complaint charging a misdemeanor and issued by a

peace officer. *Stubert v. County Court*, 163 Colo. 535, 433 P.2d 97 (1967).

Where a preliminary hearing has been had, verification upon information and belief by the district attorney is sufficient, since the arrest of the party charged must have been made upon warrant issued upon the requisite affidavit. *Brown v. People*, 20 Colo. 161, 36 P. 1040 (1894).

It is not necessary in such information to set out that a preliminary hearing had been had. It devolves upon the defendant to establish the same by showing that such preliminary hearing had not been had. *Brown v. People*, 20 Colo. 161, 36 P. 1040 (1894).

Information need not be verified except in cases in which no preliminary examination has been had or waived. *Ratcliff v. People*, 22 Colo. 75, 43 P. 553 (1896).

In such cases it must be verified by some person upon his own knowledge. *Brown v. People*, 20 Colo. 161, 36 P. 1040 (1894).

Where a verification is necessary, as where a preliminary hearing has not been had or waived, it must be contained in the independent affidavit of some credible person having knowledge of the commission of the offense. *White v. People*, 8 Colo. App. 289, 45 P. 539 (1896).

Accused cannot attack truth of affidavit made as basis of information. When an affidavit is made as the basis of an information in conformity with the requirements of this section, it is not in the power of the accused to attack, by counteraffidavit or otherwise, the truth of any of its material statements. *Holt v. People*, 23 Colo. 1, 45 P. 374 (1896).

Neither can the statements in the affidavit be attacked by extraneous evidence. Whether or not an affidavit upon which an information is based complies with this section must be determined from the context of the affidavit itself, and its statements cannot be attacked by extraneous evidence. The verification cannot be attacked on the ground that the testimony disclosed that the party who verified it did not have personal knowledge of the guilt of the defendant. *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900).

It is unnecessary for the affidavit to recite that affiant is a competent witness to testify in the case. His competency will be presumed until the contrary appears. *Walt v. People*, 46 Colo. 136, 104 P. 89 (1909); *Wilkinson v. People*, 86 Colo. 406, 282 P. 257 (1929); *Hubbard v. People*, 153 Colo. 252, 385 P.2d 419 (1963).

Want of a verification on an information is not jurisdictional. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

Error of failure to verify may be waived. The information is required to be verified as designated, but unless the objection on that ground is properly presented in the trial court it is waived and cannot be raised in the appellate

court. *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900).

The absence of a sufficient affidavit to support a count in the information is, at most, an irregularity, and any objection thereto must be made before trial. *Curl v. People*, 53 Colo. 578, 127 P. 951 (1912); *Harris v. Municipal Court*, 123 Colo. 539, 234 P.2d 1055 (1951).

The affidavit bears the same relation to an information in a criminal action that it does to a complaint in a civil action. It is no substantial part of either the one or the other, and there is no reason why it may not be waived without prejudice to any substantial right of the defendant, or why he should not be held to have waived any irregularity or defect therein by not objecting before pleading to the merits. *Curl v. People*, 53 Colo. 578, 127 P. 951 (1912).

An affidavit is for the benefit of the defendant and want of a verification affidavit is waived unless timely objection is made thereto in the trial court. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

Verification of an information is required by statute but the right to challenge the verification is waived if a timely objection is not interposed. *Scott v. People*, 176 Colo. 289, 490 P.2d 1295 (1971).

Verification may be provided before trial at the direction of the trial court once timely objection is made, and it is not error to deny a motion, made and ruled upon before trial, to strike a verification made to an information after service thereof. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

This section does not prescribe before whom the affidavit shall be taken, but by a fundamental principle, when the statute fails to designate the particular officer before whom the oath shall be taken, it may be taken before any officer having general authority to administer oaths. *Walker v. People*, 22 Colo. 415, 45 P. 388 (1896).

And statute giving notaries the power to take oath in all cases is sufficiently broad to cover affidavits since an affidavit is an oath reduced to writing and attested by him who has authority to administer the same. *Walker v. People*, 22 Colo. 415, 45 P. 388 (1896).

Affidavit complied with this section where it was attached to the information and particularly recited that the facts stated in the foregoing information were true and the offense charged therein was committed as of the affiant's own personal knowledge. The affidavit was as full and complete as if each and every fact contained in the information had been fully embodied in the affidavit. *Ausmus v. People*, 47 Colo. 167, 107 P. 204 (1910).

An affidavit to an information which states that the facts stated in the information are true and that the offense was committed of affiant's personal knowledge, is sufficient to make the information good as against a motion to quash for insufficient verification. *Wilkinson v. People*, 86 Colo. 406, 282 P. 257 (1929).

Applied in *Velasquez v. People*, 154 Colo. 284, 389 P.2d 849 (1964).

16-5-204. Witnesses before a grand jury - procedure. (1) (a) Whenever a witness in any proceeding before any grand jury refuses, without just cause shown, to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording, or other material, the prosecuting attorney may submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal was without just cause, hold the witness in contempt and order the witness to be confined. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information; however, the court may release the witness from confinement if the court determines that further confinement will not cause the witness to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

(b) If a witness has been confined in accordance with paragraph (a) of this subsection (1), he or she may, upon petition filed with the court, request a hearing to be held within fourteen days to review the contempt order at which hearing he or she shall have the right to be represented by counsel. The court, at the hearing, may rescind, modify, or affirm the order.

(c) In any proceeding conducted under this section, counsel may be appointed for a person financially unable to obtain adequate assistance.

(1.5) (a) Upon verified application of the prosecuting attorney stating that a witness was lawfully served with a subpoena to appear and testify before the grand jury and that the

witness failed to appear in accordance with such subpoena, the court shall issue a warrant commanding any peace officer to bring the witness without unnecessary delay before the court for a hearing on the matters set forth in the application and to determine whether the witness should be held in contempt pursuant to subsection (1) of this section.

(b) Upon issuance of the warrant, the court may fix an appropriate bond and direct, as a condition of the bond, that the witness appear on a date and at a time certain for the hearing.

(2) No person who has been imprisoned or fined by a court for refusal to testify or provide other information concerning any criminal incident or incidents in any proceeding before a grand jury impaneled before any district court shall again be imprisoned or fined for a subsequent refusal to testify or provide other information concerning the same criminal incident or incidents before any grand jury.

(3) Upon impanelment of each grand jury, the court shall give to such grand jury adequate and reasonable written notice of and shall assure that the grand jury reasonably understands the nature of:

(a) Its duty to inquire into offenses against the criminal laws of the state of Colorado alleged to have been committed;

(b) Its right to call and interrogate witnesses;

(c) Its right to request the production of documents or other evidence;

(d) The subject matter of the investigation and the criminal statutes or other statutes involved, if these are known at the time the grand jury is impaneled;

(e) The duty of the grand jury by an affirmative vote of nine or more members of the grand jury to determine, based on the evidence presented before it, whether or not there is probable cause for finding indictments and to determine the violations to be included in any such indictments; and

(f) The requirement that the grand jury may not find an indictment in cases of perjury unless at least two witnesses to the same fact present evidence establishing probable cause to find such an indictment.

(4) (a) At the option of the prosecuting attorney, a grand jury subpoena may contain an advisement of rights. If the prosecuting attorney determines that an advisement is necessary, the grand jury subpoena shall contain the following advisement prominently displayed on the front of the subpoena:

NOTICE

(I) You have the right to retain an attorney to represent you and to advise you regarding your grand jury appearance.

(II) Anything you say to the grand jury may be used against you in a court of law.

(III) You have the right to refuse to answer questions if you feel the answers would tend to incriminate you or to implicate you in any illegal activity.

(IV) If you cannot afford or obtain an attorney, you may request the court to appoint an attorney to consult with or represent you.

(b) Any witness who is not advised of his rights pursuant to paragraph (a) of this subsection (4) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testimony or evidence be used as evidence in any criminal proceeding, except for perjury, against him in any court.

(c) Repealed.

(d) Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of such grand jury, and counsel may be present in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such

counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an in camera hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the courtroom when advising his client. No attorney shall be permitted to provide counsel in the grand jury room to more than one witness in the same criminal investigation, except with the permission of the grand jury.

(e) Once a grand jury has returned a no true bill based upon a transaction, set of transactions, event, or events, a grand jury inquiry into the same transaction or events shall not be initiated unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.

(f) An authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval.

(g) Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his own grand jury testimony, or minutes, reports, or exhibits relating to them.

(h) Any witness summoned to testify before a grand jury, or an attorney for such witness with the witness's written approval, shall be entitled, prior to testifying, to examine and copy at the witness's expense any statement in the possession of the prosecuting attorney or the grand jury which such witness has made to any law enforcement or prosecution official or under an oath required by law that relates to the subject matter under inquiry by the grand jury. If a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript and shall not pay a fee.

(i) No person subpoenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury shall be required to testify or to produce such objects, or be confined as provided in this section, for his failure to so testify or produce such objects if, upon filing a motion and upon an evidentiary hearing before the court which issued such subpoena or a court having jurisdiction under this section, the court finds that:

(I) A primary purpose or effect of requiring such person to so testify or to produce such objects before the grand jury is or will be to secure testimony for trial for which the defendant has already been charged by information, indictment, or criminal complaint;

(II) Compliance with a subpoena would be unreasonable or oppressive;

(III) A primary purpose of the issuance of the subpoena is to harass the witness;

(IV) The witness has already been confined, imprisoned, or fined under this section for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events; or

(V) The witness has not been advised of his rights as specified in paragraph (a) of this subsection (4).

(j) Any grand jury may indict a person for an offense when the evidence before such grand jury provides probable cause to believe that such person committed such offense.

(k) The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

(l) Any person may approach the prosecuting attorney or the grand jury and request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. The prosecuting attorney or the grand jury shall keep a record of all denials of such requests to that prosecuting attorney or grand jury, including the reasons for not allowing such person to testify or appear. If the person making such request is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interests of justice.

(m) The foreman, or acting foreman when designated by the court, of the grand jury may swear or affirm all witnesses who come before the grand jury.

(n) Any other motions testing the validity of the indictment may be heard by the court based only on the record and argument of counsel, unless there is cause shown for the need for additional evidence.

Source: L. 72: R&RE, p. 215, § 1. C.R.S. 1963: § 39-5-204. L. 77: Entire section R&RE, p. 853, § 1, effective June 21. L. 81: (4)(c) repealed, p. 926, § 2, effective July 1. L. 82: (4)(f) amended, p. 623, § 15, effective April 2. L. 2000: (4)(h) amended, p. 428, § 1, effective April 14. L. 2002: (1.5) added, p. 759, § 6, effective July 1. L. 2012: (4)(a) amended, (HB-1310), ch. 268, p. 1393, § 6, effective June 7; (1)(b) amended, (SB 12-175), ch. 208, p. 849, § 71, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "State Grand Juries in Colorado: Understanding the Process and Attacking Indictments", see 34 Colo. Law. 63 (April 2005).

Annotator's note. Since § 16-5-204 is similar to repealed CSA, C. 48, § 448, relevant cases construing that provision have been included in the annotations to this section.

Compliance need not appear on face of indictment. Compliance with the provisions of this section need not appear on the face of the indictment because the presumption of regularity pertains. *People v. Swanson*, 109 Colo. 371, 125 P.2d 637 (1942).

This section does not prohibit grand jury from questioning persons suspected of crimes. *People v. McPhail*, 118 Colo. 478, 197 P.2d 315 (1948).

Even if issuance of subpoena was abuse of grand jury's powers, defendant must show that the abuse prejudiced him before he is entitled to have the fruits of the subpoena suppressed. *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

Where subpoena produces only evidence otherwise discoverable, defendant is in no way prejudiced by its issuance, even though erroneous, and any impropriety in the grand jury process is harmless. *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

Order suppressing intercepted communications is "just cause". An order suppressing intercepted communications pursuant to § 16-15-102 (10) would constitute a showing of "just cause" within the meaning of subsection (1)(a). *In re P.R. v. District Court*, 637 P.2d 346 (Colo. 1981).

Attorney may not represent more than one witness. To preserve the secrecy and effectiveness of the grand jury process, no attorney who provides counsel in the grand jury room may represent more than one witness in a single

investigation without grand jury permission, and this is a constitutionally permissible limitation of the right to counsel. *People ex rel. Lasavio v. J.L.*, 195 Colo. 494, 580 P.2d 23 (1978).

Legislative intent as to right to counsel. Close scrutiny of this section reveals that the general assembly intended to abolish the established practice of permitting grand-jury witnesses to consult with an attorney outside the grand jury room only, and substitute a system which expands the protections afforded grand jury witnesses while insuring continued efficacy of the grand jury process. *People ex rel. Lasavio v. J.L.*, 195 Colo. 494, 580 P.2d 23 (1978).

Equal protection not violated. Subsection (4)(d) does not create a classification subject to challenge under the equal protection clause. *People ex rel. Lasavio v. J.L.*, 195 Colo. 494, 580 P.2d 23 (1978).

Oral advisement of rights in presence of grand jury does not meet requirements of this section and does not afford the witness the protection intended by this section that he be permitted to exercise his privilege against self-incrimination outside the presence of the grand jury without having to appear and do so in the presence of the grand jury. *People ex rel. Gallagher v. District Court*, 198 Colo. 468, 601 P.2d 1380 (1979).

Inappropriate conduct by district attorney merits court's release of grand jury transcripts to defense. Only in case where clear examples of inappropriate conduct by the district attorney may affect the validity of the defendant's indictment, or the determination of probable cause, should the trial court sacrifice the confidentiality of the grand jury proceedings and release a transcript of the grand jury colloquy to defense counsel. *People v. District Court*, 199 Colo. 398, 610 P.2d 490 (1980).

Indictment is culmination of probable cause screening process of grand jury and that

procedure functions as a constitutionally adequate substitute for a preliminary hearing. *People v. District Court*, 199 Colo. 398, 610 P.2d 490 (1980).

When indictment properly dismissed. Where trial judge, with probable cause as the criteria for determining the sufficiency of the record to support the indictment, concluded that the record was insufficient to support the charges contained in the indictment, the indictment was properly dismissed. *People v. Laughlin*, 621 P.2d 1388 (Colo. 1981).

Court to evaluate finding of probable cause. The duty of the trial court under subsection (4)(k) is to evaluate the sufficiency of the evidence presented to the grand jury to establish probable cause. *People v. Luttrell*, 636 P.2d 712 (Colo. 1981).

Standards for review of determination of probable cause. The district court function in conducting a review of the grand jury record, as authorized by subsection (4)(k), is much like the role of the court at a preliminary hearing and the same rule applies in determining the existence or absence of probable cause. The court must draw all inferences in favor of the prosecution, and when there is a conflict in the testimony a question of fact exists for determination at trial. *People v. Summers*, 197 Colo. 445, 593 P.2d 969 (1979); *People v. Luttrell*, 636 P.2d 712 (Colo. 1981).

In determining whether compliance with subpoena duces tecum will be "unreasonable or oppressive", the court must balance the competing interests of the individual's right to keep his personal affairs confidential with the grand jury's right to investigate criminal activity. *Losavio v. Robb*, 195 Colo. 533, 579 P.2d 1152 (1978).

When evidentiary phase of contempt hearing may be closed to public. The evidentiary phase of a grand jury witness's contempt hearing may be closed to the public and press only upon express findings by the court that: (1) A public hearing would create a clear and present danger to the investigation of matters presently pending before the grand jury; and (2) the prejudicial effect of such information on presently pending grand jury matters cannot be avoided by any reasonable alternative less drastic than closure. *In re P.R. v. District Court*, 637 P.2d 346 (Colo. 1981).

As to procedures at indirect contempt hearing, see *In re P.R. v. District Court*, 637 P.2d 346 (Colo. 1981).

Grand jury subpoenas not bona fide where obtained by unauthorized persons. Subpoenas for toll records of a telephone subscriber were

not bona fide grand jury subpoenas where they were obtained by investigators of strike force who had no authority to represent the state grand jury, and therefore toll records so obtained were properly suppressed. *People v. Corr*, 682 P.2d 20 (Colo. 1984), cert. denied, 469 U.S. 555, 105 S. Ct. 181, 83 L. Ed.2d 115 (1984).

Disclosure of grand jury materials to federal prosecutors without prior court approval, in violation of this section, did not violate federal constitutional or statutory rights. *United States v. Pignatiello*, 628 F. Supp. 68 (D. Colo. 1986).

Written advisement requirement of subsection (4) does not apply to non-subpoenaed, voluntary witnesses. *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994).

Term "any witness", as used in subsection (4)(b), means any subpoenaed witness who did not receive a written advisement upon the subpoena. It does not include a voluntary witness. *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994).

The right to service of a subpoena bearing an advance written advisement is a statutory right subject to voluntary waiver. *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994).

Violation of procedures may warrant dismissal of indictment if behavior of government agents is so outrageous as to violate fundamental fairness and shock the universal sense of justice. *People v. Auld*, 815 P.2d 956 (Colo. App. 1991); *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994).

Alleged prosecutorial misconduct held not sufficient to warrant dismissal where evidence against defendant was strong, unauthorized changes to transcript after return of indictment were minor, and review of records and affidavits supported trial court's determination that grand jury discharged its duty without malice, ill will, fear, or favoritism. *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994).

No right to evidentiary hearing on issue of off-the-record prosecutorial misconduct where evidence presented during recorded proceedings was more than sufficient to support the indictment. Although grand jury secrecy is not absolute, breach of that security should be countenanced only upon compelling need. *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994).

Applied in *Lindsay v. People*, 119 Colo. 483, 204 P.2d 878 (1949); *People v. DeJesus*, 184 Colo. 230, 519 P.2d 944 (1974); *Thomas v. County Court*, 198 Colo. 87, 596 P.2d 768 (1979); *People v. North Ave. Furn. & Appliance, Inc.*, 645 P.2d 1291 (Colo. 1982); *People v. Armstrong*, 664 P.2d 713 (Colo. App. 1982); *People v. Moyer*, 670 P.2d 785 (Colo. 1983).

16-5-205. Informations - authority to file - indictments - warrants and summons.

(1) The prosecuting attorney may file an information in the court having jurisdiction over the offense charged, alleging that a person committed the criminal offense described therein.

The court shall enter an order fixing the amount of bail, if the offense is bailable, and the amount of bail shall be endorsed upon any warrant issued for the arrest of the alleged offender. When a summons is issued instead of a warrant, no bail shall be fixed; except that, when a person is charged with an offense pursuant to section 42-2-138 (1) (d) or 42-4-1301 (1) or (2) (a), C.R.S., the court may enter an order fixing the amount of bail even if a summons is issued.

(2) Upon the return of an indictment by a grand jury, or the filing of an information, or the filing of a felony complaint in the county court, the prosecuting attorney shall request the court to order that a warrant shall issue for the arrest of the defendant, or that a summons shall issue and be served upon the defendant. If a warrant is requested upon an information or a felony complaint, the information or felony complaint must contain, or be accompanied by, a sworn written statement of facts establishing probable cause to believe that the criminal offense was committed as alleged by the person for whom the warrant is sought. In lieu of such sworn statement, the information or felony complaint may be supplemented by sworn testimony of such facts. Such testimony must be transcribed and then signed under oath by the witness giving the testimony.

(3) Except as otherwise provided in this article, any information, indictment, felony complaint, warrant, or summons shall comply with the requirements of applicable rules of criminal procedure adopted by the supreme court of Colorado. Any procedures connected with service of summons, the arrest and detention of an alleged offender upon a warrant, and the duties of the arresting officer relating to the summons or arrest, not specifically set forth in this code, shall be as provided by the applicable rules of criminal procedure adopted by the supreme court of Colorado.

(4) Repealed.

Source: L. 72: R&RE, p. 215, § 1. C.R.S. 1963: § 39-5-205. L. 77: (4) added, p. 856, § 2, effective June 21. L. 89: (4) amended, p. 779, § 7, effective July 1. L. 91: (4) amended, p. 402, § 2, effective June 6. L. 97: (4) repealed, p. 315, § 2, effective October 1. L. 2008: (1) amended, p. 785, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "By Leave of Court First Had", see 8 Dicta 10 (May, 1931). For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963).

Annotator's note. Since § 16-5-205 is similar to repealed § 39-4-1, C.R.S. 1963, § 39-4-1, CRS 53, and CSA, C. 48, § 454, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section provides concurrent methods of proceeding against a criminal defendant. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969).

In each method there are provisions to protect the accused against discrimination and oppression on the part of the district attorney. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969).

Constitutionality. Provision allowing prosecutions upon information was held not unconstitutional when surrounded by proper regulations and safeguards and made applicable to all

persons and communities in the state without discrimination. *In re Dolph*, 17 Colo. 35, 28 P. 470 (1891).

Provision requiring a proper and sufficient affidavit supporting information before warrant of arrest can issue was held constitutionally valid as not opposed to § 7 of art. II, Colo. Const., the provision of the bill of rights relating to warrants. *Ratcliff v. People*, 22 Colo. 75, 43 P. 553 (1896).

The portion of this section which authorizes initiation of criminal proceedings by direct information is not a violation of due process or equal protection of the law. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969).

No constitutional provision forbids indictments and informations as concurrent remedies when surrounded by proper regulations and safeguards. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969).

This section is a valid exercise by the general assembly of its power pursuant to § 23, of art. II, Colo. Const. *de'Sha v. Reed*, 194 Colo. 367, 572 P.2d 821 (1977).

This section applies to the extent of any conflict with Crim. P. 6.7. *de'Sha v. Reed*, 194 Colo. 367, 572 P.2d 821 (1977).

Information provision pari materia with system of prosecution. The legislative acts providing for the prosecution of crimes, naming the parties who shall prosecute, and prescribing the means and methods to be pursued are all parts of the same system and must be construed in *pari materia*. *People v. Gibson*, 53 Colo. 231, 125 P. 531 (1912).

It is general both in form and substance and of uniform operation throughout the state. *In re Dolph*, 17 Colo. 35, 28 P. 470 (1891).

Neither the prosecuting attorney nor any other officer is authorized to exercise an arbitrary discretion in the matter of instituting criminal prosecutions. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969).

Discretion is given to the prosecuting attorney to determine whether in any given case an information ought or ought not to be filed. He is the official possessed of the power and charged with the duty to accuse of crime by information in like manner as the grand jury is in cases by indictment. *Stainer v. San Luis Valley Land & Mining Co.*, 166 F. 220 (8th Cir. 1908).

Complaining witness or victim of crime has no control over case, since he is not a party to

it he can neither require prosecution of the case nor its dismissal. *People v. Lucero*, 623 P.2d 424 (Colo. App. 1980).

Preliminary hearing unnecessary before filing information. It is not necessary in order to vest power in the prosecuting attorney to file an information that there shall be a preliminary hearing and commitment. *Holt v. People*, 23 Colo. 1, 45 P. 374 (1896).

There is no procedure for dismissing a felony complaint without prejudice. Once the filing of a felony complaint in county court is dismissed, the prosecution must either obtain a grand jury indictment or file an information directly in the district court. *People v. Williams*, 987 P.2d 232 (Colo. 1999).

Determination of probable cause after arrest. Where insufficient information was presented to the court at the time of the filing of the information, which was sufficiently verified by a police officer, probable cause could be determined after the arrest. *People v. Mundt*, 38 Colo. App. 331, 561 P.2d 1272 (1976).

Applied in *People v. Read*, 132 Colo. 390, 288 P.2d 347 (1955); *People v. Rice*, 40 Colo. App. 357, 579 P.2d 647 (1978).

16-5-205.5. Grand jury reports. (1) In any case in which a grand jury does not return an indictment, the grand jury may prepare or ask to be prepared a report of its findings if the grand jury determines that preparation and release of a report would be in the public interest, as described in subsection (5) of this section. The determination to prepare and release a report pursuant to this section must be made by an affirmative vote of at least the number of jurors that would have been required to return an indictment. The report shall be accompanied by certification that the grand jury has determined that release of the report is in the public interest, as described in subsection (5) of this section.

(2) The provisions of this section shall not apply in any instance in which the prosecuting attorney chooses to file charges against the person or business that was the subject of the grand jury investigation.

(3) Within fourteen days after receiving a report of the grand jury prepared pursuant to subsection (1) of this section, the prosecuting attorney shall notify in writing all persons and businesses named in the grand jury report to give such persons and businesses an opportunity to review the grand jury report and prepare a response to be submitted to the court with the grand jury report. Such notice shall be by personal service or by certified mail return receipt requested. Any responses shall be submitted to the prosecuting attorney within fourteen days after notification.

(4) Upon completion of the time for submitting responses, the prosecuting attorney shall submit the grand jury report to the court, together with the certification of public interest and any responses that may have been submitted. The court shall examine the report and make an order accepting and filing the report, including the certification and any responses that the respondent, by written notice to the prosecuting attorney and the court, has agreed to release, as a public record only if the court is satisfied that:

(a) The grand jury and the prosecuting attorney were acting within the statutory jurisdiction of such persons in convening the grand jury; and

(b) The grand jury foreman and the prosecuting attorney have verified on the record that:

(I) The certification of public interest by the grand jury complies with the provisions of subsection (5) of this section; and

(II) The report is based on facts revealed in the course of the grand jury investigation and is supported by a preponderance of the evidence; and

(III) The report does not contain material the sole effect of which is to ridicule or abuse a person or business or to subject such person or business to public disgrace or embarrassment; and

(IV) The report does not contain material that is personal in nature that does not relate to any lawful inquiry; and

(V) No confidentiality agreement will be violated and the identity of no confidential informant will be disclosed in making such grand jury report public; and

(VI) The filing of such report as a public record does not prejudice the fair consideration of a criminal matter.

(5) Release of a grand jury report pursuant to this section may be deemed to be in the public interest only if the report addresses one or more of the following:

(a) Allegations of the misuse or misapplication of public funds;

(b) Allegations of abuse of authority by a public servant, as defined in section 18-1-901

(3) (o), C.R.S., or a peace officer, as described in section 16-2.5-101;

(c) Allegations of misfeasance or malfeasance with regard to a governmental function, as defined in section 18-1-901 (3) (j), C.R.S.;

(d) Allegations of commission of a class 1, class 2, or class 3 felony.

Source: **L. 97:** Entire section added, p. 313, § 1, effective October 1. **L. 2003:** (5)(b) amended, p. 1614, § 8, effective August 6. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 849, § 72, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Grand jury had discretion to release a report under this statute even though it did not choose to issue an indictment and trial court was correct in approving the release of the grand jury report in this instance. In re 2000-2001 Dist. Grand Jury Report, 22 P.3d 922 (Colo. 2001).

Term "case" in the statute means any matter that has become the object of investigation arising out of the subject matter of inquiry. If a single, comprehensive investigation by a grand jury led to an indictment, this section prohibits the release of a grand jury report on another issue of the investigation unrelated to the indictment. In re 2003-2004 Term of the State Grand Jury, 148 P.3d 440 (Colo. App. 2006).

Trial court's role in reviewing the grand jury proceedings is limited. In re 2000-2001 Dist. Grand Jury Report, 22 P.3d 922 (Colo. 2001).

Statute's legislative history evidences intent of general assembly that the court should have limited discretion in determining whether a grand jury report should be released. In re 2000-2001 Dist. Grand Jury Report, 22 P.3d 922 (Colo. 2001).

Because the general assembly did not provide in statute for disclosure of grand jury reports and limited the court's role in reviewing grand jury reports, it intended that persons

named respond only to the information contained in the report. Open-ended discovery of the grand jury proceedings is not an option. In re 2000-2001 Dist. Grand Jury, 77 P.3d 779 (Colo. App. 2003), aff'd, 97 P.3d 921 (Colo. 2004).

Party to grand jury report failed to demonstrate that this section affects a cognizable due process interest, and, thus, federal due process concerns are not implicated. In re 2000-2001 Dist. Grand Jury, 97 P.3d 921 (Colo. 2004).

Role of a trial court reviewing a grand jury report for the purpose of determining whether it should be released or not is to review the report independently to determine whether, on its face, the report satisfies the requirement that it concern matters of public interest, as defined by the statute, and to measure the certification of the grand jury foreperson and the prosecuting attorney against the facts contained in the report. Trial court had obligation to verify that the report comports with the certification and in this instance the trial court did not err in permitting the release of a report. In re 2000-2001 Dist. Grand Jury Report, 22 P.3d 922 (Colo. 2001).

Purpose of subsection (4) is to prevent the grand jury process from being used as a subterfuge to obtain information for use in other proceedings. *Charnes v. Lilly*, 197 Colo. 460, 593 P.2d 967 (1979) (decided under repealed § 16-5-205 (4)).

Word “report” in subsection (4) is all-inclusive and includes transcripts. *Charnes v. Lilly*, 197 Colo. 460, 593 P.2d 967 (1979) (decided under repealed § 16-5-205 (4)).

“Report” also includes corporate records used in grand jury proceedings. *People v. Tynan*, 701 P.2d 80 (Colo. App. 1984) (decided under repealed § 16-5-205 (4)).

16-5-206. Summons in lieu of warrant. (1) Except in class 1, class 2, and class 3 felonies and in unclassified felonies punishable by a maximum penalty of more than ten years, if an indictment is returned or an information, felony complaint, or complaint has been filed prior to the arrest of the person named as defendant therein, the court has power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his or her arrest unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim or public safety may be compromised.

(2) If a summons is issued in lieu of a warrant under subsection (1) of this section:

(a) It shall be in writing.

(b) It shall state the name of the person summoned and his address.

(c) It shall identify the nature of the offense.

(d) It shall state the date when issued and the county where issued.

(e) It shall be signed by the judge or clerk of the court with the title of his office.

(f) It shall command the person to appear before the court at a certain time and place.

(3) A summons issued under this section may be served in the same manner as the summons in a civil action or by mailing it to the defendant’s last-known address by certified mail with return receipt requested not less than fourteen days prior to the time the defendant is requested to appear. Service by mail is complete upon the return of the receipt signed by the defendant.

(4) If any person summoned under this section fails to appear as commanded by the summons, the court shall forthwith issue a warrant for his arrest.

Source: L. 72: R&RE, p. 216, § 1. **C.R.S. 1963: § 39-5-206.** **L. 2009: (1)** amended, (HB 09-1262), ch. 104, p. 381, § 1, effective August 5. **L. 2012: (3)** amended, (SB 12-175), ch. 208, p. 849, § 73, effective July 1.

Editor’s note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-5-207. Standards and criteria relating to issuance of summons in lieu of warrant. (1) A summons shall be issued instead of a warrant in all petty offenses, class 3 misdemeanors, and all unclassified offenses which are punishable by a maximum penalty of six months’ imprisonment or less, except in those cases where the court finds that:

(a) The defendant has previously failed to respond to a summons for an offense; or

(b) There is a substantial likelihood that the defendant will not respond to a summons; or

(c) The whereabouts of the defendant is unknown and the issuance of an arrest warrant is necessary in order to subject him to the jurisdiction of the court.

(2) Except in class 1, class 2, and class 3 felonies, the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant except where there is reasonable ground to believe that, unless taken into custody, the defendant will flee to avoid prosecution or will fail to respond to a summons. The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests. When an application is made to a court for issuance of an arrest warrant or summons, the court may require the applicant to provide such information as reasonably is available concerning the following:

(a) The defendant’s residence;

(b) The defendant’s employment;

(c) The defendant’s family relationships;

(d) The defendant’s past history of response to legal process; and

(e) The defendant’s past criminal record.

Source: L. 72: R&RE, p. 216, § 1. C.R.S. 1963: § 39-5-207.

16-5-208. Information not filed - reasons. In all cases where on preliminary hearing in the county court concerning the commission of a felony the accused is bound over and is committed to jail, or recognized and held to bail, it is the duty of the district attorney to file an information in the district court. If the district attorney determines in any such case that an information ought not to be filed, he or she shall file with the clerk of the district court having jurisdiction of the supposed offense a written statement containing his or her reasons, in fact and in law, for not filing an information in the case, and such statement shall be filed within sixty-three days following the date upon which the offender was held for appearance.

Source: L. 72: R&RE, p. 217, § 1. C.R.S. 1963: § 39-5-208. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 849, § 74, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-5-209. Judge may require prosecution. The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge and explain the refusal. If after that proceeding, based on the competent evidence in the affidavit, the explanation of the prosecuting attorney, and any argument of the parties, the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so. The judge shall appoint the special prosecutor from among the full-time district attorneys, assistant district attorneys, or deputy district attorneys who serve in judicial districts other than where the appointment is made; except that, upon the written approval of the chief justice of the supreme court, the judge may appoint any disinterested private attorney who is licensed to practice law in the state of Colorado to serve as the special prosecutor. Any special prosecutor appointed pursuant to this section shall be compensated as provided in section 20-1-308, C.R.S.

Source: L. 72: R&RE, p. 217, § 1. C.R.S. 1963: § 39-5-209. L. 77: Entire section amended, p. 858, § 1, effective May 24. L. 2000: Entire section amended, p. 454, § 12, effective April 24.

ANNOTATION

Purpose of this section is to allow persons who believe that a prosecuting attorney is not pursuing a case with diligence to petition the court to review the status of the case. *Dohaish v. Tooley*, 670 F.2d 934 (10th Cir.), cert. denied, 459 U.S. 826, 103 S. Ct. 60, 74 L. Ed.2d 63 (1982).

This section provides a remedy only for a district attorney's refusal to file charges, not for refusal to investigate criminal charges. *Kailey v. Chambers*, 261 P.3d 792 (Colo. App. 2011).

The scope of appellate court review under this section is a mixed question of law and fact. A district court's factual findings resulting from an evidentiary hearing may only be disturbed if clearly erroneous and not supported by

the record. However, the district court's application of the statutory standard may be reviewed de novo. *J.S. v. Chambers*, 226 P.3d 1193 (Colo. App. 2009).

Evidence necessary for judge to substitute judgment. A district judge should not, in the absence of clear and convincing evidence that the terms of this section have been met, substitute his judgment or discretion for that of the prosecutor in a criminal case. *Tooley v. District Court*, 190 Colo. 468, 549 P.2d 772 (1976).

The district attorney's decision not to prosecute a case may not be challenged unless there is a showing that his decision was arbitrary or capricious. *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *Sandoval v. Farish*, 675 P.2d 300 (Colo. 1984).

District attorney's decision not to prosecute a woman for alleged theft by deception was not proved to be arbitrary or capricious and without reasonable excuse, and therefore the judge could not substitute his judgment or discretion for that of the prosecutor. *Landis v. Farish*, 674 P.2d 957 (Colo. 1984).

There must be a clear and convincing showing that the prosecutor's decision not to prosecute was arbitrary and capricious and without reasonable excuse before the court will order prosecution or the appointment of a special prosecutor. The court's finding that there were credibility issues with the alleged victim's claims, the lack of specificity regarding the where and when the events occurred, and the passage of time show the court's decision was not arbitrary and capricious. *Kailey v. Chambers*, 261 P.3d 792 (Colo. App. 2011).

The first step for a court to consider is whether a prosecuting attorney has made a decision not to prosecute. This section requires a refusal to prosecute for the inquiry to continue. *Kailey v. Chambers*, 261 P.3d 792 (Colo. App. 2011).

Challenging party has the burden of proof and even a strong showing does not shift the burden of proof to the prosecutor. *Moody v. Larsen*, 802 P.2d 1169 (Colo. App. 1990); *J.S. v. Chambers*, 226 P.3d 1193 (Colo. App. 2009).

This section provides for a prosecutor's appearance at a court-ordered hearing to "explain the refusal" to prosecute. The statute does not require the prosecutor to present evidence. *J.S. v. Chambers*, 226 P.3d 1193 (Colo. App. 2009).

This section calls for the usual type of hearing in which both parties are given the opportunity to present evidence and argument. *Moody v. Larsen*, 802 P.2d 1169 (Colo. App. 1990).

Each party has the right to present rebuttal evidence to the testimony of a witness concerning a material issue, including the right to call witnesses for such purpose. *Moody v. Larsen*, 802 P.2d 1169 (Colo. App. 1990).

Actions brought under this section are special statutory proceedings not exempted from application of the rules of civil procedure because this section lacks an adequate, exclusive, full, and complete procedure. To hold otherwise is to render the legislature's mechanism

for prevention of prosecutorial abuses a hollow shell and is not consonant with sound judicial administration. Trial court thus erred in denying challenging party's requests for discovery and a continuance to permit discovery and in failing to exercise its discretion concerning whether to allow discovery. *Moody v. Larsen*, 802 P.2d 1169 (Colo. App. 1990).

The amendment to this section in 2000 effectively eliminated the right to formal discovery and the right to a full evidentiary hearing. Consequently, the trial court may, at its discretion, provide for an evidentiary hearing after it has considered the petitioner's affidavit, the explanation of the district attorney, if required by the court, and any argument of the parties. *Schupper v. Smith*, 128 P.3d 323 (Colo. App. 2005).

The 2000 amendment also established that this section creates a special statutory proceeding that is exempted from application of the rules of civil procedure. *Schupper v. Smith*, 128 P.3d 323 (Colo. App. 2005).

This section does not require the court to require the prosecuting attorney to appear before the court and explain the refusal to prosecute. *Kailey v. Chambers*, 261 P.3d 792 (Colo. App. 2011).

This section contemplates that the prosecuting attorney may appear in person before the court and explain the refusal to prosecute. *Schupper v. Smith*, 128 P.3d 323 (Colo. App. 2005).

Under this section, the "prosecuting attorney" is the only individual who may be ordered to prosecute a case; therefore, dismissal of assistant attorneys from proceeding brought under this section is proper. *Schupper v. Smith*, 128 P.3d 323 (Colo. App. 2005).

District attorney's explanation for declining to prosecute identified reasons that were supported by some competent evidence and were proper factors under *Sandoval v. Farish*, 675 P.2d 300 (Colo. 1984). The district attorney's analysis of factors in support of declining prosecution were not so overwhelmed by factors that favor prosecution as to compel the conclusion that the district attorney's exercise of broad discretion was arbitrary and capricious. *J.S. v. Chambers*, 226 P.3d 1193 (Colo. App. 2009).

PART 3

PRELIMINARY HEARING

16-5-301. Preliminary hearing or waiver - dispositional hearing. (1) (a) Every person accused of a class 1, 2, or 3 felony by direct information or felony complaint has the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information or felony complaint was committed by the defendant. In addition, only those persons accused of a class 4, 5, or 6 felony by direct information or felony complaint which felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406, C.R.S., or

is a sexual offense under part 4 of article 3 of title 18, C.R.S., shall have the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information or felony complaint was committed by the defendant. The procedure to be followed in asserting the right to a preliminary hearing and the time within which demand therefor must be made, as well as the time within which the hearing, if demanded, shall be had, shall be as provided by applicable rule of the supreme court of Colorado. A failure to observe and substantially comply with such rule shall be deemed a waiver of this right to a preliminary hearing.

(b) (I) No person accused of a class 4, 5, or 6 felony by direct information or felony complaint, except those which require mandatory sentencing or which are crimes of violence as defined in section 18-1.3-406, C.R.S., or which are sexual offenses under part 4 of article 3 of title 18, C.R.S., shall have the right to demand or receive a preliminary hearing; except that such person shall participate in a dispositional hearing for the purposes of case evaluation and potential resolution.

(II) Any defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing pursuant to subparagraph (I) of this paragraph (b), may demand and shall receive a preliminary hearing within a reasonable time pursuant to paragraph (a) of this subsection (1), if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing.

(III) The chief justice of the Colorado supreme court is encouraged to promulgate rules defining the term "dispositional hearing" for purposes of this paragraph (b), section 18-1-404 (2), C.R.S., and section 19-2-705 (1.5), C.R.S.

(2) If a person is accused of an unlawful sexual offense classified as a felony, upon the request of any party to the proceeding, the court may exclude from the preliminary hearing any member of the general public. In making a ruling for exclusion, the court shall:

(a) Set forth sufficient findings of fact and conclusions of law to support the order; and

(b) Make its order sufficiently narrow to protect the requesting party's compelling interest considering any reasonable alternative to exclusion for the entire hearing of all members of the general public.

(3) The court may exempt a victim's advocate from any order entered pursuant to subsection (2) of this section. For the purposes of this section, "victim's advocate" means any person whose regular or volunteer duties include the support of an alleged victim of physical or sexual abuse or assault.

Source: L. 72: R&RE, p. 217, § 1. C.R.S. 1963: § 39-5-301. L. 73: p. 499, § 3. L. 87: Entire section amended, p. 603, § 2, effective July 1. L. 92: Entire section amended, p. 321, § 1, effective July 1. L. 98: (1) amended, p. 1272, § 1, effective July 1. L. 2000: (1)(b)(II) amended, p. 454, § 11, effective April 24. L. 2002: (1)(a) and (1)(b)(I) amended, p. 1490, § 133, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (1)(a) and (1)(b)(I), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "By Leave of Court First Had", see 8 Dicta 10 (June 1931). For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For note, "Preliminary Hearings — The Case for Revival", see U. Colo. L. Rev. 580 (1967). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to right of access to criminal proceedings,

see 15 Colo. Law. 1563 (1986). For article, "Felony Preliminary Hearings in Colorado", see 17 Colo. Law. 1085 (1988).

Annotator's note. Since § 16-5-301 is similar to repealed § 39-5-1, C.R.S. 1963, CSA, C. 48, § 461, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Right to preliminary hearing has constitutional foundation. Defendant in requesting and obtaining a preliminary hearing is exercising a

right that is not only guaranteed him by statute and rule of court, but also one that has a constitutional foundation. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

There is no constitutional requirement making a preliminary hearing a prerequisite to a prosecution by information. *Holt v. People*, 23 Colo. 1, 45 P. 374 (1896).

There is no federal constitutional requirement of a preliminary hearing before proceeding by information. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969); *People v. Moody*, 630 P.2d 74 (Colo. 1981).

The primary purpose of the preliminary hearing is to determine whether probable cause exists to support the prosecution's charge that the accused committed a specific crime. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973); *People v. Lancaster*, 683 P.2d 1202 (Colo. 1984); *People v. District Court*, 779 P.2d 385 (Colo. 1989); *People v. Sutherland*, 886 P.2d 681 (Colo. 1994).

The preliminary hearing is held for the limited purpose of determining if probable cause exists to believe that the crime or crimes charged were committed by the defendant. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

The sole issue at the preliminary hearing is probable cause. *Lucero v. District Court*, 188 Colo. 67, 532 P.2d 955 (1975).

The preliminary hearing is a screening device to determine whether probable cause exists. *People v. Weaver*, 182 Colo. 221, 511 P.2d 908 (1973).

A preliminary hearing is a screening device and does not require that the prosecution lay out for inspection and for full examination all witnesses and evidence. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Evidence to support a conviction is not required at a preliminary hearing. *People v. Brisbin*, 727 P.2d 374 (Colo. 1986); *People v. District Court*, 779 P.2d 385 (Colo. 1989).

The preliminary hearing was created as a screening device to afford the defendant an opportunity to challenge the sufficiency of the prosecution's evidence to establish probable cause before an impartial judge. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Because the preliminary hearing is a screening device, much latitude is accorded the prosecution at this stage, and the trial court is obligated to view the evidence presented in the light most favorable to the prosecution. *People v. District Court*, 803 P.2d 193 (Colo. 1990).

Trial court did not have the authority to dismiss defendant's felony charge on the basis that defendant had not received a timely preliminary hearing. Because defendant was not in the custody of the county charging him with the felony, he was not legally entitled to a

preliminary hearing. *People v. Pena*, 250 P.3d 592 (Colo. App. 2009).

Preliminary hearing does not alter proposition that accused entitled to one trial on merits. Although a preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Standards for determining probable cause at preliminary hearing are: (1) Probable cause is established when the evidence is sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged; (2) the evidence presented must be viewed in the light most favorable to the prosecution; (3) if testimony conflicts, the trial court must draw an inference for the prosecution; and (4) the preliminary hearing is a screening device and not a trial. *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *Abbott v. County Ct. in & for County of Grand*, 886 P.2d 730 (Colo. 1994).

Judge without jurisdiction to adjudge ultimate guilt. In a preliminary hearing of one charged with the commission of a crime, the judge is without jurisdiction to adjudge the ultimate guilt or innocence of the accused. *Ex parte Snyder*, 110 Colo. 35, 129 P.2d 672 (1942).

Judging the merits of a case is for the trier of facts at trial and not for the trial judge at a preliminary hearing. *People v. District Court*, 779 P.2d 385 (Colo. 1989).

Hearsay and other evidence may be bulk of evidence at hearing. Hearsay and other evidence, which would be incompetent if offered at the time of trial, may be the bulk of evidence at a preliminary hearing. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Hearsay evidence considered to establish probable cause. Hearsay evidence, which would otherwise be inadmissible at the trial, may be considered for purposes of establishing probable cause. *People v. Williams*, 628 P.2d 1011 (Colo. 1981).

Prosecution satisfies minimum requirements for use of hearsay at preliminary hearing if it: (1) Presents some competent nonhearsay evidence that addresses an essential element of the offense; and (2) presents the hearsay evidence through a witness who is connected to the offense or its investigation rather than someone merely reading from a report. In this case, the prosecution satisfied the status elements of the offense through nonhearsay testimony and produced the victim's testimony (hearsay) through the investigating officer who was familiar with the case. *People v. Huggins*, 220 P.3d 977 (Colo. App. 2009).

Court's failure to apply correct standard for use of hearsay at preliminary hearing was

abuse of discretion. Applying the correct standard, the evidence presented at the preliminary hearing established probable cause to believe the defendant committed the charged offenses. *People v. Huggins*, 220 P.3d 977 (Colo. App. 2009).

Resolving admissibility of such evidence. The admissibility at a preliminary hearing of a confession which is alleged to be involuntary or the admissibility of evidence that may have been seized in violation of the fourth amendment to the United States Constitution need not be resolved on the same basis that would be required when such motion is properly before the trial court or at the time of the trial. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Failure to establish an articulable suspicion for stopping defendant or probable cause for arrest at preliminary hearing is not grounds for dismissal of charges. *People v. Brisbin*, 727 P.2d 374 (Colo. 1986).

Probable cause finding may be based largely on hearsay testimony. *Abbott v. County Ct. in & for County of Grand*, 886 P.2d 730 (Colo. 1994).

However reliance on hearsay evidence must not be abused. *Maestas v. District Ct.*, 541 P.2d 889 (Colo. 1975); *Abbott v. County Ct. in & for County of Grand*, 886 P.2d 730 (Colo. 1994).

Preliminary hearing deemed waived if not demanded. The statutory right to receive a preliminary hearing is not absolute and requires that either the defendant or his attorney, or the prosecuting attorney, file a written motion demanding the preliminary hearing; if the defendant fails to file a written motion for a preliminary hearing, he is deemed to have waived his right to demand one. *People v. Moody*, 630 P.2d 74 (Colo. 1981).

A defendant, charged with a class five felony is conferred the right to a preliminary hearing only if that defendant is in custody for the offense for which the preliminary hearing is requested. The defendant's right to a preliminary hearing is lost under the circumstance that he or she is in custody for an offense other than that for which the preliminary hearing is requested. *People v. Taylor*, 104 P.3d 269 (Colo. App. 2004).

Refusal to appear constitutes waiver. In addition to an express written waiver, refusal by a defendant to appear at a scheduled preliminary hearing where the county judge had advised the defendant's attorney that the defendant's presence was required constitutes an implied waiver and extinguishes the defendant's right to a preliminary hearing in county court. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

As does failure to appear. Where it is clear that a defendant was apprised of his right to a hearing and of the date on which he was required to appear, the failure of both the defen-

dant and his attorney to appear constitutes an implied waiver of the preliminary hearing. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Application for deferred sentencing does not constitute waiver of right to preliminary hearing. *Celestine v. District Court*, 199 Colo. 514, 610 P.2d 1342 (1980).

Effect of waiver of preliminary hearing. If the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

An express written waiver by a defendant of his right to a preliminary hearing operates identically to a failure to file within the time limit prescribed by Crim. P. 5(a)(5), both requiring the defendant's case to be bound over for trial. *People v. Abbot*, 638 P.2d 781 (Colo. 1981).

Once a county court has bound a defendant over to the district court for trial, the district court is without authority or power to grant the defendant a preliminary hearing. *People v. Taylor*, 104 P.3d 269 (Colo. App. 2004).

District court cannot restore waived right. Under the Colorado rules of criminal procedure and the statutes of this state, a district court is not vested with the power to restore a defendant's statutory right to a preliminary hearing once the defendant had waived that right in county court bind-over proceedings. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974); *People v. Abbott*, 638 P.2d 781 (Colo. 1981); *People v. Taylor*, 104 P.3d 269 (Colo. App. 2004).

Where district court finds that defendant's waiver of right to preliminary hearing is ineffective, the district court has the authority to restore defendant's right to a preliminary hearing. *People v. Nicholson*, 219 P.3d 1064 (Colo. 2009).

Defendant not entitled to preliminary hearing because the substantive offense with which defendant was charged was a misdemeanor. *People v. Garcia*, 176 P.3d 872 (Colo. App. 2007).

The charge of habitual domestic violence offender is a sentence enhancer which, if proven, would enhance the level of the misdemeanor offense to a class 5 felony and would require mandatory sentencing. *People v. Garcia*, 176 P.3d 872 (Colo. App. 2007).

Habitual criminal counts. Inasmuch as habitual criminal counts do not constitute "offenses", probable cause need not be established in the preliminary hearing to bind these charges over to the district court. *Maestas v. District Court*, 189 Colo. 443, 541 P.2d 889 (1975).

Habitual criminal charges are not substantive offense and such a count could be added to

a complaint without another preliminary hearing. *People v. Hodge*, 694 P.2d 1277 (Colo. App. 1984).

Juvenile who was transferred to the district court from the juvenile court, after a transfer hearing where probable cause as to the offenses charged was determined, was not entitled in the district court to another determination of probable cause in the form of a preliminary hearing. *People v. Flanigan*, 189 Colo. 43, 536 P.2d 41 (1975).

All evidence presented in a preliminary hearing must be viewed in the light most favorable to the prosecution, and all inferences must be resolved in favor of the prosecution. *Abbott v. County Ct. in & for County of Grand*, 886 P.2d 730 (Colo. 1994).

Where technical difficulties prevented defendant from obtaining a transcript of the preliminary hearing, the judge abused his discretion in denying defendant's motion for

a second preliminary hearing. Such motion should have been granted because the testimony presented at the first preliminary hearing was directly relevant and significant to defendant's trial preparation, the prosecution was expected to rely on testimony presented at the preliminary hearing, and there was no alternative method of reconstructing the testimony from the preliminary hearing. *Harris v. District Court*, 843 P.2d 1316 (Colo. 1993).

District court does not have jurisdiction to review a county court's finding of probable cause pursuant to CRCP 106. Defendant may seek extraordinary relief under CAR 21. *Abbott v. County Ct. in & for County of Grand*, 886 P.2d 730 (Colo. 1994).

Applied in *People v. Boyette*, 635 P.2d 552 (Colo. 1981); *Chavez v. District Court*, 648 P.2d 658 (Colo. 1982); *People v. Elmore*, 652 P.2d 571 (Colo. 1982).

PART 4

STATUTE OF LIMITATIONS

16-5-401. Limitation for commencing criminal proceedings and juvenile delinquency proceedings. (1) (a) Except as otherwise provided by statute applicable to specific offenses, delinquent acts, or circumstances, no adult person or juvenile shall be prosecuted, tried, or punished for any offense or delinquent act unless the indictment, information, complaint, or petition in delinquency is filed in a court of competent jurisdiction or a summons and complaint or penalty assessment notice is served upon the defendant or juvenile within the period of time after the commission of the offense or delinquent act as specified below:

Murder, kidnapping, treason, any sex offense against a child, and any forgery regardless of the penalty provided:	No limit
Attempt, conspiracy, or solicitation to commit murder;	
attempt, conspiracy, or solicitation to commit kidnapping;	
attempt, conspiracy, or solicitation to commit treason;	
attempt, conspiracy, or solicitation to commit any sex offense against a child; and attempt, conspiracy, or solicitation to commit any forgery regardless of the penalty provided:	No limit
Vehicular homicide and leaving the scene of an accident that resulted in the death of a person:	Five years
Other felonies:	Three years
Misdemeanors:	Eighteen months
Class 1 and 2 misdemeanor traffic offenses:	One year
Petty offenses:	Six months

(b) Repealed.

(c) For purposes of this section:

(I) "Delinquent act" has the same meaning as defined in section 19-1-103 (36), C.R.S.

(II) "Juvenile" means a child as defined in section 19-1-103 (18), C.R.S.

(III) "Petition in delinquency" means any petition filed by a district attorney pursuant to section 19-2-512, C.R.S.

(IV) "Sex offense against a child" means any "unlawful sexual offense", as defined in section 18-3-411 (1), C.R.S., that is a felony.

(1.5) (a) Except as otherwise provided in paragraph (b) of this subsection (1.5), the provisions of paragraph (a) of subsection (1) of this section concerning sex offenses against children shall apply to offenses and delinquent acts committed on or after July 1, 1996.

(b) The provisions of paragraph (a) of subsection (1) of this section concerning sex offenses against children shall apply to an offense or delinquent act committed before July 1, 1996, if the applicable statute of limitations, as it existed prior to July 1, 2006, has not yet run on July 1, 2006.

(c) It is the intent of the general assembly in enacting the provisions of paragraph (a) of subsection (1) of this section concerning sex offenses against children to apply an unlimited statute of limitations to sex offenses against children committed on or after July 1, 1996, and to sex offenses against children committed before July 1, 1996, for which the applicable statute of limitations in effect prior to July 1, 2006, has not yet run on July 1, 2006.

(2) The time limitations imposed by this section shall be tolled if the adult offender or juvenile is absent from the state of Colorado, and the duration of such absence, not to exceed five years, shall be excluded from the computation of the time within which any complaint, information, indictment, or petition in delinquency must otherwise be filed or returned.

(3) (a) The period within which a prosecution must be commenced does not include any period in which a prosecution is pending against the adult defendant or juvenile for the same conduct, even if the indictment, information, complaint, or petition in delinquency which commences the prosecution is quashed or the proceedings thereon are set aside or are reversed on appeal.

(b) The period within which a prosecution must be commenced does not include any period in which a prosecution is pending against the adult defendant or juvenile for the same conduct, even if filed in a court without jurisdiction, when based on a reasonable belief the court possesses jurisdiction.

(4) When an offense or delinquent act is based on a series of acts performed at different times, the period of limitation prescribed by this code or by the "Colorado Securities Act", article 51 of title 11, C.R.S., starts at the time when the last act in the series of acts is committed.

(4.5) The period within which a prosecution must be commenced shall begin to run upon discovery of the criminal act or the delinquent act for:

(a) Offenses relating to the "Uniform Commercial Code", pursuant to part 5 of article 5 of title 18, C.R.S.;

(b) Computer crime, pursuant to article 5.5 of title 18, C.R.S.;

(c) Theft, pursuant to section 18-4-401, C.R.S.;

(d) Theft of trade secrets, pursuant to section 18-4-408, C.R.S.;

(e) Defacing or destruction of written instruments, pursuant to section 18-4-507, C.R.S.;

(f) Criminal simulation, pursuant to section 18-5-110, C.R.S.;

(g) Obtaining signature by deception, pursuant to section 18-5-112, C.R.S.;

(h) Criminal impersonation, pursuant to section 18-5-113, C.R.S.;

(i) Offering a false instrument for recording, pursuant to section 18-5-114, C.R.S.;

(j) Dual contracts to induce loan, pursuant to section 18-5-208, C.R.S.;

(k) Issuing a false financial statement or obtaining a financial transaction device by false statements, pursuant to section 18-5-209, C.R.S.;

(l) Unlawful activity concerning the selling of land, pursuant to section 18-5-302, C.R.S.;

(m) Offenses relating to equity skimming, pursuant to part 8 of article 5 of title 18, C.R.S.;

(m.5) Offenses relating to identity theft, pursuant to part 9 of article 5 of title 18, C.R.S.;

(n) Offenses relating to bribery and corrupt influences, pursuant to part 3 of article 8 of title 18, C.R.S.;

(o) Offenses relating to abuse of public office, pursuant to part 4 of article 8 of title 18, C.R.S.;

- (p) Offenses relating to perjury, pursuant to part 5 of article 8 of title 18, C.R.S.;
- (q) Offenses relating to the "Colorado Organized Crime Control Act", pursuant to article 17 of title 18, C.R.S.;
- (r) Unlawful concealment of transactions, pursuant to section 11-107-105, C.R.S.;
- (s) Embezzlement or misapplication of funds, pursuant to section 11-107-107, C.R.S.;
- (t) Unlawful acts or omissions relating to financial institutions, pursuant to section 11-107-108, C.R.S.;
- (u) Criminal offenses relating to industrial banks, pursuant to section 11-108-801 (3), C.R.S.; and
- (v) Criminal offenses relating to savings and loan associations, pursuant to section 11-41-127, C.R.S.

(5) The period of time during which an adult person or juvenile may be prosecuted shall be extended for an additional three years as to any offense or delinquent act charged under sections 18-8-302, 18-8-303, 18-8-306, 18-8-307, 18-8-402, 18-8-406, 18-8-407, 39-21-118, and 39-22-621 (3), C.R.S.

(6) Except as otherwise provided in paragraph (a) of subsection (1) of this section pertaining to sex offenses against children, the period of time during which an adult person or juvenile may be prosecuted shall be extended for an additional seven years as to any offense or delinquent act charged under section 18-3-402 or 18-6-403, C.R.S., or charged as criminal attempt, conspiracy, or solicitation to commit any of the acts specified in said sections.

(7) When the victim at the time of the commission of the offense or delinquent act is a child under fifteen years of age, the period of time during which an adult person or juvenile may be prosecuted shall be extended for an additional three years and six months as to a misdemeanor charged under section 18-3-404, C.R.S., or criminal attempt, conspiracy, or solicitation to commit such a misdemeanor.

(8) (a) Except as otherwise provided in paragraph (a) of subsection (1) of this section pertaining to sex offenses against children and except as otherwise provided in paragraphs (a.3) and (a.5) of this subsection (8), the period of time during which an adult person or juvenile may be prosecuted shall be ten years after the commission of the offense or delinquent act as to any offense or delinquent act:

(I) Charged under section 18-3-402, C.R.S., section 18-3-403, C.R.S., as said section existed prior to July 1, 2000, or section 18-6-403, C.R.S.;

(II) Charged as a felony under section 18-3-404, C.R.S.; or

(III) Charged as criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in subparagraphs (I) and (II) of this paragraph (a).

(a.3) Except as otherwise provided in paragraph (a) of subsection (1) of this section concerning sex offenses against children, if the victim at the time of the commission of an offense or delinquent act is a child under eighteen years of age, the period of time during which an adult person or juvenile may be prosecuted shall be ten years after such victim reaches the age of eighteen years as to any offense or delinquent act:

(I) Charged as a felony under section 18-3-402, C.R.S., section 18-3-403, C.R.S., as said section existed prior to July 1, 2000, or section 18-3-404, C.R.S.; or

(II) Charged as criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in subparagraph (I) of this paragraph (a.3).

(a.5) Except as otherwise provided in paragraph (a) of subsection (1) of this section concerning sex offenses against children, in any case in which the identity of the defendant is determined, in whole or in part, by patterned chemical structure of genetic information, and in which the offense has been reported to a law enforcement agency, as defined in section 26-1-114 (3) (a) (III) (B), C.R.S., within ten years after the commission of the offense, there shall be no limit on the period of time during which a person may be prosecuted after the commission of the offense as to any offense charged:

(I) Under section 18-3-402, C.R.S., or section 18-3-403, C.R.S., as said section existed prior to July 1, 2000; or

(II) As criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in subparagraph (I) of this paragraph (a.5).

(b) This subsection (8) shall apply to offenses and delinquent acts committed on or after July 1, 1984.

(9) Notwithstanding the provisions of paragraph (a) of subsection (1) of this section, the period of time during which an adult person or juvenile may be prosecuted shall be five years after the commission of the offense or delinquent act as to a misdemeanor charged under section 18-3-404, C.R.S., or criminal attempt, conspiracy, or solicitation to commit such a misdemeanor. This subsection (9) shall apply to offenses and delinquent acts committed on or after January 1, 1986.

(10) Notwithstanding the provisions of paragraph (a) of subsection (1) of this section, the period of time during which an adult person or juvenile may be prosecuted shall be three years after the date of the affected election as to a charge of any violation of any provision of the "Fair Campaign Practices Act", article 45 of title 1, C.R.S., or any criminal attempt, conspiracy, or solicitation to violate any provision of the "Fair Campaign Practices Act". This subsection (10) shall apply to offenses and delinquent acts committed on or after July 1, 1991.

(11) Notwithstanding the provisions of paragraph (a) of subsection (1) of this section, the period of time during which an adult person or juvenile may be prosecuted shall be three years after the discovery of the offense or delinquent act as to any offense or delinquent act charged under section 18-4-408, C.R.S. This subsection (11) shall apply to offenses and delinquent acts committed on or after July 1, 1998.

(12) The applicable period of limitations specified in subsection (1) of this section shall not apply to charges of offenses or delinquent acts brought to facilitate the disposition of a case, or to lesser included or non-included charges of offenses or delinquent acts given to the court or a jury at a trial on the merits, by the accused.

Source: **L. 72:** R&RE, p. 218, § 1. **C.R.S. 1963:** § 39-5-401. **L. 75:** (5) added, p. 608, § 1, effective May 15. **L. 81:** (1) amended, p. 890, § 2, effective July 1; (5) amended, p. 1879, § 1, effective July 1. **L. 82:** (6) and (7) added, p. 314, § 2, effective July 1; (1)(b) amended, p. 655, § 4, effective January 1, 1983. **L. 85:** (1)(b) repealed, p. 1359, § 8, effective June 28; (6) amended, p. 616, § 5, effective July 1. **L. 87:** (1)(a) amended, p. 1495, § 4, effective July 1; (6) and (7) amended and (8) and (9) added, p. 618, § 1, effective July 1. **L. 89:** (1)(a) amended, p. 827, § 34, effective July 1. **L. 90:** (1)(a) amended, p. 985, § 6, effective April 24. **L. 91:** (10) added, p. 646, § 3, effective May 29; (1)(a) amended and (4.5) added, p. 403, § 3, effective June 6. **L. 92:** (4.5) amended, p. 400, § 7, effective June 3. **L. 93:** (6) and (8) amended, p. 1726, § 4, effective July 1. **L. 94:** (6) and (7) amended, p. 1049, § 3, effective July 1. **L. 95:** (2) amended, p. 462, § 1, effective July 1. **L. 98:** (4.5) amended and (11) added, p. 156, § 2, effective July 1; (10) amended, p. 819, § 17, effective August 5. **L. 2000:** (12) added, p. 454, § 10, effective April 24; (6) and (8)(a)(I) amended, p. 710, § 47, effective July 1. **L. 2001:** Entire section amended, p. 730, § 2, effective July 1; (8)(a) amended and (8)(a.5) added, p. 1057, § 1, effective July 1. **L. 2002:** (8)(a) amended and (8)(a.3) added, p. 1127, § 1, effective June 3. **L. 2003:** (3) amended, p. 973, § 4, effective April 17; (4) amended, p. 1325, § 1, effective July 1; (4.5)(r) to (4.5)(u) amended, p. 1209, § 19, effective July 1. **L. 2006:** (1)(a), (1)(c), (6), (7), (8)(a), (8)(a.3), and (8)(a.5) amended and (1.5) added, p. 410, § 1, effective July 1. **L. 2009:** (1)(a) amended, (HB 09-1081), ch. 302, p. 1609, § 1, effective July 1; (4.5)(m.5) added, (SB 09-093), ch. 326, p. 1738, § 3, effective July 1.

Editor's note: Amendments to this section by HB 01-1187 and HB 01-1344 were harmonized.

Cross references: For the "Uniform Commercial Code", see title 4.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "Colorado Criminal Procedure — Does It Meet the Mini-

um Standards?", see 28 Dicta 14 (1951). For comment on *Bustamante v. District Court*, see 31 Rocky Mt. L. Rev. 235 (1959). For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For

article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Annotator's note. Since § 16-5-401 is similar to repealed § 39-1-3, CRS 53, CSA, C. 48, § 446, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

There is no ex post facto violation where the legislature extends the statute of limitations period for prosecutions not yet time-barred as of the date of the extension. When the general assembly enacted subsection (8)(a.5) in July 2001 and extended the statute of limitations indefinitely for sexual assaults committed after July 1, 1991, that meet the identity and reporting criteria of subsection (8)(a.5), prosecution of the charges against defendant was not yet time-barred. *People v. Hicks*, 262 P.3d 916 (Colo. App. 2011).

Civil and criminal statutes of limitation distinguished. Statutes of limitation in criminal cases create a bar to the prosecution, while in civil cases they are merely statutes of repose. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Section limits power of courts to proceed. In criminal cases the state has declared it will not prosecute crimes after the period has run, hence has limited the power of the courts to proceed in the matter as an indictment or information which shows on its face that the prosecution of the offense charged is barred by limitations. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

The time within which an offense is committed is a jurisdictional fact in all cases subject to limitation. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Thus, indictment must allege offense within limitation or exceptions. The act averred in an indictment must appear to have been committed within the period prescribed by the statute of limitations or it is necessary to allege the exception that relieves it from the bar of the statute of limitations, such as that a defendant was a fugitive from justice during all or a part of the period of limitation. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Exceptions in the statute must be negated by the people in an indictment. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Otherwise the application of this section is automatic whether the crime be a felony or a misdemeanor. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

And denies jurisdiction to prosecute offense not within period limited. The statute of limitations in a criminal case is not merely a defense that may be asserted at a trial as in civil matters, but denies jurisdiction to proceed to prosecute an offense not committed within the

period limited. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958), overruling *Packer v. People*, 26 Colo. 306, 57 P. 1087 (1899), *Wentzel v. People*, 55 Colo. 33, 133 P. 415 (1913), and *Thorp v. People*, 110 Colo. 7, 129 P.2d 296 (1942).

Where a misdemeanor indictment contains no allegation of a specific offense committed within 18 months of the day the indictment was filed, a trial court has no jurisdiction to try a defendant on the charge set forth therein. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958), overruling *Packer v. People*, 26 Colo. 306, 57 P. 1087 (1899), *Wentzel v. People*, 55 Colo. 33, 133 P. 415 (1913), and *Thorp v. People*, 110 Colo. 7, 129 P.2d 296 (1942).

Indictment which fails to allege any date upon which the alleged offense was committed does not confer jurisdiction upon the trial court to consider the case. *People v. Thimmes*, 643 P.2d 780 (Colo. App. 1981).

When a crime is a continuing offense that is perpetrated over time, the crime continues, and the statute of limitations does not begin to run, as long as the illegal conduct continues. *People v. Zuniga*, 80 P.3d 965 (Colo. App. 2003).

A crime will not be considered a continuing offense unless the language of the substantive criminal statute compels such a conclusion or the nature of the crime involved is such that the legislature must surely have intended that it be treated as a continuing one. *People v. Zuniga*, 80 P.3d 965 (Colo. App. 2003).

The theft of money was not complete until defendant cashed the unemployment check, therefore the statute of limitations did not begin to run until said date. Issuance of the unemployment check at an earlier date did not initiate the running of the statute of limitations because the "last act" constituting theft was negotiation of the check. *People v. Chavez*, 952 P.2d 828 (Colo. App. 1997).

The statute of limitations is a matter of defense. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

The bar of this section may be raised at any time, before or after judgment. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

This section is clear, and if a defendant can bring himself under its protective cloak, he may assert his right at any time and in any manner. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

It may be raised by plea of not guilty or by motion to dismiss for lack of jurisdiction. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Defendant may plead this section specially or meet the question by evidence under the general issue. *Dill v. People*, 94 Colo. 230, 29 P.2d 1035 (1934).

And defendant is not required to go to trial. Where prosecution of a criminal case appears upon the face of an indictment to be barred by the statute of limitations, a defendant is not required to proceed to trial and urge the statute as a defense. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

A case barred from prosecution by a statute of limitation cannot be revived by subsequent legislation that acts to extend the limitation period. *People v. Sheed*, 702 P.2d 267 (Colo. 1985).

Because felony charges against juvenile were not filed in a court of competent jurisdiction until after statute of limitations had run, the tolling provision of subsection (3) does not affect the charges, and district court properly determined that it lacked jurisdiction based upon the statute of limitations. *People v. Ware*, 39 P.3d 1277 (Colo. App. 2001).

Applicability of subsections (6) and (7). Based upon the specific and explicit indication of legislative intent in § 16-5-401.1, subsections (6) and (7) apply to the prosecution of offenses not already time-barred as of July 1, 1982. *People v. Holland*, 708 P.2d 119 (Colo. 1985).

This 1982 amendment is clear on its face and its clear intent was that it apply to prosecutions not already time barred. *Holland v. District Court*, 831 F.2d 940 (10th Cir. 1987), cert. denied, 485 U.S. 977, 108 S. Ct. 1271, 99 L.Ed.2d 482 (1988).

The 1982 amendment extending the statute of limitations from a three-year period to a seven-year period for the offense of sexual assault on a child applies to all offenses which are not time-barred as of the effective date of the amendatory legislation. *People v. Whitesell*, 729 P.2d 985 (Colo. 1986).

Statute of limitations as amended in 2002 did not bar defendant's prosecution for charge of sexual assault on a child by one in a position of trust since the effective date clause of the 2002 bill amending the statute did not conflict with the bill's substantive amendments. *People v. Boston*, 214 P.3d 507 (Colo. App. 2009), overruled in *People v. Summers*, 208 P.3d 251 (Colo. 2009).

Flat 10-year statute of limitations applies to felony sex offenses allegedly committed against children pursuant to § 18-3-411 before June 3, 2002, due to an ambiguity created in the act enacting the 2002 amendments to § 18-3-411. The general statutory construction rule of lenity requires that ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant. Thus, effective date section of the 2002 legislation amending § 18-3-411 and stating that the act applies to offenses committed on or after passage of the act (June 3, 2002) is controlling despite July 1, 1992 date set forth in the substantive provisions of the

statute. *People v. Summers*, 208 P.3d 251 (Colo. 2009) (decided based upon § 18-3-411 as it existed at the time the alleged crimes were committed prior to 2006 amendments) (overruling *People v. Boston*, 214 P.3d 507 (Colo. App. 2009)).

Subsection (8)(a.5) eliminates the statute of limitations for prosecution of sexual assaults committed after July 1, 1991, where the defendant's identity is determined in whole or in part by his or her DNA and the offense was reported to a law enforcement agency within 10 years after the commission of the offense. The 10-year statute of limitations in subsection (8)(a) remains in effect for any sexual assault committed between July 1, 1984, and July 1, 1991, and for sexual assaults committed after July 1, 1991, that do not satisfy the statutory criteria in subsection (8)(a.5). *People v. Hicks*, 262 P.3d 916 (Colo. App. 2011).

Manner of proof. When the bar of the statute of limitations is raised by a plea of not guilty, proof must be made by the state showing that its right to prosecute and punish for the offense alleged is not barred. Where the state's own indictment makes the time element material there is no need of further proof. It then is merely the duty of a trial court to apply the statute and quash the indictment. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Prohibition is proper remedy. Where a trial court is without jurisdiction to try defendant under an indictment showing on its face that prosecution is barred by the statute of limitations, prohibition is the proper remedy for relief. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

Section applies to offenses relating to banks. Offenses denounced by § 11-11-102, relating to receipt of deposits during insolvency by banks, are felonies within the three-year limitation of this section. *People v. Godding*, 55 Colo. 579, 136 P. 1011 (1913).

Section also applies where felony is charged and lesser offense is proved. Where a criminal information charges grand larceny, that will not prevent the operation of this section where the offense upon conviction proves to be of a lesser grade, prosecution for which is barred by the statute. *Drott v. People*, 71 Colo. 383, 206 P. 797 (1922).

Defendant's request for a lesser offense instruction constituted a waiver of the statute of limitations. Subsection (12) creates an exception to the applicable statute of limitations where the defendant has requested a lesser included or nonincluded offense. *People v. Lowry*, 160 P.3d 396 (Colo. App. 2007).

Under subsection (12), a plea of guilty to facilitate the disposition of a case constitutes a waiver of the statute of limitations. Defendant waived her right to raise the statute of

limitations as a defense to the amount of restitution ordered. *People v. Wilson*, 251 P.3d 507 (Colo. App. 2010).

Section also applies to complaints. The statute of limitations governing criminal offenses classed as misdemeanors makes specific use of the words "indictment", "information", and "complaint". *People v. Read*, 132 Colo. 390, 288 P.2d 347 (1955).

"Complaint" for purposes of this section includes a felony complaint that has been filed in a county court to commence felony criminal proceedings. *Higgins v. People*, 868 P.2d 371 (Colo. 1994).

Indictment charging embezzlement of public money defective. Where an indictment makes a blanket charge of embezzlement of public money averring two dates, one of which is so remote as to be barred by the statute, it is defective. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

In rape cases the complaint must state a specific date or time when it is alleged the transaction occurred. The district attorney may select any act upon which he will rely for a conviction, within the period prescribed in this section for felonies. *Laycock v. People*, 66 Colo. 441, 182 P. 880 (1919).

In a prosecution for rape where all the acts proved were within the statute of limitation, the prosecution had the right to select from among them that upon which it would rely for conviction; and in the absence of any express election from the record it will be presumed that the prosecution elected to stand by the offense it first introduced evidence to establish; and that evidence of other acts was not introduced to prove substantive offenses, but in corroboration and explanation of the evidence of the act charged. *Mitchell v. People*, 24 Colo. 532, 52 P. 67 (1898); *Abbott v. People*, 89 Colo. 121, 299 P. 1053 (1931).

Evidence of acts barred by the statute is inadmissible. In a prosecution for rape it was error to admit evidence of other acts of sexual intercourse that were barred by the statute of limitation. *Bigcraft v. People*, 30 Colo. 298, 70 P. 417 (1902).

It is error to permit the defendant to be cross-examined, over objection, as to alleged illicit relations with the prosecuting witness occurring more than three years prior to the filing of the information. *Curtis v. People*, 72 Colo. 350, 211 P. 381 (1922).

In a prosecution for rape evidence of other acts of sexual intercourse with the prosecuting witness, committed within the period of the statute of limitations, is clearly admissible.

Schuetz v. People, 33 Colo. 325, 80 P. 890 (1905).

And its admission is reversible error. *Abbott v. People*, 89 Colo. 121, 299 P. 1053 (1931).

Special verdict unnecessary. Special verdict on a plea in bar, based upon the running of the statute of limitations, is not necessary where the issue is presented to the jury under the general issue without objection. *Dill v. People*, 94 Colo. 230, 29 P.2d 1035 (1934).

When jury instruction on limitation period proper. Instructing the jury that they can find the defendant guilty of sexual assault on a child if they find that the evidence shows that the crime has occurred at any time within three years prior to the filing of the information is proper if evidence of only one transaction is admitted and there is some question as to the date of the incident. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980).

Amendment of information at close of evidence was permissible where amendment related to acts occurring within the statutory limitation period, date of offense was neither a material element nor an issue at trial, and the amendment did not involve an altered accusation or require a different defense strategy from the one defendant had chosen under the initial information. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

The statute of limitations set forth in § 13-80-102, and not that in this section, applies to a theft claim brought under § 18-4-405. *Michaelson v. Michaelson*, 923 P.2d 237 (Colo. App. 1995).

General assembly intended the discovery tolling provision of the statute of limitations to be applicable to theft committed against at-risk adults. Theft against an at-risk adult enhances a general theft crime. Accordingly, it is immaterial that the discovery tolling provision does not expressly include or exclude thefts committed against at-risk adults. *People v. McKinney*, 99 P.3d 1038 (Colo. 2004).

Because the discovery tolling provision of the statute of limitations, subsection (4.5)(c), applies to general theft, it also includes theft from an at-risk adult, which is an enhanced form of general theft. Accordingly, the period within which a prosecution for theft against an at-risk adult must be commenced does not begin to run until the time the victim discovers the criminal act. *People v. McKinney*, 99 P.3d 1038 (Colo. 2004).

Applied in *People v. Bowen*, 658 P.2d 269 (Colo. App. 1982); *People v. Green*, 658 P.2d 281 (Colo. 1983).

16-5-401.1. Legislative intent in enacting section 16-5-401 (6) and (7). (1) The intent of the general assembly in enacting section 16-5-401 (6) and (7) in 1982 was to create

a ten-year statute of limitations as to offenses and delinquent acts specified in said subsections committed on or after July 1, 1979.

(2) (Deleted by amendment, L. 94, p. 1050, § 4, effective July 1, 1994.)

Source: **L. 85:** Entire section added, p. 616, § 6, effective June 2. **L. 87:** Entire section amended, p. 619, § 2, effective July 1. **L. 94:** Entire section amended, p. 1050, § 4, effective July 1. **L. 2001:** (1) amended, p. 734, § 3, effective July 1.

ANNOTATION

Effect of section. While subsequent legislative declarations concerning the intent of an earlier statute are not controlling, they are entitled to significant weight. *People v. Holland*, 708 P.2d 119 (Colo. 1985); *People v. Midgley*, 714 P.2d 902 (Colo. 1986).

This section was unnecessary to clarify intent since the 1982 amendment to § 16-5-401 was clear on its face. *Holland v. District Court*, 831 F.2d 940 (10th Cir. 1987), cert. denied, 485 U.S. 977, 108 S. Ct. 1271, 99 L.Ed 2d 482 (1988).

16-5-402. Limitation for collateral attack upon trial judgment. (1) Except as otherwise provided in subsection (2) of this section, no person who has been convicted as an adult or who has been adjudicated as a juvenile under a criminal statute of this or any other state of the United States shall collaterally attack the validity of that conviction or adjudication unless such attack is commenced within the applicable time period, as provided in this subsection (1), following the date of said conviction, or for purposes of juvenile adjudication the applicable time period will begin at the time of the juvenile's eighteenth birthday:

All class 1 felonies:	No limit
All other felonies:	Three years
Misdemeanors:	Eighteen months
Petty offenses:	Six months

(1.5) If an appellate court can determine on the face of the motion, files, and record in a case that a collateral attack is outside the time limits specified in subsection (1) of this section, the appellate court may deny relief on that basis, regardless of whether the issue of timeliness was raised in the trial court.

(2) In recognition of the difficulties attending the litigation of stale claims and the potential for frustrating various statutory provisions directed at repeat offenders, former offenders, and habitual offenders, the only exceptions to the time limitations specified in subsection (1) of this section shall be:

(a) A case in which the court entering judgment of conviction or entering adjudication did not have jurisdiction over the subject matter of the alleged offense;

(b) A case in which the court entering judgment of conviction or entering adjudication did not have jurisdiction over the person of the defendant or juvenile;

(c) Where the court hearing the collateral attack finds by a preponderance of the evidence that the failure to seek relief within the applicable time period was caused by an adjudication of incompetence or by commitment of the defendant or juvenile to an institution for treatment as a person with a mental illness; or

(d) Where the court hearing the collateral attack finds that the failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect.

(3) Repealed.

(4) For purposes of this section:

(a) "Adjudication", except as used in paragraph (c) of subsection (2) of this section, includes "adjudicated" and has the same meaning as defined in section 19-1-103 (2), C.R.S.

(b) "Juvenile" means a child as defined in section 19-1-103 (18), C.R.S.

Source: **L. 81:** Entire section added, p. 926, § 3, effective July 1. **L. 84:** (2)(b) and (2)(c) amended and (2)(d) added, p. 486, § 1, effective February 6. **L. 98:** (1.5) added, p.

948, § 10, effective May 27. **L. 2001:** Entire section amended, p. 734, § 4, effective July 1. **L. 2002:** (4)(b) amended, p. 1016, § 17, effective June 1; (3) repealed, p. 761, § 11, effective July 1. **L. 2006:** (2)(c) amended, p. 1397, § 41, effective August 7.

Cross references: For collateral attacks upon convictions of traffic infractions, see § 42-4-1708 (5); for collateral attacks upon convictions of alcohol- or drug-related traffic offenses, see § 42-4-1702.

ANNOTATION

Law reviews. For article, "Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike", see 11 Colo. Law. 1225 (1982); For article, "Colorado's Revived Collateral Attack Statute", see 19 Colo. Law. 843 (1990).

Convictions which occurred prior to 1972 are included within the statutory limitations. *People v. Padilla*, 878 P.2d 4 (Colo. App. 1993), rev'd on other grounds, 907 P.2d 601 (Colo. 1995).

Expiration of time period in subsection (1) was not intended to divest the trial court of subject matter jurisdiction to consider defendant's contentions. *People v. Shackelford*, 851 P.2d 218 (Colo. App. 1992).

The purpose of the limitations period in this section is to alleviate the difficulties attending litigation of stale claims and the potential for frustrating various statutory provisions directed at repeat offenders, former offenders, and habitual offenders. *People v. Merchant*, 983 P.2d 108 (Colo. App. 1999); *Robbins v. People*, 107 P.3d 384 (Colo. 2005).

Prosecution must assert the time bar in trial court. Section does not automatically divest trial court of jurisdiction to hear defendant's contentions. *People v. Shackelford*, 851 P.2d 218 (Colo. App. 1992).

State waived time bar to Crim. P. 35(b) motion by not raising it in trial court. *People v. St. John*, 934 P.2d 865 (Colo. App. 1996).

The time limits in subsection (1) are specifically categorized by level of offense, so, in a case in which defendant is convicted of a class 1 felony and other felonies, the time limit for the class 1 felony does not control the time limit for all of the convictions that are not class 1 felonies. Defendant's challenges to the non-class 1 felonies in a Crim. P. 35(c) motion were subject to the three-year statute of limitations. *People v. Stovall*, 2012 COA 7, ___ P.3d ___.

The subsection (1) limitation period is not tolled during the litigation of a postconviction relief motion. *People v. Clouse*, 74 P.3d 336 (Colo. App. 2002).

Neither the timely commencement of a collateral attack, nor the pendency of an appeal from the denial of Crim. P. 35(c) relief, tolls the limitation period with respect to later asserted postconviction claims. *People v. Clouse*,

74 P.3d 336 (Colo. App. 2002); *People v. Silva*, 131 P.3d 1082 (Colo. App. 2005), aff'd in part and rev'd in part on other grounds, 156 P.3d 1164 (Colo. 2007).

A hand-written letter that does not assert any claims for defendant's Crim. P. 35(c) motion does not toll the time limit in this section. *People v. Stovall*, 2012 COA 7, ___ P.3d ___.

A late Crim. P. 35(c) motion may still be considered if a defendant can establish justifiable excuse or excusable neglect. *Silva v. People*, 156 P.3d 1164 (Colo. 2007).

When an illegal sentence is corrected pursuant to Crim. P. 35(a), it renews the three-year deadline for collaterally attacking the original judgment of conviction pursuant to Crim. P. 35(c). *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

When original judgment of conviction contains an illegal sentence on one count, the entire sentence is illegal. *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

The sentence is therefore subject to correction, and the judgment of conviction is subject to amendment, making the judgment of conviction not final or fully valid. *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

When original judgment of conviction contains an illegal sentence on one count, the entire sentence is illegal. *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

The sentence is therefore subject to correction and the judgment of conviction is subject to amendment, making the judgment of conviction not final or fully valid. *Leyva v. People*, 184 P.3d 48 (Colo. 2008).

Defendant bears the burden of establishing the existence of justifiable excuse or excusable neglect must allege facts which, if proven, would carry that burden. Absent such allegations, he is not entitled to a hearing on the applicability of the time bar. *People v. Abad*, 962 P.2d 290 (Colo. App. 1997); *People v. White*, 981 P.2d 624 (Colo. App. 1998).

There is no authority for the proposition that a habeas corpus action in federal court affects either the finality of a judgment entered at the conclusion of a criminal appeal in the state courts or the jurisdiction of the state courts to entertain a collateral challenge to the conviction. *People v. Abad*, 962 P.2d 290 (Colo. App. 1997).

Ignorance of time bar itself does not constitute justifiable excuse or excusable neglect. People v. White, 981 P.2d 624 (Colo. App. 1998).

The lack of legal assistance does not constitute justifiable excuse or excusable neglect. Nor does the defendant's limited statutory right to post-conviction counsel include the right to have counsel appointed for the purpose of establishing justifiable excuse or excusable neglect unless some factually sufficient grounds to support that assertion are appropriately alleged. People v. White, 981 P.2d 624 (Colo. App. 1998).

An exception to the time limit in subsection (1), for bringing post-conviction motions under Crim. P. 35(c), exists if a defendant demonstrates that the failure to seek timely relief was the result of justifiable excuse or excusable neglect. People v. Green, 36 P.3d 125 (Colo. App. 2001).

There is no express implication that the equitable doctrine of laches was abrogated by the enactment of this section. Robbins v. People, 107 P.3d 384 (Colo. 2005).

The doctrine of laches is applicable to persons convicted of class one felonies. The absence of a limitations period for class one felonies in subsection (1) is because the general assembly determined that it would be inappropriate to establish a fixed period for post-conviction motions for the most serious offenses. Such a legislative determination does not manifest a clear intent to deprive courts of their preexisting ability to apply the doctrine of laches to class one felony cases. Trial courts may continue to assess individually whether equitable considerations should preclude post-conviction relief when a defendant has been convicted of a class one felony. People v. Robbins, 87 P.3d 120 (Colo. App. 2003), *aff'd*, 107 P.3d 384 (Colo. 2005).

The doctrine of laches should apply in the analysis when a Crim. P. 35(c) claim is timely filed within statutory limits but not subsequently timely pursued. Crim. P. 35(c) provides a postconviction remedy grounded in equitable principles, and under certain circumstances, laches may work to bar defendant's claim for relief where this section would not. People v. Valdez, 178 P.3d 1269 (Colo. App. 2007).

Trial court was correct to consider whether postconviction counsel's conduct constituted justifiable excuse or excusable neglect and may therefore provide an exception to the operation of the doctrine of laches. People v. Valdez, 178 P.3d 1269 (Colo. App. 2007).

This section violates due process of law under the federal and state constitutions because it precludes collateral challenges to the constitutional admissibility of prior convictions in pending prosecutions solely on the basis of a

time bar, without providing the defendant an opportunity to show that the failure to assert a timely constitutional challenge was the result of circumstances amounting to justifiable excuse or excusable neglect. People v. Leonard, 673 P.2d 37 (Colo. 1983); People v. Dugger, 673 P.2d 351 (Colo. 1983); People v. Germany, 674 P.2d 345 (Colo. 1983) (all decisions decided prior to enactment of subsection (2)(d) in 1984).

Constitutionality. The construction that this section applies to postconviction challenges to criminal convictions under Crim. P. 35(c) does not violate the constitutional protections of habeas corpus, separation of powers, due process, or equal protection of the laws. People v. Wiedemer, 852 P.2d 424 (Colo. 1993); People v. Wiedemer, 852 P.2d 449 (Colo. 1993); People v. Boehmer, 872 P.2d 1320 (Colo. App. 1993).

The application of this section to bar a motion to challenge a prior conviction in an unrelated proceeding does not violate the constitution. The justifiable excuse or excusable neglect exception in subsection (2)(d) provides a defendant with a meaningful opportunity to challenge allegedly unconstitutional convictions. People v. Deskins, 904 P.2d 1358 (Colo. App. 1995), *aff'd* in part and *rev'd* in part on other grounds, 927 P.2d 368 (Colo. 1996).

Defendant lacks standing to challenge constitutionality of § 16-5-402 based on the argument that subsection (3) violates due process because subsection (3) is severable from the other provisions of this section that are directly implicated, subsection (3) has no application to the present proceeding, and the defendant failed to show he is effected by the alleged unconstitutionality of subsection (3). It is best to defer validity of subsection (3) until the issue is presented by one whose rights are affected and who has an interest in challenging the statute. People v. Heitzman, 852 P.2d 443 (Colo. 1993).

Subsection (3) is unconstitutional. People v. Thomas, 867 P.2d 880 (Colo. 1994).

Holding in Thomas case could have been anticipated by any reasonable person from holding in People v. Germany, 674 P.2d 345 (Colo. 1983), and thus Crim. P. 35(c) motion was time-barred. People v. Collins, 8 P.3d 520 (Colo. App. 2000).

Five-year grace period from the effective date of this section on July 1, 1984, was implied for person seeking to challenge a constitutionally flawed conviction under § 18-1-410, where conviction predated the length of time specified as a limitation period under this section. People v. Fagerholm, 768 P.2d 689 (Colo. 1989); People v. Stephens, 837 P.2d 231 (Colo. App. 1992), *cert. dismissed*, 854 P.2d 231 (Colo. 1993).

However, for the five-year grace period to apply, a conviction must antedate July 1, 1984, the effective date of this section, by an interval of time in excess of the limitations set forth in

this section. *People v. Brack*, 796 P.2d 49 (Colo. App. 1990).

Only convictions occurring after July 1, 1984, the effective date of this section, are unaffected by the five-year grace period. *People v. Janke*, 895 P.2d 1102 (Colo. App. 1994).

Judicially created five-year grace period under this section does not give notice that same five-year grace period applies to collateral attacks brought under § 42-4-1501.5. *People v. Trimble*, 839 P.2d 1168 (Colo. 1992).

The U.S. supreme court decision in *Custis v. U.S.* does not require a state court to consider a collateral attack on a state court conviction used to enhance a sentence in federal court when the state court conviction was outside of the five-year grace period. *People v. Vigil*, 955 P.2d 589 (Colo. App. 1997).

Present need standard for postconviction relief not established under collateral attack statute for 30-year-old conviction for violations of municipal ordinances. *City and County of Denver v. Rhinehart*, 742 P.2d 948 (Colo. App. 1987).

"Present need" challenge not available. *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992).

Statute of limitations set forth in this section does not bar the filing of a Crim. P. 35(c) motion by a defendant convicted of first degree murder, a class 1 felony. *Duran v. Price*, 868 P.2d 375 (Colo. 1994).

Term "collateral attack" includes challenge to a conviction in a suppression hearing in another criminal proceeding. *People v. Fultz*, 761 P.2d 242 (Colo. App. 1988).

"Collateral attack" as used in this section includes relief sought pursuant to Crim. P. 35. *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992); *People v. Hampton*, 857 P.2d 441 (Colo. App. 1992); *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993); *People v. Wiedemer*, 852 P.2d 449 (Colo. 1993).

Term "collateral attack" includes relief sought pursuant to Crim. P. 35. Although a distinction exists between collateral attacks and other types of postconviction relief, a successful attack under Crim. P. 35 results in vacation of the conviction at issue and therefore comes within the commonly accepted meaning of "collateral" in the criminal-law context. *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992); *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993); *People v. Wiedemer*, 852 P.2d 449 (Colo. 1993).

Motions under Crim. P. 35(c) are subject to the time bar of this section. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993); *People v. Vigil*, 983 P.2d 805 (Colo. App. 1999).

To give effect to the legislative intent expressed clearly in subsection (2), a more expansive definition of "collateral attack" is necessary. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993).

Reference to collateral attacks in this section was intended to include Crim. P. 35(c) motions that seek directly to set aside a judgment in the same court in which it was obtained as well as motions to suppress convictions in a proceeding where the convictions serve a purpose such as establishing a predicate offense for some other charge. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993).

Time bar in this section applies to requests for post-conviction relief under both § 18-1-410 (1)(b) and Crim. P. 35 (c)(2)(II) where defendant's motion is a collateral attack. *People v. Vigil*, 983 P.2d 805 (Colo. App. 1999).

The limitation period cannot commence until there is a right to pursue a collateral attack. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Defendant's motion alleging a violation of § 16-14-102(3) was time-barred under this section because it did not allege a jurisdictional defect. While violation of § 16-14-102 (3) would have entitled the defendant to dismissal of the charges, regardless of whether he suffered any prejudice, it did not deprive the court of jurisdiction. Therefore, the trial court properly dismissed defendant's motion as untimely under this section. *People v. Slusher*, 43 P.3d 647 (Colo. App. 2001).

Collateral attacks on infirmities related to the adjudication of habitual criminality correctly considered under this section. *People v. Hampton*, 876 P.2d 1236 (Colo. 1994).

Timely collateral attack, not completely adjudicated, upon a previous conviction does not toll the limitations period of this section and allow future attacks upon that same conviction regardless of when such later attacks are filed. *People v. Merchant*, 983 P.2d 108 (Colo. App. 1999).

Rule of lenity does not apply as the intention of the legislature is expressed with sufficient clarity. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993).

Time limitations in this section are supplementary to and not in conflict with § 18-1-410 and are intended to apply to all forms of post conviction attacks on judgments. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993).

Irreconcilable conflict exists between this section and § 18-1-410, and this section prevails as it is the later enacted statute. *People v. Heitzman*, 852 P.2d 443 (Colo. 1993).

Statutory limitations in this section do not usurp the supreme court's rule-making authority. While the statute has an incidental effect on judicial procedure, it is primarily an expression of public policy, and therefore it prevails over terms of Crim. P. 35(c)(3) stating that motion may be filed "at any time". *People v. Robinson*, 833 P.2d 832 (Colo. App. 1992).

Evaluate the applicability of the justifiable excuse or excusable neglect exception by bal-

ancing the interests under the facts of a particular case to give effect to the overriding concern that a defendant have the meaningful opportunity required by due process to challenge his conviction. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993); *People v. Wiedemer*, 852 P.2d 449 (Colo. 1993); *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001).

In determining if the justifiable excuse or excusable neglect exception applies, consider the following: 1. Circumstances existing throughout the entire period from the inception of the conviction in question; 2. Relative strengths of various interests at stake; 3. Existence of circumstances or outside influences preventing a challenge to a prior conviction; 4. Extent to which a defendant having reason to question the constitutionality of a conviction investigates its validity and takes advantage of avenues of relief available to him; 5. Whether the defendant had any previous need to challenge a conviction; 6. Whether the defendant either knew that it was constitutionally infirm or had reason to question its validity; 7. Whether the defendant had other means of preventing the government's use of the conviction so that a postconviction challenge was previously unnecessary; and 8. Extent of time between the date of conviction and the defendant's challenge and the effect that the passage of time has on the state's ability to defend against the challenge. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993); *People v. Wiedemer*, 852 P.2d 449 (Colo. 1993); *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001).

Whether the defendant qualifies for the exception under subsection (2)(d) is a question of fact to ordinarily be resolved by the trial court. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993); *People v. Heitzman*, 852 P.2d 443 (Colo. 1993); *People v. Wiedemer*, 852 P.2d 449 (Colo. 1993); *People v. Clouse*, 74 P.3d 336 (Colo. App. 2002).

Whether a defendant has demonstrated justifiable excuse or excusable neglect is a question of fact to be resolved by the trial court, whose ruling is not to be overturned if the record supports its findings. *People v. Ambros*, 51 P.3d 1070 (Colo. App. 2002).

Justifiable excuse and excusable neglect exception was adopted for the specific purpose of preventing an unconstitutional result of the statute being applied in a manner that would violate due process of law. *People v. Heitzman*, 852 P.2d 443 (Colo. 1993).

Implicit in any finding that the statutory exception is not satisfied in a particular case is the conclusion that, acting as a bar to a defendant's claims, the statute is not unconstitutional as applied. *People v. Heitzman*, 852 P.2d 443 (Colo. 1993).

This section is applicable to postconviction remedies filed pursuant to Crim. P. 35; ac-

cordingly, a defendant must be given an opportunity to present evidence of justifiable excuse or excusable neglect when a court raises the time limitation of this section sua sponte. *People v. Lanford*, 867 P.2d 50 (Colo. App. 1993).

The limitations of this section are applicable to a proportionality review of a sentence imposed pursuant to the habitual criminal statutes. *People v. Talley*, 934 P.2d 859 (Colo. App. 1996).

Request for proportionality review alleging that sentence violates the eighth amendment to the U.S. constitution is subject to the limitation period set forth in this section. *People v. Moore-El*, 160 P.3d 393 (Colo. App. 2007).

For the purpose of this section, the word "conviction" includes the recital of the plea, the verdict or findings, the sentence, the finding of the amount of presentence confinement, and costs. *People v. Lanford*, 867 P.2d 50 (Colo. App. 1993).

Justifiable excuse or excusable neglect. The "excusable neglect" exception to this section cannot be read so broadly that the statutory limitation becomes meaningless. In this instance, the failure to attack the prior conviction within the time period allowed by this section and the grace period was not justified just because the defendant had no present need to attack the conviction until the habitual offender charges were filed. *People v. Stephens*, 837 P.2d 231 (Colo. App. 1992), cert. dismissed, 854 P.2d 231 (Colo. 1993); *People v. Boehmer*, 872 P.2d 1320 (Colo. App. 1993).

"Excusable neglect" not found. No excusable neglect existed where defendant claimed he was unable to appeal because he was under the influence of a drug during appeal period, but made no reasonable effort to appeal once free from that influence. *People v. Fultz*, 761 P.2d 242 (Colo. App. 1988).

Defendant's claim that he had not challenged previous convictions until habitual criminal charges were filed because he had no present need not excusable neglect. *People v. Merzhon*, 844 P.2d 1240 (Colo. App. 1992), aff'd, 874 P.2d 1025 (Colo. 1994); *People v. Boehmer*, 872 P.2d 1320 (Colo. App. 1993); *People v. Penrod*, 892 P.2d 383 (Colo. App. 1994).

Defendant's recent discovery of a legal basis for a collateral attack on his conviction based on the provisions of § 16-14-102 did not constitute excusable neglect where he had not otherwise demonstrated some unavoidable hindrance that would have caused a reasonably prudent person to neglect to pursue timely collateral relief. The alleged ineffective assistance of counsel also did not excuse his delay. *People v. Slusher*, 43 P.3d 647 (Colo. App. 2001).

Lack of funds while incarcerated does not qualify as justifiable excuse or excusable neglect. *People v. Merchant*, 983 P.2d 108 (Colo. App. 1999).

Defendant's indigence, ignorance of the law, and lack of legal counsel do not amount to justifiable excuse or excusable neglect. Further, the trial court gave no credence to defendant's claim that his counsel failed to advise him of his postconviction rights, since defendant immediately filed a motion to withdraw his plea when a sentence to the department of corrections was imminent. *People v. McPherson*, 53 P.3d 679 (Colo. App. 2001).

No justifiable excuse or excusable neglect where defendant did not raise a direct appeal or collateral attack of his Virginia conviction until almost 14 years after his conviction had entered. *People v. Landis*, 9 P.3d 1165 (Colo. App. 2000).

No justifiable excuse or excusable neglect where defendant waited nine years from the date conviction became final to file collateral attack challenging its validity. *People v. Jackson*, 98 P.3d 940 (Colo. App. 2004).

No justifiable excuse or excusable neglect where defendant asserted he or she could not file a second motion until the first postconviction proceedings were concluded. *People v. Silva*, 131 P.3d 1082 (Colo. App. 2005), *aff'd* in part and *rev'd* in part on other grounds, 156 P.3d 1164 (Colo. 2007).

Defendant's motion was untimely filed with no justifiable excuse, because, even though she commenced her collateral attack with a motion filed within the three-year period, that motion was denied and defendant did not appeal the denial. A subsequent motion, filed after the three-year period, could not be considered as relating back to the original motion. *People v. Cummins*, 37 P.3d 507 (Colo. App. 2001).

Ineffective assistance of counsel in Crim. P. 35(c) proceedings is colorable grounds for appointment of conflict-free counsel and a trial court hearing on justifiable excuse and excusable neglect. The allegation that postconviction counsel failed to inform the court of the constitutional limitations of defendant's sentence, which in turn resulted in a sentence twice the constitutionally permissible level, is within the standard for measuring ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *Close v. People*, 180 P.3d 1015 (Colo. 2008).

Justifiable excuse or excusable neglect would be established if the public defender's conflict of interest was the reason for not filing a motion for post-conviction relief on behalf of defendant. *People v. Chang*, 179 P.3d 240 (Colo. App. 2007).

Justifiable excuse or excusable neglect would be established if the public defender's failure to file a motion for post-conviction relief on behalf of defendant was the result of ineffective counsel. *People v. Chang*, 179 P.3d 240 (Colo. App. 2007).

Because there is no requirement that appellate counsel advise a defendant of time limitations for seeking postconviction relief, the absence of such advice is not a justifiable excuse for defendant's neglect. *People v. Alexander*, 129 P.3d 1051 (Colo. App. 2005).

Defendant's misplaced reliance on parole board's interpretation of law concerning parole decisions for sex offenders did not constitute justifiable excuse or excusable neglect to attack conviction outside of three-year period. *People v. Perez*, 895 P.2d 1090 (Colo. App. 1994).

A defendant's intentional abandonment of claims raised at an earlier proceeding does not amount to justifiable excuse or excusable neglect that would permit a late filing of a postconviction motion. *People v. Abeyta*, 923 P.2d 318 (Colo. App. 1996).

Ineffective assistance of counsel can constitute justifiable excuse or excusable neglect. *People v. Valdez*, 178 P.3d 1269 (Colo. App. 2007).

Mere failure to challenge a conviction does not establish ineffective assistance of counsel nor constitute excusable neglect or justifiable excuse. *People v. Boehmer*, 872 P.2d 1320 (Colo. App. 1993); *People v. Penrod*, 892 P.2d 383 (Colo. App. 1994); *People v. Rhorer*, 946 P.2d 503 (Colo. App. 1997), *rev'd* on other grounds, 967 P.2d 147 (Colo. 1998).

As a matter of law, postconviction counsel's seven-year delay in filing a supplemental motion in a challenge that was filed within the time limits prescribed by this section was, in light of all the circumstances, outside the wide range of professionally competent assistance. *People v. Valdez*, 178 P.3d 1269 (Colo. App. 2007).

It is appropriate for a trial court to raise the issue sua sponte of whether a defendant's motion for post-conviction relief is untimely under this section. *People v. Xiong*, 940 P.2d 1119 (Colo. App. 1997).

If a defendant's motion for post-conviction relief is untimely, the trial court may deny the motion without conducting a hearing if the defendant has failed to allege facts which, if true, would establish justifiable excuse or excusable neglect. *People v. Xiong*, 940 P.2d 1119 (Colo. App. 1997).

The timely commencement of a collateral attack fails to toll the limitations period with respect to additional postconviction claims not contained in the timely filed motion. *People v. Ambros*, 51 P.3d 1070 (Colo. App. 2002).

For purposes of this section and postconviction review, a "conviction" occurs when the trial court enters judgment and sentence is imposed, if there is no appeal; if an appeal is pursued, then the conviction is not final until the appellate process is exhausted. *People v. Hampton*, 857 P.2d 441 (Colo. App. 1992), *aff'd*, 876

P.2d 1236 (Colo. 1994); *People v. Clouse*, 74 P.3d 336 (Colo. App. 2002).

Where a defendant initiates a direct appeal from a conviction, this section's three-year limitations period does not begin to run until the appeal is exhausted; tolling of the period is not warranted during the pendency of an appeal from the denial of a Crim. P. 35(c) motion. *People v. Ambos*, 51 P.3d 1070 (Colo. App. 2002).

Direct appeal not reinstated extending the time periods of this section. When, under a Crim. P. 35 motion, post-conviction court appoints counsel to pursue any error in the original appeal, it is not reinstating defendant's direct appeal. *People v. Shepard*, 151 P.3d 580 (Colo. App. 2006).

Resentencing, upon revocation of probation or rejection from community corrections, does not create a new "conviction". The statutory sentencing scheme, under which a defendant who receives probation may subsequently have his or her probation revoked and receive a sentence to community corrections or to the department of corrections, contemplates a system of escalating sentencing alternatives available to the court. Hence, resentencing after a revocation of probation or a rejection from community corrections does not result in the entry of a new judgment of conviction for pur-

poses of this section. *People v. McPherson*, 53 P.3d 679 (Colo. App. 2001).

The date of conviction for purposes of this section is the date the appeal is exhausted, not the date of the amended mittimus reflecting the reduction of sentence, where a Crim. P. 35(b) motion has been filed and granted after the conclusion of a direct appeal. *People v. Metcalf*, 979 P.2d 581 (Colo. App. 1999).

The date of resentencing, after defendant violated the conditions of her probation, does not trigger the commencement of a new three-year period for collateral attack. Even though a Crim. P. 35(b) motion was filed within three years after the defendant was sentenced to the department of corrections for violation of her conditions of probation, the motion was untimely because it was filed more than three years after the date the judgment of conviction was entered. *People v. Cummins*, 37 P.3d 507 (Colo. App. 2001); *People v. Collier*, 151 P.3d 668 (Colo. App. 2006).

Subsection (1.5) is discretionary and a court may elect to address a defendant's claims on the merits. *People v. Kilgore*, 992 P.2d 661 (Colo. App. 1999).

Applied in *People v. Smith*, 856 P.2d 26 (Colo. App. 1992); *People v. Vigil*, 983 P.2d 805 (Colo. App. 1999); *People v. Russell*, 36 P.3d 92 (Colo. App. 2001).

PART 5

INCARCERATION

16-5-501. Prosecuting attorney - incarceration - legal representation and support services at state expense. Except as otherwise provided, in any criminal prosecution for class 2 and class 3 misdemeanors, petty offenses, class 1 and class 2 misdemeanor traffic offenses, or municipal or county ordinance violations, the prosecuting attorney may, at any time during the prosecution, state in writing whether or not he or she will seek incarceration as part of the penalty upon conviction of an offense for which the defendant has been charged. If the prosecuting attorney does not seek incarceration as part of such penalty, legal representation and supporting services need not thereafter be provided for the defendant at state expense, and no such defendant shall be incarcerated if found guilty of the charges against him or her, but the defendant shall be subject to all alternatives available to the court under section 18-1.3-702, C.R.S., and to alternatives available to each municipality under its municipal ordinances for failure to pay fines and costs.

Source: **L. 81:** Entire part added, p. 928, § 1, September 1. **L. 86:** Entire section amended, p. 732, § 1, effective July 1. **L. 87:** Entire section amended, p. 1496, § 5, effective July 1. **L. 2002:** Entire section amended, p. 1491, § 134, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

ARTICLE 6

Change of Venue and Disqualification of Judge

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1

CHANGE OF VENUE

16-6-104.

mitted in two or more coun-
ties.
Application of rules of criminal
procedure.

- 16-6-101. Grounds for change of venue.
- 16-6-102. Motion for change of venue.
- 16-6-103. Change of venue where offense
committed in two or more
counties.

PART 2

DISQUALIFICATION OF JUDGE

- 16-6-103.5. Plea of guilty to offenses com-

16-6-201.

Disqualification of judge.

PART 1

CHANGE OF VENUE

16-6-101. Grounds for change of venue. (1) The place of trial may be changed:

- (a) When a fair trial cannot take place in the county or district in which the trial is pending; or
- (b) When a more expeditious trial may be had by a change in the place of trial from one county to another; or
- (c) When the parties stipulate to a change in the place of trial to another county in the same judicial district or to a county in an adjoining judicial district.

Source: L. 72: R&RE, p. 218, § 1. C.R.S. 1963: § 39-6-101.

Cross references: For the place of trials, see § 18-1-202 and Crim. P. 18.

ANNOTATION

Annotator's note. Since § 16-6-101 is similar to repealed laws antecedent to CSA, C. 170, § 3, relevant cases construing those provisions have been included in the annotations to this section.

The object of this section is to secure to a party charged with crime a fair and impartial trial by a jury in a county uninfluenced by local bias or prejudice. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

The denial of a fair trial may be presumed when pretrial publicity is massive, pervasive, and prejudicial. *People v. Simmons*, 183 Colo. 253, 516 P.2d 117 (1973).

Prejudice must exist in all of several attached counties. Where several counties are attached for judicial purposes, a petition for change of venue, founded upon prejudice of the inhabitants must show that such prejudice exists in all of the counties so attached. *Fitzgerald v. People*, 1 Colo. 56 (1867).

Motion for change of venue properly denied. Motion for change of venue on ground that pretrial publicity made fair trial impossible was properly denied where the voir dire amply dem-

onstrated the absence of prejudice and the ability of the jurors to set aside any opinions that they may have received from the news media. *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

Trial court did not abuse its discretion in denying the change of venue where the trial court noted that media coverage of the crime was balanced and was not sensational and that some newspaper articles expressed sympathy for the defendant. Further as a result of the court's voir dire examination of the prospective jurors concerning the effect of publicity, jurors who expressed knowledge of the case were either excused for cause or expressed an ability to put aside any opinions they had formed about the case. *People v. Dore*, 997 P.2d 1214 (Colo. App. 1999).

When juror's assurances of impartiality not conclusive. Where a defendant demonstrates the existence of a pattern of deep and bitter prejudice throughout the community where he is to be tried, a juror's assurance that he will be fair and impartial is not conclusive. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

16-6-102. Motion for change of venue. (1) A motion for change of venue must be accompanied by one or more affidavits setting forth the facts upon which the defendant relies or by a stipulation of the parties.

(2) Whether circumstances exist requiring, in the interest of justice, a change in the place of trial is a question to be determined by the court in its sound discretion.

Source: L. 72: R&RE, p. 219, § 1. C.R.S. 1963: § 39-6-102.

ANNOTATION

Annotator's note. Since § 16-6-102 is similar to repealed § 39-9-5, C.R.S. 1963, § 39-9-5, CRS 53, CSA, C. 170, § 4, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is mandatory upon the court only when the party applying for change has brought himself within its provisions. *Roberts v. People*, 9 Colo. 458, 13 P. 630 (1886).

Decision on motion is discretionary. The question of prejudice of inhabitants rests in the discretion of the court. The decision will not be disturbed unless an abuse of discretion appears. *Erbaugh v. People*, 57 Colo. 48, 140 P. 188 (1914); *People v. Coit*, 961 P.2d 524 (Colo. App. 1997).

A second application in the same cause, for change of venue, is addressed to the discretion of the court, and error cannot be assigned upon refusal to grant it. *Fitzgerald v. People*, 1 Colo. 56 (1867).

The granting or refusal of a motion for change of venue is a matter lodged in the discretion of the trial court and, in the absence of an abuse of such discretion, will not be disturbed. *Corbett v. People*, 153 Colo. 457, 387 P.2d 409 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1346, 12 L. Ed.2d 302 (1964).

A motion for a change of venue due to local prejudice is a matter of judicial discretion. *People v. Simmons*, 183 Colo. 253, 516 P.2d 117 (1973).

And decision will not be reversed except where discretion is abused. In passing upon an application for a change of venue on the ground of prejudice of the inhabitants, the trial court should exercise a sound discretion; it is only in case of manifest abuse of such discretion that its decision will be reversed by the supreme court. *Power v. People*, 17 Colo. 178, 28 P. 1121 (1892).

The finding of the court on a controversy under this section is conclusive on all if he had the right conception of the law, and his conclusions are supported by the evidence or fair deductions therefrom. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Trial court acted within its discretion by only partially granting a motion to change venue by moving the trial to a different county rather than a different judicial district. *People v. Coit*, 961 P.2d 524 (Colo. App. 1997).

The motion must set forth the ground upon which the venue may be changed, and also the facts which lead to the belief that such ground exists. *Solander v. People*, 2 Colo. 48 (1873).

Affiant may state grounds of belief that prejudice exists. On motion for change of

venue, affiant in a supporting affidavit is entitled to state the grounds of his belief that defendant would not receive a fair trial by reason of prejudice of the inhabitants. *Glasson v. Bowen*, 84 Colo. 57, 267 P. 1066 (1928).

And facts should be sufficient to inform judge of causes relied on. The law contemplates that upon application for change of venue, facts shall be stated sufficient to inform the judge of the nature of the causes for the change, and their alleged foundation. *Hughes v. People*, 5 Colo. 436 (1880).

Prejudice of the inhabitants presents a question of fact triable by the court. *Erbaugh v. People*, 57 Colo. 48, 140 P. 188 (1914).

The trial judge necessarily passes upon the question in controversy as a matter of fact. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Attack of denial of motion is by appeal. If appellant desires to attack the validity of the ruling on his motion for change of venue because he could not receive a fair and impartial jury, he should proceed to a jury trial and then appeal if the result returned is unfavorable to him. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

Means to insure fair trial not appellate concern. Regardless of the means imposed by the trial judge to insure the accused's constitutional right to a fair trial by a panel of impartial jurors, the critical inquiry on appellate review is whether the chosen means did in fact preserve the accused's right to a fair trial. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Reviewing court may look to voir dire. In determining whether a trial court abuse its discretion in denying a motion for a change of venue because of alleged local prejudice, the reviewing court may quite properly look at what occurred upon voir dire examination of the prospective jurors. *Corbett v. People*, 153 Colo. 457, 387 P.2d 409 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1346, 12 L. Ed.2d 302 (1964).

Insufficient ground for change. The fact that the deceased was a banker and citizen of high standing in the community is not in itself a ground for change of venue in a murder case. *Corbett v. People*, 153 Colo. 457, 387 P.2d 409 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1346, 12 L. Ed.2d 302 (1964).

Prejudice of jury moot if defendant elects trial to the court. By electing to try the case to the court, appellant was foreclosed from asserting error in the denial of a change of venue. His contention in presenting his motion for a change of venue was that he could not obtain trial by a fair and impartial jury in the district in which he

was proceeding. Nowhere did he complain that he could not obtain a fair trial before the trial judge. Under such circumstances, the issue of whether the change of venue should have been granted became moot. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

No error in failure to grant change of venue. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973); *People v. Simmons*, 183 Colo. 253, 516 P.2d 117 (1973).

Sua sponte change of venue was not error. *People v. Wafai*, 713 P.2d 1354 (Colo. App. 1985), *aff'd*, 750 P.2d 37 (Colo. 1988).

Applied in *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915); *People v. Norwood*, 37 Colo. App. 157, 547 P.2d 273 (1975).

16-6-103. Change of venue where offense committed in two or more counties. Where a prosecution has been commenced in one county, the court, for good cause shown, may transfer the proceeding to another county within the same judicial district if it is shown that the offense was committed in more than one county within the same judicial district and if the court is satisfied that the interests of justice would be served by transferring the action to the other county.

Source: L. 72: R&RE, p. 219, § 1. **C.R.S. 1963: § 39-6-103.**

16-6-103.5. Plea of guilty to offenses committed in two or more counties. (1) Any person charged with crimes in more than one county of this state may apply to the district attorney of one of said counties to be charged with all crimes so that he may enter into a disposition and be sentenced for them in that single county. The application shall contain a description of all charged crimes and the name of the county in which each was committed.

(2) Upon receipt of the application, the district attorney shall prepare an information charging all the charged crimes and naming in each count the county where each was committed. He shall send a copy of the information to the district attorney of each other county in which the defendant stands charged, together with a statement that the defendant has applied to enter into a disposition in the county of application. Upon receipt of the information and statement, the district attorney of the other county may execute a consent in writing allowing the defendant to enter a plea of guilty in the county to which application has been made to the crime charged in the information and committed in the other county and send it to the district attorney who prepared the information.

(3) If necessary, the district attorney shall amend the information so that it includes only the offenses for which he has received written consent from the district attorney of other counties, and he shall file the information in any court of his county having jurisdiction to try or accept a plea of guilty to the most serious crime alleged therein. The defendant then may enter a plea of guilty to all offenses alleged to have been committed in the county where the court is located and to all offenses alleged to have been committed in other counties as to which consents have been executed pursuant to subsection (2) of this section. Before entering his plea of guilty, the defendant shall waive in writing any right to be tried in the county where the crime was committed. The district attorney of the county where the crime was committed need not be present when the plea is made, but his written consent shall be filed with the court.

(4) Thereupon the court shall enter such judgment, the same as if all the crimes charged were alleged to have been committed in the county where the court is located, whether or not the court has jurisdiction to try all those crimes to which the defendant has pleaded guilty under this section.

(5) The clerk of the court in the county where the plea is made shall file a copy of the judgment of conviction with the clerk in each county where a crime covered by the plea was committed. The district attorney in each of said counties shall then move to dismiss any charges covered by the plea of guilty which are pending against the defendant in his county, and the same shall thereupon be dismissed.

Source: L. 87: Entire section added, p. 603, § 3, effective July 1.

16-6-104. Application of rules of criminal procedure. Except as otherwise provided by sections 16-6-101 to 16-6-103, the filing of an application for change of venue and all proceedings relating thereto are governed by the provisions of applicable rules of criminal procedure adopted by the supreme court of Colorado.

Source: L. 72: R&RE, p. 219, § 1. C.R.S. 1963: § 39-6-104.

PART 2

DISQUALIFICATION OF JUDGE

16-6-201. Disqualification of judge. (1) A judge of a court of record shall be disqualified to hear or try a case if:

(a) He is related to the defendant or to any attorney of record or attorney otherwise engaged in the case; or

(b) The offense charged is alleged to have been committed against the person or property of the judge or of some person related to him; or

(c) He has been of counsel in the case; or

(d) He is in any way interested or prejudiced with respect to the case, the parties, or counsel.

(2) Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.

(3) A motion for change of judge on any ground must be verified and supported by the affidavits of at least two credible persons not related to the defendant, stating facts showing the existence of grounds for disqualification. If the verified motion and supporting affidavits state facts showing grounds for disqualification, the judge must enter an order disqualifying himself. After disqualifying himself, the judge may require a full hearing upon the issues raised by the affidavits and shall request that another judge conduct the hearing. The other judge shall make findings of fact with regard thereto, and such findings shall be included as a part of the trial court record.

(4) The disqualified judge shall certify the need for a judge to the chief justice of the Colorado supreme court, who shall assign a judge to the case.

(5) The term "related", when used in this section, means related within the third degree by blood, adoption, or marriage.

Source: L. 72: R&RE, p. 219, § 1. C.R.S. 1963: § 39-6-201.

ANNOTATION

- I. General Consideration.
- II. Grounds for Change of Judge.
 - A. In General.
 - B. Interest.
 - C. Prejudice.
- III. Motion for Change.
 - A. In General.
 - B. Sufficiency of Motion.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to the personal interest of judge in case, see 15 Colo. Law. 1609 (1986).

Annotator's note. Since § 16-6-201 is similar to repealed § 39-9-2, C.R.S. 1963, CSA, C. 170, § 1, and laws antecedent thereto, relevant

cases construing those provisions have been included in the annotations to this section.

The object of this section is to secure to an accused a fair and impartial trial by a judge uninfluenced by bias or prejudice against the party charged. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

The purpose of this section and *Crim. P.* 21(b), is to guarantee that no person is forced to stand trial before a judge with a bent of mind. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

It is the duty of a judge to sit in a case in the absence of a showing that he is disqualified. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

Unless a reasonable person could infer that the judge would in all probability be prejudiced against the petitioner, the judge's duty is to sit on the case. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

Defendant does not lose right to change upon reindictment. The right of the accused to an impartial judge is not waived or lost by a previous application for a change in an indictment for the same offense, which previous indictment was dismissed at the request of the state. *Lawson v. People*, 63 Colo. 270, 165 P. 771 (1917).

Applied in *People in Interest of A.L.C.*, 660 P.2d 917 (Colo. App. 1982).

II. GROUNDS FOR CHANGE OF JUDGE.

A. In General.

Grounds identical to those in Crim. P. 21(b). The grounds for disqualification set out in this section are identical to those set out in Crim. P. 21(b). *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977); *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *Comiskey v. District Ct.*, 926 P.2d 539 (Colo. 1996).

Test of judge's qualifications is same as that for jurors. Where the issues involved require the judge to pass upon the facts, and it is solely a question of fact which is presented for his consideration and determination, the same test of his qualifications to determine the matter should be applied as would be in determining the qualifications of jurors in the premises. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

General rule. This section by express terms makes the judge incompetent to try a case if he is in any way interested, or in any way prejudiced, or if he shall have been of counsel in the cause. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Subjective conclusion of rudeness not ground for disqualification. It does not comport with sound judicial policy or the intent of either Crim. P. 21(b) or this section to require disqualification of a judge solely on the basis of subjective conclusions that he was discourteous or rude. *Carr v. Barnes*, 196 Colo. 70, 580 P.2d 803 (1978).

B. Interest.

A disqualifying interest of a judge must necessarily relate to the subject matter of the litigation, and not to a determination of the facts and legal questions presented. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

It must be direct, apparent, substantial, certain, or immediate, and not one which is only indirect, contingent, incidental, remote, speculative, unreal, uncertain, inconsequential, or merely theoretical. *Kostal v. People*, 160 Colo. 64, 414 P.2d 123, cert. denied, 385 U.S. 939, 87 S. Ct. 305, 17 L. Ed.2d 218 (1966).

Sham action will not disqualify judge. The filing of sham or frivolous actions in which a judge is made a party for the sole purpose of disqualifying him in the trial of another case should not be allowed. *Kostal v. People*, 160 Colo. 64, 414 P.2d 123, cert. denied, 385 U.S. 939, 87 S. Ct. 305, 17 L. Ed.2d 218 (1966).

Facts showing interest are conclusive. To be in any way interested or to have been of counsel in the cause constitutes conclusive incompetency, and from the existence of those facts, or either of them, no other deduction can be made. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

C. Prejudice.

The appearance of possible prejudice can dictate disqualification. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Because appearances can be as damaging to public confidence in the courts as actual bias or prejudice, a trial judge must scrupulously avoid any appearance of bias or prejudice. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

But mere expression of belief that judge would not give fair trial does not show prejudice. The mere expression of a belief that the judge would not give the defendant a fair and impartial trial, without the statement of a single fact upon which such belief is based, is in no sense a compliance with the requirements of this section that the prejudice of the judge must be shown. *Young v. People*, 54 Colo. 293, 130 P. 1011 (1913).

An appearance of impropriety cannot be inferred simply because the judge was a member of the general public that witnessed the fire started by defendant or because the judge assisted in general relief efforts. *People v. Barton*, 121 P.3d 224 (Colo. App. 2004).

However, numerous other allegations of the judge's personal involvement and comments made by the judge during the sentencing hearing about his or her personal experience presented legally sufficient basis to create the appearance of prejudice that could have prevented the judge from dealing fairly with the defendant. *People v. Barton*, 121 P.3d 224 (Colo. App. 2004).

A leaning or bias interfering with fairness will constitute prejudice. If the application discloses facts reasonably tending to the conclusion that the judge has a leaning towards one side of any question involved in the prosecution, or a bias in relation to it, which may interfere with fairness in judgment, he is prejudiced and incompetent within the meaning of this section. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915); *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

The facts will vary in accordance with the peculiar situation pertaining, but, as a general rule, sufficient factual matters must be stated to show bias and prejudice on the part of the trial judge to the extent that it may reasonably and substantially appear that his actions during the course of trial will be so influenced against defendant that a fair and impartial trial may not result. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

And it exists if case is decided on considerations not connected with facts. In any law suit where the issues involved are not determined alone from considerations that belong to them, there is prejudice within the meaning of the law, and such prejudice is necessarily against the party injured. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Where no basis for disqualification. In the context of a confidential plea-bargaining conference, conducted off-the-record and in chambers, and where the challenged statement by the court implies nothing more than the judge's belief that the proposed plea and sentence concessions would not do justice, there is no basis for disqualification. *Sober v. District Court*, 197 Colo. 250, 592 P.2d 400 (1979).

It is not based upon judge's view of law. The right to disqualify the presiding judge is based upon an assumed prejudice or bias on his part, and not upon his views regarding the law of the case. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Altobella v. People*, 161 Colo. 177, 420 P.2d 832 (1966).

Thus, personal opinions as to issues generally not regarded as disqualifying judge. Personal opinions of a trial judge concerning issues in the cause before the court, or even as to the guilt or innocence of a defendant in a criminal case, are generally not regarded as disqualifying the judge unless his opinions be so pronounced that it can reasonably be said that he will be biased and prejudiced thereby during the trial. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

Speculation by trial judge concerning possible appellate response to a hypothetical review of the state's capital punishment statute does not provide the basis for an inference of any prejudice by the judge with respect to the defendant or his case. *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986).

Previous rulings of judge insufficient. Previous rulings of a presiding judge, although erroneous, numerous, and continuous, especially when they are subject to review, are not sufficient to show such bias or prejudice as would disqualify him. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Altobella v. People*, 161 Colo. 177, 420 P.2d 832 (1966).

Judges are not disqualified solely on the basis that they were formerly employed by the prosecutor's office. Instead, when em-

ployed by that office, the judge to be disqualified must have performed some role in the case or have obtained actual knowledge of disputed evidentiary facts of the case. *People v. Julien*, 47 P.3d 1194 (Colo. 2002).

Judge not disqualified due to prior prosecution of defendant while employed by prosecutor's office. Judge's prosecution of defendant seven years earlier involved similar but unrelated charges and resulted in a dismissal following defendant's successful motion to suppress. Judge not required to recuse himself where judge had no knowledge of evidentiary facts concerning the current case and no connection to the investigation, preparation, and presentation of the case. *People v. Flockhart*, ___ P.3d ___ (Colo. App. 2009).

Prejudice must be directed to defendant individually or as a member of group or organization. The prejudice of a trial judge must be shown to be directed toward the defendant, individually, either as a result of personal dislike or feeling against the defendant, or that such prejudice may have resulted by reason of animosity toward some group or organization with which the defendant may have been associated or closely affiliated. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

Bond orders did not establish bias. The facts alleged concerning revocation of defendant's bond, resetting the bond at \$100,000, and refusal to reduce the bond, when considered in the procedural setting out of which the orders arose, are not such as to establish to the satisfaction of a reasonable mind that the presiding judge had a bias or a prejudice that would in all probability prevent him from dealing fairly with the defendant. *Altobella v. People*, 161 Colo. 177, 420 P.2d 832 (1966).

There can be no presumption that a judge is intimidated by the outrage of the community in which the judge serves. Thus, motion for disqualification properly denied where there was no allegation that the judge was in fact intimidated by the community's animosity toward the defendant. *People v. Vecchio*, 819 P.2d 533 (Colo. App. 1991).

The trial court's statement that defendant's motion for a competency hearing was a "ploy" to delay the trial was adequately supported by what the judge learned in his judicial capacity during argument on pretrial motions concerning the defendant's competency, and such a statement does not constitute the kind of prejudice required for recusal. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991).

Judge's concern for welfare of alleged victim does not establish the reality or appearance of partiality. *Wilkerson v. District Ct.*, 925 P.2d 1373 (Colo. 1996).

Merely filing of complaint with the judicial performance commission, without more, does not establish sufficient grounds for recusal. Fur-

ther, county court judge's decision to recuse herself in seven prior cases does not lead to the conclusion that she should permanently recuse herself in all cases involving the attorneys. *Kane v. County Court Jefferson County*, 192 P.3d 443 (Colo. App. 2008).

III. MOTION FOR CHANGE.

A. In General.

The credibility of the persons making the affidavits required by the statute will be presumed, unless the contrary appears from the affidavits. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

The facts set forth in affidavits supporting a motion to disqualify a judge are not subject to a trial court's inquiry, but are presumed to be true. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

Facts establishing incompetency must be stated. The mere assertion that the judge is prejudiced or incompetent is not sufficient. The facts from which prejudice or incompetency is to be inferred must be set forth. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

In all cases necessary material or pertinent facts should be set out; in case of the prejudice of the judge, his attention would thus be called to some circumstance which he may have forgotten, or of which he was entirely ignorant, but which the petitioner might conceive to be a cause of prejudice. *Hughes v. People*, 5 Colo. 436 (1880).

A motion and accompanying affidavits requesting disqualification of a trial judge from participating in a case properly assigned to that judge must state facts from which it may be reasonably inferred that the judge has a bias or prejudice with respect to the case, a party, or counsel. *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986).

The requirement in this section that prejudice of the judge must be shown is of the same effect as an earlier statute by which the facts were expressly required to be stated. *Young v. People*, 54 Colo. 293, 130 P. 1011 (1913).

The mere statement of opinion or conclusion of the bias on the part of the trial judge is not sufficient in a motion seeking disqualification of a judge, and the facts from which the incompetency or prejudice is inferred must be stated. There has always been required, as essential to a proper recusal, a statement of facts in the affidavits sufficient to disclose the incompetency of the judge. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

Suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions of the pleader may not be substituted for a statement of facts. *Walker v.*

People, 126 Colo. 135, 248 P.2d 287 (1952); *People v. Cook*, 22 P.3d 947 (Colo. App. 2000).

Affidavits need not state all essential facts. The affidavits in support of a motion for disqualification do not have to contain every essential fact which establishes the judge's prejudice; it is sufficient if the affidavits verify the facts set forth in the motion. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Affidavit may refer to another instrument for particulars. An affidavit may be made full and complete by reference to an attached instrument, or by having the particular matters so referred to embodied in the affidavit itself. Either is sufficient. *Ausmus v. People*, 47 Colo. 167, 107 P. 204 (1910); *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Both actuality and appearance of fairness must be considered in reviewing a motion for disqualification and accompanying affidavits. *People v. Botham*, 629 P.2d 589 (Colo. 1981); *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986).

A motion for recusal must be verified and supported by affidavits of at least 2 credible witnesses not related to defendant. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Whether recusal is required will depend on whether defendant's motion and supporting affidavits set forth legally sufficient facts upon which bias or prejudice may be implied. *James v. People*, 727 P.2d 850 (Colo. 1986); *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

If verified motion for change of judge and supporting affidavits state facts showing grounds for disqualification, the judge must enter an order disqualifying himself or herself. *People v. Lanari*, 926 P.2d 116 (Colo. App. 1996).

This section does not preclude the referral of a motion for disqualification to the chief judge for a hearing to determine the sufficiency of the allegations of a motion for substitute judge. *People v. Lanari*, 926 P.2d 116 (Colo. App. 1996).

This section nowhere provides for the filing of counteraffidavits. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

A previously executed affidavit can lend no verity to a subsequent pleading containing new matter. The second motion is not entitled to consideration as it does not comply with this section, being insufficient in form. *Altobella v. People*, 161 Colo. 177, 420 P.2d 832 (1966).

Motions for disqualification of a judge must be filed at the very earliest opportunity. Ordinarily this requires the filing of such a motion promptly upon the service of the information or at least by time of arraignment of the defendant in a criminal case. Usually the bias or animosity of the judge will be known to the defendant, or his counsel, at that time; hence the rule requiring prompt action. It is conceivable

that in certain circumstances the fact of bias or prejudice on the part of a judge might not be ascertainable for some time after the filing of the information, but in such a situation a statement should be forthcoming showing the reason why the petition was not sooner filed. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

The requirements of Crim. P. 21(b) with respect to timely filing, apply whether the movant expressly invokes that rule or purports to proceed only under this section. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Motion presented in apt time. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Motion filed too late. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

Referring a motion for substitution to another judge for decision is not reversible error even if it is not the procedure contemplated by C.R.C.P. 21. *Comiskey v. District Ct.*, 926 P.2d 539 (Colo. 1996).

B. Sufficiency of Motion.

Test of sufficiency. The facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice that will in all probability prevent him from dealing fairly with the defendant. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *People v. Baca*, 633 P.2d 528 (Colo. App. 1981).

To be sufficient, the affidavits must state facts from which the respondent judge's prejudice may reasonably be inferred. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

The test of the legal sufficiency of a motion to disqualify a judge is whether the motion and affidavits state facts from which it may reasonably be inferred that the questioned judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with the defendant. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People v. Hrapski*, 718 P.2d 1050 (Colo. 1986); *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991).

Judicial recusal is required pursuant to motion once facts have been established from which it can be reasonably inferred that the judge has such bent of mind that he would be unable to deal fairly with the party seeking recusal. *People v. Vecchio*, 819 P.2d 533 (Colo. App. 1991); *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Evidence of either actual prejudice or the appearance of prejudice may suffice to require recusal. *Estep v. Hardeman*, 705 P.2d 523 (Colo. 1985); *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Where defendant failed to submit affidavits in accordance with requirements of this sec-

tion and Crim. P. 21(b), and supplied allegations himself that record did not verify, there were insufficient grounds for disqualification. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Where nothing in motion or affidavits suggests that the judge or any employee was present when the defendant's crime pending before the judge was committed; that the judge or any employee was in any way personally victimized by the crime; or that the work of the judge or any employee was disrupted by the crime, it cannot be said that judge would necessarily be prejudiced against the party charged as to be unable to be fair in a future trial of that party on an unrelated charge. *People v. Anderson*, 991 P.2d 319 (Colo. App. 1999).

When a motion for disqualification is filed, the court must accept the facts alleged in the motion and supporting affidavits as true and must determine, as a matter of law, its adequacy. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991).

What a judge learns in his judicial capacity is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification. Therefore, court's statement that the motion for a competency hearing was a "ploy" to delay the trial was adequately supported by what the judge learned in his judicial capacity during argument on pretrial motions concerning defendant's competency and did not constitute the kind of prejudice required for recusal. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991).

Motion and affidavits do not establish a particular bias or prejudice on the part of the trial judge even though ex parte communications did occur. *Wilkerson v. District Ct.*, 925 P.2d 1373 (Colo. 1996).

Sufficiency is a matter of law. The finding of sufficiency in a motion for change of judge is a finding of law, and not fact, and this is true whether it be the finding of the trial court or of an appellate tribunal. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915); *People ex rel. Bennet v. District Court*, 84 Colo. 367, 270 P. 663 (1928).

The judge has the right, and it is his duty, to pass upon the adequacy of the motion seeking disqualification of a judge as a matter of law. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

Whether the motion is timely and whether it sufficiently states grounds for disqualification are questions of law subject to plenary review. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Judge may determine sufficiency of motion but not question of prejudice. Where, in a criminal prosecution, motion is made for change of judge on the ground of prejudice in the mind of the presiding judge, such judge may hear and

determine questions as to the sufficiency of the motion and the affidavits in support of it, but not the question whether in fact such prejudice exists. *Erbaugh v. People*, 57 Colo. 48, 140 P. 188 (1914).

The courts, in considering the sufficiency of the motion for a change of judge, can neither reject the pleading, nor disregard the facts alleged therein. They can only apply the law and test thereby the sufficiency of the facts alleged. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Although the trial judge must, of necessity, initially determine the timeliness and legal sufficiency of a motion to disqualify him for prejudice, he cannot pass upon the truth or falsity of statements of fact in the motion and supporting affidavits. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Thus, facts are accepted as true. The change of judge is conditioned, not upon the actual fact of his prejudice, but upon the imputation of it. The facts set forth in the recusation must, for the purposes of the motion, be accepted as true, notwithstanding they may be known to the judge and all mankind to be false. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

While the alleged prejudicial judge may pass upon the question of law involving the sufficiency of the petition and affidavit, the question of the truth of the allegation is never tried. *Erbaugh v. People*, 57 Colo. 48, 140 P. 188 (1914).

As a matter of judicial policy, courts must take as true, for purposes of a motion to disqualify, facts stated in the affidavits and motion. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *Comiskey v. District Ct.*, 926 P.2d 539 (Colo. 1996); *People v. Cook*, 22 P.3d 947 (Colo. App. 2000); *Kane v. County Court Jefferson County*, 192 P.3d 443 (Colo. App. 2008).

Judge loses jurisdiction except to grant change. The motion and affidavits are conditions imposed by this section. Upon legally sufficient compliance, the defendant is entitled to a change as of right and the judge loses jurisdiction except to grant the change, without any

inquiry into the facts. *Erbaugh v. People*, 57 Colo. 48, 140 P. 188 (1914).

When it is sought to remove the judge because of his prejudice, the law-making power of our state has not deemed it proper to vest in such judge any discretion in the premises, and the judge whose competency is so questioned can only pronounce the judgment of the law. He cannot sit in judgment upon that which directly concerns himself. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915); *People ex rel. Bennet v. District Court*, 84 Colo. 367, 270 P. 663 (1928).

If the motion for disqualification be sufficient in form, and whether the allegations therein contained be in fact true or false, if they be set forth as facts they must be so accepted, and the judge may perform no further duty than that of entering an order of disqualification. He may not pass upon the facts. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

The trial judge has no discretion in the matter of recusing himself upon finding the affidavits sufficient under the rule to allege prejudice. He immediately loses all jurisdiction in the matter except to grant the change. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Review of decision on motion. Should the trial court conclude that the motion and affidavits in support of change of judge are insufficient to require the change, and a reviewing or superior tribunal find the contrary, the question upon which the two tribunals have differed is of law, not of fact. Therefore, the finding of the trial court in such case can have no bearing upon the issue when presented to a higher tribunal. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Motion held sufficient. Motion for disqualification of respondent judge with request that a substitute judge be named was sufficient where petitioner had entered a plea of guilty before the respondent judge who then imposed sentence on the petitioner and on appeal petitioner's guilty plea was vacated but on remand the case was again assigned to the respondent judge. *Golden v. District Court*, 186 Colo. 300, 527 P.2d 60 (1974).

ARTICLE 7

Separate Trial - Arraignment - Plea Agreements - Deferred Prosecution and Deferred Sentencing

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1

SEPARATE TRIAL - ALIBI NOTICE

- 16-7-101. Separate trial of joint defendants.
 16-7-102. Required notice of defense of alibi.

PART 2

ARRAIGNMENT

- 16-7-201. Place of arraignment.
 16-7-202. Presence of defendant.
 16-7-203. Irregularity of arraignment.
 16-7-204. Procedures on arraignment.
 16-7-205. Pleas authorized on arraignment.
 16-7-206. Guilty pleas - procedure and effect.
 16-7-207. Court's duty to inform on first appearance in court and on pleas of guilty.
 16-7-208. Failure or refusal to plead.

PART 3

PLEA DISCUSSIONS
AND PLEA AGREEMENTS

- 16-7-301. Propriety of plea discussions

16-7-302.

16-7-303.

16-7-304.

and plea agreements.

Responsibilities of the trial judge with respect to plea discussions and agreements.

Fact of discussion and agreement not admissible.

Charges for bad checks.

PART 4

DEFERRED PROSECUTION
AND DEFERRED SENTENCING

16-7-401.

16-7-402.

16-7-403.

16-7-403.5.

16-7-403.7.

16-7-404.

Deferred prosecution. (Repealed)

Counseling or treatment for alcohol or drug abuse. (Repealed)

Deferred sentencing of defendant. (Repealed)

Deferred sentencing - mentally ill defendants charged with certain misdemeanors - demonstration program - repeal. (Repealed)

Deferred sentencing - drug offenders - legislative declaration - demonstration program - repeal. (Repealed)

Charges for bad checks.

PART 1

SEPARATE TRIAL - ALIBI NOTICE

16-7-101. Separate trial of joint defendants. When two or more defendants are jointly indicted or informed against for any offense and there is material evidence, not relating to reputation, which is admissible against one or some of them but which is not admissible against all of them if they are tried separately and which is prejudicial to those against whom it is not admissible, those against whom such evidence is admissible shall be tried separately upon motion of any of those against whom the evidence is not admissible. In all other cases, defendants jointly prosecuted shall be tried separately or jointly in the discretion of the court.

Source: L. 72: R&RE, p. 220, § 1. C.R.S. 1963: § 39-7-101.

ANNOTATION

- I. General Consideration.
 II. Motion for Severance.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to misjoinder of defendants, see 15 Colo. Law. 1615 (1986). For article, "Felony

Plea Bargaining in Six Colorado Judicial Districts: A Limited Inquiry into the Nature of the Process", see 66 Den. U. L. Rev. 243 (1989).

Annotator's note. Since § 16-7-101 is similar to repealed § 39-7-11, C.R.S. 1963, CSA, C. 48, § 484, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section changes the common-law rule that existed prior to its enactment, which left the

granting of separate trials to defendants jointly indicted to the discretion of the court. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

Goal of section. The goal underlying this section is to promote a fair determination of the issue of guilt or innocence of the defendant. *People v. Gonzales*, 198 Colo. 450, 601 P.2d 1366 (1979); *People v. Horne*, 619 P.2d 53 (Colo. 1980).

The language of this section is positive and unequivocal. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

This section is mandatory when it appears that a defendant would be prejudiced on a joint trial by the admission of evidence which would not be admissible as against him, but which would be competent as against his codefendant. *Russell v. People*, 125 Colo. 290, 242 P.2d 610 (1952).

A defendant is entitled to severance of trial as a matter of right if there is evidence that is admissible against one but not all of the parties and if the evidence is prejudicial to the defendant against whom the evidence is not admissible. *People v. Montoya*, 942 P.2d 1287 (Colo. App. 1996).

The supreme court has interpreted this section to mean, in the mandatory severance setting, that the trial court must determine whether the admitted evidence was so inherently prejudicial that the jury could not have limited its use to its proper purpose. *People v. Montoya*, 942 P.2d 1287 (Colo. App. 1996).

The trial court's decision will be affirmed absent a showing of an abuse of discretion and actual prejudice to the moving party. *People v. Montoya*, 942 P.2d 1287 (Colo. App. 1996).

Basis for severance. Severance is to be based upon a finding of prejudice rather than simply the differences which are incidental to any trial of more than one defendant. *People v. Johnson*, 192 Colo. 483, 560 P.2d 465 (1977).

Severance is a matter of right under proper circumstances. When a case as contemplated by this section is presented, it is the duty of the court to grant a severance as a matter of right. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

Where two are indicted jointly, and there is evidence not relating to reputation, admissible as against one of them, but inadmissible as against the other, the one against whom such evidence is inadmissible is entitled to a separate trial as of right under this section. *Cook v. People*, 56 Colo. 477, 138 P. 756 (1914).

Where the evidence is admissible against all defendants, severance need not be allowed. *Moore v. People*, 31 Colo. 336, 73 P. 30 (1903); *Cook v. People*, 56 Colo. 477, 138 P. 756 (1914).

Evidence of reputation of another defendant is expressly excluded as a ground for severance by this section. *Mukuri v. People*, 92 Colo. 306, 19 P.2d 1040 (1933).

A party under criminal indictment is not entitled to a severance on the ground that his codefendants were known in the community as men of bad reputation. *Mukuri v. People*, 92 Colo. 306, 19 P.2d 1040 (1933).

Matter of severance left to discretion of trial court. Where there was no claim that the joint trial involved evidence admissible against only one of the defendants, the matter of severance was left to the discretion of the trial court. *People v. Johnson*, 192 Colo. 483, 560 P.2d 465 (1977).

The granting or denial of a motion for severance and continuance is a matter within the sound discretion of the trial court. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

A motion for severance of defendants is addressed to the sound discretion of the trial court. *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Vigil*, 678 P.2d 554 (Colo. App. 1983); *People v. Adams*, 678 P.2d 572 (Colo. App. 1984); *People v. Durre*, 713 P.2d 1344 (Colo. App. 1985); *People v. Manners*, 713 P.2d 1348 (Colo. App. 1985).

Although court properly denied motion for severance on evidentiary grounds, it was an abuse of discretion to deny motion for severance on speedy trial grounds under § 18-1-405 where court made no finding of good cause why severance should not be granted. Finding of good cause is specifically required by § 18-1-405 (6) (c). *People v. Hernandez*, 829 P.2d 392 (Colo. App. 1991).

And denial not reversed unless defendant prejudiced. Where there is no showing that the denial of a motion for severance prejudiced the defendant, the trial court's ruling will not be disturbed on appeal. *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Magoon*, 645 P.2d 286 (Colo. App. 1982); *People v. Vigil*, 678 P.2d 554 (Colo. App. 1983).

Severance not mandatory. *People v. Gallegos*, 680 P.2d 1294 (Colo. App. 1983).

Severance is not constitutionally mandated because of conflicting peremptory challenges exercised by defendant's counsel. *People v. Durre*, 713 P.2d 1344 (Colo. App. 1985).

To determine whether separate trials are required, a trial court must determine whether admitted evidence is so inherently prejudicial that the jury would not be able to limit its use to its proper purpose. Otherwise, a motion for joinder is addressed to the discretion of the trial court, and will be affirmed absent a showing of an abuse of discretion and actual prejudice to the moving party. *People v. Escano*, 843 P.2d 111 (Colo. App. 1992).

When an out-of-court statement of a co-defendant does not make reference to the co-defendant, severance should be granted only when it is necessary to promote a fair determination of the guilt or innocence of one or more defendants. The court should make

this determination by considering, among other factors, whether, in view of the number of offenses and defendants charged and the complexity of the evidence offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense and as to each defendant. *People v. Escano*, 843 P.2d 111 (Colo. App. 1992).

Since a co-defendant's statements to the police, made in defendant's presence, are admissible against defendant, defendant is not entitled to severance as a matter of right under this section. *People v. Gardenhire*, 903 P.2d 1159 (Colo. App. 1995).

Trial court did not abuse its discretion by failing to sever defendant's case where defendant's reason for requesting a severance was to be able to exercise additional peremptory challenges. *People v. Lesney*, 855 P.2d 1364 (Colo. 1993).

Two-part test for determining severance issues. This section contemplates a two-part test for determining severance issues: (1) Whether there is material evidence admissible against one but not all of the parties; and (2) whether admission of that evidence would be prejudicial against whom the evidence is not admissible. *People v. Gonzales*, 198 Colo. 450, 601 P.2d 1366 (1979); *People v. Hernandez*, 829 P.2d 392 (Colo. App. 1991); *People v. Escano*, 843 P.2d 111 (Colo. App. 1992).

Test applied in *People v. Barela*, 689 P.2d 689 (Colo. App. 1984); *People v. Gregory*, 691 P.2d 357 (Colo. App. 1984); *People v. Peltz*, 697 P.2d 766 (Colo. App. 1984), aff'd, 728 P.2d 1271 (Colo. 1986); *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984); *People v. Pappadiakis*, 705 P.2d 983 (Colo. App. 1985), aff'd sub nom. *Peltz v. People*, 728 P.2d 1271 (Colo. 1986).

Showing required to establish abuse of discretion. To establish abuse of the trial court's discretion, more is required than a showing that separate trials might afford a better chance of acquittal. *People v. Armstrong*, 664 P.2d 716 (Colo. App. 1982), rev'd on other grounds, 701 P.2d 17 (Colo. 1985).

Mutual participation of defendants in an offense is considered a logical basis for refusing to sever. *People v. Adams*, 678 P.2d 572 (Colo. App. 1984); *People v. Carrillo*, 946 P.2d 544 (Colo. App. 1997), aff'd on other grounds, 974 P.2d 478 (Colo. 1999).

Factors to be considered in determining whether denial of severance constitutes an abuse of discretion include: (1) whether the number of defendants or the complexity of the evidence is such that the jury will probably confuse the law and evidence applicable to each defendant; (2) whether, despite admonitory instructions, evidence admissible against one defendant will improperly be considered against another; and (3) whether the defenses presented are antagonistic. *People v. Escano*, 843 P.2d 111 (Colo. App.

1992); *People v. Carrillo*, 946 P.2d 544 (Colo. App. 1997), aff'd on other grounds, 974 P.2d 478 (Colo. 1999).

Admission of testimony of codefendant not reversible error. It was not reversible error to admit evidence concerning a description of defendants just because it was testimony of a codefendant as to whom the severance had been granted. In view of the inconclusive nature of the identification, it cannot be said that there was any prejudice to the defendants from the admission of this evidence, although it would clearly be a better procedure to conceal the source of the extrajudicial identifications. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

This section is applicable to cases of conspiracy. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895); *Seebass v. People*, 116 Colo. 555, 182 P.2d 901 (1947).

II. MOTION FOR SEVERANCE.

Considerations in deciding motion for severance. When deciding whether to grant a motion for severance, the trial court should consider whether evidence inadmissible against one defendant will be considered against the other defendant, despite the issuance by the trial court of the proper admonitory instructions. An additional consideration is whether the defendants plan to offer antagonistic defenses. *People v. Gonzales*, 198 Colo. 450, 601 P.2d 1366 (1979).

Additional criteria for consideration in determining whether the possibility of prejudice and unfair trial will result if severance is denied is whether the number of defendants or the complexity of evidence, together with the applicable law, will be confused by the jury, as it applies the law to each defendant. *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978).

Criteria applied in *People v. Vigil*, 678 P.2d 554 (Colo. App. 1983); *People v. Backus*, 952 P.2d 846 (Colo. App. 1998).

Motion should set out the alleged incompetent evidence. That a defendant will be prejudiced on a joint trial by the admission of evidence which is not admissible as against him but which is competent as against his codefendant must be made to appear in support of a motion for a severance, not by merely stating that evidence will be admitted which is not competent as against the moving defendant, but the evidence which it is claimed is incompetent must be set out so that the court will be given the opportunity to determine whether or not the defendant moving for a severance may be prejudiced. Such has been the recognized practice in this jurisdiction. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895); *Moore v. People*, 31 Colo. 336, 73 P. 30 (1903); *Robinson v. People*, 76 Colo. 416, 232 P. 672 (1925).

Under the provisions of this section it is held that the showing in support of a motion for a

severance was not sufficient to make the denial of the motion prejudicial error. The alleged incompetent evidence should be set out in the motion. *Robinson v. People*, 76 Colo. 416, 232 P. 672 (1925).

The trial court is to be guided by the contents of the motion and the affidavit and must be advised thereby as to the nature of the evidence before it can determine whether the severance should be granted. Where neither the motion, nor the required affidavit, shows sufficient cause, the trial court commits no error in denying the motion for severance. *Russell v. People*, 125 Colo. 290, 242 P.2d 610 (1952).

Unless it is impossible to set forth the evidence required. While a motion for severance should set forth the evidence which it is claimed will prejudice the rights of the moving defendant, if it is impossible for him to set out such evidence, the motion will not be held insufficient because of his failure to do the impossible. *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931).

The application for severance must be supported by an affidavit which definitely shows a good cause therefor. *Robinson v. People*, 76 Colo. 416, 232 P. 672 (1925).

Otherwise the motion is denied. A motion for a separate trial which contained no statement of facts from which the court could determine whether there was evidence against a codefendant which was immaterial and inadmissible as to the moving defendant and which would be prejudicial if admitted, and the motion being unverified, not supported by affidavit, and not referring to any source from which the facts might be obtained, held properly denied. *Garcia v. People*, 88 Colo. 267, 295 P. 491 (1931).

Defendant against whom evidence is inadmissible is proper party to make the application. *Garcia v. People*, 88 Colo. 267, 295 P. 491 (1931).

The separation must be requested by the party against whom the material evidence is inadmissible. *Cook v. People*, 56 Colo. 477, 138 P. 756 (1914), disapproving *Moore v. People*, 31 Colo. 336, 73 P. 30 (1903).

Other defendant cannot complain of denial of severance. Where only one of two defendants moved for a severance, which was denied, the other defendant will not be heard to complain of the ruling. *McClary v. People*, 79 Colo. 205, 245 P. 491 (1926).

If the defendant fails to move for severance, he cannot raise the question of severance on appeal. *Reed v. People*, 174 Colo. 43, 482 P.2d 110 (1971).

Motion denied where evidence was not within prohibition. Where evidence of which defendants' counsel complained was not within the prohibitions of this section, overruling of motion for separate trials did not constitute prejudicial error. *Lewis v. People*, 109 Colo. 89, 123 P.2d 398 (1942).

Motion for severance inadequate. *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

Denial of motion upheld where no objection is made to evidence during trial. Where a motion for severance under this section was denied, and on the trial no objection was made on behalf of either defendant to any evidence which could by any possibility be considered as admissible against one and inadmissible against the other, the ruling of the court in denying the motion is upheld. *Stone v. People*, 71 Colo. 162, 204 P. 897 (1922).

Or where evidence is not prejudicial. Unless the appeal discloses the admission of prejudicial evidence, no error is committed in denying a motion for a severance. *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931).

Severance was not mandatory and was at the discretion of the trial court because there was no material evidence admissible against one defendant but not against the other. *People v. Wandel*, 713 P.2d 398 (Colo. App. 1985).

Refusal to grant severance on proper motion is error. A motion for a separate trial, when supported by a transcript of the evidence of a former trial in which it clearly appeared that there had been prejudicial evidence offered and received, should have been granted, and the refusal to do so was error. *Garcia v. People*, 88 Colo. 267, 295 P. 491 (1931).

16-7-102. Required notice of defense of alibi. If the defendant intends to introduce evidence that the defendant was at a place other than the location of the offense, the defendant shall serve upon the prosecuting attorney as soon as practicable, but not later than thirty-five days before trial, a statement in writing specifying the place where the defendant claims to have been and the names and addresses of the witnesses the defendant will call to support the defense of alibi. Upon receiving the defendant's statement, the prosecuting attorney shall advise the defendant of the names and addresses of any additional witnesses who may be called to refute such alibi as soon as practicable after the names of such witnesses become known. Neither the prosecuting attorney nor the defendant shall be permitted at the trial to introduce evidence inconsistent with the specification statement unless the court for good cause and upon just terms permits the specification statement to be amended. If the defendant fails to make the specification required by this section, the court shall exclude evidence offered in support of the defense of alibi unless the court finds upon good cause shown that such evidence should be admitted in the interest of justice.

Source: L. 72: R&RE, p. 220, § 1. C.R.S. 1963: § 39-7-102. L. 74: Entire section amended, p. 238, § 1, effective March 19. L. 93: Entire section amended, p. 517, § 7, effective July 1. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 850, § 75, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Where the defendant fails to provide notice of the alibi defense and where he fails to request an instruction on alibi, the trial court's failure to instruct on alibi was not plain error.

People v. Montgomery, 743 P.2d 439 (Colo. App. 1987).

Applied in People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975).

PART 2

ARRAIGNMENT

16-7-201. Place of arraignment. The defendant shall be arraigned in the court having trial jurisdiction in which the indictment, information, or complaint is filed, unless before arraignment the cause has been removed to another court, in which case he shall be arraigned in that court.

Source: L. 72: R&RE, p. 221, § 1. C.R.S. 1963: § 39-7-201.

ANNOTATION

Annotator's note. Since § 16-7-201 is similar to repealed laws antecedent to CSA, C. 48, § 479, relevant cases construing those provisions have been included in the annotations to this section.

Arraignment and plea are essential prerequisites to a judgment of conviction. People v. Lawton, 61 Colo. 566, 158 P. 1099 (1916).

Former provisions concerning arraignment and pleading in cases of felonies were held to be imperative. Ray v. People, 6 Colo. 231 (1882).

An arraignment and plea are indispensable to a valid conviction. Wright v. People, 22 Colo. 143, 43 P. 1021 (1896).

Wherever the duty to arraign is imperative, failure in the performance of this duty is fatal, when the record shows the failure in an appellate court. Ray v. People, 6 Colo. 231 (1882).

16-7-202. Presence of defendant. (1) If the offense charged is a felony or a class 1 misdemeanor or if the maximum penalty for the offense charged is more than one year's imprisonment, the defendant must be personally present for arraignment; except that the court, for good cause shown, may accept a plea of not guilty made by an attorney representing the defendant without requiring the defendant to be personally present. In all prosecutions for lesser offenses, the defendant may appear by his or her attorney who may enter a plea on his or her behalf. If the defendant appears personally for a charge that is not in title 42, C.R.S., the court may advise the defendant of the possibility that restorative justice practices may be part of a sentence, if available in the jurisdiction and requested by the victim who has been informed about the restorative justice practices pursuant to section 24-4.1-303 (11) (g), C.R.S.

(2) If a plea of guilty or nolo contendere (no contest) is entered by counsel in the absence of the defendant, the court may command the appearance of the defendant in person for the imposition of sentence.

Source: L. 72: R&RE, p. 221, § 1. C.R.S. 1963: § 39-7-202. L. 2011: (1) amended, (HB 11-1032), ch. 296, p. 1400, § 1, effective August 10.

ANNOTATION

Applied in *People v. Lesh*, 668 P.2d 1362 (Colo. 1983).

16-7-203. Irregularity of arraignment. No irregularity in the arraignment which does not affect the substantial rights of the defendant shall affect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to the irregularity.

Source: L. 72: R&RE, p. 221, § 1. C.R.S. 1963: § 39-7-203.

ANNOTATION

Arraignment procedures are designed primarily to protect the defendant. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

Representation by nonresident counsel does not nullify arraignment. Where an attorney from a sister state is admitted to the bar of Colorado for the purpose of representing a defendant in a trial for murder in the first degree, the fact that such counsel does not have an associate resident counsel with him in the case

does not nullify the arraignment of defendant or his plea of not guilty. *Martinez v. People*, 134 Colo. 82, 299 P.2d 510 (1956) (decided under repealed § 39-7-9, CRS 53).

Elements of arraignment not ritual from which court cannot deviate. While the statutes and rules prescribe the necessary elements of an arraignment, this section makes it clear that they have not created a ritual from which a court cannot deviate. *People v. Adargo*, 622 P.2d 593 (Colo. App. 1980).

16-7-204. Procedures on arraignment. The procedure to be followed upon arraignment shall be in compliance with the provisions of applicable rules of criminal procedure adopted by the supreme court of Colorado.

Source: L. 72: R&RE, p. 221, § 1. C.R.S. 1963: § 39-7-204.

16-7-205. Pleas authorized on arraignment. (1) A defendant personally, or, where permissible, by counsel may orally enter:

- (a) A plea of guilty; or
- (b) A plea of not guilty; or
- (c) A plea of nolo contendere (no contest) with the consent of the court; or
- (d) A plea of not guilty by reason of insanity, in which event a not guilty plea may also be entered.

Source: L. 72: R&RE, p. 221, § 1. C.R.S. 1963: § 39-7-205.

ANNOTATION

Annotator's note. Since § 16-7-205 is similar to repealed § 39-7-5, CRS 53, CSA, C. 48, § 479, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Entry of plea by counsel for defendant is sufficient. *Davis v. People*, 77 Colo. 546, 238 P. 25 (1925).

When the essential presence of an accused in a court having jurisdiction is a fulfilled condition, there is no express requirement in the federal law that in pleading to an indictment he

must actually speak for himself or remain mute in order that a valid plea may be entered. *Marler v. People*, 139 Colo. 23, 336 P.2d 101 (1959).

Declaration of plea may be made orally, by defendant or counsel. *Minich v. People*, 8 Colo. 440, 9 P. 4 (1885); *Boyd v. People*, 108 Colo. 289, 116 P.2d 193 (1941); *Marler v. People*, 139 Colo. 23, 336 P.2d 101 (1959).

But plea must be entered in open court. A message from counsel for defendant to the prosecuting attorney, authorizing the entry of a plea, does not authorize the acceptance of such a plea.

Whether by defendant or his counsel, the plea must be entered orally and in open court. *Boyd v. People*, 108 Colo. 289, 116 P.2d 193 (1941).

Withdrawal of plea is not a matter of right.

In the absence of statute or of peculiar circumstances, a defendant in a criminal case is not entitled as a matter of right to withdraw a plea duly made to an indictment or information, in order that he may file another plea or interpose objections to the proceedings which should have been presented before the plea; hence the action of a trial court in refusing a change of plea will not be reversed if there is no abuse of discretion. *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

Where a defendant in a criminal case is arraigned and enters pleas of not guilty and not guilty by reason of insanity, he does not thereafter have an absolute right to withdraw those pleas and enter a plea of guilty in order to avoid prosecution upon another information which includes habitual criminal counts. *Matz v. People*, 133 Colo. 45, 291 P.2d 1059 (1956).

Defendants cannot withdraw consent which was freely given simply because the sentence which the court imposes is not to their liking. *Williams v. People*, 134 Colo. 580, 307 P.2d 466 (1957).

Application to change a plea is addressed to the sound discretion of the court, and its ruling will be reversed only for an abuse of that discretion, resulting in direct prejudice to the defendant whose application is denied. *Matz v. People*, 133 Colo. 45, 291 P.2d 1059 (1956).

No abuse of discretion in refusing defendant permission to change plea. A trial court did not abuse its discretion in refusing to grant the defendant permission to withdraw his plea of nolo contendere and to reinstate a plea of not guilty. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

Nolo contendere plea should be upheld. Nolo contendere plea that is voluntarily and understandingly made, with a factual basis that appears in the record, should be upheld. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

16-7-206. Guilty pleas - procedure and effect. (1) Every person charged with an offense shall be permitted to tender a plea of guilty to that offense if the following conditions have been satisfied:

(a) The court shall have advised the defendant that if the plea is accepted the defendant shall be determined to have waived his right to trial by jury on all issues including the determination of the penalty to be assessed, and the court shall also have advised the defendant as to the maximum and minimum penalties that the court may impose.

(b) In class 1 felonies or where the plea of guilty is to a lesser included offense, a written consent has been filed with the court by the district attorney.

(c) In all felony and class 1 misdemeanor cases, the defendant shall be represented by counsel or waive his right thereto in open court, and the guilty plea shall be tendered in open court by the defendant in the presence of counsel, if any.

(2) The refusal or consent of the district attorney or the court to accept a plea of guilty to the charge shall not be a basis for assignment of error, and such refusal or acceptance by the district attorney or court is final.

(3) The acceptance by the court of a plea of guilty acts as a waiver by the defendant of the right to trial by jury on all issues including the determination of the penalty to be assessed, and the acceptance of such plea also acts as a conviction for the offense.

Source: L. 72: R&RE, p. 221, § 1. C.R.S. 1963: § 39-7-206.

ANNOTATION

Law reviews. For article, "Recent Judicial Modification of Habitual Criminal Act", see 23 *Dicta* 84 (1946). For article, "Procedure on Plea of Guilty", see 27 *Dicta* 364 (1950). For article, "Plea of Guilty as an Admission", see 33 *Dicta* 188 (1956). For article, "One Year Review of Criminal Law", see 34 *Dicta* 98 (1957). For note, "One Year Review of Constitutional Law", see 41 *Den. L. Ctr. J.* 77 (1964). For note, "One Year Review of Colorado Law — 1964", see 42 *Den. L. Ctr. J.* 140 (1965).

Annotator's note. Since § 16-7-206 is similar to repealed § 40-1-302, C.R.S. 1963, § 39-7-8, C.R.S. 1963, § 39-7-8, CRS 53, and CSA, C. 48, § 482, relevant cases construing those provisions have been included in the annotations to this section.

This section is mandatory. The provisions of this section dealing with arraignment, advice of counsel, and warning as to consequences of the guilty plea are mandatory and a prerequisite under due process. *Vanderhoof v. People*, 152

Colo. 147, 380 P.2d 903 (1963).

This section deals with certain procedures that are to be followed by trial courts where the accused enters a plea of guilty. *Burbach v. Tinsley*, 143 Colo. 449, 354 P.2d 170 (1960).

It satisfies requirements of due process. Compliance with this section, provisions for the appointment of counsel for indigent defendants, and §§ 16 and 25 of art. II, Colo. Const., satisfies the due process requirement of the fourteenth amendment to the United States Constitution. *Santo v. Santo*, 120 Colo. 13, 206 P.2d 341 (1949).

And failure to comply would render sentence void. If a prisoner pleading guilty is entitled to preliminary safeguards, including warning as to the consequences of the plea, and is not told that he may be imprisoned for life, the life sentence would be void. *Vanderhoof v. People*, 152 Colo. 147, 380 P.2d 903 (1963).

Court may refuse to accept guilty plea. In some circumstances a trial court, in the protection of an accused, might well refuse to accept a tendered plea of guilty, while in other circumstances protection of the interests of the people might demand similar action. *Matz v. People*, 133 Colo. 45, 291 P.2d 1059 (1956).

Defendants are in jeopardy upon acceptance of guilty plea. Where defendants plead guilty to a charge of robbery, which pleas are accepted, and evidence produced for the purpose of enlightening a court prior to sentence is found to be insufficient to sustain the charge, whereupon the court orders the information dismissed and the defendants discharged, whether such orders are right or wrong, the defendants are in jeopardy. *Markiewicz v. Black*, 138 Colo. 128, 330 P.2d 539 (1958).

Constitutional requirements for valid plea of guilty. The constitution requires that the defendant be aware of the elements of the offense and that he voluntarily and understandingly acknowledge his guilt when pleading guilty. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

Rather than ritualistic compliance, the constitution requires only that a defendant pleading guilty be aware of the elements of the offense and that he voluntarily and understandingly acknowledge his guilt. *People v. Duran*, 183 Colo. 180, 515 P.2d 1117 (1973).

A plea of guilty should not be set aside if a factual basis exists for the plea and if the defendant has knowledge of the elements of the crime and enters the plea voluntarily. *People v. Hutton*, 183 Colo. 388, 517 P.2d 392 (1973).

A defendant must be made aware of the elements of the crime with which he is charged before a guilty plea may be accepted. *People v. Musser*, 187 Colo. 198, 529 P.2d 626 (1974).

A plea of guilty, to be valid, must be intelligently made. If there is any question, the trial court has the duty to determine the defendant's

mental capacity to understand the nature and effect of such a plea before accepting it. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

For a waiver of a fundamental right to be valid, the defendant must voluntarily, knowingly, and intentionally relinquish that right. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

A guilty plea cannot stand if it lacks a factual basis and is not voluntary and accurate. *People v. Alvarez*, 181 Colo. 213, 508 P.2d 1267 (1973).

Plea of guilty is clearly involuntary if it is induced by threats or by a promise of lenient sentence. *People v. McClellan*, 183 Colo. 176, 515 P.2d 1127 (1973).

If a plea of guilty results from plea bargaining and the bargain is not honored, the judgment must be vacated. *People v. McClellan*, 183 Colo. 176, 515 P.2d 1127 (1973).

A plea of guilty by one who is insane is a nullity. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

Prior to Boykin v. Alabama (395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969)) there was no prescribed ritual to be performed to satisfy the court that the defendant understood the nature of the charge when pleading guilty. *People v. Moore*, 185 Colo. 54, 521 P.2d 768 (1974).

Since Boykin v. Alabama, courts must put finding of voluntariness on record. *People v. Gutierrez*, 182 Colo. 55, 511 P.2d 20 (1973).

A valid plea of guilty waives substantially all the fundamental procedural rights afforded the accused in a criminal proceeding such as his rights to the assistance of counsel, confrontation of witnesses, and trial by jury. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

A guilty plea does not waive a valid double jeopardy claim of being punished twice for the same offense. *People v. Gardner*, 250 P.3d 1262 (Colo. App. 2010).

A guilty plea waives an as-applied equal protection claim to the constitutionality of a statute. *People v. Gardner*, 250 P.3d 1262 (Colo. App. 2010).

Waiver must affirmatively appear. Every reasonable presumption against waiver must be indulged, and the record must affirmatively show that the accused understandingly and voluntarily waived the constitutional right which is in issue by a plea of guilty. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

And burden on accused to attack such waiver. If there is some showing of an affirmative waiver, the burden of proof rests with the defendant to show by a preponderance of the evidence that his apparent waiver was not effective.

tive. *People v. Harrington*, 179 Colo. 312, 500 P.2d 360 (1972).

Plea of guilty entered by counsel valid. If an indicted person is actually present in open court with his attorney who is competent to represent him and does so under circumstances which fairly show that the attorney speaks for his client who understands what is being done and its import and who acquiesces when the attorney enters a plea of guilty for him, should have exactly the same force and effect as though he had spoken himself in the words of the attorney. *Marler v. People*, 139 Colo. 23, 336 P.2d 101 (1959).

Uncertainty as to whether evidence was sufficiently direct to warrant death penalty does not mean guilty plea was unintelligently made and invalid and attorneys had a reasonable foundation for advising that the death penalty was a real possibility prompting petitioner's guilty plea. *Scheer v. Patterson*, 429 F.2d 907 (10th Cir. 1970), cert. denied, 400 U.S. 996, 91 S. Ct. 471, 27 L. Ed.2d 445 (1971).

Evidentiary hearing on failure to advise possible penalties not required. Where trial court in providency hearing advises petitioner of possible sentence term, and sentences imposed were within that range, and trial court did not treat either offense as a second offense, evidentiary hearing on petitioner's contention that sentencing court failed to properly inform him of the possible penalties for crimes to which he entered guilty plea is not required. *Hyde v. Hinton*, 180 Colo. 324, 505 P.2d 376 (1973).

Formalistic recitation by the trial judge at a providency hearing is not a constitutional requisite. *People v. Canino*, 181 Colo. 207, 508 P.2d 1273 (1973).

Right of defendant held sufficiently protected. The right of defendant to be advised concerning the consequences of his pleas of guilty which pleas resulted in a life sentence under the habitual criminal statute, held sufficiently protected. *Glass v. People*, 127 Colo. 210, 255 P.2d 738 (1953).

Failure to determine plea was made intelligently denied due process. In a criminal case where a defendant was unable at the time of his guilty plea to remember the details of the offense and where since its commission he has

been subconsciously unable to remember these details until a relatively recent date, the failure of the judge at the trial to consider whether accused was insane at the time and could thus enter a plea of guilty intelligently constituted a violation of procedural, if not substantive, due process. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

A guilty plea under subsection (3) constitutes a conviction, even if subsequently dismissed under a deferred judgment, for purposes of determining whether the case can be sealed pursuant to § 24-72-308. *M.T. v. People*, ___ P.3d ___, (Colo. App. 2010).

Conviction by guilty plea may be used for impeachment purposes. Acceptance by a court of a guilty plea, pursuant to subsection (3), may be equated to a jury verdict which has been sustained following a motion for a new trial, and, even if the defendant is never sentenced following that guilty plea, that conviction may be used for impeachment purposes should the defendant testify at a later trial. *People v. Baca*, 44 Colo. App. 167, 610 P.2d 1083 (1980).

Plea to misdemeanor or traffic offense. Before accepting a plea of guilty or nolo contendere to a misdemeanor or traffic offense, the trial court must be satisfied that the defendant's decision to acknowledge guilt has been made knowingly and understandingly. *People v. Lesh*, 668 P.2d 1362 (Colo. 1983).

Guilty plea entered voluntarily. *People v. Musser*, 187 Colo. 198, 529 P.2d 626 (1974).

Although a guilty plea under subsection (3) acts as a conviction, the conviction process is incomplete until the entry of a judgment of conviction under Crim. P. 32(c). *People v. Wiedemer*, 899 P.2d 283 (Colo. App. 1994).

Conditional guilty pleas are not authorized in Colorado by statute or court rule. *People v. Neuhaus*, 240 P.3d 391 (Colo. App. 2009).

Defendant who pleads guilty may not bring an as-applied equal protection postconviction challenge. *People v. Ford*, 232 P.3d 260 (Colo. App. 2009).

Applied in *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975); *People v. Palmer*, 42 Colo. App. 460, 595 P.2d 1060 (1979); *Hafelfinger v. District Court*, 674 P.2d 375 (Colo. 1984).

16-7-207. Court's duty to inform on first appearance in court and on pleas of guilty. (1) At the first appearance of the defendant in court or upon arraignment, whichever is first in time, it is the duty of the judge to inform the defendant and make certain that he understands the following:

- (a) He need make no statement, and any statement made can and may be used against him.
- (b) He has a right to counsel.
- (c) If he is an indigent person, he may make application for a court-appointed attorney, and upon payment of the application fee he will be assigned counsel as provided by law or applicable rule of criminal procedure; except that, if the defendant is charged with an

offense described in section 16-7-301 (4) (a), and, after conferring with the defendant pursuant to section 16-7-301 (4), the prosecutor files a written statement that incarceration is not being sought as provided in section 16-5-501, counsel will not be provided to the defendant.

(d) Any plea he makes must be voluntary on his part and not the result of undue influence or coercion on the part of anyone.

(e) He has a right to bail, if the offense is bailable, and the amount of bail that has been set by the court.

(f) He has a right to a jury trial.

(g) The nature of the charges against him.

(2) The court shall not accept a plea of guilty or nolo contendere (no contest) without first determining that the defendant is advised of all the matters set forth in subsection (1) of this section and also determining:

(a) That the defendant understands the nature of the charge and the elements of the offense to which he is pleading and the effect of his plea;

(b) That the plea is voluntary on defendant's part and is not the result of undue influence or coercion on the part of anyone;

(c) That he understands the right to trial by jury;

(d) That he understands the possible penalty or penalties and the possible places of incarceration;

(e) That the defendant understands that the court will not be bound by any representations made to the defendant by anyone concerning the penalty to be imposed or the granting or the denial of probation, unless the representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report, if any; and

(f) That there is a factual basis for the plea. If the plea is entered as a result of a plea agreement, the court shall explain to the defendant and satisfy itself that the defendant understands the basis for the plea agreement, and the defendant may then waive the establishment of a factual basis for the particular charge to which he pleads guilty.

Source: L. 72: R&RE, p. 222, § 1. C.R.S. 1963: § 39-7-207. L. 90: (1)(c) amended, p. 1039, § 2, effective July 1. L. 92: (1)(c) amended, p. 465, § 1, effective July 1.

ANNOTATION

This section and Crim. P. 11(b) require that a trial court must make certain determinations before it accepts a plea of guilty or a plea of nolo contendere. *People v. Lambert*, 189 Colo. 264, 539 P.2d 1238 (1975).

In pleading guilty, defendant must be adequately advised of nature and critical elements of offense charged and reading of information may suffice. *Wilson v. People*, 708 P.2d 792 (Colo. 1985).

If the trial judge doubted the credibility of the charge, even though a factual basis for the guilty plea existed, his duty was to vacate the guilty plea, enter a plea of not guilty, and set the case for trial. *People v. Worsley*, 191 Colo. 351, 553 P.2d 73 (1976).

No set ritual. The overriding consideration in analyzing a record pertaining to a guilty plea or a plea of nolo contendere is that a set ritual is not required. *People v. Lambert*, 189 Colo. 264, 539 P.2d 1238 (1975).

Detailed discussion of possible locales of imprisonment not required. *Wilson v. People*, 708 P.2d 792 (Colo. 1985).

Or precise language in record. If the record reflects that the trial court had assured itself that defendant's plea was voluntary and intelligently entered with full knowledge of the nature and elements of the offense and of the waiver of his rights as an accused person, then lack of precise language in the record expressing these things is not of itself a valid reason to reverse acceptance of a plea of nolo contendere. *People v. Lambert*, 189 Colo. 264, 539 P.2d 1238 (1975).

Record must reflect factual basis for guilty plea and factual basis may be established by record as a whole. *Wilson v. People*, 708 P.2d 792 (Colo. 1985).

Full compliance would reduce challenges. The failure of a trial judge to make certain that the record expressly reflects full compliance with this section and Crim. P. 11 before he accepts a plea of guilty or a plea of nolo contendere frequently generates a challenge. Full compliance would certainly diminish challenges and appeals. *People v. Lambert*, 189 Colo. 264, 539 P.2d 1238 (1975).

The court is not bound by a recommendation; in its discretion it may refuse to grant the

district attorney's sentence concession. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Duty to comply with Crim. P. 32(e). The provision in Crim. P. 11(b)(5) and subsection (2)(e), that the court will not be bound by representations made to the defendant "unless the representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report ...", does not free the court from complying with Crim. P. 32(e), which requires that if the court decides that the final disposition should not include the charge or sentence concessions contemplated by a plea agreement, as provided in Crim. P. 11(f), it shall so advise the defendant and then call on the defendant to either affirm or withdraw his plea of guilty or nolo contendere. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Merely informing the defendant that the court will not be bound by any recommendation or representation by anyone concerning sentencing or probation does not obviate the necessity of its complying with Crim. P. 32(e). *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Authority to vacate guilty plea. Although a trial judge's authority to dismiss a criminal

charge on his own motion prior to trial, except as expressly authorized by statute or rule, is narrowly limited, a trial court does have the authority to vacate a guilty plea and enter a not guilty plea if the charges were not supported by facts appearing in the record of all court appearances and in the presentencing report. *People v. Carino*, 193 Colo. 412, 566 P.2d 1061 (1977).

A trial court is not generally required to inform a defendant of the collateral consequences of his guilty plea. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992); *People v. Jones*, 957 P.2d 1046 (Colo. App. 1997).

To satisfy due process, a defendant must be informed only of the direct consequences of his guilty plea, which include those which have a definite, immediate, and largely automatic effect on the range of possible punishment. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992); *People v. Jones*, 957 P.2d 1046 (Colo. App. 1997).

Accordingly, a guilty plea is not invalid for failure of a trial court to warn a defendant of its possible effect on future criminal liability. *People v. Heinz*, 589 P.2d 931 (Colo. 1979); *People v. Moore*, 841 P.2d 320 (Colo. App. 1992); *People v. Jones*, 957 P.2d 1046 (Colo. App. 1997).

Conditional guilty pleas are not authorized in Colorado by statute or court rule. *People v. Neuhaus*, 240 P.3d 391 (Colo. App. 2009).

16-7-208. Failure or refusal to plead. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or a plea of nolo contendere (no contest), or if a corporation fails to appear, the court shall enter a plea of not guilty. If for any reason a plea has not been entered, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

Source: L. 72: R&RE, p. 223, § 1. C.R.S. 1963: § 39-7-208.

ANNOTATION

Annotator's note. Since § 16-7-208 is similar to repealed § 39-7-9, C.R.S. 1963, § 39-7-9, CRS 53, and CSA, C. 48, § 483, relevant cases construing those provisions have been included in the annotations to this section.

This section refers to an accused who refuses to respond and obstinately stands mute. *Marler v. People*, 139 Colo. 23, 336 P.2d 101 (1959).

It has no application to a plea entered by counsel authorized to speak for an accused. *Marler v. People*, 139 Colo. 23, 336 P.2d 101 (1959).

Court authorized to enter plea of not guilty only. Where defendant, on being arraigned, stood mute, the court was without authority to enter a plea of "not guilty by reason of insanity at the time of the commission of the crime and since". The only plea that the court, under the circumstances, could properly enter for defen-

dant was a plea of "not guilty". *Boyd v. People*, 108 Colo. 289, 116 P.2d 193 (1941).

Proceedings valid where defendant did not object to omission of plea. Where defendant proceeded to trial without objection and contested the action as though a not guilty plea had been entered, and the fact that no such plea had been entered was not mentioned or called to the trial court's attention in the motion for a new trial, such omission did not render proceedings void and defendant is entitled to no relief by reason thereof. *Landford v. People*, 148 Colo. 300, 365 P.2d 893 (1961), cert. denied, 369 U.S. 862, 82 S. Ct. 953, 8 L. Ed.2d 20 (1962).

Where defendant proceeded to trial without objection and in all respects contested the case as though the "not guilty" plea had been entered, the defendant was not prejudiced by this procedural omission. The error or omission is called to the attention of the trial court by the

appeal, and the entry of a plea of not guilty will suffice. *Romero v. People*, 170 Colo. 234, 460 P.2d 784 (1969).

PART 3

PLEA DISCUSSIONS AND PLEA AGREEMENTS

Law reviews: For article, "Felony Plea Bargaining in Six Colorado Judicial Districts: A Limited Inquiry into the Nature of the Process", see 66 Den. U.L. Rev. 243 (1989).

16-7-301. Propriety of plea discussions and plea agreements. (1) Where it appears that the effective administration of criminal justice will thereby be served, the district attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach plea agreements with the defendant only through or in the presence of defense counsel except where the defendant is not eligible for appointment of counsel, or refuses appointment of counsel and has not retained counsel, or except as provided in subsection (4) of this section.

(2) The district attorney may agree to one or more of the following, depending upon the circumstances of the individual case:

(a) To make or not to oppose favorable recommendations concerning the sentence to be imposed if the defendant enters a plea of guilty or *nolo contendere* (no contest);

(b) To seek or not to oppose the dismissal of an offense charged if the defendant enters a plea of guilty or *nolo contendere* (no contest) to another offense reasonably related to the defendant's conduct;

(c) To seek or not to oppose the dismissal of other charges or not to prosecute other potential charges against the defendant if the defendant enters a plea of guilty or *nolo contendere* (no contest);

(d) To consent to deferred prosecution, as provided in section 18-1.3-101, C.R.S.;

(e) To consent to deferred sentencing, as provided in section 18-1.3-102, C.R.S.

(3) Defendants whose situations are similar should be afforded similar opportunities for plea agreement.

(4) (a) In misdemeanors, petty offenses, or offenses under title 42, C.R.S., the prosecuting attorney is obligated to tell the defendant any offer that can be made based on the facts as known by the prosecuting attorney at that time. The defendant and the prosecuting attorney may engage in further plea discussions about the case, but the defendant is under no obligation to talk to the prosecuting attorney. The prosecuting attorney shall advise the defendant that the defendant has the right to retain counsel or seek appointment of counsel. The application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant as provided in this subsection (4). Upon completion of the discussions, the prosecutor shall inform the court of whether a plea agreement has been reached, and:

(I) If a plea agreement has been reached, the prosecutor shall inform the court of the terms of the proposed plea agreement and the recommended penalty. If the court determines that the proposed plea agreement is acceptable, the court shall, in addition to any other advisement required by law, advise the defendant of the right to a court-appointed attorney prior to acceptance of the defendant's plea. The court shall also advise the defendant prior to acceptance of the defendant's plea that the court exercises independent judgment in deciding whether to grant charge and sentence concessions made in the plea agreement and that the court may therefore sentence the defendant in a manner that is different than that discussed during the plea discussions.

(II) If a plea agreement has not been reached and the defendant chooses to retain an attorney, or the defendant meets the requirements of section 21-1-103, C.R.S., the court shall appoint counsel and all discussions with the defendant outside of the presence of counsel shall cease.

(b) After completion of discussions as described in paragraph (a) of this subsection (4), if counsel is retained by the defendant, or if counsel is appointed for the defendant, when

it appears that the effective administration of justice will thereby be served, the prosecutor may engage in additional plea discussions with the counsel for the defense for the purpose of reaching a plea agreement.

Source: **L. 72:** R&RE, p. 223, § 1. **C.R.S. 1963:** § 39-7-301. **L. 75:** IP(2) amended and (2)(d) and (2)(e) added, p. 609, § 1, effective March 12. **L. 92:** (1) amended and (4) added, p. 465, § 2, effective July 1. **L. 93:** (4) amended, p. 1285, § 2, effective July 1. **L. 2002:** (2)(d) and (2)(e) amended, p. 1491, § 135, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (2)(d) and (2)(e), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

This section does not have to be read in conjunction with the due process clause of the United States constitution so as to guarantee that each confederate in crime would be given a comparable or similar sentence. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Due process requires that if defendant relies to his detriment on government's promise in plea agreement, specific performance of agreement is appropriate. *People v. Macrander*, 756 P.2d 356 (Colo. 1988).

Subsection (2) relates to authority granted to district attorney in plea agreements, not to defendants who are able to waive inalienable constitutional rights without any statutory authorization. This includes a waiver of due process rights. *People v. Gurule*, 748 P.2d 1329 (Colo. App. 1987).

Generally, a guilty plea must be voluntarily, knowingly and intelligently made in order to be valid. To be voluntary, a guilty plea cannot be induced by misrepresentation, including unfulfilled or unfulfillable promises. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

A plea induced by a promised sentence that is statutorily unavailable is invalid. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

When a defendant enters into a plea agreement that includes as a material element a recommendation for an illegal sentence and the illegal sentence is in fact imposed on the defendant, the guilty plea is invalid and must be vacated because the basis on which the defendant entered the plea included the impermissible inducement of an illegal sentence. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Where the sentence recommendation provided for an illegal suspended sentence, the basis for the guilty plea amounted to an invalid, unfulfillable promise. Therefore, the guilty plea must be vacated because the illegal sentence recommendation in the plea agreement invalidated the guilty plea. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Withdrawal of guilty plea proper where plea results in illegal suspension of mandatory sen-

tence. *People v. Hummel*, 131 P.3d 1204 (Colo. App. 2006).

However, where there is a valid plea agreement but an illegal sentence imposed to enforce the valid and legal plea, the proper remedy is to modify the sentence to effect the intent of the plea agreement. *People v. Antonio-Antimo*, 29 P.3d 298 (Colo. 2000).

The trial court was correct in reinstating defendant's plea of guilty because the plea bargain at issue itself was legal, only one provision of the sentence was illegal, and because that illegality had been rectified. *People v. Fennell*, 32 P.3d 1092 (Colo. App. 2000).

Since an illegal sentencing provision prevented the defendant from being bound by his original plea agreement, the district attorney also is not bound by the agreement. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Defendant received no promise constituting an inappropriate inducement to plead guilty from either the prosecutor or trial court in that nothing in the plea agreement could be interpreted to eliminate or alter the application of the mandatory parole provisions of § 18-1-105. *Benavidez v. People*, 986 P.2d 943 (Colo. 1999).

Defendant was sufficiently well advised of the mandatory parole requirement so as to enter a plea with sufficient knowledge of the consequences. *Benavidez v. People*, 986 P.2d 943 (Colo. 1999); *People v. Jones*, 997 P.2d 1286 (Colo. App. 1999).

The record as a whole, including the advisement given at the time a defendant pleaded guilty to the charge, must be considered in determining whether the defendant was adequately advised concerning mandatory parole at the time he pleaded guilty to a complaint alleging a probation violation. *People v. Wright*, 53 P.3d 730 (Colo. App. 2002).

Identical concessions not required for similarly situated defendants. This section and Crim. P. 11(f)(3) do not require that similarly situated defendants be offered identical concessions. *People v. Lewis*, 671 P.2d 985 (Colo. App. 1983).

This section relates to plea agreements, rather than to sentencing procedures. People v. Bruebaker, 189 Colo. 219, 539 P.2d 1277 (1975).

Agreements to dismiss pending prosecutions, distinguished from plea bargains by the absence of any element of admission of guilt, often have been deemed contrary to public policy and unenforceable. People v. Marquez, 644 P.2d 59 (Colo. App. 1981).

If a plea of guilty results from plea bargaining and the bargain is not honored, the judgment must be vacated. People v. McClellan, 183 Colo. 176, 515 P.2d 1127 (1973).

Defendant not entitled to reduction in sentence. Defendant entered into a plea agreement for a reduced sentence if a district attorney's polygraphist determined that the defendant was

telling the truth. Defendant then refused to disclose the results of earlier polygraph tests administered by a defense polygraphist. DA's polygraphist testified that it was necessary for him to review the results of those tests before offering an opinion as to the truthfulness of the defendant's story. The court could not order the defendant to turnover the results of the earlier polygraph tests, but, if he did not do so, the court was not obligated to reduce the sentence. People v. Johnson, 999 P.2d 825 (Colo. 2000).

Conditional guilty pleas are not authorized in Colorado by statute or court rule. People v. Neuhaus, 240 P.3d 391 (Colo. App. 2009).

Applied in People v. Ray, 192 Colo. 139, 560 P.2d 74 (1977); People v. Dawson, 89 P.3d 447 (Colo. App. 2003).

16-7-302. Responsibilities of the trial judge with respect to plea discussions and agreements. (1) The trial judge shall not participate in plea discussions.

(2) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere (no contest) in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, the trial judge may, upon request of the parties, permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the district attorney and defense counsel or defendant whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs but later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere (no contest).

(3) Notwithstanding the reaching of a plea agreement between the district attorney and defense counsel or defendant, the judge in every case should exercise an independent judgment in deciding whether to grant charge and sentence concessions.

Source: L. 72: R&RE, p. 223, § 1. C.R.S. 1963: § 39-7-302.

ANNOTATION

Annotator's note. Since § 16-7-302 is similar to repealed § 40-1-303, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Participation by trial judge in the plea bargaining process must be condemned. People v. Clark, 183 Colo. 201, 515 P.2d 1242 (1973).

Court may involve itself in plea discussions if such involvement merely involves observations regarding the evolving legal posture of the case or inquiries as to whether the parties still wish to consummate the agreement. People v. Venzor, 121 P.3d 260 (Colo. App. 2005).

When rejecting a plea agreement, a trial court must demonstrate on the record that it has actually exercised its discretion. A court's failure to make such showing is an abuse of discretion. People v. Jasper, 984 P.2d 1185 (Colo. App. 1999), rev'd on other grounds, 17 P.3d 807 (Colo. 2001); People v. Copenhagen, 21 P.3d 413 (Colo. App. 2000).

Court has discretion to reject a plea agreement, separately from the merits, on the basis that the parties tendered it in an untimely fashion. The trial court must provide adequate notice to the parties of the plea bargain cutoff date and must permit an exception to the rule for good cause. If a court rejects a plea for failure to conform to plea deadline, court need not necessarily consider the terms of the plea agreement proffered by the parties. People v. Jasper, 17 P.3d 802 (Colo. 2001).

Court must indicate position in plea-bargaining conference. During a plea-bargaining conference, the judge must indicate to the district attorney and defense counsel whether or not he will concur in the proposed disposition. Sober v. District Court, 197 Colo. 250, 592 P.2d 400 (1979).

When the trial judge couples his intervention into plea negotiations with threats of a longer sentence if the defendant goes to trial and

is found guilty, he has attempted to use his office to force the defendant to waive his right to a jury trial or be penalized for exercising this constitutionally guaranteed right. *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973).

Defendant's motion to withdraw guilty plea must be granted where trial judge participated in plea negotiations. Because trial judge stepped out of his role as a neutral and impartial arbiter of justice by advising defendant and making other inappropriate remarks to influence defendant to agree to plea bargain, defendant has a fair and just reason to withdraw his plea. *Crumb v. People*, 230 P.3d 726 (Colo. 2010).

Where no basis for disqualification of judge. In the context of a confidential plea-bargaining conference, conducted off-the-record and in chambers, and where the challenged statement by the court implies nothing more than the judge's belief that the proposed plea and sentence concessions would not do justice, there is no basis for disqualification. *Sober v. District Court*, 197 Colo. 250, 592 P.2d 400 (1979); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983).

Crim. P. 32(e) implements subsection (2). *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

Subsection (2) applies to "charge or sentence concessions" and not to cost concessions. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

A sentence recommendation is a sentence concession whether or not the court approves or concurs. *People v. Wright*, 38 Colo. App. 271, 559 P.2d 249 (1976), *aff'd*, 194 Colo. 448, 573 P.2d 551 (1978).

When a defendant enters a plea agreement that includes a recommendation for a particular sentence, the fact that the sentence is rejected by the court removes the basis upon which the defendant entered his guilty plea and draws into question the voluntariness of the plea. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

A court is not bound to accept a prosecutor's sentence recommendations, and in fact, is statutorily mandated to exercise an independent judgment in deciding whether to grant sentencing concessions in plea bargain situations. *People v. Smith*, 827 P.2d 577 (Colo. App. 1991).

Trial court did not have to follow the plea agreement even if it is assumed that the imposi-

sition of a concurrent sentence in Denver was part of the agreement between defendant and the Moffat county prosecutor, and even if that agreement was binding on the prosecution in Denver. *People v. Smith*, 827 P.2d 577 (Colo. App. 1991).

Decision of judge should be independently reached. When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration; but notwithstanding its existence, he should reach an independent decision on whether to grant charge or sentence concessions. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971).

But he should disclose basis for decision not to grant concessions. If the trial judge concurs in the proposed statement but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decision not to grant these concessions. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971).

Court retains jurisdiction over conditional plea agreements in criminal cases so approved at least until such time as the express condition has been satisfied. *White v. District Court*, 695 P.2d 1133 (Colo. 1984).

Neither the Colorado statutes nor the Colorado rules of criminal procedure prohibit conditional pleas. The obvious advantages of a conditional plea procedure are not outweighed by any significant or compelling disadvantages. A conditional plea is particularly effective when the issue preserved for appeal is dispositive of the case. *People v. Hoffman*, __ P.3d __ (Colo. App. 2010).

Plea may not be withdrawn because of a condition of probation. Defendant charged with attempted first degree sexual assault who pleads guilty to the lesser offense of third degree misdemeanor assault may be required to undergo a psychosexual evaluation as a condition of probation. *People v. Fleming*, 3 P.3d 449 (Colo. App. 1999).

Applied in *Vigil v. People*, 196 Colo. 522, 587 P.2d 1196 (1978); *People v. Cunningham*, 200 Colo. 303 614 P.2d 886 (1980); *People v. Adams*, 678 P.2d 572 (Colo. App. 1984); *People v. Carpenter*, 709 P.2d 72 (Colo. App. 1985); *People v. Lucero*, 714 P.2d 498 (Colo. App. 1985).

16-7-303. Fact of discussion and agreement not admissible. Except as to proceedings resulting from a plea of guilty or nolo contendere (no contest) which is not withdrawn, the fact that the defendant or his defense counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceeding.

ANNOTATION

Hearing necessary prerequisite to admit statements made in conjunction with withdrawn plea. A defendant who challenges the voluntariness or reliability of statements made in the course of tendering a guilty plea which is subsequently withdrawn or rejected and is later sought to be used against him at trial for impeachment purposes is entitled to a hearing which provides the safeguards set forth in *Jackson v. Denno*, (378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed.2d 908 (1964)) before those statements may be used against him. *People v. Cole*, 195 Colo. 483, 584 P.2d 71 (1978).

Where defendant's statements inadmissible. Where the defendant's statements were made in the course of plea negotiations, for the narrowly limited purpose of assisting the district attorney and the court in determining whether he was an appropriate candidate for deferred sentencing, and where, when the statements were elicited, it was contemplated by both sides that they would have no probative effect on the issue of guilt or innocence, for both parties then assumed that a guilty plea would be entered, when the defendant did withdraw from the plea nego-

tiations, thus aborting the only purpose for which his inculpatory statements had been given, it was palpably unfair to allow the prosecution to use those statements against him for an entirely unintended purpose to prove his guilt. *Gelfand v. People*, 196 Colo. 487, 586 P.2d 1331 (1978).

Where a trial court has accepted a defendant's plea agreement in which the prosecution and defendant have stipulated to imposition of concurrent sentences, the court is obligated under the plea agreement either to impose only concurrent periods of incarceration or to grant only concurrent periods of probation. *People v. Flenniken*, 720 P.2d 617 (Colo. App. 1986), rev'd on other grounds, 749 P.2d 395 (Colo. 1988).

Application of CRE 410, when read in light of Crim. P. 11 (e) (6) and this section, requires the exclusion of evidence of statements made by defendant during plea bargaining process only in regard to plea discussions with the attorney for the government. *People v. Rollins*, 759 P.2d 816 (Colo. App. 1988).

16-7-304. Charges for bad checks. The department or agency supervising the collection of restitution agreed to as a condition of a plea agreement, including dismissal of a charge, may assess a charge of fifteen dollars to a defendant for collection of each bad check or each bad check received as a restitution payment. For the purposes of this section, "bad check" means a check or similar sight order for the payment of money which is dishonored by the bank or other drawee because the issuer does not have sufficient funds upon deposit with the bank or other drawee to pay the check or order upon presentation within thirty days after issue.

Source: **L. 84:** Entire section added, p. 488, § 1, effective July 1. **L. 87:** Entire section amended, p. 620, § 1, effective July 1.

Cross references: For charges for bad checks received as a restitution payment ordered as a condition of a deferred prosecution or deferred sentence, see § 16-7-404; for assessment of a penalty for a dishonored check presented as a payment for restitution, see § 16-18.5-108.

PART 4

DEFERRED PROSECUTION
AND DEFERRED SENTENCING**16-7-401. Deferred prosecution. (Repealed)**

Source: **L. 72:** R&RE, p. 224, § 1. **C.R.S. 1963:** § 39-7-401. **L. 75:** (2) amended, p. 610, § 1, effective June 26. **L. 77:** (1) amended, p. 860, § 1, effective May 24. **L. 81:** (1) amended, p. 930, § 1, effective May 13. **L. 83:** (2) amended, p. 664, § 3, effective July 1. **L. 85:** (1) amended, p. 616, § 7, effective July 1. **L. 94:** (1) amended, p. 2036, § 15, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-101.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-7-402. Counseling or treatment for alcohol or drug abuse. (Repealed)

Source: **L. 72:** R&RE, p. 224, § 1. **C.R.S. 1963:** § 39-7-402. **L. 81:** Entire section amended, p. 930, § 2, effective May 13. **L. 82:** (1) repealed, p. 309, § 2, effective March 11. **L. 2000:** (2) amended, p. 235, § 4, effective July 1. **L. 2001:** (3) added, p. 658, § 6, effective May 30. **L. 2002:** (2) amended, p. 665, § 8, effective May 28; (3) amended, p. 1182, § 6, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: House Bill 02-1229 amended subsection (2). Senate Bill 02-010 amended subsection (3). This section as amended by House Bill 02-1229 and Senate Bill 02-010 was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-210.

Cross references: (1) For the duties of the division of alcohol and drug abuse in the department of human services concerning alcohol and drug abuse, see part 2 of article 1 of title 25.

(2) For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-7-403. Deferred sentencing of defendant. (Repealed)

Source: **L. 75:** Entire section added, p. 611, § 1, effective February 9. **L. 83:** (2) amended, p. 664, § 4, effective July 1. **L. 85:** (1) amended, p. 617, § 8, effective July 1; (1) amended, p. 1371, § 50, effective July 1. **L. 87:** (1) and (2) amended, p. 614, § 2, effective July 1. **L. 93:** (2) amended, p. 1727, § 5, effective July 1. **L. 97:** (2) amended, p. 1541, § 7, effective July 1. **L. 98:** (4) added, p. 948, § 8, effective May 27. **L. 2002:** (2) amended, p. 760, § 9, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: House Bill 02-1225 amended subsection (2). This section as amended by House Bill 02-1225 was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-102.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-7-403.5. Deferred sentencing - mentally ill defendants charged with certain misdemeanors - demonstration program - repeal. (Repealed)

Source: **L. 96:** Entire section added, p. 1279, § 1, effective June 1.

Editor's note: Subsection (4) provided for the repeal of this section, effective July 1, 2001. (See L. 96, p. 1279.)

16-7-403.7. Deferred sentencing - drug offenders - legislative declaration - demonstration program - repeal. (Repealed)

Source: **L. 2000:** Entire section added, p. 489, § 1, effective May 4. **L. 2002:** (5) amended, p. 979, § 1, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: Senate Bill 02-018 amended subsection (5). This section as amended by Senate Bill 02-018 was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-103.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-7-404. Charges for bad checks. The department or agency supervising the collection of restitution ordered as a condition of a deferred prosecution or deferred sentence pursuant to this part 4 may assess a charge of fifteen dollars to a defendant for collection of each bad check or each bad check received as a restitution payment. For the purposes of

this section, "bad check" means a check or similar sight order for the payment of money which is dishonored by the bank or other drawee because the issuer does not have sufficient funds upon deposit with the bank or other drawee to pay the check or order upon presentation within thirty days after issue.

Source: **L. 84:** Entire section added, p. 488, § 2, effective July 1. **L. 87:** Entire section amended, p. 620, § 2, effective July 1.

Cross references: For charges for bad checks received as a restitution payment ordered as a condition of a plea agreement, see § 16-7-304; for assessment of a penalty for a dishonored check presented as a payment for restitution, see § 16-18.5-108.

ARTICLE 8

Insanity - Release

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

Cross references: For liability for the costs of the care and treatment of persons committed to the department of institutions pursuant to this article, see § 27-92-101. For procedures related to determining competency to proceed, see article 8.5 of this title.

Law reviews: For article, "Current Colorado Law on the Insanity Defense", see 24 Colo. Law. 1497 (1995); for article, "When Worlds Collide: Mentally Ill Criminal Defendants—Part I", see 29 Colo. Law. 57 (June 2000); "When Worlds Collide: Mentally Ill Criminal Defendants—Part II", see 29 Colo. Law. 101 (July 2000).

PART 1

GENERAL PROVISIONS

			bership - duties - rules - repeal. (Repealed)
		16-8-107.	Evidence.
16-8-101.	Insanity defined - offenses committed before July 1, 1995.	16-8-108.	Examination at instance of defendant.
16-8-101.3.	Legislative intent in enacting section 16-8-101.5 and in making conforming amendments.	16-8-109.	Testimony of lay witnesses.
16-8-101.5.	Insanity defined - offenses committed on and after July 1, 1995.	16-8-110.	Mental incompetency to proceed - effect - how and when raised. (Repealed)
16-8-102.	Other definitions.	16-8-111.	Determination of incompetency to proceed. (Repealed)
16-8-103.	Pleading insanity as a defense.	16-8-112.	Procedure after determination of competency or incompetency. (Repealed)
16-8-103.5.	Impaired mental condition - when raised - procedure - legislative intent.	16-8-113.	Restoration to competency. (Repealed)
16-8-103.6.	Waiver of privilege.	16-8-114.	Evidence concerning competency - inadmissibility.
16-8-103.7.	Examination after entry of defenses of insanity and impaired mental condition.	16-8-114.5.	Commitment - termination of proceedings. (Repealed)
16-8-104.	Separate trial of issues.	16-8-115.	Release from commitment after verdict of not guilty by reason of insanity or not guilty by reason of impaired mental condition.
16-8-104.5.	Single trial of issues.	16-8-115.5.	Enforcement and revocation of conditional release from commitment.
16-8-105.	Procedure after plea for offenses committed before July 1, 1995.	16-8-116.	Release by hospital authority.
16-8-105.5.	Procedure after plea for offenses committed on or after July 1, 1995.	16-8-117.	Advisement on matters to be determined.
16-8-106.	Examinations and report.	16-8-118.	Temporary removal for treatment and rehabilitation.
16-8-106.5.	Competency evaluation advisory board - creation - mem-		

- 16-8-119. Counsel and physicians for indigent defendants.
- 16-8-120. Applicable tests for release.
- 16-8-121. Escape - return to institution.
- 16-8-122. Commitment and observation.

PART 3

COMPETENCY OF PERSONS
TO BE EXECUTED

PART 2

- 16-8-301 to
- 16-8-307.

(Repealed)

INTENSIVE TREATMENT
MANAGEMENT FOR PERSONS
WITH MENTAL ILLNESS

- 16-8-201 to
- 16-8-206. (Repealed)

PART 1

GENERAL PROVISIONS

16-8-101. Insanity defined - offenses committed before July 1, 1995. (1) The applicable test of insanity shall be, and the jury shall be so instructed: "A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable. But care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to the law."

(2) The term "diseased or defective in mind", as used in subsection (1) of this section, does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) This section shall apply to offenses committed before July 1, 1995.

Source: L. 72: R&RE, p. 225, § 1. C.R.S. 1963: § 39-8-101. L. 83: Entire section amended, p. 672, § 1, effective July 1. L. 84: (1) amended, p. 490, § 1, effective February 6. L. 95: (3) added, p. 71, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "Insanity Defense Reform", see 11 Colo. Law. 3006 (1982). For article, "Legislative Update", see 12 Colo. Law. 1251 (1983). For a discussion of the 1984 amendment to subsection (1), see article, "Legislative Update", 13 Colo. 1419 (1984). For article, "Not Guilty by Reason of Insanity: A Research Note", see 14 Colo. Law. 569 (1985).

Annotator's note. Since § 16-8-101 is similar to repealed § 39-8-1, C.R.S. 1963, and § 39-8-1, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Test of criminal responsibility is policy of general assembly. The kind and character of test and the extent of the category of recognized criminal irresponsibility are questions of policy which are properly within the province of the general assembly. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

Constitutionality. The right and wrong and irresistible impulse tests described by this section are valid. *Early v. People*, 142 Colo. 462,

352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

The test of insanity prescribed by this section is not so uncertain, ambiguous, and unintelligible as to constitute a deprivation of due process of law. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

This section has adopted the M'Naghten right and wrong test and the irresistible impulse test. Thus a person is held to be insane as far as the criminal laws are concerned when he is so diseased in mind as to be incapable of distinguishing right from wrong or where he suffers such an impairment of mind as to render him incapable of choosing the right and refraining from doing the wrong. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

Rationale for excusing from criminal responsibility. A person who is criminally insane is excused from criminal responsibility for his actions because, due to a mental disease or defect, he lacks the capacity to distinguish right from wrong with respect to the act or to adhere

to the right or refrain from the wrong. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

Section does not address defendant's ability to form particular mental state. This section's definition addresses the issue of whether the defendant has sufficient mental capacity to be held accountable for any crimes he may have committed. It does not answer the question of whether the defendant was capable of forming a particular mental state required for a conviction of the substantive charge. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

An insane defendant can be found guilty of a crime, provided he was not insane at the time of the offenses charged. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Trial court did not err in precluding expert witness from offering an opinion as to whether defendant was legally insane in 1981 where the single issue to be determined by the jury was defendant's legal sanity or insanity at the time of the killing in 1983. *People v. Galimanis*, 944 P.2d 626 (Colo. App. 1997).

Trial court did not improperly exclude evidence of specific instances of defendant's conduct that occurred during defendant's confinement at state hospital in the months subsequent to the killing for which the defendant was on trial. *People v. Galimanis*, 944 P.2d 626 (Colo. App. 1997).

Different standard for competence to stand trial. A criminal defendant who raises the sanity issue is constitutionally entitled to a separate hearing to determine his competence to stand trial because a different standard determines competence to stand trial from that which determines the validity of a defense of not guilty by reason of insanity. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

Insanity tests under this section and § 16-8-120 different. The general assembly has chosen by enactment of this section and § 16-8-120 to distinguish between the test in a criminal case for a verdict of not guilty by reason of insanity and the test for release from a mental institution once it is suggested that commitment might safely be terminated. *People v. Lyles*, 186 Colo. 302, 526 P.2d 1332 (1974).

And defendant was not denied due process by failure to apply as the standard for release the same test applied to determine whether he was insane several years earlier when the alleged crime was committed. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

Where defendant was insane at the time of his escape, he should not be held accountable for his escape so as to forfeit good time earned prior thereto, or be held subject to the sanctions of § 17-1-207 (2) (as that section existed prior to the repeal and reenactment of title 17 in 1977), by which he was ordered by the admin-

istrative adjustment committee to serve at least two calendar years from and after his administrative transfer to the prison, without the opportunity to earn good time during this two-year period. It would be an anomaly that the defendant, by reason of his legal insanity and unaccountability, could not have been convicted of a felonious escape under § 18-8-208, whereas he could be held accountable for his escape and be subject to the statutory sanctions resulting therefrom, in spite of his insanity and unaccountability. *Lange v. Schauer*, 184 Colo. 373, 520 P.2d 753 (1974).

A court cannot find one sane who had previously been found insane unless he is first "released from commitment" pursuant to law. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

A person found insane as to one time cannot be held to be sane at a subsequent time unless and until there is compliance with the statutory mandates relating to release from commitment. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Insanity adjudication results in a presumptive continuation of a state of mental incapacity until it is shown that sanity has been restored. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

But committed person not incapable of committing crimes. An insanity adjudication represents a judicial determination that an accused is not legally responsible for a past criminal act by reason of a mental disease or defect which existed at the time the act was committed. It is simply not true, however, that an insanity adjudication renders a committed person legally incapable of committing future crimes during the period of commitment. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

While a finding of insanity as to one time is binding on the courts, such a finding does not mandate a finding of insanity as to an earlier time period. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Finding of sanity as to one act does not preclude different finding as to another act. Where acts are separated by time and location, a finding of sanity as to one act would not preclude a different finding as to the later ones. *People v. Beasley*, 43 Colo. App. 488, 608 P.2d 835 (1979).

The distinction between insanity and incompetency must be sharply drawn. Incompetency merely abates the action and is procedural in effect, while insanity is substantive and renders the defendant not guilty. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Insane persons are, under the law, not necessarily incompetent to stand trial because of the fact of their insanity, while, in contrast, an incompetent defendant may not be tried. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Although a person may be both insane and incompetent, likewise, one may be insane and yet competent to stand trial. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

A person adjudicated not guilty by reason of insanity as defined in this section and § 16-8-101.5 is not a handicapped individual under § 504 of the Rehabilitation Act of 1973. *Neiberger v. Hawkins*, 239 F. Supp.2d 1140 (D. Colo. 2002).

The “deific-decree” delusion is recognized in Colorado; a defendant may be judged legally insane if the defendant’s cognitive ability to distinguish right from wrong with respect to the act has been destroyed as a result of a psychotic delusion that God has decreed the act. *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

But the trial court did not err in refusing to submit an instruction specifying that a “deific-decree” delusion could constitute legal insanity where the court instead submitted an instruction explaining that the term “incapable of distinguishing right from wrong” refers to cognitive inability, due to mental disease or defect, to distinguish right from wrong as measured by a societal standard of morality, even though the person may be aware that the conduct in question is criminal. *People v. Tally*, 7 P.3d 172 (Colo. App. 1999).

Trial court did not err in refusing to include as a jury instruction that a “deific-decree” delusion could constitute legal insanity where there was no evidence that defendant felt he was under any compulsion by God to murder the victim. *People v. Galimanis*, 944 P.2d 626 (Colo. App. 1997).

The concepts of “right” and “wrong” are essentially ethical in character and have their primary source in the existing societal standards of morality as distinguished from the written law. But a personal and subjective standard of morality should not be permitted to exonerate a defendant. *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

Trial court was not required to submit the clarifying instruction on the definition of legal insanity specifying that right from wrong is measured by a societal standard where defendant did not contend that his actions were justified under his own moral beliefs or moral code, nor that he was conscious that what he was doing was right or wrong, either legally or mor-

ally. *People v. Galimanis*, 944 P.2d 626 (Colo. App. 1997).

The appropriate construction of the term “incapable of distinguishing right from wrong” should be measured by existing societal standards of morality rather than a defendant’s personal and subjective understanding of the legality or illegality of the act in question. *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

Res judicata or collateral estoppel do not operate to make a prior adjudication of insanity into a conclusive presumption of insanity or incompetence to stand trial for criminal acts which are committed after an insanity adjudication but before a formal restoration of the defendant to sanity. *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

When a mental infirmity is directly caused by voluntary intoxication, even though effects have dissipated, the defendant is not diseased within legal insanity statute, and, therefore, court was correct in refusing to issue jury instruction on settled insanity doctrine. *People v. Bieber*, 835 P.2d 542 (Colo. App. 1992), *aff’d*, 856 P.2d 811 (Colo. 1993), *cert. denied*, 510 U.S. 1054, 114 S. Ct. 716, 126 L. Ed.2d 680 (1994).

Instruction in language of section is proper. No error is committed when a trial court submits to the jury an instruction which is drafted substantially in the language of this section, and which has been approved by the Colorado supreme court. The words “depravity” and “obliquity”, while not used in every day conversation, are well within the comprehension of a jury. *Simms v. People*, 174 Colo. 85, 482 P.2d 974 (1971).

Jury instruction which set forth the test of insanity in the exact language of the statute was held to be proper. *Salas v. People*, 181 Colo. 321, 509 P.2d 586 (1973).

Trial court is not required to provide an instruction on the phrase “moral obliquity”, as such term is well within the comprehension of a jury. *People v. Galimanis*, 944 P.2d 626 (Colo. App. 1997).

Applied in *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Roark*, 643 P.2d 756 (Colo. 1982); *People v. Wright*, 648 P.2d 665 (Colo. 1982); *People v. Martin*, 851 P.2d 186 (Colo. App. 1992).

16-8-101.3. Legislative intent in enacting section 16-8-101.5 and in making conforming amendments. The intent of the general assembly in enacting section 16-8-101.5 and making conforming amendments to sections 16-8-101 to 16-8-104, 16-8-106, 16-8-110, 16-8-114, 16-8-115, and 16-8-120 in 1995, and in enacting clarifying provisions in this section and sections 16-8-104.5 and 16-8-105.5 and making conforming amendments to sections 16-8-105 and 16-8-107 and sections 18-1-802 and 18-1-803, C.R.S., in 1996, was to combine the defense of not guilty by reason of insanity and the affirmative defense of

impaired mental condition into the affirmative defense of not guilty by reason of insanity and to create a unitary process for hearing the issues raised by said affirmative defense to apply to offenses committed on or after July 1, 1995.

Source: L. 96: Entire section added, p. 3, § 1, effective January 31.

16-8-101.5. Insanity defined - offenses committed on and after July 1, 1995.

(1) The applicable test of insanity shall be:

(a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable; except that care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law; or

(b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged, but care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when the act is induced by any of these causes, the person is accountable to the law.

(2) As used in subsection (1) of this section:

(a) "Diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(b) "Mental disease or defect" includes only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance but does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) This section shall apply to offenses committed on or after July 1, 1995.

Source: L. 95: Entire section added, p. 71, § 2, effective July 1.

ANNOTATION

A person adjudicated not guilty by reason of insanity as defined in this section and § 16-8-101 is not a handicapped individual under § 504 of the Rehabilitation Act of 1973. *Neiberger v. Hawkins*, 239 F. Supp.2d 1140 (D. Colo. 2002).

Exclusion for voluntary ingestion of intoxicating substances applies to both prongs of the insanity test. *People v. Grant*, 174 P.3d 798 (Colo. App. 2007).

Defendant offered insufficient evidence showing that he was insane or incompetent to stand trial. Since defendant failed to introduce sufficient evidence on those issues, the court need not determine whether defendant could offer evidence of "settled insanity" along with other evidence of his mental condition on the

issue of sanity. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

The trial court properly instructed the jury that "any mental illness suffered by defendant is not a defense in this case". Defendant's mental illness does not support the defense of involuntary intoxication since the defense of involuntary intoxication involves a temporary condition, and bipolar is not a temporary condition. Defendant's bipolar condition would have provided evidence for an insanity defense, but defendant did not plead insanity, which requires a special pleading. Therefore, the court properly instructed the jury that mental illness was not a defense in this case. *People v. Sommers*, 200 P.3d 1089 (Colo. App. 2008).

16-8-102. Other definitions. As used in this article, unless the context otherwise requires:

(1) and (2) Repealed.

(2.7) (a) "Impaired mental condition" means a condition of mind, caused by mental disease or defect that prevents the person from forming the culpable mental state that is an essential element of any crime charged. For the purposes of this subsection (2.7), "mental

disease or defect" includes only those severely abnormal mental conditions which grossly and demonstrably impair a person's perception or understanding of reality and which are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(b) This subsection (2.7) shall apply only to offenses committed before July 1, 1995.

(3) Repealed.

(4) "Ineligible for release" means the defendant is suffering from a mental disease or defect which is likely to cause him to be dangerous to himself, to others, or to the community, in the reasonably foreseeable future, if he is permitted to remain at liberty.

(4.5) "Ineligible to remain on conditional release" means the defendant has violated one or more conditions in his release, or the defendant is suffering from a mental disease or defect which is likely to cause him to be dangerous to himself, to others, or to the community in the reasonably foreseeable future, if he is permitted to remain on conditional release.

(4.7) "Mental disease or defect" means only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(5) "Release examination" means a court-ordered examination of a defendant directed to developing evidence relevant to determining whether he is eligible for release.

(6) "Release hearing" means a hearing for the purpose of determining whether a defendant previously committed to the department of human services, following a verdict of not guilty by reason of insanity, has become eligible for release.

(7) Repealed.

(8) "Sanity examination" means a court-ordered examination of a defendant who has entered a plea of not guilty by reason of insanity, directed to developing information relevant to determining the sanity or insanity of the defendant at the time of the commission of the act with which he is charged and also his competency to proceed.

Source: L. 72: R&RE, p. 225, § 1. C.R.S. 1963: § 39-8-102. L. 81: (4.5) added, p. 932, § 1, effective July 1. L. 83: (2.7) added, p. 672, § 2, effective July 1. L. 94: (6) amended, p. 2647, § 116, effective July 1. L. 95: (2.7) amended and (4.7) added, p. 72, § 3, effective July 1. L. 2008: (1), (2), (3), and (7) repealed, p. 1850, § 3, effective July 1.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (6), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2008 act repealing subsections (1), (2), (3), and (7), see section 1 of chapter 389, Session Laws of Colorado 2008.

ANNOTATION

Law reviews. For article, "Incompetency and the Problem of Ganser's Syndrome", see 22 Colo. Law 1897 (1993).

The primary purpose of the competency hearing is to ascertain whether he has sufficient mental capacity to know the nature of the charge and to cooperate with his counsel in his defense. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

It is a separate hearing tried by different standard. A criminal defendant who raises the sanity issue is constitutionally entitled to a separate hearing to determine his competence to stand trial because a different standard determines competence to stand trial from that which

determines the validity of a defense of not guilty by reason of insanity. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

Where the expert witness testified that the defendant had done "quite well" on a competency assessment that addressed whether the defendant had a realistic appreciation of the charges against him and the consequences of those charges and whether the defendant could work effectively with his counsel, the trial court's finding of competency was adequately supported and could not be set aside. *People v. Tally*, 7 P.3d 172 (Colo. App. 1999).

"Culpable mental state" as used in the definition of "impaired mental condition"

speaks to mental condition not state of mind. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990).

No finding of dangerousness is necessary to hold defendant ineligible to remain on conditional release if defendant has violated one or more conditions of release. Conditions of release are presumably imposed to eliminate or reduce the risk of future dangerous conduct by the defendant. *People v. McCoy*, 821 P.2d 873 (Colo. App. 1991).

The condition violated must bear a substantial relationship to the prevention of recurring mental illness or the management of an insanity acquittee's existing mental illness, and to the prevention of future dangerous behavior arising from the mental illness. If defendant has violated such a condition, the court may revoke the conditional release without infringing upon due process. *People v. Garlotte*, 958 P.2d 469 (Colo. App. 1997).

The distinction between insanity and incompetency must be sharply drawn. Incompetency merely abates the action and is procedural in effect, while insanity is substantive and renders the defendant not guilty. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Insane persons are, under the law, not necessarily incompetent to stand trial because of the

fact of their insanity, while, in contrast, an incompetent defendant may not be tried. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Although a person may be both insane and incompetent, likewise, one may be insane and yet competent to stand trial. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Involuntary intoxication and insanity are legally separate and distinct defenses with significantly distinct consequences. *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

Defendant's failure to plead the affirmative defense of impaired mental condition did not bar expert testimony that defendant focused on only one thing at a time. The defendant did not suffer from mental disease or defect. The condition was not "severely abnormal". And the condition did not grossly and demonstrably impair the defendant's perception of reality, where defendant did not claim he was unable to recognize or understand the reality of the situation he was in, but instead, as he did not process information quickly, did not notice it. *People v. Requejo*, 919 P.2d 874 (Colo. App. 1996).

Applied in *Jones v. District Court*, 617 P.2d 803 (Colo. 1980); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Hall*, 697 P.2d 746 (Colo. App. 1984); *People v. Karpierz*, 165 P.3d 753 (Colo. App. 2006).

16-8-103. Pleading insanity as a defense. (1) (a) The defense of insanity may only be raised by a specific plea entered at the time of arraignment; except that the court, for good cause shown, may permit the plea to be entered at any time prior to trial. The form of the plea shall be: "Not guilty by reason of insanity"; and it must be pleaded orally either by the defendant or by the defendant's counsel. A defendant who does not raise the defense as provided in this section shall not be permitted to rely upon insanity as a defense to the crime charged but, when charged with a crime requiring a specific intent as an element thereof, may introduce evidence of the defendant's mental condition as bearing upon his or her capacity to form the required specific intent. The plea of not guilty by reason of insanity includes the plea of not guilty.

(b) This subsection (1) shall apply only to offenses committed before July 1, 1995.

(1.5) (a) The defense of insanity may only be raised by a specific plea entered at the time of arraignment; except that the court, for good cause shown, may permit the plea to be entered at any time prior to trial. The form of the plea shall be: "Not guilty by reason of insanity"; and it must be pleaded orally either by the defendant or by the defendant's counsel. The plea of not guilty by reason of insanity includes the plea of not guilty.

(b) This subsection (1.5) shall apply to offenses committed on or after July 1, 1995.

(2) If counsel for the defendant believes that a plea of not guilty by reason of insanity should be entered on behalf of the defendant but the defendant refuses to permit the entry of the plea, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists or psychologists to assist a psychiatrist to examine the defendant and advise the court. After its investigation the court shall conduct a hearing to determine whether the plea should be entered. If the court finds that the entry of a plea of not guilty by reason of insanity is necessary for a just determination of the charge against the defendant, it shall enter the plea on behalf of the defendant, and the plea so entered shall have the same effect as though it had been voluntarily entered by the defendant himself.

(3) If there has been no grand jury indictment or preliminary hearing prior to the entry of the plea of not guilty by reason of insanity, the court shall hold a preliminary hearing

prior to the trial of the insanity issue. If probable cause is not established, the case shall be dismissed, but the court may order the district attorney to institute civil proceedings pursuant to article 65 of title 27, C.R.S., if it appears that the protection of the public or the accused requires it.

(4) Before accepting a plea of not guilty by reason of insanity, the court shall advise the defendant of the effect and consequences of the plea.

Source: L. 72: R&RE, p. 226, § 1. C.R.S. 1963: § 39-8-103. L. 75: (3) amended, p. 926, § 26, effective July 1. L. 95: (1) amended and (1.5) added, p. 73, § 4, effective July 1. L. 2010: (3) amended, (SB 10-175), ch. 188, p. 783, § 21, effective April 29.

ANNOTATION

- I. General Consideration.
- II. Raising Insanity Issues.
 - A. Under Plea of Not Guilty by Reason of Insanity.
 - B. Under Plea of Not Guilty.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Mental State of Defendants in Criminal Trials — A Comparison of Some Colorado and Massachusetts Procedures", see 14 Rocky Mt. L. Rev. 21 (1941). For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For note, "Trial Procedure in Colorado Under the 1951 Amendment Relating to Insanity in Criminal Cases", see 24 Rocky Mt. L. Rev. 223 (1952). For article, "Highlights of the 1955 Legislative Session — Criminal Law and Procedure", see 28 Rocky Mt. L. Rev. 69 (1955). For note, "Procedural Aspects of the Colorado Criminal Insanity Statutes", see 31 Rocky Mt. L. Rev. 90 (1958). For article, "A Review of the 1959 Constitutional and Administrative Law Decisions", see 37 Dicta 81 (1960). For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961). For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For article, "Medical-Legal Liaison: A Need for Dialogue in the Criminal Law", see 37 U. Colo. L. Rev. 169 (1965). For article, "Self Incrimination and the Insanity Plea: Out of the Mouths of Babies", see 66 Den. U. L. Rev. 81 (1988).

Annotation's note. Since § 16-8-103 is similar to repealed § 39-8-1, C.R.S. 1963, § 39-8-1, CRS 53, CSA, C. 48, § 507, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The affirmative defense of impaired mental condition is separate and distinct from the defense of insanity; its sole effect is to negate the existence of an element of the crime charged. However, if a defendant intends to raise the defense of impaired mental condition at trial, he must also specially plead the defense at

arraignment. *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993).

The purpose of this section is to require the defense of insanity to be tried only under a special plea, to require this plea to be interposed at the time of arraignment, and to require a special verdict on this issue. This defense cannot now be introduced under the plea of "not guilty", as it formerly could be. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933); *Mundy v. People*, 105 Colo. 547, 100 P.2d 584 (1940).

Notwithstanding this section, based upon a criminal defendant's constitutional right to due process, the defendant's "mental slowness" may be considered as factual evidence to support the argument that he or she lacked the required culpable mental state. *People v. Vanrees*, 125 P.3d 403 (Colo. 2005).

Constitutionality. The constitutional provision concerning the inviolability of jury trials does not prohibit the general assembly from changing the method of raising the question of insanity. Nor does the requirement that in order to raise the question of insanity, the defendant must plead it in the specified manner, offend against the due process clause of the constitution. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

A statute which requires a special plea to be entered in cases where insanity is relied on as a defense does not deny due process of law. *Leick v. People*, 131 Colo. 353, 281 P.2d 806 (1955).

The requirement that a special plea as to insanity be entered to be followed by a period of observation does not deny to a defendant any constitutional right. *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960).

Subsection (2) not unconstitutional. Subsection (2), which provides for the determination of the issue of defendant's sanity in advance of trial, is not facially unconstitutional. *Les v. Meredith*, 193 Colo. 3, 561 P.2d 1256 (1977).

Subsection (2) does not offend traditional notions of fair play and substantial justice. Public safety and welfare considerations override the reasons assigned by the trial court for its declaration of unconstitutionality, i.e., that in violation of §§ 16 and 25 of art. II, Colo. Const.,

defendant had lost his right to confront witnesses against him, the right to appear and defend against the charges made, the right to assert all available defenses, and the right to a public trial upon the merits of the charges. *Les v. Meredith*, 193 Colo. 3, 561 P.2d 1256 (1977).

The administration of justice is improved if, upon having reason to do so and after holding a hearing, a trial judge can enter a plea of not guilty by reason of insanity on behalf of the defendant, irrespective of the defendant's wishes. *Les v. Meredith*, 193 Colo. 3, 561 P.2d 1256 (1977).

Section only changes the procedure. The substance of the defendant's right to a jury trial on the question of insanity has been preserved; the procedure only has been changed. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933); *Mundy v. People*, 105 Colo. 547, 100 P.2d 584 (1940).

And it is to be liberally construed in favor of defendants. *Martinez v. People*, 179 Colo. 197, 499 P.2d 611 (1972).

"Just determination" inquiry or determination regarding imposition of a mental status defense over the objection of the defendant requires a balancing of the public's interest in not holding criminally liable a defendant lacking criminal responsibility and the defendant's interest in autonomously controlling the nature of person's defense. Under subsection (2) and § 16-8-103.5 (2) the court must consider not only the defendant's stated reasons for objecting to the mental status defenses at the time of arraignment—but also the defendant's state of mind at the time of the commission of the offense. Against this, the court must consider the defendant's reasons for attempting to forego assertion of the mental status defense by examining whether those reasons satisfy a "basic rationality" inquiry. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

Trial court must first consider the viability of the mental status defense that defense counsel requests the court to assert on behalf of the defendant. This requires the court to assess the mental state of the defendant at the time of the commission of the offense to determine whether there is substantial evidence that the defendant may not be guilty because of the defendant's mental status. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

Defendant's choice should be accorded substantial weight in evaluating whether imposition of a mental status defense results in a "just determination of the charge against the defendant". At the same time it is inappropriate to give weight to a defendant's choice if the choice is founded in the defendant's delusions or is otherwise devoid of a rational basis. To satisfy this inquiry the trial court must assess whether the defendant's reason for the decision has a

plausible grounding in reality. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

A finding of competency to stand trial does not substitute for a finding of basic rationality. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

An individual's interest in autonomously controlling the nature of his or her defense, provided that interest is premised on a choice that satisfies the basic rationality test, will predominate over the broader interest of society unless pressing concerns mandate a contrary result. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

It is mandatory to the extent that it requires a defendant who intends to defend on the ground of insanity to interpose an appropriate plea. But this does not mean that this section operates to exclude every other possible mental examination of an accused. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

A defendant desiring to rely upon insanity as a defense in a criminal action is bound to comply with the provisions of this section concerning the entry of such plea. *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960).

But it does not compel self-incrimination. Since a defendant under a plea of not guilty can offer evidence of his insanity bearing upon his ability to form criminal intent, it cannot be said that he is compelled to enter a plea of not guilty by reason of insanity under this section and his election to do so cannot be held compulsory incrimination. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

Where the defendant does not enter a special plea raising the defense of insanity, any evidence introduced at his trial which would support such a plea is irrelevant and inadmissible. *People v. Low*, 732 P.2d 622 (Colo. 1987).

Rationale for excusing from criminal responsibility. A person who is criminally insane is excused from criminal responsibility for his actions because, due to a mental disease or defect, he lacks the capacity to distinguish right from wrong with respect to the act or to adhere to the right or refrain from the wrong. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

Insane persons are not necessarily incompetent to stand trial because of the fact of their insanity. *People v. Benns*, 641 P.2d 298 (Colo. App. 1981).

Putting accused on trial while he is incompetent violates due process of law. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

And prohibition attaches at commencement of formal criminal proceedings and continues throughout the execution and satisfaction of the sentence. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Defense counsel to bring belief of accused's incompetence to court's attention. When de-

fense counsel has reason to believe the accused is incompetent, he is obliged to bring this matter to the court's attention even though it might be to the disadvantage of the accused. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

And court to inquire where issue of competency raised. Where defense attorney's representation to the court raised a substantial issue as to the petitioner's competency to stand trial, trial court's refusal to make any inquiry into that issue or to receive any evidence in that regard constituted an abuse of discretion. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Or due process is violated when a trial court refuses to accord an accused an adequate hearing on his claimed incompetency to stand trial. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Choice of entering plea left to defendant. The tactical choice of whether to enter a plea of not guilty by reason of insanity by a defendant found "mentally competent" is left to the defendant and his counsel. *People v. Lopez*, 640 P.2d 275 (Colo. App. 1982).

When a defendant is competent to proceed, the tactical choice whether to utilize the affirmative defense of insanity should be left up to the defendant and his counsel. *People v. Benms*, 641 P.2d 298 (Colo. App. 1981).

No authority for court to raise defense unless requested by defendant. Neither *Crim. P. 11(e)* nor this section gives a trial court the authority to enter a plea of not guilty by reason of insanity when it has not been requested by the defendant or his counsel. *Labor v. Gibson*, 195 Colo. 416, 578 P.2d 1059 (1978); *People v. Lopez*, 640 P.2d 275 (Colo. App. 1982).

Claim of incompetence to stand trial on issue of guilt cannot be waived. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Entitled to instruction on commitment procedures. A defendant who is relying on an insanity defense is entitled, upon request, to an instruction on commitment procedures. *People v. Thomson*, 197 Colo. 232, 591 P.2d 1031 (1979); *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979); *People v. Beasley*, 43 Colo. App. 488, 608 P.2d 835 (1979).

The court should give a jury instruction which clearly and simply explains the consequences to the defendant of an insanity verdict. Such an instruction should clearly indicate that it is only informational and is to have no persuasive bearing on the jury's determination of a proper verdict. *People v. Roark*, 643 P.2d 756 (Colo. 1982).

People v. Thomson should be applied retroactively in those cases in which an instruction on commitment procedures has been requested and judgment of conviction is not final. *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980).

This section does not seek to regulate arrest and investigation. *Early v. People*, 142 Colo.

462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

The statutory procedure does not exclude other examinations. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960); *People v. Beasley*, 687 P.2d 1323 (Colo. App. 1984).

There is nothing in this section and § 16-8-105 which precludes the employment, by either the accused or the state, of physicians or psychiatrists with a view to their testifying at the trial. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

One entering insanity plea cannot be denied bail. One who enters a plea of not guilty by reason of insanity at the time of the commission of the alleged crime cannot be denied bail pending trial. *Palmer v. District Court*, 156 Colo. 284, 398 P.2d 435 (1965).

Statute as basis for jurisdiction. See *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

Applied in *People v. Garza*, 44 Colo. App. 393, 612 P.2d 1139 (1979); *People v. Moody*, 630 P.2d 74 (Colo. 1981).

II. RAISING INSANITY ISSUES.

A. Under Plea of Not Guilty by Reason of Insanity.

Previously the question of insanity could be raised under a general plea of not guilty. In order to avoid or lessen certain abuses that were believed to exist under that practice, the general assembly changed the method of raising the question of insanity, but left to the defendant all the substantial rights he formerly enjoyed. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Defense of insanity can only be raised by special plea. *Boyd v. People*, 108 Colo. 289, 116 P.2d 193 (1941).

The plea of not guilty by reason of insanity is in the nature of confession and avoidance. *Boyd v. People*, 108 Colo. 289, 116 P.2d 193 (1941); *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

It is a plea on the merits because it attacks the mental element of the offense alleged which is an essential element of guilt. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

By asserting insanity a defendant admits the acts charged, but denies criminal culpability. However, such admission extends only and solely to the consideration of such plea; beyond that it has no efficacy in a criminal case. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L.

Ed.2d 1366 (1958); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Permitting change of plea is within discretion of court. Where good cause is shown, it is incumbent on the trial court to allow changes of plea or additional pleas to accomplish the fair and just determination of criminal charges. Whether good cause is shown rests within the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion by the trial court, the supreme court will not disturb its ruling. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

Trial court's determination of lack of good cause shown for permitting insanity defense will be affirmed unless there has been an abuse of discretion. *Martinez v. People*, 179 Colo. 197, 499 P.2d 611 (1972).

Whether good cause is shown to permit a plea of insanity rests within the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion by the trial court, an appellate court will not disturb its ruling. *Taylor v. District Court*, 182 Colo. 406, 514 P.2d 309 (1973).

Question of good cause is addressed to sound discretion of trial judge and, absent a clear abuse of discretion, the trial judge's ruling will not be disturbed on appeal. *Garza v. People*, 200 Colo. 62, 612 P.2d 85 (1980).

Good cause shown. Good cause is shown when the defendant establishes that the plea was not entered at arraignment because of mistake, ignorance, or inadvertence, and that fairness and justice will best be served by permitting the additional plea. *Ellis v. District Court*, 189 Colo. 123, 538 P.2d 107 (1975); *People v. Reed*, 692 P.2d 1150 (Colo. App. 1984).

Where good cause not found. Where defense counsel forcefully argues that he has demonstrated good cause through his showing that defendant lied to him about his real identity and his past criminal record and said that he had some mental problems, this did not establish good cause. *Garza v. People*, 200 Colo. 62, 612 P.2d 85 (1980).

Denial, for lack of good cause, of request to add insanity plea held not abuse of discretion. *Martinez v. People*, 179 Colo. 197, 499 P.2d 611 (1972).

Where four and one half months after a plea of not guilty to a charge of murder has been entered, a jury selected and sworn, counsel for the defendant is advised that defendant may be subject to epilepsy, and thereupon requests the court to order a mistrial and to permit defendant to enter a plea of "not guilty by reason of insanity", the refusal of the trial court to grant such requests is not an abuse of discretion where the record discloses that the trial court carefully investigated the matter in the course of which competent medical advice was sought and received following an examination of the defen-

dant. *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960).

Court acted arbitrarily in denying leave to plead defense. Prior to arraignment, counsel for defendant had discussed the insanity defense with him, but defendant did not want to plead not guilty by reason of insanity and counsel agreed. However, when defendant was severed from his codefendants for trial, he disclosed new evidence to his counsel, which led counsel to the discovery of other evidence indicative of a foundation for insanity pleas, and, on the basis of this new knowledge, counsel again discussed the possibility of the insanity defense with him, and he then stated that he wanted to so plead. On the basis of this showing, the trial court acted arbitrarily in denying leave to plead the defense of insanity. *Taylor v. District Court*, 182 Colo. 406, 514 P.2d 309 (1973).

B. Under Plea of Not Guilty.

Under plea of not guilty defendant cannot demand acquittal by reason of insanity. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Defendant withdrew his plea of not guilty by reason of insanity and having done so, he may not thereafter seek an acquittal on the ground that he was incapable of forming the general intent to commit a crime. *Russell v. People*, 155 Colo. 422, 395 P.2d 16 (1964).

On a trial of the issue of guilt after defendant was adjudged sane, evidence of mental condition could not form the basis for an outright acquittal on the ground that the accused was unable to form even a general intent to commit a crime. *Rupert v. People*, 163 Colo. 219, 429 P.2d 276 (1967).

Evidence of mental condition admissible as bearing on specific intent. Upon trial of issues framed by a plea of not guilty, any evidence bearing on the mental condition of the accused, including evidence of legal insanity, is admissible as bearing on the ability to deliberate and form the intent essential to murder in the first degree. *Leick v. People*, 131 Colo. 353, 281 P.2d 806 (1955).

This section provides that evidence of mental condition may be offered regardless of whether a plea of not guilty by reason of insanity has been interposed. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

Evidence of insanity or mental deficiency is relevant in a criminal trial, notwithstanding the fact that defendant has merely entered a plea of not guilty, as bearing upon the capacity of the accused to form a specific intent essential to the crime. *Early v. People*, 42 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

A defendant is entitled under the proviso of this section to adduce evidence bearing upon his capacity to form the particular intent essential to

constitute the crime of felonious escape. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

A line of testimony regarding mental condition is proper on a trial on the issue of guilt after defendant was adjudged sane, but only for the very limited purpose of whether testimony bears upon the capacity of the accused to form a specific intent essential to constitute a crime. *Rupert v. People*, 163 Colo. 219, 429 P.2d 276 (1967).

Or to reduce the grade of the crime. A defendant pleading not guilty may introduce evidence of mental condition for the purpose not of securing an acquittal, but of reducing the grade of the crime. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Or in mitigation of sentence. A defendant may introduce evidence of mental derangement at the time of the commission of the homicide for the purpose of enabling the jury to determine, in the exercise of its discretion, whether to fix the penalty at death or imprisonment for life, should it find him guilty of first degree murder.

Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

And court may limit jury determination to issue of specific intent. After defendant withdrew his plea of not guilty due to insanity, the trial court was correct in limiting medical testimony on defendant's emotional age to the determination by the jury as to whether defendant could form a specific intent. *Russell v. People*, 155 Colo. 422, 395 P.2d 16 (1964).

But refusal to admit such evidence would deny due process. A refusal on the part of a trial court to admit evidence of mental condition, including evidence of legal insanity, would be a denial of due process of law. *Leick v. People*, 131 Colo. 353, 281 P.2d 806 (1955).

Defendant who withdrew his plea of not guilty by reason of insanity could not complain regarding a jury instruction which failed to indicate that insanity resulting from involuntary intoxication could mitigate first degree murder. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

16-8-103.5. Impaired mental condition - when raised - procedure - legislative intent. (1) If the defendant intends to assert the affirmative defense of impaired mental condition, he shall indicate that intention to the court and to the prosecution at the time of arraignment; except that the court, for good cause shown, shall permit the defendant to inform the court and the prosecution of his intention to assert the affirmative defense of impaired mental condition at any time prior to trial.

(2) If counsel for the defendant believes that an assertion of the affirmative defense of impaired mental condition should be entered on behalf of the defendant but the defendant refuses to permit counsel to offer such evidence, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists or psychologists to assist a psychiatrist to examine the defendant and advise the court. After its investigation, the court shall conduct a hearing to determine whether evidence of impaired mental condition should be offered at trial. If the court finds that such a defense is necessary for a just determination of the charge against the defendant, it shall inform the prosecution that such defense shall be asserted at trial by the defendant and shall order the defendant's counsel to present evidence at trial on the defense of impaired mental condition.

(3) At the time at which the defendant announces his intention to assert the affirmative defense of impaired mental condition, the court shall advise the defendant of the effect and consequences of asserting the defense.

(4) When the defendant indicates his intention to assert the defense of impaired mental condition, the court shall order an examination of the defendant pursuant to section 16-8-106. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of persons, other than medical experts subject to the provisions of section 16-8-103.6, whom the parties intend to call as witnesses with regard to the affirmative defense of impaired mental condition.

(5) If the trier of fact finds the defendant not guilty by reason of impaired mental condition, pursuant to section 18-1-803 (3), C.R.S., the court shall commit the defendant to the custody of the department of human services until such time as he is found eligible for release, pursuant to the standards set forth in sections 16-8-115 and 16-8-120. The executive director of the department of human services shall designate the state facility at which the defendant shall be held for care and psychiatric treatment and may transfer the defendant from one institution to another if in the opinion of the director it is desirable to do so in the interest of the proper care, custody, and treatment of the defendant or the protection of the public or the personnel of the facilities in question.

(6) It is the intent of the general assembly that the assertion of the affirmative defense of impaired mental condition not be made in such a fashion that it is used to circumvent the requirements of disclosure specified in rule 16 of the Colorado rules of criminal procedure.

(7) A defendant may raise impaired mental condition only through an assertion of affirmative defense.

(8) This section shall apply only to offenses committed before July 1, 1995.

Source: **L. 83:** Entire section added, p. 673, § 3, effective July 1. **L. 85:** (6) and (7) added, p. 625, § 1, effective June 6. **L. 87:** (4) amended, p. 622, § 2, effective July 1. **L. 94:** (5) amended, p. 2648, § 117, effective July 1. **L. 95:** (8) added, p. 73, § 5, effective July 1.

Cross references: (1) For affirmative defenses generally, see § 18-1-407.

(2) For the legislative declaration contained in the 1994 act amending subsection (5), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Law reviews. For article, "Legislative Update", see 12 Colo. Law. 1251 (1983).

The plea of impaired mental condition must be raised at the arraignment of the defendant or such plea is waived. *People v. Low*, 732 P.2d 622 (Colo. 1987); *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990).

The affirmative defense of impaired mental condition is separate and distinct from the defense of insanity; its sole effect is to negate the existence of an element of the crime charged. However, if a defendant intends to raise the defense of impaired mental condition at trial, he must also specially plead the defense at arraignment. *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993).

Exclusion of impaired mental condition defense for noncompliance with discovery order by reason of prejudice to prosecution was not an abuse of discretion where defendant was examined six months prior to trial and at a time when he was represented by counsel, yet only declared his intention to use a defense of impaired mental condition just before trial, and no events occurred after non-compliance which mitigated prejudice to prosecution. *People v. Reger*, 731 P.2d 752 (Colo. App. 1986).

Testimony relating to an impaired mental condition defense may be excluded if the procedural requirements of this section and § 16-8-103.6 are not met. *People v. Sandoval*, 805 P.2d 1126 (Colo. App. 1990).

Admissible medical testimony relating to an impaired mental condition need not arise out an examination concerning precisely the issue of impaired mental condition. No such limitation is found in this section or § 16-8-103.6. *People v. Sandoval*, 805 P.2d 1126 (Colo. App. 1990).

"Just determination" inquiry or determination regarding imposition of a mental status defense over the objection of the defendant requires a balancing of the public's interest

in not holding criminally liable a defendant lacking criminal responsibility and the defendant's interest in autonomously controlling the nature of person's defense. Under subsection (2) and § 16-8-103 (2) the court must consider not only the defendant's stated reasons for objecting to the mental status defenses at the time of arraignment—but also the defendant's state of mind at the time of the commission of the offense. Against this, the court must consider the defendant's reasons for attempting to forego assertion of the mental status defense by examining whether those reasons satisfy a "basic rationality" inquiry. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

Trial court must first consider the viability of the mental status defense that defense counsel requests the court to assert on behalf of the defendant. This requires the court to assess the mental state of the defendant at the time of the commission of the offense to determine whether there is substantial evidence that the defendant may not be guilty because of the defendant's mental status. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

Defendant's choice should be accorded substantial weight in evaluating whether imposition of a mental status defense results in a "just determination of the charge against the defendant". At the same time it is inappropriate to give weight to a defendant's choice if the choice is founded in the defendant's delusions or is otherwise devoid of a rational basis. To satisfy this inquiry the trial court must assess whether the defendant's reason for the decision has a plausible grounding in reality. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

A finding of competency to stand trial does not substitute for a finding of basic rationality. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

An individual's interest in autonomously controlling the nature of his or her defense, provided that interest is premised on a choice that

satisfies the basic rationality test, will predominate over the broader interest of society unless

pressing concerns mandate a contrary result. *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000).

16-8-103.6. Waiver of privilege. (1) (a) A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity pursuant to section 16-8-103, asserting the affirmative defense of impaired mental condition pursuant to section 16-8-103.5, or disclosing witnesses who may provide evidence concerning the defendant's mental condition during a sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S., waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, hearing on the issue of such mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated the defendant for such mental condition.

(b) This subsection (1) shall apply only to offenses committed before July 1, 1995.

(2) (a) A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity pursuant to section 16-8-103 or disclosing witnesses who may provide evidence concerning the defendant's mental condition during a sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S., or, for offenses committed on or after July 1, 1999, by seeking to introduce evidence concerning his or her mental condition pursuant to section 16-8-107 (3) waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, hearing on the issue of such mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated the defendant for such mental condition.

(b) This subsection (2) shall apply to offenses committed on or after July 1, 1995.

Source: **L. 87:** Entire section added, p. 622, § 1, effective July 1. **L. 95:** Entire section amended, p. 73, § 6, effective July 1. **L. 98:** Entire section amended, p. 381, § 2, effective April 21. **L. 99:** (2)(a) amended, p. 403, § 5, effective July 1. **L. 2002:** (1)(a) and (2)(a) amended, p. 1491, § 136, effective October 1. **L. 2002, 3rd Ex. Sess.:** (2)(a) amended, p. 29, §§ 17, 18, effective July 12. **L. 2008:** (1)(a) and (2)(a) amended, p. 1850, § 4, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (1)(a) and (2)(a), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (2)(a), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2008 act amending subsections (1)(a) and (2)(a), see section 1 of chapter 389, Session Laws of Colorado 2008.

ANNOTATION

Law reviews. For article, "New Definitions of Therapist Confidentiality", see 18 Colo. Law. 251 (1989).

By requiring disclosure of defendant's medical examinations by defense-retained non-testifying psychiatric experts, statutory provision did not violate defendant's constitutional rights to effective assistance of counsel. *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998).

No standing to attack the constitutionality of this section where defendant did not raise the defense of impaired mental condition subse-

quent to the denial of his pretrial challenge to such section. *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

Testimony relating to an impaired mental condition defense may be excluded if the procedural requirements of this section and § 16-8-103.5 are not met. *People v. Sandoval*, 805 P.2d 1126 (Colo. App. 1990).

Admissible medical testimony relating to an impaired mental condition need not arise out an examination concerning precisely the issue of impaired mental condition. No such limitation is found in this section or § 16-8-

103.5. *People v. Sandoval*, 805 P.2d 1126 (Colo. App. 1990).

A plain reading of this section and § 13-90-107 is that the attorney-client and the physician-patient privileges do not apply to communications made to a physicians or psychologists who are eligible to testify concerning a defendant's mental condition once the defendant enters a mental condition plea or defense. *Gray v. District Ct.*, 884 P.2d 286 (Colo. 1994).

A defendant who places his or her mental condition at issue waives the attorney-client and the physician-patient privileges. The prosecution may use the testimony of a physician retained by the defense even though the defense does not intend to use the physician at trial. In addition, the prosecution may use pre-offense or post-offense information concerning the defendant's mental condition. *Gray v. District Ct.*, 884 P.2d 286 (Colo. 1994).

Discovery under this section includes all medical and mental health records concerning a mental condition that the defendant places at

issue in a criminal case and the attorney work product doctrine does not preclude discovery of an expert's file on the ground that the expert is an agent of defense counsel. However, if the defendant invokes the attorney work product doctrine, any work product actually generated by defense counsel that is in an expert's file must be reviewed by the trial court and excised from the file before the file is disclosed to the prosecution. *People v. Ullery*, 964 P.2d 539 (Colo. App. 1997), *aff'd*, 984 P.2d 586 (Colo. 1999).

The waiver contained in this section does not encompass attorney work product. Waiver of privileged communications under this section includes the disclosure of medical records but does not apply to the thoughts and conclusions of defense counsel. Therefore, on a defendant's motion claiming attorney work product, the trial court should conduct an in camera review to determine whether portions of the file contain defense counsel's work product. *People v. Ullery*, 984 P.2d 506 (Colo. 1999).

16-8-103.7. Examination after entry of defenses of insanity and impaired mental condition. (1) (a) When, at the time of arraignment, the defense of insanity is raised, pursuant to section 16-8-103, and the defendant asserts his or her intention to raise the affirmative defense of impaired mental condition, pursuant to section 16-8-103.5, the court shall order one examination of the defendant with regard to both defenses pursuant to section 16-8-106.

(b) This subsection (1) shall apply only to offenses committed before July 1, 1995.

(2) (a) When, at the time of arraignment, the defense of insanity is raised pursuant to section 16-8-103, the court shall order an examination of the defendant with regard to the insanity defense pursuant to section 16-8-106.

(b) This subsection (2) shall apply to offenses committed on or after July 1, 1995.

(3) (a) When the defendant gives notice pursuant to section 16-8-107 (3) that he or she intends to introduce evidence in the nature of expert opinion concerning his or her mental condition, the court shall order an examination of the defendant pursuant to section 16-8-106.

(b) The provisions of this subsection (3) shall apply to offenses committed on or after July 1, 1999.

Source: **L. 83:** Entire section added, p. 673, § 3, effective July 1. **L. 95:** Entire section amended, p. 74, § 7, effective July 1. **L. 99:** (3) added, p. 404, § 6, effective July 1.

16-8-104. Separate trial of issues. The issues raised by the plea of not guilty by reason of insanity shall be tried separately to different juries, and the sanity of the defendant shall be tried first. This section shall apply only to offenses committed before July 1, 1995.

Source: **L. 72:** R&RE, p. 226, § 1. **C.R.S. 1963:** § 39-8-104. **L. 95:** Entire section amended, p. 74, § 8, effective July 1.

ANNOTATION

Law reviews. For article, "The Mental State of Defendants in Criminal Trials — A Comparison of some Colorado and Massachusetts Procedures", see 14 Rocky Mt. L. Rev. 21 (1941). For note, "Trial Procedure in Colorado Under

the 1951 Amendment Relating to Insanity in Criminal Cases", see 24 Rocky Mt. L. Rev. 223 (1952). For comment on *People ex rel. Juhan v. District Court*, see 40 U. Colo. L. Rev. 626 (1968).

Annotator's note. Since § 16-8-104 is similar to repealed § 39-8-3, C.R.S. 1963, § 39-8-3, CRS 53, and CSA, C. 48, § 509, relevant cases construing those provisions have been included in the annotations to this section.

Legislative intent. By enactment of this section, the general assembly intended that the issues of guilt and legal accountability be completely separated for trial purposes. *People v. King*, 181 Colo. 439, 510 P.2d 333 (1973); *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

This section relates to the order of trial of issues raised by the separate and distinct pleas which may be entered by an accused. *Martin v. District Court*, 129 Colo. 27, 272 P.2d 648 (1954).

This section provides for the order of trial of an offense where an insanity plea is joined with other pleas. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

A separation of the issues for trial does not deny due process of law. *Leick v. People*, 131 Colo. 353, 281 P.2d 806 (1955).

Or other constitutional rights. The right to a trial by a jury of 12, the right to a speedy public trial by an impartial jury, due process, and other constitutional rights are not violated because the trial of the issues separately results in one trial. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

Purpose of separate trials. Separate trials of the issues of guilt and of mental condition are provided to safeguard, as far as possible, against the prejudice likely to arise in the minds of a jury trying both the issue of guilt and of mental condition by reason of the wide variety of evidence which might be competent on the issue of insanity and which would not be admissible upon trial of the not guilty plea. *Trujillo v. People*, 150 Colo. 235, 372 P.2d 86 (1962).

The bifurcated trial was designed to eliminate many constitutional challenges where the issues of insanity and guilt were resolved in the unitary trial. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

Purpose of sanity trial limited. A sanity trial is designed to determine whether the defendant was sane or insane at the time of the alleged offense, and the issue of guilt or innocence plays no part in the resolution of this issue. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

Separate trials utilize separate juries. In Colorado there are two separate and distinct trials, utilizing two separate and distinct juries, whenever the plea of not guilty by reason of insanity is raised. *Lewis v. People*, 174 Colo. 334, 483 P.2d 949 (1971).

In a proceeding under this section, if the cause is set for trial to the jury on the issue of insanity only, and the defendant is found sane, then the defendant shall be tried on the issue of guilt at a

later time to a different jury. *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972).

Which constitute but one trial. This section provides for disposition of a plea of insanity in a criminal case before trial of the issue of not guilty; although such issues are tried separately, they constitute but one trial. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

Under the procedure permitting a disposition of the insanity issue before the issue of not guilty, the trial is conducted in sections which together constitute one trial. The action is single. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

And a single judgment to the charge results. Where there is but a single charge to which a defendant pleads not guilty by reason of insanity at the time of the commission of the offense and the further plea of not guilty, and the issues so raised are tried separately, a single judgment only could be entered. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

Procedure does not make trial a civil case. The fact that the issue of insanity defense has been separated from other questions for the purpose of trial does not make a civil case out of that which is tendered as a defense to an accusation of crime. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959); *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

However, in the sanity trial, defendant's testimony is not considered within the same constitutional guarantees as it is in the guilt trial. It is not error for the judge to not give a Curtis advisement concerning the right to testify and previous convictions. *People v. Chou*, 981 P.2d 668 (Colo. App. 1999).

And proof beyond a reasonable doubt is required of issues in separate trial. By procedurally requiring a separate trial on the issue of mental capacity to commit any crime — which admittedly is a necessary ingredient of any offense — the material ingredient set apart for separate trial shall be governed by all the firmly established doctrine that as to every necessary ingredient of the total crime there must be proof beyond a reasonable doubt. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

In Colorado, the sanity trial stands on the same footing with the trial on the other elements of the crime. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

In considering a motion for a directed verdict in a sanity trial under this section, the trial court must consider the evidence, together with reasonable inferences therefrom, in the light most favorable to the people, and, if

there is substantial competent evidence to support a verdict in favor of the people, the motion must be denied and the matter submitted to the jury for determination. *People v. King*, 181 Colo. 439, 510 P.2d 333 (1973).

Defendant was not placed in double jeopardy on insanity issue. Where defendant, charged with homicide, moved for a separate trial on the sanity issue as provided by this section, he was not placed in double jeopardy where the trial court's direction of verdict of insanity was held erroneous and the defendant was retried on the sanity issue. *People v. King*, 181 Colo. 439, 510 P.2d 333 (1973).

Grant of new trial on sanity does not require new trial on merits. When a separate sanity trial has been held which results in an erroneous verdict requiring a new sanity trial, it is not necessary to also grant a new trial on the merits where there is no prejudicial error in the trial of the substantive charge. *Young v. People*, 175 Colo. 461, 488 P.2d 567 (1971); *Lewis v. People*, 174 Colo. 334, 483 P.2d 949 (1971).

Admission of psychiatric report on sanity but not guilt issues. The general assembly, in providing for the admission in evidence of defendant's statements to the psychiatrist where sanity is the issue, but barring them on the guilt issue, does not violate the defendant's rights against self-incrimination. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

The use of the confessions or admissions of the defendant in the decisional process by the psychiatrist in forming an opinion as to the sanity or insanity of the defendant does not aid

in the proof of guilt, but is limited to the issue of sanity. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

No self-incrimination. When the sanity issue is a separate proceeding, as it is in Colorado, before a jury that cannot consider the issue of guilt in the event the defendant is found sane and where the admissions cannot be used to establish guilt, there is no self-incrimination within the contemplation of the constitutional provisions. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

Joinder of a charge of forcible rape with an unrelated deviate sexual intercourse charge committed on a different female on a different date for purposes of trial on the sanity issue was not error. *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

Sanity trial jury not instructed on substantive elements. A trial court is correct to refuse to instruct the jury at a sanity trial on the elements and culpable mental states of the substantive offenses with which the defendant is charged. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

Motion for new trial after trial on merits preserves for appeal errors alleged in sanity trial because the judgment declaring the defendant sane is not final for appeal purposes until defendant is found guilty of the crime charged. *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979).

Applied in *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976); *Labor v. Gibson*, 195 Colo. 416, 578 P.2d 1059 (1978); *People v. Roark*, 643 P.2d 756 (Colo. 1982); *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

16-8-104.5. Single trial of issues. (1) The issues raised by the plea of not guilty by reason of insanity shall be treated as an affirmative defense and shall be tried at the same proceeding and before the same trier of fact as the charges to which not guilty by reason of insanity is offered as a defense.

(2) This section shall apply to offenses committed on or after July 1, 1995.

Source: L. 96: Entire section added, p. 3, § 1, effective January 31.

ANNOTATION

Unitary trial provisions did not violate defendant's right against self-incrimination and his rights to due process and a fair trial. Jury was instructed that evidence concerning defendant's statements during his sanity examination was to be considered only to determine whether defendant had the capacity to form or did form the requisite culpable mental state and for no other purpose. Where there is nothing in the record to suggest the contrary, the jury is presumed to have followed the instruction. *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998).

Unitary trial procedures did not violate defendant's rights to due process and a fair

trial on the grounds he was deprived of the presumption of innocence. Jury was properly instructed on the presumption of innocence, and there is nothing in the record to indicate that it disregarded those instructions. *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998).

Under unitary trial provisions, even when prosecution stipulates to defendant's insanity, defendant still has a constitutional right to a jury trial that must be personally waived. *People v. Laeke*, __ P.3d __ (Colo. App. 2009).

16-8-105. Procedure after plea for offenses committed before July 1, 1995.

(1) When a plea of not guilty by reason of insanity is accepted, the court shall forthwith commit the defendant for a sanity examination, specifying the place and period of commitment.

(2) Upon receiving the report of the sanity examination, the court shall immediately set the case for trial to a jury on the issue raised by the plea of not guilty by reason of insanity. In all cases except class 1, class 2, and class 3 felonies, the defendant may waive jury trial by an express written instrument or announcement in open court appearing of record. If the court and the district attorney consent, jury trial may be waived in a class 1, class 2, or class 3 felony case. Every person is presumed to be sane; but, once any evidence of insanity is introduced, the people have the burden of proving sanity beyond a reasonable doubt.

(3) If the trier of fact finds the defendant was sane at the time of commission of the offense, the court, unless it has reason to believe that the defendant is incompetent to proceed or the question is otherwise raised as provided in section 16-8.5-102, shall immediately set the case for trial on the issues raised by the plea of not guilty. If the question of whether the defendant is incompetent to proceed is raised, the court shall follow the procedure set forth in section 16-8.5-103.

(4) If the trier of fact finds the defendant not guilty by reason of insanity, the court shall commit the defendant to the custody of the department of human services until such time as he is found eligible for release. The executive director of the department of human services shall designate the state facility at which the defendant shall be held for care and psychiatric treatment and may transfer the defendant from one institution to another if in the opinion of the director it is desirable to do so in the interest of the proper care, custody, and treatment of the defendant or the protection of the public or the personnel of the facilities in question.

(5) This section shall apply to offenses committed before July 1, 1995.

Source: L. 72: R&RE, p. 226, § 1. C.R.S. 1963: § 39-8-105. L. 75: (2) amended, p. 613, § 1, effective July 1. L. 94: (4) amended, p. 2648, § 118, effective July 1. L. 96: (5) added, p. 5, § 2, effective January 31. L. 2008: (3) amended, p. 1851, § 5, effective July 1.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (4), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2008 act amending subsection (3), see section 1 of chapter 389, Session Laws of Colorado 2008.

ANNOTATION

- I. General Consideration.
- II. Trial of Insanity Issue.
 - A. In General.
 - B. Burden of Proof.
- III. Procedure After Trial.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Mental State of Defendants in Criminal Trials — A Comparison of Some Colorado and Massachusetts Procedures", see 14 Rocky Mt. L. Rev. 21 (1941). For note, "Trial Procedure in Colorado Under the 1951 Amendment Relating to Insanity in Criminal Cases", see 24 Rocky Mt. L. Rev. 223 (1952). For article, "Insanity and the Law", see 39 Dicta 325 (1962). For comment on French v. District Court, see 36 U. Colo. L. Rev. 280 (1964). For comment on People ex rel. Juhan v.

District Court, see 40 U. Colo. L. Rev. 626 (1968). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to post-arrest silence as evidence of sanity, see 15 Colo. Law. 1606 (1986).

Annotator's note. Since § 16-8-105 is similar to repealed § 39-8-3, C.R.S. 1963, § 39-8-3, CRS 53, CSA, C. 48, § 509, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is constitutional. This section is valid and does not deprive an accused of due process of law. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

This section is constitutional and its adoption was a valid exercise of legislative power. *Bell v. People*, 158 Colo. 146, 406 P.2d 681 (1965),

cert. denied, 384 U.S. 1024, 86 S. Ct. 1964, 16 L. Ed.2d 1027, reh'g denied, 385 U.S. 892, 87 S. Ct. 23, 17 L. Ed.2d 126 (1966).

Colorado's automatic commitment statute does not violate the due process rights of one found not guilty by reason of insanity, nor is equal protection violated by the fact that a defendant is denied the same precommitment hearing or release standards provided those civilly committed. *People v. Fetty*, 650 P.2d 541 (Colo. 1982); *Glatz v. Kort*, 650 F. Supp. 191 (D. Colo. 1984), aff'd, 807 F.2d 1514 (10th Cir. 1986).

Insanity procedure does not compel self-incrimination. No change in the matter of incarceration and observation is provided by insanity procedure from jail to hospital, and this is no violation of a defendant's constitutional exemption from testifying against himself. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

The general assembly, in providing for the admission in evidence of defendant's statements to the psychiatrist where sanity is the issue, but barring them on the guilt issue, does not violate the defendant's rights against self-incrimination. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

When the sanity issue is a separate proceeding, as it is in Colorado, before a jury that cannot consider the issue of guilt in the event the defendant is found sane and where the admissions cannot be used to establish guilt, there is no self-incrimination within the contemplation of the constitutional provisions. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

Refusal to cooperate in examination does not forfeit defense. A person accused of a crime who enters a plea of not guilty by reason of insanity cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions, or for a refusal to "cooperate" with persons appointed to examine him. Section 16-8-106 and this section, which prescribe the procedures to be followed upon the entry of a plea of not guilty by reason of insanity, cannot operate to destroy the constitutional safeguards against self-incrimination. *French v. District Court*, 153 Colo. 10, 384 P.2d 268 (1963).

This section can have but one meaning; the commitment must follow immediately after the entry of the plea. It fixes a period of time intervening between the date on which a defendant enters his plea and the date on which the issues thus raised shall be tried. Within this intervening period, and "forthwith" upon the entry of the plea, the commitment for observation and examination must be made. *Martin v. District Court*, 129 Colo. 27, 272 P.2d 648 (1954).

Trial may not precede commitment. Where one accused of a felony enters pleas of "not guilty" and "not guilty by reason of insanity", it

is not permissible to try defendant on the issues raised by his not guilty plea prior to any commitment for observation and examination as required by § 16-8-106. *Martin v. District Court*, 129 Colo. 27, 272 P.2d 648 (1954).

Primary purpose of immediate commitment is to furnish the state with an opportunity to assess the defendant's mental status and to determine whether he likely will pose a danger to himself or others upon his release. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Judicially determined doubt as to accused's sanity provides sufficient warrant for immediate commitment and further examination as to his present mental condition. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Commitment proceedings require due process consideration. Commitment to a mental institution constitutes a severe infringement on the basic interest of an individual to be free from governmental restraint and, thus, requires due process protection. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Insanity plea not allowed in probation revocation proceeding. A court, in permitting a plea of "not guilty by reason of insanity" in a probation revocation hearing, exceeds its jurisdiction, as a plea of not guilty by reason of insanity is not a proper means of testing competency at such a hearing. *People ex rel. Gallagher v. District Court*, 196 Colo. 499, 591 P.2d 1015 (1978).

Statute as basis for jurisdiction. See *Schauer v. Smeltzer*, 175 Colo. 364, 488 P.2d 899 (1971).

Applied in *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976); *Labor v. Gibson*, 195 Colo. 416, 578 P.2d 1059 (1978); *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Roark*, 643 P.2d 756 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982).

II. TRIAL OF INSANITY ISSUE.

A. In General.

Insanity procedure is criminal in nature. Procedure under this section is not violative of the state or federal constitutions as intermingling criminal and civil proceedings in one trial. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

The fact that the issue of insanity is separated from other questions for the purpose of trial does not make a civil case out of that which is tendered as a defense to an accusation of crime. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959); *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

Insanity at the time of the commission of the offense is not a mitigating factor that relieves the

accused of punishment, but is a complete defense to the criminal charge. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

The separate sanity trial determines finally guilt of defendant as to an essential ingredient of the crime; mental capacity to commit a crime is a material part of total guilt for there can be no crime without the mens rea. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

And the question of sanity or insanity is solely one for the jury. *Sherrill v. People*, 75 Colo. 401, 225 P. 840 (1924); *Wymer v. People*, 114 Colo. 43, 160 P.2d 987 (1945); *Palmer v. People*, 162 Colo. 92, 424 P.2d 766 (1967).

The determination of the issue of insanity, when raised, is solely within the province of the jury. *Henderson v. People*, 156 Colo. 229, 397 P.2d 872 (1965).

The question of sanity in a criminal case is an issue of fact to be determined by the trier of fact. *People v. Wright*, 648 P.2d 665 (Colo. 1982).

Jury trial may be waived. This section requiring that if defense waives jury trial on the issue of insanity in a first-degree murder prosecution, it must secure consent of district attorney, is constitutional and not violative of defense right to waive trial by jury. *People v. Brisbin*, 175 Colo. 428, 488 P.2d 63 (1971); *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972); *People v. District Court*, 731 P.2d 720 (Colo. 1987).

The order of proof before the jury is discretionary with the court for there is no requirement that the prosecution initially produce its experts in its case in chief. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Statutory requirement that prosecution consent to waiver of jury in sanity trial applied to trial of defendant prosecuted for second-degree murder rather than subsequently enacted general statute, § 18-1-406 (2), which did not refer to prosecutor's consent to waiver of jury trial. *People v. District Court*, 731 P.2d 720 (Colo. 1987).

Distinction between classes of felonies where consent of court and prosecution must be obtained and those classes for which consent is not required before waiver of jury trial will be permitted in a sanity trial has rational foundation. *People v. District Court*, 731 P.2d 720 (Colo. 1987).

And the prosecution may fortify the presumption of sanity by the presentation of evidence tending to establish the fact of sanity. *Henderson v. People*, 156 Colo. 229, 397 P.2d 872 (1965).

And introduce evidence of sanity as case in chief. Where a defendant by cross-examination of the people's witnesses produces evidence rebutting the presumption of sanity, it is incumbent on the prosecution to prove the sanity of defendant as part of its case in chief, and it is not

error to receive such evidence. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

Evidence of normal or abnormal conduct is relevant on sanity issue. A much wider area of conduct on the part of a defendant can be made the subject of inquiry in a trial relating to his sanity than would be permissible in a trial upon a plea of not guilty. Any abnormal conduct, whether related to the act forming the basis of the accusation or not, may be relevant and important on the issue of his mental condition. Conversely, evidence of normal conduct, and actions reflecting the usual and ordinary under the circumstances, may be shown to prove sanity. *Trujillo v. People*, 150 Colo. 235, 372 P.2d 86 (1962).

And jury has discretion to infer lack of mental capacity from appearance or conduct of the accused while in their presence, or from the factual circumstances disclosed by the evidence, thus evidence of sanity should not be excluded whether offered as part of the case in chief or upon rebuttal. *Henderson v. People*, 156 Colo. 229, 397 P.2d 872 (1965); *Palmer v. People*, 162 Colo. 92, 424 P.2d 766 (1967).

Thus, expert testimony is not conclusive on the jury and must be weighed along with all other testimony. *Palmer v. People*, 162 Colo. 92, 424 P.2d 766 (1967).

A jury is not bound by the testimony of experts and is free to believe lay testimony over any other. *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974).

Neither is defendant's acknowledged status as a ward of the state conclusive evidence of insanity. It does not follow from a commitment to such an institution that one necessarily is incapable of forming an intent to commit a crime. *McConnell v. People*, 157 Colo. 235, 402 P.2d 75 (1965).

Trial court has discretion to determine order in which evidence will be presented at the sanity trial. *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979).

The order of proof before the jury is discretionary with the court for there is no requirement that the prosecution initially produce its experts in its case in chief. *Elliot v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Scope of evidence admissible on the issue of insanity is broad. *People v. Wright*, 648 P.2d 665 (Colo. 1982).

Evidence offered must touch issue. While evidence going only to the commission of the act and to the surrounding circumstances is relevant, the evidence offered in some way must touch on the issue of whether the defendant could distinguish between right and wrong and adhere to the right and refrain from the wrong. *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974).

Defense attorney entitled to physician's information. Where the confessions and admis-

sions of the defendant have been weighed by the examining physician in evaluating the defendant's sanity, fairness requires that the prosecutor have the same information as the defense attorney. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

Limited to issue of insanity. The use of the confessions or admissions of the defendant in the decisional process by the psychiatrist in forming an opinion as to the sanity or insanity of the defendant does not aid in the proof of guilt, but it is perforce limited to the issue of sanity. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

District attorney's statement improper. Where the district attorney in his closing argument stated that if they found the defendant to be insane, he would never be tried for the criminal act charged, this statement was improper. *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

Defendant pleading insanity entitled to have such form of verdict submitted. Defendant pled insanity, along with his general plea of not guilty, which plea was never formally withdrawn, though in practical effect it was abandoned as no evidence was offered on the issue raised by the plea of insanity. Defendant, had he so desired, was entitled to have appropriate forms of verdict on this issue submitted to the jury. *Cruz v. People*, 147 Colo. 528, 364 P.2d 561 (1961), cert. denied, 368 U.S. 978, 82 S. Ct. 483, 7 L. Ed.2d 440 (1962).

Upon trial neither the people nor the defendant offered any evidence related to the issue raised by the plea of insanity. Nevertheless, it was error to direct the jury to find the defendant sane and defendant, had he so desired, was entitled to have appropriate instructions on the questions of insanity and to have forms of verdict on this issue submitted to the jury. *Henderson v. People*, 156 Colo. 229, 397 P.2d 872 (1965).

And verdict as to guilt does not dispose of insanity issue. When a defendant pleads not guilty and not guilty by reason of insanity and at trial the defense attorney states that the trial will go forward on the not guilty plea, a verdict of guilty does not dispose of the insanity issue which must be tried to a jury unless the insanity plea is withdrawn. *People v. Duran*, 179 Colo. 129, 498 P.2d 937 (1972).

Error in failing to so submit verdict may be waived. Counsel for defendant, after examining the proposed forms of verdict, had no objections nor did he tender any additional forms of verdicts. Thus, defendant cannot successfully predicate error on the failure of the trial court to submit a form of verdict on the issue raised by the insanity plea. *Cruz v. People*, 147 Colo. 528, 364 P.2d 561 (1961), cert. denied, 368 U.S. 978, 82 S. Ct. 483, 7 L. Ed.2d 440 (1962).

Instruction on status of defendant after verdict properly refused. In a criminal case where the defense is insanity, the jury has no duty to perform with reference to subsequent orders of court after a verdict of not guilty by reason of insanity is returned, and a requested instruction concerning the status of defendant after such a verdict is properly refused. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931).

Determination of insanity does not bar subsequent prosecution for separate crime committed hours later. The determination by one district court that defendant was insane at the time of a crime committed within that district does not bar a subsequent prosecution in another district court for a separate crime committed a few hours later within that district. *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972).

But issue of sanity at time of earlier crime is final. The doctrine of collateral estoppel affords the defendant the right in a subsequent sanity trial to claim finality with respect to the fact that he had become insane at the time of the commission of a crime several hours earlier in another county and, given this fact, the prosecution will not be able to prove the defendant's sanity unless it can show that the defendant's mental state changed abruptly sometime after the earlier offense was committed. *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972).

As is finding of sanity at hearing prior to trial on guilt issue. The argument that the defendant was incapable of forming the requisite mens rea and, therefore, he could not be criminally responsible for his acts, is unpersuasive where the defendant was found sane in a separate sanity hearing prior to trial on the issue of guilt, and no objection was raised as to the propriety of the proceedings. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Jury verdict of not guilty by reason of insanity is an adjudication on the merits which absolves the defendant of criminal responsibility. *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

Colorado's statutory procedure does not permit the issue of sanity to be submitted to the jury where no evidence of insanity has been presented. Under this procedure, if a trial court properly determines that no evidence of insanity has been introduced, it should not submit the issue to the jury because the presumption of sanity has not been rebutted. *People v. Hill*, 934 P.2d 821 (Colo. 1997); *People v. Anderson*, 70 P.3d 485 (Colo. App. 2002).

Because defendant's proffered evidence and theory did not support an insanity plea or defense, court concluded that he was not entitled to pursue or have counsel pursue them at trial; consequently, trial court did not err in vacating defendant's plea of not guilty by reason of insanity over defendant's objection,

since defendant simply had no such evidence to present. *People v. Anderson*, 70 P.3d 485 (Colo. App. 2002).

B. Burden of Proof.

It is not necessary for the prosecution to prove in the first instance that defendant was sane. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931); *Henderson v. People*, 156 Colo. 229, 397 P.2d 872 (1965).

In a homicide case the defense being not guilty by reason of insanity, the people are not required in the first instance to offer proof of sanity which is presumed in the absence of evidence tending to show the contrary. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934).

Ordinarily the issue of insanity is not present at the outset of a trial and is not properly a part of the prosecution's case. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

As every person is presumed to be sane until the contrary appears. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931); *Henderson v. People*, 156 Colo. 229, 397 P.2d 872 (1965).

Notwithstanding a plea of insanity, the presumption of sanity exists at the outset of a hearing, and it is incumbent upon a defendant to generate a reasonable doubt of its existence. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

A defendant is presumed to be sane and this presumption continues until evidence of his insanity is offered. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

The presumption of sanity will operate until some evidence to the contrary is presented. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971); *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972); *People v. Johnson*, 180 Colo. 177, 503 P.2d 1019 (1972).

Prosecution's failure to introduce evidence of sanity, despite opening statement concerning such evidence, not error. It is not error for the prosecution to make an opening statement outlining the evidence he intends to present to the jury on the issue of insanity and then rest on the presumption of sanity without presenting any evidence. *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979).

Presumption, if not rebutted, supports verdict of sanity. When no evidence is presented to rebut the presumption of sanity, and defendant refuses to talk with the court appointed psychiatrist, it is proper for the jury to return a verdict finding the defendant to be sane. *People v. Johnson*, 180 Colo. 177, 503 P.2d 1019 (1972).

But defendant is required to present only some evidence of insanity to rebut presumption of sanity, since a presumption is not evidence, and the primary purpose of the presumption of sanity is merely procedural convenience in those

trials in which sanity is not really an issue. *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972); *People v. Hill*, 934 P.2d 821 (Colo. 1997).

The presumption of sanity will stand if no evidence of insanity is offered by the defense. *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974).

And the burden is on the people to prove defendant's sanity beyond a reasonable doubt. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

When evidence of insanity is introduced, the people have the burden of proving beyond a reasonable doubt the sanity of the defendant. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Once defendant produces evidence tending to beget a reasonable doubt, he casts upon the state the obligation of presenting evidence which will satisfy the jury that he was sane beyond a reasonable doubt at the time of the act charged. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

Mental capacity to commit crime is a necessary ingredient of any offense, and as to every necessary ingredient of the total crime there must be proof beyond a reasonable doubt. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

The burden is on the people to prove defendant sane beyond any reasonable doubt, not by mere preponderance of the evidence. *Lewis v. People*, 174 Colo. 334, 483 P.2d 949 (1971).

The burden in criminal cases required proof of sanity beyond a reasonable doubt. *Young v. People*, 175 Colo. 461, 488 P.2d 567 (1971).

For the prosecution to prevail after the presumption of sanity has been rebutted, it must prove that the defendant was sane beyond a reasonable doubt. *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972).

Every person is presumed sane, but once any evidence of insanity is introduced, due process requires that the people prove sanity beyond a reasonable doubt. *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974); *People v. Wright*, 648 P.2d 665 (Colo. 1982).

This section recognizes that where the sanity of the defendant is placed in issue, the burden of proof is on the people to prove his sanity beyond a reasonable doubt. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975); *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

Prosecution not required to prove defendant's sanity beyond a reasonable doubt if, prior to the presentation of defendant's case, no evidence had been presented that defendant's mental condition was unconnected to drug use. To dispel the presumption of sanity, the evidence must tend to establish each of the

elements of the insanity defense. *People v. Grant*, 174 P.3d 798 (Colo. App. 2007).

And defendant is not required to prove issues to satisfaction of jury. It is not incumbent upon the defendant in a criminal case, either by his own evidence or that of the people, or both combined, to prove anything to the satisfaction of the jury. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

Adjudication of insanity represents failure to prove defendant's sanity. An adjudication of insanity represents a judicial determination that the prosecution has failed to prove the defendant's sanity beyond a reasonable doubt. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Some competent lay evidence of sanity may suffice when the defendant has introduced only token evidence of insanity. *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974).

But this same evidence of sanity may be totally inadequate when defendant's evidence of insanity is substantial. *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974).

The court determines in the first instance whether evidence presented is sufficient to dissipate the presumption of sanity. *People v. Johnson*, 180 Colo. 177, 503 P.2d 1019 (1972).

But jury having reasonable doubt as to sanity must return verdict of not guilty. If, upon consideration of all the evidence in a homicide case, the jury has a reasonable doubt as to whether the defendant was sane or insane at the time of committing the act charged, the defense being insanity, they must return a verdict of not guilty. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934); *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

If the evidence raises in the minds of the jury a reasonable doubt of the defendant's sanity at the time of the act, they must find the defendant not guilty of the crime charged. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

If, after considering all the evidence, a jury has a reasonable doubt whether the defendant was sane or insane at the time of committing the act, the verdict must be that the defendant is insane. *People v. Ware*, 187 Colo. 28, 528 P.2d 224 (1974).

Directed verdict of not guilty by reason of insanity was proper. *People v. Anderson*, 159 Colo. 124, 410 P.2d 164 (1966).

In a criminal case a defendant can assert as many defenses as can be supported by evidence. If affirmative defenses such as self-defense or alibi are presented, the issues thereon are tried as part of the criminal case, and if any such defense raises in the mind of the jury a reasonable doubt as to a defendant's guilt he should be acquitted. The defense of insanity stands upon the same footing. *Castro v. People*, 140 Colo. 493, 346

P.2d 1020 (1959); *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

Once the presumption of sanity has been rebutted, a directed verdict should be granted to the defendant if the prosecution fails to put on any evidence of the defendant's sanity. *People v. Kernanen*, 178 Colo. 234, 497 P.2d 8 (1972).

Former requirement of proof by preponderance held to violate due process. Former provision permitting the people to establish an accused's sanity by a preponderance of the evidence was held to be a denial of due process of law and thereby unconstitutional. *Washington v. People*, 169 Colo. 323, 455 P.2d 656 (1969); *Simms v. People*, 175 Colo. 191, 486 P.2d 22 (1971); *Moneyhun v. People*, 175 Colo. 220, 486 P.2d 434 (1971).

Former provision which provided that the burden shall be on the defendant to prove by a preponderance of the evidence that he was insane at the time of the alleged commission of the crime violated the due process clause of the constitution of Colorado. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

Erroneous instruction on burden of proof requires new trial on sanity only. Where the jury was erroneously instructed that the people have the burden of proving the defendant sane by a preponderance of the evidence, it is necessary to have a new trial on the issue of defendant's sanity, but the entire decision need not be reversed nor a new trial held on the merits as well. *Lewis v. People*, 174 Colo. 334, 483 P.2d 949 (1971).

The instruction to the jury that the defendant has the burden of proving by a preponderance of the evidence that he was insane at the time of the alleged commission of the crime is prejudicially erroneous and requires remand for new trial on sanity issue. *Simms v. People*, 166 Colo. 278, 443 P.2d 371 (1968).

The trial court's instruction that the burden of proof is on the prosecution to prove by a preponderance of the evidence that the defendant was sane at the time of the alleged commission of the crime, in harmony with the statute then in effect, was declared unconstitutional by the supreme court and the conviction is reversed and remanded for new trial on the issue of sanity. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

When a trial judge under former provisions erroneously instructed the jury that the burden of proof is upon the defendant to establish by a preponderance of the evidence that he was insane at the time of the commission of the offense, this error clearly requires that the defendant be granted a new trial on the sanity issue. *Moneyhun v. People*, 175 Colo. 220, 486 P.2d 434 (1971).

Statement of law contained in jury instruction was a correct statement of the presump-

tion of sanity and the burden of proof. *Salas v. People*, 181 Colo. 321, 509 P.2d 586 (1973).

III. PROCEDURE AFTER TRIAL.

Law reviews. For article, "Insanity and the Law", see 39 *Dicta* 325 (1962).

Committing court has subject matter jurisdiction to hear and determine issues relating to care and treatment of defendant committed to department of institutions as result of an insanity adjudication and such jurisdiction continues until the defendant is unconditionally released from the order of commitment. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

Insane defendant is confined in state institution. Under this section no matter how brutal a homicide may be, a person who is insane at the time of committing it cannot lawfully be convicted of murder, but if found guilty of committing the act, under former procedures for trying the issue of guilt first, must be confined in a state institution under the laws governing institutions. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934).

Because he is not accountable to the law. A defendant found not guilty by reason of insanity is sent to a state institution, not because he is accountable to the law, but because he is not. In requiring him to be committed, the law is not in any sense holding him accountable for the homicide. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931).

Where petitioner was found not guilty of the crime charged by reason of insanity, it means that he was not legally responsible for the acts committed. *Scheidt v. Meredith*, 307 F. Supp. 63 (D. Colo. 1970).

He is not, therefore, a convicted criminal. *Scheidt v. Meredith*, 307 F. Supp. 63 (D. Colo. 1970).

And commitment is not punishment. A judgment of limited responsibility allows one to be committed to a hospital for treatment and custody until he regains his sanity. This is not, however, punishment and indeed the state may not constitutionally impose criminal sanctions against persons who have committed no crime. *Scheidt v. Meredith*, 307 F. Supp. 63 (D. Colo. 1970).

Purpose of commitment following adjudication of not guilty by reason of insanity. Where a defendant has been adjudicated not guilty by reason of insanity for acts which, but for his insanity, would be punishable as crimes, that adjudication furnishes a legitimate basis for the immediate commitment of the defendant to an institution for observation and examination, as well as any needed treatment, so that a reliable determination might be made of his mental condition and what danger, if any, he poses to himself and others. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *Glatz v. Kort*, 650 F. Supp.

191 (D. Colo. 1984), *aff'd*, 807 F.2d 1514 (10th Cir. 1986); *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

This section confers on persons criminally committed a right to treatment. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974); *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

But, in the absence of findings that the state hospital staff failed to consider relevant facts and exercise competent professional judgment in devising a treatment plan, the district court exceeded its jurisdiction in ordering defendant's treatment by private psychiatrist and payment of therapist from the hospital's budget. *Kort v. Carlson*, 723 P.2d 143 (Colo. 1986).

Person committed to department of institutions for care and treatment as result of an insanity adjudication is entitled to the same general quality of treatment available to a civilly committed patient. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

Probation, recommitment, and transfer are discretionary acts clothed with governmental immunity. A request for transfer of a mental patient from a state hospital to the penitentiary, provided for by Colorado law, is not only an act of discretion on the part of the director of state institutions but is an act expressly provided for and authorized by Colorado law. The allegation of the existence of a conspiracy between the staff psychiatrist and officials not to release the appellant in violation of the civil rights act does not effect the application of the doctrine of governmental immunity. *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967).

Judicial department cannot interfere with statutorily granted discretion of director of state institutions regarding the transfer of a patient committed to the custody of the department between institutions or between treatment units within an institution. *Kort v. Hufnagel*, 729 P.2d 370 (Colo. 1986).

District attorney's legal interest in an insanity adjudication does not end with the order of commitment but continues until such time as defendant is unconditionally released from the order of commitment. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

When nonconsensual treatment of criminal defendant may be ordered. In accordance with *People v. Medina* (705 P.2d 961), treatment with antipsychotic medication should not be ordered unless: (1) The patient is incompetent to effectively participate in the treatment decision; (2) such treatment is necessary to prevent long-term deterioration in the patient's mental condition; (3) a less intrusive treatment is not available; and (4) the patient's need for such treatment overrides any legitimate interest of the patient in refusing treatment. Any order for involuntary medication cannot exceed six months without further extension. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

16-8-105.5. Procedure after plea for offenses committed on or after July 1, 1995.

(1) When a plea of not guilty by reason of insanity is accepted, the court shall forthwith commit the defendant for a sanity examination, specifying the place and period of commitment.

(2) Upon receiving the report of the sanity examination, the court shall immediately set the case for trial. Every person is presumed to be sane; but, once any evidence of insanity is introduced, the people have the burden of proving sanity beyond a reasonable doubt.

(3) When the affirmative defense of not guilty by reason of insanity has been raised, the jury shall be given special verdict forms containing interrogatories. The trier of fact shall decide first the question of guilt as to felony charges that are before the court. If the trier of fact concludes that guilt has been proven beyond a reasonable doubt as to one or more of the felony charges submitted for consideration, the special interrogatories shall not be answered. Upon completion of its deliberations on the felony charges as previously set forth in this subsection (3), the trier of fact shall consider any other charges before the court in a similar manner; except that it shall not answer the special interrogatories regarding such charges if it has previously found guilt beyond a reasonable doubt with respect to one or more felony charges. The interrogatories shall provide for specific findings of the jury with respect to the affirmative defense of not guilty by reason of insanity. When the court sits as the trier of fact, it shall enter appropriate specific findings with respect to the affirmative defense of not guilty by reason of insanity.

(4) If the trier of fact finds the defendant not guilty by reason of insanity, the court shall commit the defendant to the custody of the department of human services until such time as the defendant is found eligible for release. The executive director of the department of human services shall designate the state facility at which the defendant shall be held for care and psychiatric treatment and may transfer the defendant from one facility to another if in the opinion of the director it is desirable to do so in the interest of the proper care, custody, and treatment of the defendant or the protection of the public or the personnel of the facilities in question.

(5) This section shall apply to offenses committed on or after July 1, 1995.

Source: L. 96: Entire section added, p. 4, § 1, effective January 31.

ANNOTATION

Unitary trial procedures did not violate defendant's rights to due process and a fair trial on the grounds he was deprived of the presumption of innocence. Jury was properly instructed on the presumption of innocence, and there is nothing in the record to indicate that it disregarded those instructions. *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998).

Under unitary trial provisions, even when prosecution stipulates to defendant's insanity, defendant still has a constitutional right to a jury trial that must be personally waived. *People v. Laeke*, __ P.3d __ (Colo. App. 2009).

Error to instruct jury that if defendant was found guilty on any offense he could not be found not guilty by reason of insanity on any other offense. However, under the circumstances, defendant is not entitled to relief on that basis. *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998).

Court may determine good cause has been shown adequate to order additional examination on the issue of sanity if prior experts' opinions were incomplete and a potentially new and significant diagnosis had been proposed that could dramatically affect the outcome of the assessment of defendant's behavior. *People v. Grant*, 174 P.3d 798 (Colo. App. 2007).

Prosecution not required to prove defendant's sanity beyond a reasonable doubt if, prior to the presentation of defendant's case, no evidence had been presented that the defendant's mental condition was unconnected to drug use. To dispel the presumption of sanity, the evidence must tend to establish each of the elements of the insanity defense. *People v. Grant*, 174 P.3d 798 (Colo. App. 2007).

16-8-106. Examinations and report. (1) All examinations ordered by the court in criminal cases shall be accomplished by the entry of an order of the court specifying the place where such examination is to be conducted and the period of time allocated for such

examination. The defendant may be committed for such examination to the Colorado psychiatric hospital in Denver, the Colorado mental health institute at Pueblo, the place where he or she is in custody, or such other public institution designated by the court. In determining the place where such examination is to be conducted, the court shall give priority to the place where the defendant is in custody, unless the nature and circumstances of the examination require designation of a different facility. The defendant shall be observed and examined by one or more psychiatrists during such period as the court directs. For good cause shown, upon motion of the prosecution or defendant, or upon the court's own motion, the court may order such further or other examination, including services of psychologists, as is advisable under the circumstances. Nothing in this section shall abridge the right of the defendant to procure a psychiatric examination as provided in section 16-8-108.

(2) (a) The defendant shall have a privilege against self-incrimination during the course of an examination under this section. The fact of the defendant's noncooperation with psychiatrists and other personnel conducting the examination may be admissible in the defendant's trial on the issue of insanity or impaired mental condition and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) The defendant shall have a privilege against self-incrimination during the course of an examination under this section. The fact of the defendant's noncooperation with psychiatrists and other personnel conducting the examination may be admissible in the defendant's trial on the issue of insanity and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. This paragraph (b) shall apply to offenses committed on or after July 1, 1995, but prior to July 1, 1999.

(c) The defendant shall cooperate with psychiatrists and other personnel conducting any examination ordered by the court pursuant to this section. Statements made by the defendant in the course of such examination shall be protected as provided in section 16-8-107. If the defendant does not cooperate with psychiatrists and other personnel conducting the examination, the court shall not allow the defendant to call any psychiatrist or other expert witness to provide evidence at the defendant's trial concerning the defendant's mental condition including, but not limited to, providing evidence on the issue of insanity or at any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. In addition, the fact of the defendant's noncooperation with psychiatrists and other personnel conducting the examination may be admissible in the defendant's trial to rebut any evidence introduced by the defendant with regard to the defendant's mental condition including, but not limited to, the issue of insanity and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. This paragraph (c) shall apply to offenses committed on or after July 1, 1999.

(3) (a) To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity, eligibility for release, or impaired mental condition, and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S., the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the

defendant both at the time of the commission of the alleged offense and at the present time. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity or eligibility for release and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S., the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of the commission of the alleged offense and at the present time. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

(c) For offenses committed on or after July 1, 1999, when a defendant undergoes an examination pursuant to the provisions of paragraph (b) of this subsection (3) because the defendant has given notice pursuant to section 16-8-107 (3) that he or she intends to introduce expert opinion evidence concerning his or her mental condition, the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as such statements and reactions entered into the formation of their opinions as to the mental condition of the defendant.

(4) A written report of the examination shall be prepared in triplicate and delivered to the clerk of the court which ordered it. The clerk shall furnish a copy of the report both to the prosecuting attorney and the counsel for the defendant.

(5) With respect to offenses committed before July 1, 1995, the report of examination shall include, but is not limited to:

- (a) The name of each physician or other expert who examined the defendant; and
- (b) A description of the nature, content, extent, and results of the examination and any tests conducted; and
- (c) A diagnosis and prognosis of the defendant's physical and mental condition; and
- (d) (I) An opinion as to whether the defendant suffers from a mental disease or defect; and, if so,

(II) Separate opinions as to whether the defendant was insane or had an impaired mental condition at the time of the commission of the act or is ineligible for release, as those terms are defined in this article, and, in any class 1 felony case, an opinion as to how the mental disease or defect affects any mitigating factor. The nature of the opinions required depends upon the type of examination ordered by the court.

(6) With respect to offenses committed on or after July 1, 1995, the report of examination shall include, but is not limited to, the items described in paragraphs (a) to (c) of subsection (5) of this section, and:

(a) An opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind caused by mental disease or defect that prevented the person from forming the culpable mental state that is an essential element of any crime charged; and, if so,

(b) Separate opinions as to whether the defendant was insane or is ineligible for release, as those terms are defined in this article, and, in any class 1 felony case, an opinion as to how the mental disease or defect or the condition of mind caused by mental disease or

defect affects any mitigating factor. The nature of the opinions required depends upon the type of examination ordered by the court.

(7) With respect to offenses committed on or after July 1, 1999, when a defendant has undergone an examination pursuant to the provisions of this section because the defendant has given notice pursuant to section 16-8-107 (3) that he or she intends to introduce expert opinion evidence concerning his or her mental condition, the report of examination shall include, but is not limited to, the items described in paragraphs (a) to (c) of subsection (5) of this section and:

(a) An opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind caused by mental disease or defect that affected the defendant's mental condition; and, if so,

(b) Separate opinions as to the defendant's mental condition including, but not limited to, whether the defendant was insane or is ineligible for release, as those terms are defined in this article, and, in any class 1 felony case, an opinion as to how the mental disease or defect or the condition of mind caused by mental disease or defect affects any mitigating factor. The nature of the opinions required depends upon the type of examination ordered by the court.

Source: L. 72: R&RE, p. 227, § 1. C.R.S. 1963: § 39-8-106. L. 73: p. 500, § 1. L. 83: (1), (2), (3), and (5)(e) amended, p. 674, § 4, effective July 1. L. 91: (1) amended, p. 1142, § 3, effective May 18. L. 95: (2), (3), and IP(5) amended and (6) added, p. 75, § 9, effective July 1. L. 98: (2), (3), (5)(d), and (6) amended, p. 382, § 3, effective April 21. L. 99: (2)(b) amended and (2)(c), (3)(c), and (7) added, pp. 401, 402, §§ 1, 2, 3, effective July 1. L. 2002: (2), (3)(a), and (3)(b) amended, p. 1492, § 137, effective October 1. L. 2002, 3rd Ex. Sess.: (2)(b), (2)(c), and (3)(b) amended, pp. 29, 30, §§ 19, 20, effective July 12. L. 2006: (1) amended, p. 177, § 1, effective March 31. L. 2008: (1), (2), (3), (5)(d)(II), (6)(b), and (7)(b) amended, p. 1851, § 6, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (2), (3)(a), and (3)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsections (2)(b), (2)(c), and (3)(b), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2008 act amending subsections (1), (2), (3), (5)(d)(II), (6)(b), and (7)(b), see section 1 of chapter 389, Session Laws of Colorado 2008.

ANNOTATION

Law reviews. For article, "The Mental State of Defendants in Criminal Trials — A Comparison of Some Colorado and Massachusetts Procedures", see 14 Rocky Mt. L. Rev. 21 (1941). For note, "Trial Procedure in Colorado Under the 1951 Amendment Relating to Insanity in Criminal Cases", see 24 Rocky Mt. L. Rev. 223 (1952). For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Insanity and the Law", see 39 Dicta 325 (1962). For comment on French v. District Court, see 36 U. Colo. L. Rev. 280 (1964).

Annotator's note. Since § 16-8-106 is similar to repealed § 39-8-2, C.R.S. 1963, § 39-8-2, CRS 53, CSA, C. 48, § 508, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (2)(b) held constitutional. People v. Anderson, 70 P.3d 485 (Colo. App. 2002).

Defendant has no constitutional right to counsel during a psychiatric examination. People v. Galimanis, 765 P.2d 644 (Colo. App. 1988), cert. granted, 783 P.2d 838 (Colo. 1989), cert. denied, 805 P.2d 1116 (Colo. 1991).

Court ordered competency examination is a critical stage of aggregate adversary proceedings. A criminal defendant must be given the opportunity to consult with counsel prior to submitting to a court-ordered competency examination under this section. People v. Branch, 786 P.2d 441 (Colo. App. 1989).

This section does not deprive defendant of due process of law. One charged with a criminal offense, who claims he was insane at the time he committed the act with which he is charged, may be temporarily confined in a hospital for observation and examination without depriving him of due process of law. Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

Psychiatric examinations do not work a denial of due process or amount to self-incrimination; psychiatric interrogations cannot be likened to surreptitious extractions of evidence. *Early v. Tinsley*, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed.2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed.2d 201 (1961).

Or compel him to testify against himself. Confinement of a defendant, who urges the defense of insanity, in a hospital for observation and examination does not offend against § 18 of art. II, Colo. Const., providing that no person shall be compelled to testify against himself in a criminal case. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933); *Wymer v. People*, 114 Colo. 43, 160 P.2d 987 (1945).

An accused who submits to the procedures prescribed by statute in connection with criminal insanity cannot at the same time claim that he is being compelled to testify against himself. Such incarceration and examination does not offend against § 18 of art. II, Colo. Const. *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959).

The general assembly, in providing for the admission in evidence of defendant's statements to the psychiatrist where sanity is the issue, but barring them on the guilt issue, does not violate the defendant's rights against self-incrimination. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

When the sanity issue is a separate proceeding, as it is in Colorado, before a jury that cannot consider the issue of guilt in the event the defendant is found sane and where the admissions cannot be used to establish guilt, there is no self-incrimination within the contemplation of the constitutional provisions. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

In a sanity trial, the admission of statements made by the defendant does not violate his right against self-incrimination because the issue of defendant's guilt is not decided. *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979).

Use of defendant's statements to hospital employee while confined for sanity examination to rebut defendant's self-defense theory did not constitute reversible error as defendant failed to properly object to hospital employee's testimony at trial and fact that testimony was given in prosecution's case-in-chief rather than as rebuttal testimony did not constitute plain error which would require consideration of issue not raised at trial. *People v. Kruse*, 839 P.2d 1 (Colo. 1992).

Nor does prearrest examination. Prearrest examinations do not operate per se to deny defendant due process of law or compel self-incrimination. *Early v. Tinsley*, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S.

830, 81 S. Ct. 717, 5 L. Ed.2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed.2d 201 (1961).

Defendant's statutory privilege against self-incrimination during course of court-ordered psychiatric examinations and protection from being confronted with evidence acquired from examinations did not extend to proceedings conducted for sentencing purposes. And, even if the constitutional privilege against self-incrimination is assumed to apply to the use of information for sentencing purposes after guilt has been established, the defendant waived his right against self-incrimination where he consented to use of reports from court-ordered psychiatric examination at sentencing hearing and had been apprised of his constitutional rights by his attorney. *People v. Hernandez*, 768 P.2d 755 (Colo. App. 1988).

Requiring a defendant to cooperate during a sanity examination does not subject him or her to an unconstitutional risk of self-incrimination, nor is cooperation a prerequisite to asserting a mental condition defense. Hence, a defendant is not forced to choose between constitutional rights. *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003).

A psychiatrist does not violate a defendant's constitutional privilege against self-incrimination by continuing to pursue questions germane in reaching an opinion regarding sanity after such defendant has expressed reluctance in discussing certain topics. *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988), cert. granted, 783 P.2d 838 (Colo. 1989), cert. denied, 805 P.2d 1116 (Colo. 1991).

Trial may not precede commitment. Where one accused of a felony enters pleas of "not guilty" and "not guilty by reason of insanity", it is not permissible to try defendant on the issues raised by his not guilty plea prior to any commitment for observation and examination as required by this section. *Martin v. District Court*, 129 Colo. 27, 272 P.2d 648 (1954).

The procedure outlined in this section is not exclusive where an accused enters a plea of not guilty by reason of insanity. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

This section does not establish exclusive procedures governing the mental examination of the accused. Though mandatory to some extent, this section does not govern all aspects of the criminal insanity question. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

As exclusive procedures interfere with right to adduce evidence. A statute which creates exclusive procedures for examining the accused and for the giving of expert testimony interferes with the constitutional right of the parties to adduce such evidence as they think useful. *Early v. People*, 142 Colo. 462, 352 P.2d

112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

Thus, this section does not exclude other examinations or testimony based upon non-statutory examinations. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

This section, while intended to insure examination of accused persons by psychiatrists and specialists in mental diseases, does not operate to exclude employment of psychiatrists by either the state or the accused, or the admission of their testimony on the trial of the issue of insanity. *Early v. Tinsley*, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed.2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed.2d 201 (1961).

The testimony of psychiatrists based on pre-arraignment examinations was correctly admitted in evidence along with the testimony of several other psychologists and psychiatrists testifying for the state and the defense. *Early v. Tinsley*, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed.2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed.2d 201 (1961).

Or private employment of psychiatrists. This section and § 16-8-103 do not operate to exclude private employment of psychiatrists. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

Substitution of court-appointed psychiatrist by ex parte order. Defendant suffered no prejudice where hearing on substitution allowed him ample opportunity to present evidence refuting the "good cause" shown for the substitution of experts. *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988), cert. granted, 783 P.2d 838 (Colo. 1989), cert. denied, 805 P.2d 1116 (Colo. 1991).

Although a defendant is entitled to an examination by an expert of his or her choosing, the state is not obligated to pay for such expert. *People v. Palmer*, 31 P.3d 863 (Colo. 2001).

Indigent defendants are entitled to expert examinations at the state's expense, but that does not mean the state must pay for the expert of defendant's choosing. *People v. Palmer*, 31 P.3d 863 (Colo. 2001).

Defendant not entitled to examination conducted by doctor of his choice. A defendant is not entitled, as a matter of due process, to a second psychiatric examination conducted by the doctor of his own choosing. *People v. Mascarenas*, 643 P.2d 786 (Colo. App. 1981); *People v. Palmer*, 31 P.3d 863 (Colo. 2001); *Bloom v. People*, 185 P.3d 797 (Colo. 2008).

Moreover, a paying defendant wishing to exercise his right to a second competency evaluation by an expert of his own choosing must nonetheless make a showing of good cause un-

der this section. *People v. Palmer*, 31 P.3d 863 (Colo. 2001); *Bloom v. People*, 185 P.3d 797 (Colo. 2008).

Court may require good cause to be shown before ordering further psychiatric examination once defendant has been examined by specialists in field of nervous and mental diseases. *Massey v. District Court*, 180 Colo. 359, 506 P.2d 128 (1973).

Court may determine good cause has been shown adequate to order additional examination on the issue of sanity if prior experts' opinions were incomplete and a potentially new and significant diagnosis had been proposed that could dramatically affect the outcome of the assessment of defendant's behavior. *People v. Grant*, 174 P.3d 798 (Colo. App. 2007).

The presumption is that the professional conclusions of the mental health experts are fair and impartial. The federal circuit court cannot impute to the psychiatrists a predetermined diagnosis of the accused where the examinations were conducted without any coercive influence whatsoever, and, according to the defendant, the statements made to the psychiatrists were no more than repetition of voluntary statements made the night before. *Early v. Tinsley*, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed.2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed.2d 201 (1961).

There is no statutory or regulatory requirement that a court-appointed expert in a competency evaluation be "neutral and detached". *People v. Karpierz*, 165 P.3d 753 (Colo. App. 2006).

Subsection (3) contains a specific exception to the hearsay rule. *People v. Lyles*, 186 Colo. 302, 526 P.2d 1332 (1974).

And is limited to sanity hearings or trials. The general assembly in subsection (3) limited the use of "confessions and admissions" and "statements and reactions" to trials or hearings where the issue of defendant's sanity is the issue. This prohibits its use as evidence by the people in a trial on the issue of guilt. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

The use of the confessions or admissions of the defendant in the decisional process by the psychiatrist in forming an opinion as to the sanity or insanity of the defendant does not aid in the proof of guilt, but it is perforce limited to the issue of sanity. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

This section does not direct or authorize a defendant's treatment at the psychopathic hospital, nor does it contemplate a trial of the defendant by the hospital staff; it provides merely for the observation and examination of the defendant while at the hospital. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931).

It contemplates observation as well as examination. The legislative scheme for determining a defendant's mental condition at the time of the alleged offense contemplates observation as well as examination. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970); *People v. Vialpando*, 954 P.2d 617 (Colo. App. 1997).

And results of both processes are admissible. What the psychiatrist learns from either observation or examination or from both processes, to the extent that such learning contributes to his opinion, is relevant and admissible in evidence. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970); *People v. Vialpando*, 954 P.2d 617 (Colo. App. 1997).

Admissions to privately retained psychiatrist privileged. The prosecution may not call, as a witness in its case-in-chief, a psychiatrist privately retained by the defendant in connection with an insanity plea and elicit from the psychiatrist incriminating admissions made by the defendant during a sanity examination. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).

But copy of report to prosecution if defense to offer testimony of exam. The only limitation placed on a defendant seeking a sanity examination by a private psychiatrist is that a copy of the psychiatrist's report be furnished to the prosecution reasonably in advance of the sanity trial if the defense intends to offer testimony about the examination. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).

Nowhere is it indicated that "examination" as used in this section is restricted merely to "tests", but, on the contrary, it is broadened to include conversations and other vital evidence from the defendant, as well as "procedures" and "observation". *People v. Lyles*, 186 Colo. 302, 526 P.2d 1332 (1974).

An assessment that ignores or cannot be tested against a defendant's prior mental health history has marginal utility. *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003).

Refusal to cooperate with examiners does not forfeit defense. A person accused of a crime, who enters a plea of not guilty by reason of insanity, cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions, or for refusal to "cooperate" with persons appointed to examine him. Section 16-8-105 and this section, which prescribe the procedures to be followed upon the entry of a plea of not guilty by reason of insanity, cannot operate to destroy the constitutional safeguards against self-incrimination. *French v. District Court*, 153 Colo. 10, 384 P.2d 268 (1963).

But defendant's noncooperation may be shown. If the defendant chooses to remain silent when the state's psychiatrist attempts his examination, the fact of his noncooperation may be shown to the jury. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

It is permissible to use defendant's silence at a sanity examination as evidence of his or her sanity, especially where the defendant was specifically informed that, if he refused to cooperate with the examining physician, such noncooperation could be referred to at his trial and where the jurors were instructed that they could consider defendant's refusal to speak with the examining psychiatrist only in considering defendant's mental state and for no other purpose. *People v. Tally*, 7 P.3d 172 (Colo. App. 1999).

And the expert witness may testify to any conclusions as to mental condition he is able to draw from the conduct or actions of the defendant or from what he says during such an interview. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

The defendant has a constitutional right not to talk to the psychiatrist, but he cannot complain, if the doctor is able to draw inferences from his conduct upon which to found an opinion as to his sanity or lack of it. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970); *People v. Vialpando*, 954 P.2d 617 (Colo. App. 1997).

A psychologist may testify in court to defendant's statements and reactions, if they help him form his professional opinion. *People v. Lyles*, 186 Colo. 302, 526 P.2d 1332 (1974).

Such testimony does not violate the defendant's privilege against self-incrimination, either at the sanity trial or the guilt trial. *People v. Vialpando*, 954 P.2d 617 (Colo. App. 1997).

The jury may return verdict finding defendant sane when no evidence is presented to rebut the presumption of sanity, and defendant refuses to talk with the court-appointed psychiatrist. *People v. Johnson*, 180 Colo. 177, 503 P.2d 1019 (1972).

Section does not entitle defendant's psychiatrist to copy of confession. This section is inapplicable to demand of defendant that a copy of his confession in the possession of the district attorney be turned over to defendant's psychiatrist witness. *Wooley v. People*, 148 Colo. 392, 367 P.2d 903 (1961).

But prosecutor entitled to examining physician's information. Where the confessions and admissions of the defendant have been weighed by the examining physician in evaluating the defendant's sanity, fairness requires that the prosecutor have the same information as the defense attorney. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

Reversal is justified only when substantive right has been prejudiced. In order to justify a reversal on the ground that the hospital staff acted beyond the powers conferred by this section, it must appear that in this case some substantial right of the defendant has been prejudiced, and that depends upon the use made of the information so obtained. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931).

Trial court erred in ordering a second evaluation. A court may order a second evaluation only for good cause shown. There must be some basis, other than counsel's opinion, for showing that the first examination was inadequate or unfair. *People v. Garcia*, 87 P.3d 159 (Colo. App.

2003), aff'd in part and rev'd in part on other grounds, 113 P.3d 775 (Colo. 2005).

Applied in *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976); *People v. Schultheis*, 638 P.2d 8 (Colo. 1981); *People v. Roark*, 643 P.2d 756 (Colo. 1982).

16-8-106.5. Competency evaluation advisory board - creation - membership - duties - rules - repeal. (Repealed)

Source: **L. 2007:** Entire section added, p. 40, § 1, effective March 8. **L. 2008:** Entire section repealed, p. 1854 § 7, effective July 1.

Editor's note: In 2008, this section was relocated to § 16-8.5-119.

Cross references: For the legislative declaration contained in the 2008 act repealing this section, see section 1 of chapter 389, Session Laws of Colorado 2008.

16-8-107. Evidence. (1) (a) Except as provided in this subsection (1), no evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination under section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible against the defendant on the issues raised by a plea of not guilty, if the defendant is put to trial on those issues, except to rebut evidence of his or her mental condition introduced by the defendant to show incapacity to form a culpable mental state; and, in such case, that evidence may be considered by the trier of fact only as bearing upon the question of capacity to form a culpable mental state, and the jury, at the request of either party, shall be so instructed.

(b) Evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination under section 16-8-108 or acquired pursuant to section 16-8-103.6 is admissible at any sentencing hearing held pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., only to prove the existence or absence of any mitigating factor.

(c) If the defendant testifies in his or her own behalf upon the trial of the issues raised by the plea of not guilty or at a sentencing hearing held pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony.

(1.5) (a) Except as otherwise provided in this subsection (1.5), evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination pursuant to section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible only as to the issues raised by the defendant's plea of not guilty by reason of insanity, and the jury, at the request of either party, shall be so instructed; except that, for offenses committed on or after July 1, 1999, such evidence shall also be admissible as to the defendant's mental condition if the defendant undergoes the examination because the defendant has given notice pursuant to subsection (3) of this section that he or she intends to introduce expert opinion evidence concerning his or her mental condition.

(b) Evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination under section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible at any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S., only to prove the existence or absence of any mitigating factor.

(c) If the defendant testifies in his or her own behalf, the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony. This subsection (1.5) shall apply to offenses committed on or after July 1, 1995.

(2) In any trial or hearing concerning the defendant's mental condition, physicians and other experts may testify as to their conclusions reached from their examination of hospital records, laboratory reports, X rays, electroencephalograms, and psychological test results if

the material which they examined in reaching their conclusions is produced at the time of the trial or hearing.

(3) (a) In no event shall a court permit a defendant to introduce evidence relevant to the issue of insanity, as described in section 16-8-101.5, unless the defendant enters a plea of not guilty by reason of insanity, pursuant to section 16-8-103.

(b) Regardless of whether a defendant enters a plea of not guilty by reason of insanity pursuant to section 16-8-103, the defendant shall not be permitted to introduce evidence in the nature of expert opinion concerning his or her mental condition without having first given notice to the court and the prosecution of his or her intent to introduce such evidence and without having undergone a court-ordered examination pursuant to section 16-8-106. A defendant who places his or her mental condition at issue by giving such notice waives any claim of confidentiality or privilege as provided in section 16-8-103.6. Such notice shall be given at the time of arraignment; except that the court, for good cause shown, shall permit the defendant to inform the court and prosecution of the intent to introduce such evidence at any time prior to trial. Any period of delay caused by the examination and report provided for in section 16-8-106 shall be excluded, as provided in section 18-1-405 (6) (a), C.R.S., from the time within which the defendant must be brought to trial.

(c) The provisions of this subsection (3) shall apply to offenses committed on or after July 1, 1999.

Source: L. 72: R&RE, p. 228, § 1. C.R.S. 1963: § 39-8-107. L. 83: (1) amended, p. 675, § 5, effective July 1. L. 87: (1) amended, p. 623, § 3, effective July 1. L. 96: (1.5) added, p. 5, § 3, effective January 31. L. 98: (1) and (1.5) amended, p. 384, § 4, effective April 21. L. 99: (1.5)(a) amended and (3) added, p. 402, § 4, effective July 1. L. 2002: (1)(b), (1)(c), and (1.5)(b) amended, p. 1493, § 138, effective October 1. L. 2002, 3rd Ex. Sess.: (1)(b), (1)(c), and (1.5)(b) amended, pp. 31, 32, §§ 21, 22, effective July 12.

Cross references: (1) For the introduction of evidence of a physician or surgeon or certified psychologist without first obtaining the consent of the patient, see § 13-90-107 (1)(d) and (1)(g).

(2) For the legislative declaration contained in the 2002 act amending subsections (1)(b), (1)(c), and (1.5)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsections (1)(b), (1)(c), and (1.5)(b), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Law reviews. For comment on French v. District Court, see 36 U. Colo. L. Rev. 280 (1964). For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

Annotator's note. Since § 16-8-107 is similar to § 39-8-2, C.R.S. 1963, § 39-8-2, CRS 53, and laws antecedent to CSA, C. 48, § 508, relevant cases construing those provisions have been included in the annotations to this section.

Separate trials designed as safeguard against prejudice. On a separate trial of a plea of not guilty by reason of insanity in a murder prosecution, a much wider area of defendant's conduct may be the subject of inquiry than would be permissible in trial of a plea of not guilty; separate trials of such issues are provided to safeguard against prejudice likely to arise by reason of wide variety of evidence competent on issue of insanity but which would not be admissible on trial of a not guilty plea. Trujillo v. People, 150 Colo. 235, 372 P.2d 86 (1962).

Recognition of the constitutional rights of the defendant relative to self-incrimination

appears in subsection (1). Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

The general assembly, in providing for the admission in evidence of defendant's statements to the psychiatrist where sanity is the issue, but barring them on the guilt issue, does not violate the defendant's rights against self-incrimination. Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

When the sanity issue is a separate proceeding, as it is in Colorado, before a jury that cannot consider the issue of guilt in the event the defendant is found sane and where the admissions cannot be used to establish guilt, there is no self-incrimination within the contemplation of the constitutional provisions. Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

In a sanity trial the admission of statements made by the defendant does not violate his right against self-incrimination because the issue of defendant's guilt is not decided. People v.

Osborn, 42 Colo. App. 376, 599 P.2d 937 (1979).

Subsection (1.5)(a) does not violate the privilege against self-incrimination. The only permissible use of statements made during a sanity examination is to determine whether a defendant was capable of forming a culpable mental state. *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003).

The court's limiting instruction and surrounding instructions regarding the expert's testimony on the issue of defendant's sanity adequately protected defendant's privilege against self-incrimination. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

This section does not force a defendant to choose between the privilege against self-incrimination and the due process right to a competency determination. A defendant may remain silent during the court-ordered evaluation under this section and then be examined by a psychiatrist of his own choice under §16-8-108. Therefore, under the statutory scheme, the defendant could obtain a competency evaluation and protect his privilege against self-incrimination unless and until he relied upon the lack of mental capacity to commit the charged crimes. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

This section does not force a defendant to choose between his privilege against self-incrimination and his fundamental right to present a defense. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Defendant could comply with subsection (3)(b) without waiving his privilege against self-incrimination by invoking the privilege during the court-ordered examination. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Use in impeaching defendant constitutional. Neither the United States constitution nor the Colorado constitution should be construed to allow a defendant to take the stand without the possibility of his credibility being impeached by his prior inconsistent statements. Where the defendant makes statements to a psychiatrist upon the advice of his counsel and without physical coercion and intimidation, he cannot take the stand with his credibility immune from attack on the basis of his prior inconsistent statements. *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

When cross-examination for impeachment purposes not narrowly limited. When a defendant elects to fabricate testimony to effectively commit perjury, cross-examination for the purpose of impeachment is not narrowly limited. *People v. Allen*, 193 Colo. 526, 568 P.2d 56 (1977).

Miranda warnings not required. Even assuming that warnings are required, or that the examination under this section was a type of custodial interrogation requiring that defendant

be given the equivalent of *Miranda v. Arizona* (384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)) warnings prior to his examination, such warnings are not required before the admission of statements for impeachment purposes. *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

The last sentence of subsection (1) cannot be interpreted as only permitting the admission of statements concerning defendant's lack of capacity to form a specific intent and as not allowing the admission of statements concerning other issues of his guilt. *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

The reference in subsection (1.5)(a) to issues raised by the insanity plea relates to the defendant's "mental condition" and is equivalent to the references in subsection (1)(a) to a defendant's "capacity to form a culpable mental state". *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003).

Evidence from examination limited to rebuttal in trial of guilt. This section provides that any statements made by the defendant to examining psychiatrists cannot be used as evidence against him in a trial on the issue of guilt of the crime charged. However, it is also provided that such evidence may be received on the trial of the issued guilt of a murder charge to rebut evidence of insanity offered by the defendant to reduce the degree of murder. *French v. District Court*, 153 Colo. 10, 384 P.2d 268 (1963).

This section definitely prohibits the presentation of the evidence obtained by experts during the period of observation, until evidence has been brought forward by defendant placing in issue, by testimony, the question of mental capacity. The entry of a plea of not guilty by reason of insanity does not destroy the presumption of sanity with which all persons are clothed. Under this section the evidence obtained during the period of observation should not have been received upon the direct case of the people on the trial of the issue of guilt and the cause is remanded for a new trial upon all issues raised by the plea. *Leick v. People*, 131 Colo. 353, 281 P.2d 806 (1955).

The limitation in this section on the admission of evidence applies only to the guilt phase of a trial and does not speak to the penalty phase or a postconviction proceeding. *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Nothing in this section prohibits the prosecution from calling the examining psychiatrist to give an opinion based on information derived from other sources, provided that such evidence was not acquired directly or indirectly for the first time from a communication made during the course of a court-ordered examination. *People v. Saiz*, 923 P.2d 197 (Colo. App. 1995).

Prosecution's antisocial personality disorder evidence properly admitted as relevant evidence. Prosecution's rebuttal of a defendant's insanity defense is not limited solely to presenting evidence that directly disproves the disorder claimed by defendant. Rather, the prosecution may present alternative explanations of a defendant's behavior. *People v. Gonzales-Quevedo*, 203 P.3d 609 (Colo. App. 2008).

Use of defendant's statements to hospital employee while confined for sanity examination to rebut defendant's self-defense theory did not constitute reversible error as defendant failed to properly object to hospital employee's testimony at trial and fact that testimony was given in prosecution's case-in-chief rather than as rebuttal testimony did not constitute plain error which would require consideration of issue not raised at trial. *People v. Kruse*, 839 P.2d 1 (Colo. 1992).

Expert testimony concerning the nature of the condition of minimal brain dysfunction, and its relation to poor impulse control and lack of willpower, is admissible in evidence and relevant to the issue of the defendant's sanity. *People v. Wright*, 648 P.2d 665 (Colo. 1982).

Trial court not required to give limiting instruction sua sponte. Court is required to give jury limiting instruction on use of expert testimony only at the request of either party. *People v. Grant*, 174 P.3d 798 (Colo. App. 2007).

Trial court has discretion to determine order in which evidence will be presented at the sanity trial. *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979).

Opinion based on information of third persons not testifying inadmissible. A physician cannot express an opinion based in whole or in part upon information obtained from third persons who have not testified to the facts, and the admission of such evidence was reversible error. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931).

An expert witness is not permitted to give an opinion of sanity based upon information obtained from third persons who have not testified. *Garrison v. People*, 158 Colo. 348, 408 P.2d 60 (1965).

Exception if opinion not based on such information. A doctor is not disqualified to express his opinion concerning the sanity of a defendant merely because he had some information from a source outside his own examination if his opinion was not in any manner based on that information. *Garrison v. People*, 158 Colo. 348, 408 P.2d 60 (1965).

Doctor-patient privilege was not violated by court-appointed psychiatrist's testimony where the prosecution called him as a witness to rebut evidence introduced by defendant which tended to show that he was incapable of forming a specific intent. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Admissions to privately retained psychiatrist privileged. The prosecution may not call, as a witness in its case-in-chief, a psychiatrist privately retained by the defendant in connection with an insanity plea and elicit from the psychiatrist incriminating admissions made by the defendant during a sanity examination. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).

Prosecutor entitled to physician's information. Where the confessions and admissions of the defendant have been weighed by the examining physician in evaluating the defendant's sanity, fairness requires that the prosecutor have the same information as the defense attorney. *Lewis v. Thulemeyer*, 189 Colo. 139, 538 P.2d 441 (1975).

Section only requires a limiting instruction "at the request of either party". *People v. Freeman*, 47 P.3d 700 (Colo. App. 2001).

Subsection (3)(b) is not limited to evidence of a defendant's condition during the offense and it contains no exception for evidence of a post-incident condition. Trial court properly ruled that expert testimony related to defendant's mental condition and that defendant would have to comply with the provisions of subsection (3)(b) if he wished to have the experts testify. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

This section does not preclude a defendant from calling expert witnesses, it merely requires defendant to comply with subsection (3)(b) if he chooses to pursue this line of defense. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

"Mental condition" includes expert testimony offered to show how defendant's intellectual or developmental disability affects the reliability or credibility of statements made to police. *People v. Flippo*, 159 P.3d 100 (Colo. 2007).

Trial court did not err in denying defendant's motion to present evidence of his mental state without pleading not guilty by reason of insanity. Defendant proffered evidence that tended to show he was incapable of accurately comprehending the surrounding circumstances and of making a reasoned decision about an appropriate course of action and that otherwise fell within the statutory definition of insanity. *People v. Gonzales-Quevedo*, 203 P.3d 609 (Colo. App. 2008).

For the admissibility of prearrestment examination, see *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

Applied in *Oaks v. People*, 150 Colo. 64, 371 P.2d 443 (1962); *People v. Schultheis*, 44 Colo. App. 452, 618 P.2d 710 (1980); *People v. Roark*, 643 P.2d 756 (Colo. 1982); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

16-8-108. Examination at instance of defendant. (1) If the defendant wishes to be examined by a psychiatrist, psychologist, or other expert of his own choice in connection with any proceeding under this article, the court, upon timely motion, shall order that the examiner chosen by the defendant be given reasonable opportunity to conduct the examination.

(2) A copy of any report of examination of the defendant made at the instance of the defense shall be furnished to the prosecution a reasonable time in advance of trial.

Source: L. 72: R&RE, p. 229, § 1. C.R.S. 1963: § 39-8-108. L. 87: (2) amended, p. 623, § 4, effective July 1.

ANNOTATION

Annotator's note. Since § 16-8-108 is similar to repealed § 39-8-2, C.R.S. 1963, and CSA, C. 48, § 508, relevant cases construing those provisions have been included in the annotations to this section.

The court's authority to appoint a psychiatrist upon application of defendant is found in this section. *Martinez v. People*, 124 Colo. 170, 235 P.2d 810 (1951).

It does not give defendant absolute right to have psychiatrist of his own choosing appointed. Nor does it guarantee that expert selected by indigent defendant will in all cases be provided without cost to him. *Massey v. District Court*, 180 Colo. 359, 506 P.2d 128 (1973).

Right of incarcerated defendant to private examination. An incarcerated defendant can obtain a court order granting a privately retained psychiatrist a reasonable opportunity to conduct an examination. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).

Court may require good cause to be shown before ordering further psychiatric examination once defendant has been examined by specialists in field of nervous and mental diseases. *Massey v. District Court*, 180 Colo. 359, 506 P.2d 128 (1973).

Defendant's waiver of right to a third competency evaluation was not a waiver of the right to be competent. Where defendant has had an adequate hearing on the issue of competence, opposes a continuance and waives further competence examinations, due process does not require the court to make a second competency

determination. *People v. White*, 870 P.2d 424 (Colo. 1994).

Sections 16-8-103 and 16-8-105 do not operate to exclude private employment of psychiatrists. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed.2d 70 (1960).

Admissions to court-appointed psychiatrist privileged. During the guilt trial, the prosecution may not call, as a witness in its case-in-chief, an indigent defendant's court-appointed psychiatrist and elicit incriminating admissions made by the defendant during a sanity examination. *People v. Roark*, 643 P.2d 756 (Colo. 1982).

Admissions to privately retained psychiatrist privileged. The prosecution may not call, as a witness in its case-in-chief, a psychiatrist privately retained by the defendant in connection with an insanity plea and elicit from the psychiatrist incriminating admissions made by the defendant during a sanity examination. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).

But copy of report to prosecution if defense to offer testimony of examination. The only limitation placed on a defendant seeking a sanity examination by a private psychiatrist is that a copy of the psychiatrist's report be furnished to the prosecution reasonably in advance of the sanity trial if the defense intends to offer testimony about the examination. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).

Applied in *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

16-8-109. Testimony of lay witnesses. In any trial or hearing in which the mental condition of the defendant is an issue, witnesses not specially trained in psychiatry or psychology may testify as to their observation of the defendant's actions and conduct, and as to conversations which they have had with him bearing upon his mental condition, and they shall be permitted to give their opinions or conclusions concerning the mental condition of the defendant.

Source: L. 72: R&RE, p. 229, § 1. C.R.S. 1963: § 39-8-109.

ANNOTATION

Annotator's note. Since § 16-8-109 is similar to repealed § 39-8-1, C.R.S. 1963, and § 39-8-1, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Nonexpert may not give hypothetical opinion of sanity. A nonexpert witness may never, in response to a purely hypothetical question stating the facts, be permitted to give an opinion on the question of sanity. *Rupert v. People*, 163 Colo. 219, 429 P.2d 276 (1967).

But a lay witness may, when a proper foundation is laid, express an opinion as to the sanity of another. *People v. Median*, 185 Colo. 101, 521 P.2d 1257 (1974).

Subject to the proper foundation, a psychiatric social worker may give opinion testimony on a defendant's mental condition. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

The foundation to be laid under this section must indicate that the conclusions of the witness bear directly upon the issue of sanity and not merely conclusions of fact as to conduct. *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

Requirements which must be met before a lay witness can express his opinion as to the sanity of another are: (1) It must be shown that the lay witness had an adequate means of becoming acquainted with the person whose sanity is in issue; and (2) the contacts must be proximate in time to the alleged offense. *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

Before opinion evidence from a nonexpert regarding the sanity of another can be admissible, the specific facts upon which the opinion is based must be first stated by the witness, and his testimony must also show a close or intimate relationship with the party alleged to be insane. *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

Before a lay witness is permitted to state an opinion regarding the sanity or insanity or mental competence or incompetence of a person whose mental condition is in issue, the witness must have had ample opportunity to observe the speech, manner, habits, or conduct of the person. *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

One who in the opinion of a trial court shows adequate means of becoming acquainted with a person whose mental condition is in issue, after detailing the facts and circumstances concerning his acquaintance and the acts and conversations upon which his conclusion is based, may give his opinion on the question of sanity. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958); *Rupert v. People*, 163 Colo. 219, 429 P.2d 276 (1967).

The opinion of a nonexpert is admissible only when it is made to appear that his acquaintance with a defendant, whose sanity is in issue, had the requisite nearness in time after the act charged, to persuade the court, in the exercise of a sound discretion, to receive it. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

The necessary predicate for lay opinion evidence is a showing of adequate means to have become acquainted with the person whose mental condition is at issue. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

A lay witness may give an opinion relative to the defendant's sanity if the witness details the facts which demonstrate his acquaintance with the defendant, and if those facts demonstrate that the acquaintance is close and that contacts were maintained at a point proximate in time to the alleged offense. *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979).

Discretion of trial judge. Trial judges have very broad discretion in determining whether or not any proffered witness is qualified to give opinion testimony. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

The testimony of a corrections officer who observed defendant during defendant's pre-trial incarceration had proper foundation. The record indicates that the witness testified concerning the witness's observations of defendant's behavior, not concerning the witness's opinion of defendant's mental condition. This testimony is specifically permitted by this section. *People v. Henderson*, 794 P.2d 1050 (Colo. App. 1990), rev'd on other grounds, 810 P.2d 1058 (Colo. 1991).

When discretion abused. Where foundation testimony fails to conform and where the proper guidelines are not adhered to in judging these requirements, it must be held that the trial court abused its discretion in permitting the admission of nonexpert opinion testimony. *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974).

Court abused its discretion in admitting some lay opinions from mental health providers who had not been properly noticed as experts by the prosecution. Some of the opinions were expert opinions improperly admitted under the guise of lay opinion testimony. The improper testimony related to symptoms of specific mental illness and opinions about whether defendant suffered from mental illness. The evidence relied upon the witness' specialized knowledge and training and, therefore, went beyond the bounds of lay opinion. The error in this case was harmless since there was ample evidence in addition to the improperly admitted opinions. *Dunlap v. People*, 173 P.3d 1054

(Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

The weight of a nonexpert's opinion is for the jury. Leick v. People, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct.

1363, 2 L. Ed.2d 1366 (1958); Rupert v. People, 163 Colo. 219, 429 P.2d 276 (1967).

Applied in People v. Johnson, 44 Colo. App. 118, 613 P.2d 902 (1980); People v. Wright, 648 P.2d 665 (Colo. 1982).

16-8-110. Mental incompetency to proceed - effect - how and when raised. (Repealed)

Source: L. 72: R&RE, p. 229, § 1. C.R.S. 1963: § 39-8-110. L. 76: (2)(c) amended, p. 530, § 1, effective April 9. L. 83: (1) amended, p. 675, § 6, effective July 1. L. 87: (2)(c) amended, p. 1170, § 7, effective March 13. L. 95: (1) amended, p. 76, § 10, effective July 1. L. 2001: (3) added, p. 407, § 3, effective April 19. L. 2008: Entire section repealed, p. 1855, § 8, effective July 1.

Editor's note: In 2008, this section was relocated to § 16-8.5-102.

Cross references: For the legislative declaration contained in the 2008 act repealing this section, see section 1 of chapter 389, Session Laws of Colorado 2008.

16-8-111. Determination of incompetency to proceed. (Repealed)

Source: L. 72: R&RE, p. 229, § 1. C.R.S. 1963: § 39-8-111. L. 2001: (1) amended and (4) added, p. 407, § 4, effective April 19. L. 2006: (1) amended and (3.5) added, p. 178, § 2, effective March 31. L. 2008: Entire section repealed, p. 1856, § 9, effective July 1.

Editor's note: In 2008, this section was relocated to § 16-8.5-103.

Cross references: For the legislative declaration contained in the 2008 act repealing this section, see section 1 of chapter 389, Session Laws of Colorado 2008.

16-8-112. Procedure after determination of competency or incompetency. (Repealed)

Source: L. 72: R&RE, p. 230, § 1. C.R.S. 1963: § 39-8-112. L. 81: (2) R&RE and (3) and (4) added, p. 936, §§ 1, 2, effective January 1, 1982. L. 94: (2) amended, p. 2648, § 119, effective July 1. L. 2008: Entire section repealed, p. 1856, § 10, effective July 1.

Editor's note: In 2008, this section was relocated to § 16-8.5-111.

Cross references: For the legislative declaration contained in the 2008 act repealing this section, see section 1 of chapter 389, Session Laws of Colorado 2008.

16-8-113. Restoration to competency. (Repealed)

Source: L. 72: R&RE, p. 230, § 1. C.R.S. 1963: § 39-8-113. L. 2009: Entire section repealed, (HB 09-1253), ch. 128, p. 552, § 4, effective August 5.

ANNOTATION

Because criminal proceedings are suspended during the entire time a defendant is incompetent and may not resume until a judicial determination is made that the defendant has been restored to competency, there is no

basis upon which to find that the period in which a defendant is "incompetent" under § 18-1-405 (6) ends in any manner other than in accord with the procedures of this section. People v. Harris, 914 P.2d 425 (Colo. App. 1995).

16-8-114. Evidence concerning competency - inadmissibility.

(1) and (2) (Deleted by amendment, L. 2008, p. 1857, § 11, effective July 1, 2008.)

(3) (a) Evidence of any determination as to the defendant's competency or incompetency is not admissible on the issues raised by the pleas of not guilty or not guilty by reason of insanity or the affirmative defense of impaired mental condition. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) Evidence of any determination as to the defendant's competency or incompetency is not admissible on the issues raised by the pleas of not guilty or not guilty by reason of insanity. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

Source: L. 72: R&RE, p. 230, § 1. C.R.S. 1963: § 39-8-114. L. 79: (1) amended, p. 670, § 19, effective July 1. L. 83: (3) amended, p. 675, § 7, effective July 1. L. 95: (3) amended, p. 77, § 11, effective July 1. L. 2008: Entire section amended, p. 1857, § 11, effective July 1.

Cross references: For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 389, Session Laws of Colorado 2008.

ANNOTATION

Annotator's note. Since § 16-8-114 is similar to repealed § 39-8-6, C.R.S. 1963, and § 39-8-6, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Recovery removes the statutory impediment, and the regular course of the law takes up at the point where the incompetency arose. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

If a defendant who is incompetent to stand trial later regains his sanity, he must face trial on the merits. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

Return to sanity requires new preliminary hearing. When the preliminary hearing is held first and the competency hearing second, if the

outcome of the competency hearing is that the defendant is presently insane, then upon his return to competency another preliminary hearing must be held. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970).

Section limits admissibility of results of examination in trial on guilt. The statutory limitation on the use at the trial of the issue of guilt or innocence of any substantive evidence or information acquired directly or indirectly for the first time as the result of examination of accused applies to an examination in connection with a plea of insanity at the time or an allegation of incompetency after the alleged commission of the crime. *Nowels v. People*, 166 Colo. 140, 442 P.2d 410 (1968).

Applied in *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

16-8-114.5. Commitment - termination of proceedings. (Repealed)

Source: L. 81: Entire section added, p. 937, § 3, effective January 1, 1982. L. 89: (2) amended, p. 867, § 1, effective April 27. L. 90: (1) amended, p. 954, § 20, effective June 7. L. 94: (1) amended, p. 2649, § 120, effective July 1. L. 2007: (2) amended, p. 1756, § 1, effective June 1. L. 2008: Entire section repealed, p. 1858, § 12, effective July 1.

Editor's note: In 2008, this section was relocated to § 16-8.5-116.

Cross references: For the legislative declaration contained in the 2008 act repealing this section, see section 1 of chapter 389, Session Laws of Colorado 2008.

16-8-115. Release from commitment after verdict of not guilty by reason of insanity or not guilty by reason of impaired mental condition. (1) The court may order a release hearing at any time on its own motion, on motion of the prosecuting attorney, or on motion of the defendant. The court shall order a release hearing upon receipt of the report of the chief officer of the institution in which the defendant is committed that the defendant no longer requires hospitalization, as provided in section 16-8-116, or upon motion of the defendant made after one hundred eighty-two days following the date of the initial commitment order. Except for the first hearing following the initial commitment order,

unless the court for good cause shown permits, the defendant is not entitled to a hearing within one year subsequent to a previous hearing.

(1.5) (a) Any victim of any crime or any member of such victim's immediate family, if the victim has died or is a minor, the perpetrator of which has been found not guilty by reason of insanity or not guilty by reason of impaired mental condition, shall be notified by the court in a timely manner prior to any hearing for release of the perpetrator held pursuant to subsection (1) of this section, if such victim or family member can reasonably be located. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) Any victim of any crime or any member of such victim's immediate family, if the victim has died or is a minor, the perpetrator of which has been found not guilty by reason of insanity, shall be notified by the court in a timely manner prior to any hearing for release of the perpetrator held pursuant to subsection (1) of this section, if such victim or family member can reasonably be located. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

(2) (a) The court shall order a release examination of the defendant when a current one has not already been furnished or when either the prosecution or defense moves for an examination of the defendant at a different institution or by different experts. The court may order any additional or supplemental examination, investigation, or study which it deems necessary to a proper consideration and determination of the question of eligibility for release. The court shall set the matter for release hearing after it has received all of the reports which it has ordered under this section. When none of said reports indicates that the defendant is eligible for release, the defendant's request for release hearing shall be denied by the court if the defendant is unable to show by way of an offer of proof any evidence by a medical expert in mental disorders that would indicate that the defendant is eligible for release. For the purposes of this subsection (2), "medical expert in mental disorders" means a physician licensed under the provisions of article 36 of title 12, C.R.S., a psychologist licensed under the provisions of article 43 of title 12, C.R.S., a psychiatric technician licensed under the provisions of article 42 of title 12, C.R.S., a registered professional nurse as defined in section 12-38-103 (11), C.R.S., who by reason of postgraduate education and additional nursing preparation has gained knowledge, judgment, and skill in psychiatric or mental health nursing, or a social worker licensed under the provisions of part 4 of article 43 of title 12, C.R.S. The release hearing shall be to the court or, on demand by the defendant, to a jury of not to exceed six persons. At the release hearing, if any evidence of insanity is introduced, the defendant has the burden of proving restoration of sanity by a preponderance of the evidence; if any evidence of ineligibility for release by reason of impaired mental condition is introduced, the defendant has the burden of proving, by a preponderance of the evidence, that the defendant is eligible for release by no longer having an impaired mental condition. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) The court shall order a release examination of the defendant when a current one has not already been furnished or when either the prosecution or defense moves for an examination of the defendant at a different institution or by different experts. The court may order any additional or supplemental examination, investigation, or study that it deems necessary to a proper consideration and determination of the question of eligibility for release. The court shall set the matter for release hearing after it has received all of the reports that it has ordered under this section. When none of the reports indicates that the defendant is eligible for release, the defendant's request for release hearing shall be denied by the court if the defendant is unable to show by way of an offer of proof any evidence by a medical expert in mental disorders that would indicate that the defendant is eligible for release. For the purposes of this subsection (2), "medical expert in mental disorders" means a physician licensed under the provisions of article 36 of title 12, C.R.S., a psychologist licensed under the provisions of article 43 of title 12, C.R.S., a psychiatric technician licensed under the provisions of article 42 of title 12, C.R.S., a registered professional nurse as defined in section 12-38-103 (11), C.R.S., who by reason of postgraduate education and additional nursing preparation has gained knowledge, judgment, and skill in psychiatric or mental health nursing, or a social worker licensed under the provisions of part 4 of article 43 of title 12, C.R.S. The release hearing shall be to the court or, on demand by the

defendant, to a jury composed of not more than six persons. At the release hearing, if any evidence that the defendant does not meet the release criteria is introduced, the defendant has the burden of proving by a preponderance of the evidence that the defendant has no abnormal mental condition which would be likely to cause him or her to be dangerous either to himself or herself or to others or to the community in the reasonably foreseeable future. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

(3) (a) If the court or jury finds the defendant eligible for release, the court may impose such terms and conditions as the court determines are in the best interests of the defendant and the community, and the jury shall be so instructed. If the court or jury finds the defendant ineligible for release, the court shall recommit the defendant. The court's order placing the defendant on conditional release shall include notice that the defendant's conditional release may be revoked pursuant to the provisions of section 16-8-115.5.

(b) When a defendant is conditionally released, the chief officer of the institution in which the defendant is committed shall forthwith give written notice of the terms and conditions of such release to the executive director of the department of human services and to the director of any community mental health center which may be charged with continued treatment of the defendant. The director of such mental health center shall make written reports every three months to the executive director of the department of human services and to the district attorney for the judicial district where the defendant was committed and to the district attorney for any judicial district where the defendant may be required to receive treatment concerning the treatment and status of the defendant. Such reports shall include all known violations of the terms and conditions of the defendant's release and any changes in the defendant's mental status which would indicate that the defendant has become ineligible to remain on conditional release as defined in section 16-8-102 (4.5).

(c) A defendant who has been conditionally released remains under the supervision of the department of human services until the committing court enters a final order of unconditional release. When a defendant fails to comply with any conditions of his release requiring him to establish, maintain, and reside at a specific residence and his whereabouts have therefore become unknown to the authorities charged with his supervision or when the defendant leaves the state of Colorado without the consent of the committing court, the defendant's absence from supervision shall constitute escape, as defined in section 18-8-208, C.R.S. Such offense occurs in the county in which the defendant is authorized to reside.

(d) Any terms and conditions imposed by the court on the defendant's release and the defendant's mental status shall be reviewed at least every twelve months unless the court sooner holds a release hearing as provided in this section.

(e) As long as the defendant is granted conditional release and is subject to the provisions thereof, there shall be free transmission of all information, including clinical information regarding the defendant, among the department of human services, the appropriate community mental health centers, and appropriate district attorneys, law enforcement, and court personnel.

(4) (a) In addition to any terms and conditions of release imposed pursuant to subsection (3) of this section, a court shall order a defendant, as a condition of release, to register with the local law enforcement agency of the jurisdiction in which the defendant resides if the court finds that:

(I) The defendant was found not guilty by reason of insanity on a charge of an offense involving unlawful sexual behavior; or

(II) The defendant was found not guilty by reason of insanity on a charge of any other offense, the underlying factual basis of which includes an offense involving unlawful sexual behavior.

(a.5) In addition to any terms and conditions of release imposed pursuant to subsection (3) of this section, a court may order a defendant, as a condition of release, to register with the local law enforcement agency of the jurisdiction in which the defendant resides if the court finds that the chief officer of the institution in which the defendant has been committed recommends registration based on information obtained from the defendant during the course of treatment that indicates the defendant has committed an offense involving unlawful sexual behavior.

(b) The court's order placing the defendant on conditional release shall include notice of the requirement to register. The court's order, at a minimum, shall specify:

(I) The time period following release within which the defendant shall register with the local law enforcement agency;

(II) The time period following a change of residence within which the defendant shall reregister with the local law enforcement agency of the jurisdiction in which the defendant resides;

(III) The frequency with which the defendant must reregister with the local law enforcement agency of the jurisdiction in which the defendant resides to provide a periodic verification of the defendant's location;

(IV) Any other circumstances under which the defendant must reregister with the local law enforcement agency of the jurisdiction in which the defendant resides.

(c) Prior to release of any defendant who is required to register as a condition of release pursuant to this subsection (4), the department of human services shall obtain from the defendant the address at which the defendant plans to reside upon release. At least two days prior to release of the defendant, the department of human services shall notify the local law enforcement agency of the jurisdiction in which the defendant plans to reside upon release and the Colorado bureau of investigation of the anticipated release of the defendant and shall provide to the local law enforcement agency and the Colorado bureau of investigation the address at which the defendant plans to reside, a copy of the court order establishing the condition to register pursuant to this section, and any other pertinent information concerning the defendant.

(d) If the defendant plans to reside within the corporate limits of any city, town, or city and county, the defendant shall register at the office of the chief law enforcement officer of the city, town, or city and county. If the defendant plans to reside outside of such corporate limits, the defendant shall register at the office of the county sheriff of the county in which the defendant plans to reside.

(e) A defendant who registers with a local law enforcement agency as a condition of release pursuant to this subsection (4) shall register using forms provided by the local law enforcement agency and shall provide the information requested by the local law enforcement agency, including at a minimum a photograph and a complete set of fingerprints.

(f) The local law enforcement agency shall transmit any registrations received pursuant to paragraph (e) of this subsection (4) to the Colorado bureau of investigation within three business days following receipt. The Colorado bureau of investigation shall include any registration information received pursuant to this section in the central registry established pursuant to section 16-22-110, and shall specify that the information applies to a defendant required to register as a condition of release pursuant to this section. The forms completed by defendants required to register as a condition of release pursuant to this subsection (4) shall be confidential and shall not be open to inspection except as provided in paragraph (e) of subsection (3) of this section and except as provided for release of information to the public pursuant to sections 16-22-110 (6) and 16-22-112.

(g) As used in this subsection (4), "an offense involving unlawful sexual behavior" means any of the following offenses:

(I) (A) Sexual assault, in violation of section 18-3-402, C.R.S.; or

(B) Sexual assault in the first degree, in violation of section 18-3-402, C.R.S., as it existed prior to July 1, 2000;

(II) Sexual assault in the second degree, in violation of section 18-3-403, C.R.S., as it existed prior to July 1, 2000;

(III) (A) Unlawful sexual contact, in violation of section 18-3-404, C.R.S.; or

(B) Sexual assault in the third degree, in violation of section 18-3-404, C.R.S., as it existed prior to July 1, 2000;

(IV) Sexual assault on a child, in violation of section 18-3-405, C.R.S.;

(V) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3, C.R.S.;

(VI) Sexual assault on a client by a psychotherapist, in violation of section 18-3-405.5, C.R.S.;

(VII) Enticement of a child, in violation of section 18-3-305, C.R.S.;

- (VIII) Incest, in violation of section 18-6-301, C.R.S.;
- (IX) Aggravated incest, in violation of section 18-6-302, C.R.S.;
- (X) Trafficking in children, in violation of section 18-3-502, C.R.S.;
- (XI) Sexual exploitation of children, in violation of section 18-6-403, C.R.S.;
- (XII) Procurement of a child for sexual exploitation, in violation of section 18-6-404, C.R.S.;
- (XIII) Indecent exposure, in violation of section 18-7-302, C.R.S.;
- (XIV) Soliciting for child prostitution, in violation of section 18-7-402, C.R.S.;
- (XV) Pandering of a child, in violation of section 18-7-403, C.R.S.;
- (XVI) Procurement of a child, in violation of section 18-7-403.5, C.R.S.;
- (XVII) Keeping a place of child prostitution, in violation of section 18-7-404, C.R.S.;
- (XVIII) Pimping of a child, in violation of section 18-7-405, C.R.S.;
- (XIX) Inducement of child prostitution, in violation of section 18-7-405.5, C.R.S.;
- (XX) Patronizing a prostituted child, in violation of section 18-7-406, C.R.S.; or
- (XXI) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in this paragraph (g).

(h) Any condition imposed pursuant to this subsection (4) shall be in addition to any conditions that may be imposed pursuant to subsection (3) of this section and shall be subject to monitoring, review, and enforcement in the same manner as any condition imposed pursuant to subsection (3) of this section.

(i) (I) Any defendant required to register as a condition of release pursuant to this subsection (4), upon completion of a period of not less than twenty years from the date the defendant is placed on conditional release, may petition the district court for an order that discontinues the requirement for such registration and removes the defendant's name from the central registry established pursuant to section 16-22-110. The court may issue such order only if the court makes written findings of fact that the defendant has neither been convicted nor found not guilty by reason of insanity of an offense involving unlawful sexual behavior subsequent to his or her conditional release and that the defendant would not pose an undue threat to the community if allowed to live in the community without registration.

(II) Upon the filing of a petition pursuant to this paragraph (i), the court shall set a date for a hearing on the petition. The defendant shall notify the local law enforcement agency with which the defendant is required to register and the prosecuting attorney for the jurisdiction in which the local law enforcement agency is located of the filing of the petition and the hearing date. Upon the victim's request, the court shall notify the victim of the filing of the petition and the hearing date. At the hearing, the court shall give opportunity to the victim to provide written or oral testimony. If the court enters an order discontinuing the defendant's duty to register, the defendant shall send a copy of the order to the local law enforcement agency and the Colorado bureau of investigation.

Source: L. 72: R&RE, p. 231, § 1. C.R.S. 1963: § 39-8-115. L. 81: (3) amended, p. 934, § 3, effective July 1; (1) amended, p. 938, § 1, effective September 1; (2) amended, p. 939, § 1, effective September 1. L. 83: (1) and (2) amended, p. 679, § 1, effective July 1; (2) amended, p. 676, § 8, effective July 1. L. 86: (2) amended, p. 736, § 1, effective March 13. L. 90: (1.5) added, p. 924, § 4, effective March 27. L. 94: (3)(a) amended, p. 1423, § 1, effective July 1; (3)(b), (3)(c), and (3)(e) amended, p. 2649, § 121, effective July 1. L. 95: (1.5) and (2) amended, p. 77, § 12, effective July 1. L. 2002: (4) added, p. 495, § 1, effective July 1; (4)(f) amended, p. 1191, § 37, effective July 1. L. 2003: (4)(i)(I) amended, p. 1990, § 28, effective May 22. L. 2005: (4)(a) amended and (4)(a.5) added, p. 995, § 1, effective June 2. L. 2010: (4)(g)(X) amended, (SB 10-140), ch. 156, p. 537, § 4, effective April 21. L. 2012: (1) amended, (SB 12-175), ch. 208, p. 850, § 76, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 1994 act amending subsections (3)(b), (3)(c), and (3)(e), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Annotator's note. Since § 16-8-115 is similar to repealed § 39-8-4, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

This section does not state that the release hearing shall be considered a civil proceeding. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Where a proceeding is an inquiry into the mental condition of a defendant who has been committed under a plea of not guilty by reason of insanity, the proceeding is not an adversary proceeding in the usual sense of a case which is controlled by the rules of civil procedure. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Rather, it is a special statutory proceeding. In view of the detailed procedure prescribed by this section, the release proceedings are special statutory proceedings governed by C.R.C.P. 81(a), *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Historically, the supreme court has considered mental health proceedings to be special statutory proceedings. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

The provisions of paragraphs (a), (b), and (c) of subsection (3) indicate legislative intent to vest the committing court with continuing subject matter jurisdiction to determine questions relating to the treatment needs of a committed defendant. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

Committing court has subject matter jurisdiction to hear and determine issues relating to the care and treatment of a committed defendant. Court that did not commit defendant was without habeas corpus jurisdiction to hear treatment issues. *Garcia v. Carmel*, 873 P.2d 1317 (Colo. 1994).

But no other circumstances are set forth in the statutes relating to the committing court's jurisdiction after the order of commitment is entered, and thus there is no jurisdiction over issues involving the return of seized property. *People v. Galves*, 955 P.2d 582 (Colo. App. 1997).

Probation, recommitment, and transfer are discretionary acts clothed with governmental immunity. Where the trial judge had continuing jurisdiction under Colorado law both over appellant upon his commitment to a state hospital following acquittal on grounds of insanity and his transfer to the state penitentiary and over the subject matter involved, the doctrine of judicial immunity is applicable to the judge against allegations of violations of the civil rights act. The supervision of the state hospital and the staff

psychiatrist were also clothed with governmental immunity because the revocation of probation, recommitment, and transfer were discretionary in nature. *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967).

Implied authority to order recommitment. The statutory authority to issue a conditional release order necessarily and implicitly includes the authority to enforce that order by recommitment. *Campbell v. District Court*, 195 Colo. 304, 577 P.2d 1096 (1978).

Automatic commitment not denial of due process. A defendant acquitted by reason of insanity is not denied due process of law by an immediate and automatic commitment to a psychiatric facility, so long as there are available to him procedures similar to those in this section. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Nor is six-month initial commitment period. Given the uncertainties and variables of psychiatric diagnosis and prognosis, the legislative choice of a six-month period of initial commitment does not violate due process, for in the absence of a showing that the time fixed is unreasonable in length and unrelated to purpose a court must defer to the general assembly's decision. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *Glatz v. Kort*, 650 F. Supp. 191 (D. Colo. 1984), *aff'd*, 807 F.2d 1514 (10th Cir. 1986).

Defendant's liberty interest not violated by requirement in subsection (4)(a) that he register as a sex offender as a condition of his conditional release since the requirement was in place prior to his conditional release. *People v. Durapau*, __ P.3d __ (Colo. App. 2011).

Since sex offender registration is not punitive, requiring an offender who pled not guilty by reason of insanity to register as a sex offender upon his or her conditional release does not violate the principles of *ex post facto*. *People v. Durapau*, __ P.3d __ (Colo. App. 2011).

Release conditioned by criminal probation denies due process. A judgment which places one adjudged not guilty by reason of insanity on criminal probation or, on his refusal to accept such terms, remands him to indefinite custody violates his fourteenth amendment rights under the United States constitution. Such a commitment is an invalid deprivation of liberty without due process. *Scheidt v. Meredith*, 307 F. Supp. 63 (D. Colo. 1970).

As such conditions may not be imposed on one not convicted of crime. Criminal probation is designed for the guilty and not for those who are not guilty. An essential requirement is an adjudication of guilt, and punitive aspects are

clearly involved. The conditions imposed upon a person who has been granted probationary release under this section are, as a matter of practice, the same conditions imposed upon a convicted criminal who has been placed on probation. The imposition of such conditions on one who has not been convicted of a crime is unconstitutional. *Scheidt v. Meredith*, 307 F. Supp. 63 (D. Colo. 1970).

Unrelated criminal probationary conditions unconstitutional. The imposition of criminal probationary conditions which are not related to the individual seeking release are unconstitutional. *Campbell v. District Court*, 195 Colo. 304, 577 P.2d 1096 (1978).

Conditional release of one restored to sanity may not be conditioned on terms having no relation to his status and which were non-responsive or irrelevant to the judgment of not guilty by reason of insanity. *Scheidt v. Meredith*, 307 F. Supp. 63 (D. Colo. 1970).

Court may impose nonpunitive terms such as out-patient care. The interests of the community and the individual are relevant to the granting of a conditional release. It would be clearly proper to require that petitioner accept psychiatric out-patient care or supervision, but, terms which were designed to regulate the activities of convicted criminals, and which are punitive in nature, cannot be imposed. *Scheidt v. Meredith*, 307 F. Supp. 63 (D. Colo. 1970).

However, there is no per se prohibition against admission of evidence concerning specific conditions of release. Rather, admissibility of evidence is to be determined within framework of rules of relevance in rules of evidence. *Vialpando v. People*, 727 P.2d 1090 (Colo. 1986).

Under subsection (3), a defendant who is conditionally released remains under the supervision of the department of institutions until the committing court enters a final order of unconditional release. *People v. McCoy*, 821 P.2d 873 (Colo. App. 1991).

Writ of habeas corpus is a proper remedy for persons committed to a state hospital after a plea of not guilty by reason of insanity to challenge a lack of treatment and to obtain a remedy addressing appropriate treatment short of immediate release. *Marshall v. Kort*, 690 P.2d 219 (Colo. 1984).

Court may terminate release to order examination. Inasmuch as defendant had been away from the hospital on a probationary release, the hospital authorities would almost have to reexamine him in order to determine his present mental condition and the trial court could terminate probationary release and return him to the hospital for the period of time necessary for reexamination. *Bartosik v. People*, 163 Colo. 267, 430 P.2d 83 (1967).

No broad right of discovery. Based on this section and §§ 16-8-116 and 16-8-117 and on

the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Under C.R.C.P. 81(a), the procedure in release hearings under this section is so inconsistent and in conflict with the rules of civil procedure as to make civil discovery rules inapplicable to release hearings. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Discretion of trial court as to procedures. The procedures set out in this section and § 16-8-117 are addressed to the discretion of the trial court and permit all participants to prepare adequately for the hearing. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Upon a proper showing, the trial court may use or authorize the use of suitable discovery procedures reasonably fashioned to elicit facts necessary to help the court dispose of the matter as law and justice may require. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

The jury's function ends with its determination whether or not the defendant is eligible for release. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976); *People v. Vialpando*, 695 P.2d 1192 (Colo. App. 1984), rev'd on other grounds, 727 P.2d 1090 (Colo. 1986).

The decision whether to impose conditions on release is solely for the court. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976); *People v. Vialpando*, 695 P.2d 1192 (Colo. App. 1984), rev'd on other grounds, 727 P.2d 1090 (Colo. 1986).

Where conditional release is appropriate, the terms and conditions must be tailor-made by the court to fit the individual case. It is the court, not the jury, which has the necessary experience and knowledge of available alternatives to perform this function. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

Burden of proof shifts to the defendant in a release hearing once any evidence is introduced that the defendant is not eligible for release. *People v. Hilton*, 902 P.2d 883 (Colo. App. 1995).

Trial court acted properly in shifting burden of proving eligibility for release to the defendant where state introduced evidence that defendant was not eligible for release because he had an abnormal mental condition. *People v. Hilton*, 902 P.2d 883 (Colo. App. 1995).

Burden of proof. Where the superintendent of the state hospital recommended the defendant's release from commitment and a release hearing was held, but a jury denied the defendant his release, and he appealed, the appellate court reversed and remanded to the trial court with directions to hold another hearing. The trial court asked the superintendent for an updated report and this time the superintendent recom-

mended that the defendant remain committed. It was perfectly proper for the trial court to order a reexamination of the defendant in order to bring the evidence up to date. As a result the superintendent rendered a contrary opinion, which the defendant contested. Under the plain language of subsection (2) the contestant defendant then had the burden of proof. *People v. District Court*, 189 Colo. 151, 538 P.2d 469 (1975).

Burden of proof on one seeking release. One who is contesting the recommendation of the custodial institution has the burden of proving by a preponderance of the evidence that he is not likely to be dangerous. *People v. Howell*, 196 Colo. 408, 586 P.2d 27 (1978).

It is not unconstitutional to require defendant to bear burden of proof that he will not be dangerous in the reasonably foreseeable future in a proceeding under this section. *People v. Logan*, 196 Colo. 573, 588 P.2d 870 (1979).

Allocation of burden of proof to defendant permissible. In a case of contested eligibility for release the statutory allocation of the burden of proof is permissible because: (1) There will have been a judicial determination of probable cause to believe that the defendant committed the acts charged against him as a crime; (2) there will have been an adjudication that at the time of the commission of the offense the defendant was legally insane; and (3) the chief officer of the institution to which the defendant has been committed will have found him ineligible for release by reason of a mental disease or defect likely to cause him to be dangerous to himself, to others, or to the community, in the reasonably foreseeable future. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

Jury's entitlement to hear all competent evidence relevant to the ultimate issue in the case may include evidence that bears on the likelihood of whether the defendant's release would pose a danger to himself, to others, or to the community in the reasonably foreseeable future. *Vialpando v. People*, 727 P.2d 1090 (Colo. 1986).

Phrase "any other evidence" in subsection (2) does not mean expert testimony only and may include lay testimony that would indicate that defendant was eligible for release. *People v. Howell*, 701 P.2d 131 (Colo. App. 1985).

A person found insane as to one time cannot be held to be sane at a subsequent time unless and until there is compliance with the statutory mandates relating to release from commitment. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

A court cannot find one sane who had previously been found insane unless he is first "re-

leased from commitment" pursuant to law. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

While a finding of insanity as to one time is binding on the courts, such a finding does not mandate a finding of insanity as to an earlier time period. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

A defendant who is found not guilty by reason of insanity and committed to the department of institutions is not entitled to a release hearing a short time later under this section until there is a showing that some evidence exists tending to demonstrate that the defendant is medically eligible for release. *People v. Armstrong*, 919 P.2d 826 (Colo. App. 1995).

Although the court must consider a defendant's motion filed more than 180 days from his commitment, and may order the parties to prepare for an evidentiary hearing on defendant's request for release, the hearing need not be held unless the medical documentation is favorable to the defendant or unless the defendant demonstrates in an offer of proof that there is favorable medical evidence to support his release. *People v. Armstrong*, 919 P.2d 826 (Colo. App. 1995).

Medical report prepared at the time of defendant's plea was not supportive of his contention he was ready to be released because the issue then was whether or not he should be committed not whether or not he should be released. *People v. Armstrong*, 919 P.2d 826 (Colo. App. 1995).

This section does not apply to a factual situation in which the defendant seeks to remain in the hospital. It merely provides a procedural framework for §§ 16-8-116 and 16-8-117, which are applicable to such a factual situation. *People v. Lowe*, 967 P.2d 177 (Colo. App. 1998).

When a defendant pleads not guilty by reason of insanity to an offense involving unlawful sexual behavior and is granted conditional release, the court must impose a sex offender registration requirement on the offender. The word "shall" in subsection (4)(a) makes the condition mandatory. The registration requirement is not predicated on a conviction, but rather on the defendant's conditional release and the requirement that registration be mandatory was enacted prior to the offender's conditional release. *People v. Durapau*, __ P.3d __ (Colo. App. 2011).

Applied in *Labor v. Gibson*, 195 Colo. 416, 578 P.2d 1059 (1978); *People v. Benis*, 641 P.2d 298 (Colo. App. 1981).

16-8-115.5. Enforcement and revocation of conditional release from commitment.

(1) The terms and conditions imposed upon a defendant's release pursuant to section 16-8-115 (3) or (4) may be enforced as are any other orders of court.

(2) (Deleted by amendment, L. 94, p. 1423, §2, effective July 1, 1994.)

(3) Whenever the superintendent of the Colorado mental health institute at Pueblo has probable cause to believe that such defendant has become ineligible to remain on conditional release as defined in section 16-8-102 (4.5), said superintendent shall notify the district attorney for the judicial district where the defendant was committed. The superintendent or the district attorney shall apply for a warrant to be directed to the sheriff or a peace officer in the jurisdiction in which the defendant resides or may be found commanding such sheriff or peace officer to take custody of the defendant. The application shall include the order conditionally releasing the defendant pursuant to section 16-8-115 (3) and supporting documentation showing that defendant has become ineligible to remain on conditional release as defined in section 16-8-102 (4.5). The committing court and the district court for the tenth judicial district are authorized to issue such a warrant pursuant to the provisions of section 16-1-106. The superintendent shall mail a copy of the application to the committing court and the district attorney in the committing jurisdiction.

(4) The sheriff or peace officer to whom the warrant is directed pursuant to subsection (3) of this section shall take all necessary legal action to take custody of the defendant. A sheriff shall deliver the defendant immediately to the Colorado mental health institute at Pueblo which shall provide care and security for the defendant. If any other peace officer takes custody of the defendant, such peace officer shall deliver the defendant to the custody of the sheriff of the jurisdiction in which the defendant was found, and such sheriff shall comply with the provisions of this subsection (4).

(5) The Colorado mental health institute at Pueblo shall examine the defendant to evaluate the defendant's ability to remain on conditional release. The examination shall be consistent with the procedure provided in section 16-8-106. If the defendant refuses to submit to and cooperate with the examination, the committing court shall revoke the conditional release. The examination shall be completed within twenty-one days after the defendant has been delivered to the institute as a result of the defendant's arrest. The institute shall mail or deliver a written report of the examination to the committing court and the district attorney in the committing jurisdiction promptly after the examination is completed. The defendant may request an examination as provided in section 16-8-108.

(6) (a) The district attorney for the judicial district where the defendant was committed may file in the committing court a petition for the revocation of the defendant's conditional release. The petition shall set forth the name of the defendant, an allegation that the defendant has become ineligible to remain on conditional release as defined in section 16-8-102 (4.5), and the substance of the evidence sustaining the allegation.

(b) If the district attorney for the committing judicial district does not file a petition for revocation, as provided in paragraph (a) of this subsection (6), within ten days after the defendant is delivered to the Colorado mental health institute at Pueblo, the defendant shall be immediately released from custody; except that, upon a showing of good cause by the district attorney, the court may grant a reasonable extension of time to file the petition for revocation.

(c) The court may dismiss revocation proceedings at any time upon receipt of a written request for dismissal from the district attorney who filed the petition for revocation.

(d) The district attorney for the committing judicial district shall ensure that the defendant receives a copy of the petition for revocation prior to any appearance by the defendant before the court.

(7) (Deleted by amendment, L. 97, p. 1554, § 9, effective July 1, 1997.)

(8) Within thirty-five days after the defendant is delivered to the Colorado mental health institute in Pueblo pursuant to subsection (4) of this section, and if the defendant is not released from custody pursuant to paragraph (b) of subsection (6) of this section, the committing court shall hold a hearing on the petition for revocation of conditional release. At such hearing, any evidence having probative value shall be admissible, but the defendant shall be permitted to offer testimony and to call, confront, and cross-examine witnesses. If the court finds by a preponderance of the evidence that the defendant has become ineligible to remain on conditional release as defined in section 16-8-102 (4.5), it shall enter an order revoking the defendant's conditional release and recommitting the defendant. At any time thereafter, the defendant may be afforded a release hearing as provided in section 16-8-115.

If the court does not find by a preponderance of the evidence that the defendant has become ineligible to remain on conditional release as defined in section 16-8-102 (4.5), it shall dismiss the petition and reinstate or modify the original order of conditional release.

Source: **L. 81:** Entire section added, p. 932, § 2, effective July 1. **L. 94:** Entire section amended, p. 1423, § 2, effective July 1. **L. 97:** Entire section amended, p. 1554, § 9, effective July 1. **L. 2002:** (1) amended, p. 500, § 3, effective July 1. **L. 2012:** (5) and (8) amended, (SB 12-175), ch. 208, p. 850, § 77, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (5) and (8) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

No finding of dangerousness is necessary to hold defendant ineligible to remain on conditional release if defendant has violated one or more conditions of release. The condition violated must bear a substantial relationship to the prevention of recurring mental illness or the management of an insanity acquittee's existing

mental illness, and to the prevention of future dangerous behavior arising from the mental illness. If defendant has violated such a condition, the court may revoke the conditional release without infringing upon due process. *People v. Garlotte*, 958 P.2d 469 (Colo. App. 1997).

16-8-116. Release by hospital authority. (1) When the chief officer of the institution in which a defendant has been committed after a finding of not guilty by reason of insanity determines that the defendant no longer requires hospitalization because he no longer suffers from a mental disease or defect which is likely to cause him to be dangerous to himself, to others, or to the community in the reasonably foreseeable future, such chief officer shall report this determination to the court that committed the defendant and the prosecuting attorney, including in the report a report of examination equivalent to a release examination. The clerk of the court shall forthwith furnish a copy of the report to counsel for the defendant.

(2) Within thirty-five days after receiving the report of the chief officer of the institution having custody of the defendant, the court shall set a hearing on the discharge of the defendant in accordance with section 16-8-115, whether or not such report is contested.

(3) Repealed.

Source: **L. 72:** R&RE, p. 231, § 1. **C.R.S. 1963:** § 39-8-116. **L. 83:** (1) and (2) amended and (3) repealed, pp. 680, 681, §§ 2, 5, effective July 1. **L. 86:** (1) amended, p. 733, § 1, effective July 1. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 851, § 78, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

This section, read in conjunction with §§ 16-8-115 and 16-8-117, entitles a defendant to a release hearing to be held by the court, or, on demand by the defendant, to a jury not to exceed six persons. This hearing is mandated for a defendant committed after a finding of not guilty by reason of insanity, whether or not eligibility for release is contested. *People v. Lowe*, 967 P.2d 177 (Colo. App. 1998).

No broad right of discovery in release proceedings. Based on this section and §§ 16-8-115 and 16-8-117 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Subsections (1) and (2) indicate legislative intent to vest the committing court with contin-

uing subject matter jurisdiction to determine questions relating to the treatment needs of a committed defendant. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

The weight and credence given to testimony of expert clinical psychologist at hearing concerning release under this section is for the jury. *People v. Lyles*, 186 Colo. 302, 526 P.2d 1332 (1974).

For purposes of determining eligibility for release, the terms "mental disease or defect", as

used in this section, and "abnormal mental condition", as used in § 16-8-120, are equivalent. *People v. Parrish*, 879 P.2d 453 (Colo. App. 1994); *Parrish v. State of Colo.*, 78 F.3d 1473 (10th Cir. 1996).

Applied in *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Bennis*, 641 P.2d 298 (Colo. App. 1981); *People v. Lopez*, 640 P.2d 275 (Colo. App. 1982).

16-8-117. Advisement on matters to be determined. When a determination is to be made as to a defendant's eligibility for release, the court shall explain to the defendant the nature and consequences of the proceeding and the rights of the defendant under this section, including his or her right to a jury trial upon the question of eligibility for release. The defendant, if he or she wishes to contest the question, may request a hearing which shall then be granted as a matter of right. At the hearing, the defendant and the prosecuting attorney are entitled to be present in person, to examine any reports of examination or other matter to be considered by the court as bearing upon the determination, to introduce evidence, summon witnesses, cross-examine witnesses for the other side or the court, and to make opening and closing statements and argument. The court may examine or cross-examine any witness called by the defendant or prosecuting attorney and may summon and examine witnesses on its own motion.

Source: L. 72: R&RE, p. 232, § 1. **C.R.S. 1963: § 39-8-117. L. 2008:** Entire section amended, p. 1858, § 13, effective July 1.

Cross references: For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 389, Session Laws of Colorado 2008.

ANNOTATION

This section, read in conjunction with §§ 16-8-115 and 16-8-116, entitles a defendant to a release hearing to be held by the court, or, on demand by the defendant, to a jury not to exceed six persons. This hearing is mandated for a defendant committed after a finding of not guilty by reason of insanity, whether or not eligibility for release is contested. *People v. Lowe*, 967 P.2d 177 (Colo. App. 1998).

No broad right of discovery in release proceedings. Based on this section and §§ 16-8-115 and 16-8-116 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Discretion of trial court as to procedures. The procedures set out in this section and § 16-

8-115 are addressed to the discretion of the trial court and permit all participants to prepare adequately for the hearing. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Upon a proper showing, the trial court may use or authorize the use of suitable discovery procedures reasonably fashioned to elicit facts necessary to help the court dispose of the matter as law and justice may require. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Defendant need not be advised on right to remain silent in competency evaluation for a Crim. P. 35(c) postconviction motion if the evaluation is not being used to establish guilt. No self-incrimination issue exists, and procedural safeguards of this section do not apply because defendant already confessed, pleaded guilty, and was sentenced. *People v. Karpierz*, 165 P.3d 753 (Colo. App. 2006).

16-8-118. Temporary removal for treatment and rehabilitation. (1) The chief officer of the institution in which a defendant has been committed under this article or article 8.5 of this title may authorize treatment and rehabilitation activities involving temporary physical removal of such person from the institution in which the defendant has been placed, if prior to such authorization the following procedures are carried out:

(a) Such chief officer shall give written notice by certified mail, with return receipt

requested, to the committing court and the district attorney that on or after thirty-five days from the date of mailing such notice he or she will authorize treatment and rehabilitation activities involving temporary physical removal of the defendant from the institution, unless written objections to such authorization are received by him or her within thirty-five days from the date of mailing such notice.

(b) The clerk of the committing court shall deliver a copy of the notice mentioned in paragraph (a) of this subsection (1) to the attorney of record for the defendant. The district attorney or the attorney of record for the defendant may file objections with the clerk of the committing court to the proposed action of the chief officer of the institution in which such defendant is held. A copy of any such objections shall be delivered by the party making such objections, either by mail or by personal service, to such chief officer prior to the expiration of thirty-five days from the mailing of the notice by the chief officer of the institution.

(c) In the event that objections are filed and served as provided in paragraphs (a) and (b) of this subsection (1), the committing court shall fix a time for a hearing upon the objections, and no removal of the defendant from the institution in which he is held shall be authorized unless and until approval thereof is given by the committing court following such hearing.

(1.5) The chief officer of the institution is authorized to allow a defendant, without court authorization as set forth in subsection (1) of this section, to leave the physical premises of the treatment or habilitation facility for needed medical treatment at a hospital, clinic, or other health care facility, so long as the defendant is accompanied by staff from the facility.

(2) (a) A court shall order any defendant who receives treatment and rehabilitation activities involving temporary physical removal of the defendant from the institution to register with the local law enforcement agency of the jurisdiction in which the defendant resides if the court finds that:

(I) The defendant was found not guilty by reason of insanity on a charge of an offense involving unlawful sexual behavior; or

(II) The defendant was found not guilty by reason of insanity on a charge of any other offense, the underlying factual basis of which includes an offense involving unlawful sexual behavior.

(a.5) A court may order any defendant who receives treatment and rehabilitation activities involving temporary physical removal of the defendant from the institution to register with the local law enforcement agency of the jurisdiction in which the defendant resides if the court finds that the chief officer of the institution in which the defendant has been committed recommends registration based on information obtained from the defendant during the course of treatment that indicates the defendant has committed an offense involving unlawful sexual behavior.

(b) Prior to temporary physical removal from the institution of any defendant who is required to register pursuant to this subsection (2), the department of human services shall obtain from the defendant the address at which the defendant plans to reside and shall notify the local law enforcement agency of the jurisdiction in which the defendant plans to reside and the Colorado bureau of investigation as provided in section 16-8-115 (4) (c).

(c) Any defendant required to register pursuant to this subsection (2) shall register as provided in section 16-8-115 (4). The local law enforcement agency shall transmit any registrations received pursuant to this subsection (2) to the Colorado bureau of investigation within three business days following receipt. The Colorado bureau of investigation shall include any registration information received pursuant to this section in the central registry established pursuant to section 16-22-110, and shall specify that the information applies to a defendant required to register as a condition of temporary physical removal from an institution. The forms completed by defendants required to register pursuant to this subsection (2) shall be confidential and shall not be open to inspection except as otherwise provided in section 16-8-115 (3) (e) for information pertaining to persons granted conditional release and except as provided for release of information to the public pursuant to sections 16-22-110 (6) and 16-22-112.

(d) (I) Any defendant required to register pursuant to this subsection (2), upon completion of a period of not less than twenty years from the date the defendant begins

receiving treatment and rehabilitation activities involving temporary physical removal of the defendant from the institution, may petition the district court for an order that discontinues the requirement for such registration and removes the defendant's name from the central registry established pursuant to section 16-22-110. The court may issue such order only if the court makes written findings of fact that the defendant has neither been convicted nor found not guilty by reason of insanity of an offense involving unlawful sexual behavior subsequent to such temporary removal and that the defendant would not pose an undue threat to the community if allowed to live in the community without registration.

(II) Upon the filing of a petition pursuant to this paragraph (d), the court shall set a date for a hearing on the petition. The defendant shall notify the local law enforcement agency with which the defendant is required to register and the prosecuting attorney for the jurisdiction in which the local law enforcement agency is located of the filing of the petition and the hearing date. Upon the victim's request, the court shall notify the victim of the filing of the petition and the hearing date. At the hearing, the court shall give opportunity to the victim to provide written or oral testimony. If the court enters an order discontinuing the defendant's duty to register, the defendant shall send a copy of the order to the local law enforcement agency and the Colorado bureau of investigation.

Source: L. 72: R&RE, p. 232, § 1. C.R.S. 1963: § 39-8-118. L. 73: p. 501, § 1. L. 86: (1)(a), (1)(b), and (1)(c) amended, p. 738, § 1, effective July 1. L. 2002: (2) added, p. 498, § 2, effective July 1; (2)(c) amended, p. 1191, § 38, effective July 1. L. 2003: (2)(d)(I) amended, p. 1990, § 29, effective May 22. L. 2005: (2)(a) amended and (2)(a.5) added, p. 996, § 2, effective June 2. L. 2008: IP(1) amended and (1.5) added, p. 1859, § 14, effective July 1. L. 2012: (1)(a) and (1)(b) amended, (SB 12-175), ch. 208, p. 851, § 79, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(a) and (1)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2008 act amending the introductory portion to subsection (1) and enacting subsection (1.5), see section 1 of chapter 389, Session Laws of Colorado 2008.

ANNOTATION

This statutory provision indicates legislative intent to vest the committing court with continuing subject matter jurisdiction to determine questions relating to the treatment needs of a committed defendant. *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

Court did not abuse its discretion in emphasizing the uncertainties involved in predicting the insanity acquittee's future behavior and the seriousness of his misconduct in the past, rather than sharing the confidence of his

doctors in his lack of dangerousness. *People v. Riggs*, 87 P.3d 109 (Colo. 2004).

Where there is no indication the hospital offered to modify the treatment plan to alleviate the court's concerns, the court merely exercised its discretion to deny the plan because it allowed for the removal of an unrestored insanity acquittee who admitted committing the most serious of crimes. *People v. Riggs*, 87 P.3d 109 (Colo. 2004).

16-8-119. Counsel and physicians for indigent defendants. In all proceedings under this article, upon motion of the defendant and proof that he is indigent and without funds to employ physicians, psychologists, or attorneys to which he is entitled under this article, the court shall appoint such physicians, psychologists, or attorneys for him at state expense.

Source: L. 72: R&RE, p. 232, § 1. C.R.S. 1963: § 39-8-119.

Cross references: For representation of indigent persons generally, see § 21-1-103.

ANNOTATION

This section gives indigent defendant right to have state pay for experts to which he is entitled under law, but not to have state pay for particular expert which he might select or desire. *Massey v. District Court*, 180 Colo. 359, 506 P.2d 128 (1973).

But court may require good cause to be shown before ordering further psychiatric examination once defendant has been examined by specialists in field of nervous and mental diseases. *Massey v. District Court*, 180 Colo. 359, 506 P.2d 128 (1973).

16-8-120. Applicable tests for release. (1) As to any person charged with any crime allegedly committed on or after June 2, 1965, the test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release, shall be: "That the defendant has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future".

(2) As to any person charged with any crime allegedly committed prior to June 2, 1965, the test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release, shall be the test provided by law at the time of the alleged crime to determine the sanity or insanity of such defendant.

(3) As to any person charged with any crime allegedly committed on or after July 1, 1983, the test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release, shall be: "That the defendant has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or others or to the community in the reasonably foreseeable future, and is capable of distinguishing right from wrong and has substantial capacity to conform his conduct to requirements of law".

(4) As to any person charged with any crime allegedly committed on or after July 1, 1983, but before July 1, 1995, resulting in commitment by reason of impaired mental condition, the test for determination of a defendant's mental condition for release from commitment, or a defendant's eligibility for conditional release, shall be: "That the defendant has no abnormal mental condition which would be likely to cause the defendant to be dangerous either to himself or herself or to others or to the community in the reasonably foreseeable future".

Source: L. 72: R&RE, p. 232, § 1. C.R.S. 1963: § 39-8-120. L. 83: (3) added, p. 680, § 3, effective July 1; (4) added, p. 676, § 9, effective July 1. L. 95: (4) amended, p. 78, § 13, effective July 1.

ANNOTATION

Law reviews. For article, "Legislative Update", see 12 Colo. Law. 1251 (1983). For article, "Not Guilty by Reason of Insanity: A Research Note", see 14 Colo. Law. 569 (1985).

Standard for determining eligibility for conditional release constitutional on its face. *People v. Howell*, 196 Colo. 408, 586 P.2d 27 (1978).

Section is not unconstitutionally vague. *Glatz v. Kort*, 650 F. Supp. 191 (D. Colo. 1984), *aff'd*, 807 F.2d 1514 (10th Cir. 1986).

The term "dangerousness" does not violate due process due to lack of specificity. *People v. Hilton*, 902 P.2d 883 (Colo. App. 1995).

Historically, the supreme court has considered mental health proceedings to be special

statutory proceedings. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

The test for release under this section is a fair and rational standard. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

And need not be same test applied to determine insanity at time of offense. A state is not required to apply the same standard to govern release of one previously found not guilty by reason of insanity as it applied in determining that he was insane at the time of offense. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

Defendant was not denied due process by failure to apply as the standard for release the same test applied to determine whether he was insane several years earlier when the alleged

crime was committed. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

This section meets the due process requirements set by the United States supreme court, because it bases continued commitment on a finding of both mental disorder and dangerousness. *People v. Parrish*, 879 P.2d 453 (Colo. App. 1994).

The term "abnormal mental condition" according to its plain meaning includes a severe antisocial personality disorder, however such a disorder is manifested. *People v. Hilton*, 902 P.2d 883 (Colo. App. 1995).

Insanity test under this section and § 16-8-101 different. The general assembly has chosen by enactment of § 16-8-101 and this section to distinguish between the test in a criminal case for a verdict of not guilty by reason of insanity and the test for release from a mental institution once it is suggested that commitment might safely be terminated. *People v. Lyles*, 186 Colo. 302, 526 P.2d 1332 (1974).

The purpose of the test for release under this section is to determine whether a person who previously claimed he was criminally insane, and therefore not accountable for actions which otherwise would be crimes, should now be set free. *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976).

Stringent standards for release related to public safety. The more stringent standards for release applicable to the criminally committed defendant reflect the increased risk to the public associated with the release decision and, as in the case of automatic commitment, they are reasonably related to the state's interest in public safety. *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

For purposes of determining eligibility for release, the terms "mental disease or defect", as used in § 16-8-116, and "abnormal mental condition", as used in this section, are equivalent. *People v. Parrish*, 879 P.2d 453 (Colo. App. 1994); *Parrish v. State of Colo.*, 78 F.3d 1473 (10th Cir. 1996).

Potential dangerousness of a defendant is an essential element in determining his eligibility for release. Evidence regarding conditions of release recommended to reduce that dangerousness is, therefore, directly related to a fact of consequence to the determination of the action. *Vialpando v. People*, 727 P.2d 1090 (Colo. 1986).

Determination of dangerousness function of jury. Although a court should take full advantage of the expert psychiatric and psychological testimony offered by parties as to the element of danger, the ultimate determination of whether one has an abnormal mental condition likely to cause him to be dangerous in the reasonably foreseeable future is for the jury. *People v. Howell*, 196 Colo. 408, 586 P.2d 27 (1978).

Probable future conduct may be considered in determination of dangerousness. The fact that the determination of dangerousness involves a prediction of the appellant's future conduct rather than mere characterization of his past conduct does not violate due process, since the required finding is the likelihood of dangerous conduct in terms of probability, not mere possibility. *People v. Howell*, 196 Colo. 408, 586 P.2d 27 (1978).

Application of statutory test within expertise of qualified expert clinical psychologist. Where witness was qualified by the court as an expert clinical psychologist, the application of the statutory test for release specified in this section is within his expertise, and, with the proper foundation and questions, he may give his professional opinion as to whether a patient suffers from "an abnormal mental condition". *People v. Lyles*, 186 Colo. 302, 526 P.2d 1332 (1974).

A defendant is not required to submit the matter of his eligibility for release to a second jury trial before he may be released. *People ex rel. Farina v. District Court*, 191 Colo. 225, 553 P.2d 394 (1976).

Where defendant was determined eligible for release from the hospital in a hearing in one county, the doctrine of collateral estoppel applied, and a hearing on the same issue scheduled in another county was precluded. *People ex rel. Farina v. District Court*, 191 Colo. 225, 553 P.2d 394 (1976).

A person confined pursuant to a not guilty by reason of insanity plea may not be released under this section so long as that person remains under the effects of a treatable abnormal mental condition rendering such person dangerous and such person continues to receive appropriate treatment for that abnormality. *People v. Jones*, 935 P.2d 28 (Colo. App. 1996).

Applied in *Campbell v. District Court*, 195 Colo. 304, 577 P.2d 1096 (1978).

16-8-121. Escape - return to institution. (1) If any defendant, confined in an institution for the care and treatment of persons with mental illness or developmental disabilities under the supervision of the executive director of the department of human services, escapes from such institution, it is the duty of the chief officer thereof to apply forthwith to the district court for the county in which the hospital or institution is located for a warrant of arrest directed to the sheriff of the county, commanding him or her forthwith to take all necessary legal action to effect the arrest of such defendant and to return him or her promptly to the institution; and the fact of an escape becomes a part of the official record of a defendant and shall be certified to the committing court as part of the record in any

proceeding to determine whether the defendant is eligible for release from commitment or eligible for conditional release.

(2) If any defendant committed to the custody of the executive director of the department of human services and placed in an institution under his supervision has escaped from an asylum or other institution for insane persons or users of drugs or narcotics of another state, the chief officer thereof is authorized to return such defendant to the institution from which he escaped. The chief officer is further authorized to effect the return at the expense of the state of Colorado and under such terms and conditions as the chief officer deems suitable.

Source: **L. 72:** R&RE, p. 232, § 1. **C.R.S. 1963:** § 39-8-121. **L. 83:** (1) amended, p. 676, § 10, effective July 1. **L. 87:** Entire section amended, p. 1170, § 8, effective April 22. **L. 94:** (1) and (2) amended, p. 2650, § 122, effective July 1. **L. 2006:** (1) amended, p. 1397, § 42, effective August 7.

Cross references: For the legislative declaration contained in the 1994 act amending subsections (1) and (2), see section 1 of chapter 345, Session Laws of Colorado 1994.

16-8-122. Commitment and observation. Upon the termination of the period of observation of a defendant committed under section 16-8-106, the authorities shall present to the court their account, evidenced by a statement thereof based upon the established per diem rate of the place of confinement. If approved by the court, the account shall be paid by the state pursuant to section 13-3-104, C.R.S.

Source: **L. 72:** R&RE, p. 233, § 1. **C.R.S. 1963:** § 39-8-122. **L. 75:** Entire section amended, p. 210, § 27, effective July 16.

PART 2

INTENSIVE TREATMENT MANAGEMENT FOR PERSONS WITH MENTAL ILLNESS

16-8-201 to 16-8-206. (Repealed)

Editor's note: (1) This part 2 was added in 2000 and was not amended prior to its repeal in 2007; except that section 1 of House Bill 07-1336 provided for the repeal of section 16-8-205 (2) and (3), effective May 10, 2007. (See L. 2007, p. 755.) For the text of this part 2 prior to 2007, consult the 2006 Colorado Revised Statutes.

(2) Section 16-8-206 provided for the repeal of this part 2, effective July 1, 2007. (See L. 2000, p. 1559.)

PART 3

COMPETENCY OF PERSONS TO BE EXECUTED

16-8-301 to 16-8-307. (Repealed)

Source: **L. 2002:** Entire part repealed, p. 1463, § 3, effective October 1.

Editor's note: This part 3 was added in 2001 and was not amended prior to its repeal in 2002. For the text of this part 3 prior to 2002, consult the 2001 Colorado Revised Statutes. The provisions of this part 3 were relocated to part 14 of article 1.3 of title 18. For the location of specific provisions, see the editor's notes following each section in said part 14 and the comparative tables located in the back of the index.

Cross references: For the legislative declaration contained in the 2002 act repealing this part 3, see section 1 of chapter 318, Session Laws of Colorado 2002.

ARTICLE 8.5

Competency to Proceed

Editor's note: This article was added with relocations in 2008 containing provisions of some sections formerly located in article 8 of this title. Former C.R.S. numbers are shown in editor's notes following those sections that were relocated.

Cross references: For the legislative declaration contained in the 2008 act enacting this article, see section 1 of chapter 389, Session Laws of Colorado 2008.

16-8.5-101.	Definitions.		of competency or incompetency.
16-8.5-102.	Mental incompetency to proceed - how and when raised.	16-8.5-112.	Venue for collateral hearings.
		16-8.5-113.	Restoration to competency.
16-8.5-103.	Determination of competency to proceed.	16-8.5-114.	Procedure after hearing concerning restoration to competency.
16-8.5-104.	Waiver of privilege.		
16-8.5-105.	Evaluations and report.	16-8.5-115.	Commitment and observation.
16-8.5-106.	Evaluation at request of defendant.	16-8.5-116.	Commitment - termination of proceedings.
16-8.5-107.	Counsel and evaluators for indigent defendants.	16-8.5-117.	Escape - return to institution.
16-8.5-108.	Evidence.	16-8.5-118.	Temporary removal for treatment and rehabilitation.
16-8.5-109.	Advisement on matters to be determined.	16-8.5-119.	Competency evaluation advisory board - creation - membership - duties - rules - repeal. (Repealed)
16-8.5-110.	Testimony of lay witnesses.		
16-8.5-111.	Procedure after determination		

16-8.5-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Competency evaluation" includes both court-ordered competency evaluations and second evaluations.

(2) "Competency evaluator" means a licensed physician who is a psychiatrist or a licensed psychologist, each of whom is trained in forensic competency assessments, or a psychiatrist who is in forensic training and practicing under the supervision of a psychiatrist with expertise in forensic psychiatry, or a psychologist who is in forensic training and is practicing under the supervision of a licensed psychologist with expertise in forensic psychology.

(3) "Competency hearing" means a hearing to determine whether a defendant is competent to proceed.

(4) "Competent to proceed" means that the defendant does not have a mental disability or developmental disability that prevents the defendant from having sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding in order to assist in the defense or prevents the defendant from having a rational and factual understanding of the criminal proceedings.

(5) "Court-ordered competency evaluation" means a court-ordered examination of a defendant either before, during, or after trial, directed to developing information relevant to a determination of the defendant's competency to proceed at a particular stage of the criminal proceeding, that is performed by a competency evaluator and includes evaluations concerning restoration to competency.

(6) "Court-ordered report" means a report of an evaluation, conducted by or under the direction of the department, that is the statutory obligation of the department to prepare when requested to do so by the court.

(7) "Criminal proceedings" means trial, sentencing, execution, and any pretrial matter that is not susceptible of fair determination without the personal participation of the defendant.

(8) "Department" means the department of human services.

(9) "Developmental disability" means a disability that has manifested before the person reaches twenty-two years of age, that constitutes a substantial disability to the affected individual, and is attributable to mental retardation or other neurological conditions

when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation. Unless otherwise specifically stated, the federal definition of “developmental disability”, 42 U.S.C. sec. 15001 et seq., shall not apply.

(10) “Executive director” means the executive director of the department of human services.

(11) “Incompetent to proceed” means that, as a result of a mental disability or developmental disability, the defendant does not have sufficient present ability to consult with the defendant’s lawyer with a reasonable degree of rational understanding in order to assist in the defense, or that, as a result of a mental disability or developmental disability, the defendant does not have a rational and factual understanding of the criminal proceedings.

(12) “Mental disability” means a substantial disorder of thought, mood, perception, or cognitive ability that results in marked functional disability, significantly interfering with adaptive behavior. “Mental disability” does not include acute intoxication from alcohol or other substances, or any condition manifested only by antisocial behavior, or any substance abuse impairment resulting from recent use or withdrawal. However, substance abuse that results in a long-term, substantial disorder of thought, mood, or cognitive ability may constitute a mental disability.

(13) “Restoration hearing” means a hearing to determine whether a defendant who has previously been determined to be incompetent to proceed has become competent to proceed.

(14) “Second evaluation” means an evaluation requested by the court, the district attorney, or the defendant that is performed by a competency evaluator and that is not performed by or under the direction of, or paid for by, the department.

Source: L. 2008: Entire article added, p. 1838, § 2, effective July 1.

16-8.5-102. Mental incompetency to proceed - how and when raised. (1) While a defendant is incompetent to proceed, the defendant shall not be tried or sentenced, nor shall the court consider or decide pretrial matters that are not susceptible of fair determination without the personal participation of the defendant. However, a determination that a defendant is incompetent to proceed shall not preclude the furtherance of the proceedings by the court to consider and decide matters, including a preliminary hearing and motions, that are susceptible of fair determination prior to trial and without the personal participation of the defendant. Those proceedings may be later reopened if, in the discretion of the court, substantial new evidence is discovered after and as a result of the restoration to competency of the defendant.

(2) The question of a defendant’s competency to proceed shall be raised in the following manner:

(a) If the judge has reason to believe that the defendant is incompetent to proceed, it is the judge’s duty to suspend the proceeding and determine the competency or incompetency of the defendant pursuant to section 16-8.5-103.

(b) If either the defense or the prosecution has reason to believe that the defendant is incompetent to proceed, either party may file a motion in advance of the commencement of the particular proceeding. A motion to determine competency shall be in writing and contain a certificate of counsel stating that the motion is based on a good faith doubt that the defendant is competent to proceed. The motion shall set forth the specific facts that have formed the basis for the motion. The motion shall be sealed by the court. If the motion is made by the prosecution, the prosecution shall provide to the defense a copy of the motion. If the motion is made by the defense, the defense shall provide to the prosecution notice of the filing of the motion at the time of filing, and if the defense requests a hearing, the defense shall provide the motion to the prosecution at the time the hearing is requested. The motion may be filed after the commencement of the proceeding if, for good cause shown, the mental disability or developmental disability of the defendant was not known or apparent before the commencement of the proceeding.

(c) By the affidavit of any chief officer of an institution having custody of a defendant awaiting execution.

(3) Notwithstanding any provision of this article to the contrary, the question of whether a convicted person is mentally incompetent to be executed shall be raised and determined as provided in part 14 of article 1.3 of title 18, C.R.S.

Source: L. 2008: Entire article added, p. 1839, § 2, effective July 1.

Editor's note: This section is similar to former § 16-8-110 as it existed prior to 2008.

ANNOTATION

Law reviews. For note, "Trial Procedure in Colorado Under the 1951 Amendment Relating to Insanity in Criminal Cases", see 24 Rocky Mt. L. Rev. 223 (1952). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For article, "Insanity and the Law", see 39 Dicta 325 (1962). For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963).

Annotator's note. Since § 16-8.5-102 is similar to repealed § 16-8-110, relevant cases construing that provision have been included in the annotations to this section.

Common-law rule. It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense, and he cannot be adjudged to punishment or executed while so disordered as to be incapable of stating any reasons that may exist why judgment should not be pronounced or executed. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

The heart of the common-law doctrine has been that a suggestion of incompetency after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence. *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959).

This section is constitutional. *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959).

This section is not unconstitutional as depriving a convicted person of due process of law, proceedings to determine competency after conviction being purely a matter of legislative regulation and subject to such restrictions as the general assembly may impose. *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959).

This section meets due process requirements of the fourteenth amendment. The section involves weighty governmental interest, and because of the significant consequences to due process that an error in making the determination of mental competency would have, the lower "reason to believe" standard is an appropriate threshold for commencing the determination of mental competency. *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

No fourteenth amendment equal protection clause violation merely because of the lower "reason to believe" threshold for criminal commitment statute versus a probable cause standard of civil commitment statutes. *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

This section does not implicate the fourth amendment. *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

Purpose of this section is to ensure against a violation of due process that would arise if a defendant who is not mentally competent were required to stand trial or participate in other critical criminal procedures. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970); *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

Subsection (1) declared unconstitutional as violation of due process to the extent that it allows an accused to be tried on the issue of insanity notwithstanding a judicial finding that the accused is incompetent to proceed. See *Coolbroth v. District Court*, 766 P.2d 670 (Colo. 1988).

Trial court fulfilled its duty to inquire about defendant's mental health and did not abuse its discretion in allowing defendant to waive his right to counsel and proceed with trial without a mental health evaluation to determine his competency to do so. The fact that defendant has had mental health counseling or treatment in the past, without more, is not sufficient to trigger an inquiry into a defendant's competency to stand trial. *People v. Woods*, 931 P.2d 530 (Colo. App. 1996).

Court needs not await a specific request from defense. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

Trial court acted properly in ordering competency evaluation based on a pretrial motion that raised doubts as to defendant's competency, then allowing testimony by evaluating doctor to rebut defendant's claim of lack of mental capacity. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

An accused may not plead guilty, be tried, or sentenced while he is incompetent. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

A proceeding against an insane person in a criminal matter is a violation of his rights under the due process clause of the fourteenth amendment. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

An incompetent person may not be tried for a crime, nor may he be sentenced where his incompetency occurs and continues after the return of a verdict, nor may he be executed where incompetency occurs and continues after the sentence of death has been imposed. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

This section provides that a person sentenced to death who becomes and remains incompetent after judgment but, of necessity, before the sentence is carried out, shall not be executed until his recovery. *Garrison v. People*, 151 Colo. 388, 378 P.2d 401 (1963).

This statute requires that the person charged shall not be tried while his incompetency continues. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970).

Because of the nature of a preliminary hearing, the right to counsel at a preliminary hearing reaches constitutional proportions, but the right to counsel is a meaningless right unless the accused has the capacity to confer with counsel regarding the accusation, the nature of the proceedings, and the testimony of the witnesses. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970).

The prohibition against prosecuting an incompetent defendant attaches at the commencement of formal criminal proceedings and continues throughout the execution and satisfaction of the sentence. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Although court is permitted to use the same competency standard to determine whether defendant is competent to stand trial and competent to proceed pro se, it is not required to do so under *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). *People v. Wilson*, __ P.3d __ (Colo. App. 2011).

Trial of incompetent violates due process. Subjecting an accused to trial when he or she is incompetent violates due process of law. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

Insane persons are not necessarily incompetent to stand trial because of the fact of their insanity. *People v. Lopez*, 640 P.2d 275 (Colo. App. 1982).

Amnesia, in and of itself, does not constitute incompetency. The trial court should engage in a fact-specific inquiry that encompasses a review of the totality of the circumstances of a particular case. Although the review may include considerations as to a defendant's memory loss, no particular set of factors is determinative.

If a defendant's amnesia renders him or her unable to understand the proceedings against him or her or to assist in his or her own defense, then the defendant must be found incompetent. *People v. Palmer*, 31 P.3d 863 (Colo. 2001).

An incompetent cannot waive his constitutional rights and a trial judge must carefully safeguard such rights should the judge have a reasonable doubt as to a criminal defendant's competency. *People v. Lopez*, 640 P.2d 275 (Colo. App. 1982).

Standards for assessing competency. An accused's competency must be assessed with specific reference to the nature of the proceeding with which he is confronted and the appropriate level of understanding necessary for meaningful cooperation with his attorney. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

The determination of competency of accused to stand trial must be made before issues raised by insanity plea are tried. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

Insanity at the time of the commission of the offense is not a mitigating factor that relieves the accused of punishment, but is a complete defense to the criminal charge, and therefore the determination of sanity at the time of the offense requires a full hearing, and the accused must be able to understand and assist his counsel in his defense. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

Determination prior to preliminary hearing. The right to counsel is a meaningless right unless the defendant has the capacity to confer with his attorney regarding the pending charges and the testimony presented at the preliminary hearing, thus, a defendant is entitled to have a determination made as to his competency prior to a preliminary hearing. *People v. Fletcher*, 37 Colo. App. 173, 546 P.2d 980 (1975), rev'd on other grounds, 193 Colo. 314, 566 P.2d 345 (1977).

But denial may not require reversal. Unless a defendant demonstrates that he was prejudiced by his inability to obtain a competency hearing prior to the preliminary hearing, the denial of such a hearing does not require reversal of a subsequent conviction. *People v. Fletcher*, 37 Colo. App. 173, 546 P.2d 980 (1975), rev'd on other grounds, 193 Colo. 314, 566 P.2d 345 (1977).

Trial court's failure to make preliminary finding of competency on the record is not necessarily reversible error. *People v. Green*, 658 P.2d 281 (Colo. App. 1982).

Defendant must comply with section. An attempt to aver incompetency subsequent to an alleged offense is ineffectual when not in compliance with this section. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

This section spells out the procedures to be followed in a proceeding to determine if a defendant is incompetent after the alleged offense. *Garrison v. People*, 151 Colo. 388, 378 P.2d 401 (1963).

Showing necessary to "raise the issue" of a defendant's competency after trial has commenced. Where trial court had an opportunity to observe defendant during first day of trial and noted that defendant understood her competency was being addressed and, without prompting, stated she wanted to continue the trial, defense counsel's assertion of defendant's condition of methadone withdrawal did not create a reason to presume mental incompetency. *People v. Morino*, 743 P.2d 49 (Colo. App. 1987).

Mere statement at time of sentencing that defendant's behavior at the time of the offense was "bizarre" was insufficient to trigger the requirement that the court suspend the proceedings and make a competency hearing. *People v. Kilgore*, 992 P.2d 661 (Colo. App. 1999).

Court correctly ruled that the issue of competency had not been properly raised where defense counsel refused to give specific reasons to support his opinion that the defendant was incompetent and refused the court's offer of an in camera hearing on the issue, the court had ample opportunity to observe the defendant, and the defendant ably assisted in his case. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

And alleged condition arose after trial where issue was found against him. Where, after conviction, defendant asserts that he is incompetent and asks that sentence be postponed, his application should show that such incompetency arose subsequent to conviction, especially where the question as to defendant's insanity was at issue and found against him in the main trial. *People v. Eldred*, 103 Colo. 334, 86 P.2d 248 (1938).

But court may initiate determination on its own motion. A trial court may on its own motion, where it entertains a reasonable doubt of a defendant's competence, initiate a determination thereof, notwithstanding a failure to plead such incompetency in accordance with this section. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958).

If the court, at any stage of the proceedings, has a reasonable doubt whether the defendant is so mentally disordered, it should suspend the criminal proceedings and hold an inquiry on the matter. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

And it is duty bound to do so when competency doubtful. When the trial court has a doubt as to the mental competence of a defendant, then the court is duty bound upon its own motion to hold a competency hearing on the

matter. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

It is not only the duty of defense counsel and the prosecution, but also the obligation of the court, to raise the issue of the competency of an accused to stand trial when facts dictate that such a hearing should be held. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

A trial court has an independent obligation to raise the issue of a defendant's competency at any stage of a criminal proceeding if the court has reason to believe that he or she is incompetent. *People v. Hendricks*, 972 P.2d 1041 (Colo. App. 1998), rev'd on other grounds, 10 P.3d 1231 (Colo. 2000).

Court and counsel to raise issue whenever competency in doubt. When a doubt is entertained about the mental competence of an accused, both the court and counsel are duty bound to raise the issue and seek a reliable determination of it before further proceedings are held. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

And court's refusal to inquire possible abuse of discretion. Where defense attorney's representation to the court raised a substantial issue on the defendant's competency to stand trial, the trial court's refusal to make any inquiry into that issue or to receive any evidence in that regard constituted an abuse of discretion. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Failure to hold hearing on claimed incompetence violates due process. Due process is violated when a trial court does not afford an accused an adequate hearing on his claimed incompetency to stand trial. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

Even where competence issue raised by court. That the issue of defendant's competency is raised by the trial court, and not by the defendant's counsel, or by his advisory counsel, does not result in a weakening of the imperative that he be afforded an adequate hearing on his competency. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

And retrospective determination of competency does not cure the failure. The trial court's noncompliance with those statutory procedures set forth in this section and § 16-8-111, which provide those safeguards necessary to insure against the prosecution of an incompetent defendant, constitutes error so prejudicial as to be characterized as one of constitutional deprivation. Retrospective determination of the defendant's mental competency during his trial will not cure the error. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

When duty to suspend proceeding arises. The duty in subsection (2)(a) to suspend the proceedings arises even if no more than a "doubt" is entertained as to a defendant's com-

petency. *People v. Scherrer*, 670 P.2d 18 (Colo. App. 1983).

Determination may be initiated at any time. Where no proper allegation of incompetency relating to a time subsequent to the alleged offense is entered, and nothing in the record prompts the court to move in the matter, no prejudice results to a defendant, since such proceedings may be initiated at any time. *Leick v. People*, 136 Colo. 535, 322 P.2d 674 (1958).

Question of competency may be raised at any time, but, if possible, it should be brought to the court's attention prior to the commencement of a particular proceeding. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Prohibition proper to prevent criminal proceedings in violation of section. When a trial court and county court, before preliminary hearing, plea or arraignment, lose authority under this section to proceed further with criminal proceedings due to incompetency of defendant, for a district court to certify the cause back to the county court for further criminal proceedings is to act in excess of its jurisdiction, and the remedy of prohibition is appropriate to prevent further proceedings. *Gomez v. District Court*, 179 Colo. 299, 500 P.2d 134 (1972).

Prohibition against prosecuting incompetent defendant is not restricted to trial and

post-trial stages of the case. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Competency hearing was unnecessary. Where the results of commitment indicated that defendant was sane, though quite emotionally disturbed, that his intelligence level was above average, and that his thinking processes were clear and logical, and defendant's testimony at the rule 35(b), Crim. P. hearing and his letters to his attorney and to his relatives pending disposition of the case in the trial court show that defendant's thoughts and expression of the same were above average in quality and content for a person of his years, there is no reason for the trial court to have had any doubt as to defendant's competency and to have held a competency hearing on its own motion. *Bresnahan v. People*, 175 Colo. 286, 487 P.2d 551 (1971).

A defendant's suicide attempt during trial alone is not necessarily sufficient to establish a "bona fide doubt" as to defendant's competency. *People v. Price*, 240 P.3d 557 (Colo. App. 2010).

Applied in *Massey v. District Court*, 180 Colo. 359, 506 P.2d 128 (1973); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981).

16-8.5-103. Determination of competency to proceed. (1) Whenever the question of a defendant's competency to proceed is raised, by either party or on the court's own motion, the court may make a preliminary finding of competency or incompetency, which shall be a final determination unless a party to the case objects within fourteen days after the court's preliminary finding.

(2) If either party objects to the court's preliminary finding, or if the court determines that it has insufficient information to make a preliminary finding, the court shall order that the defendant be evaluated for competency by the department and that the department prepare a court-ordered report.

(3) Within fourteen days after receipt of the court-ordered report, either party may request a hearing or a second evaluation.

(4) If a party requests a second evaluation, any pending requests for a hearing shall be continued until the receipt of the second evaluation report. The report of the expert conducting the second evaluation shall be completed and filed with the court within sixty-three days after the court order allowing the second evaluation, unless the time period is extended by the court for good cause. If the second evaluation is requested by the court, it shall be paid for by the court.

(5) If neither party requests a hearing or a second evaluation within the applicable time frame, the court shall enter a final determination, based on the information then available to the court, whether the defendant is or is not competent to proceed.

(6) If a party makes a timely request for a hearing, the hearing shall be held within thirty-five days after the request for a hearing or, if applicable, within thirty-five days after the filing of the second evaluation report, unless the time is extended by the court after a finding of good cause.

(7) At any hearing held pursuant to this section, the party asserting the incompetency of the defendant shall have the burden of submitting evidence and the burden of proof by a preponderance of the evidence.

(8) If the question of the defendant's incompetency to proceed is raised after a jury is impealed to try the issues raised by a plea of not guilty and the court determines that the defendant is incompetent to proceed or orders the defendant committed for a court-ordered

competency evaluation, the court may declare a mistrial. Declaration of a mistrial under these circumstances does not constitute jeopardy, nor does it prohibit the trial, sentencing, or execution of the defendant for the same offense after he or she has been found restored to competency.

Source: **L. 2008:** Entire article added, p. 1840, § 2, effective July 1. **L. 2012:** (1), (3), (4), and (6) amended, (SB 12-175), ch. 208, p. 852, § 80, effective July 1.

Editor's note: (1) This section is similar to former § 16-8-111 as it existed prior to 2008.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1), (3), (4), and (6) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the constitutional provision on double jeopardy, see § 18 of article II of the state constitution.

ANNOTATION

Annotator's note. Since § 16-8.5-103 is similar to repealed § 16-8-111, relevant cases construing that provision have been included in the annotations to this section.

This section meets due process requirements of the fourteenth amendment. The section involves weighty governmental interest, and because of the significant consequences to due process that an error in making the determination of mental competency would have, the lower "reason to believe" standard is an appropriate threshold for commencing the determination of mental competency. *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

No fourteenth amendment equal protection clause violation merely because of the lower "reason to believe" threshold for criminal commitment statute versus a probable cause standard of civil commitment statutes. *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

This section does not implicate the fourth amendment. *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

Where a defendant's mental disease or defect renders him incompetent to decide whether or not to exercise his right to testify in his own defense, he is incompetent to stand trial. *People v. Mondragon*, 217 P.3d 936 (Colo. App. 2009).

Purpose of this section is to ensure against a violation of due process that would arise if a defendant who is not mentally competent were required to stand trial or participate in other critical criminal procedures. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970); *Cappelli v. Demlow*, 935 P.2d 57 (Colo. App. 1996).

Court needs not await a specific request from defense. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

Trial court acted properly in ordering competency evaluation based on a pretrial motion that raised doubts as to defendant's competency, then allowing testimony by evaluating doctor to

rebut defendant's claim of lack of mental capacity. *People v. Thomas*, 962 P.2d 263 (Colo. App. 1997).

Showing necessary to "raise the issue" of a defendant's competency after trial has commenced. Where trial court had an opportunity to observe defendant during first day of trial and noted that defendant understood her competency was being addressed and, without prompting, stated she wanted to continue the trial, defense counsel's assertion of defendant's condition of methadone withdrawal did not create a reason to presume mental incompetency. *People v. Morino*, 743 P.2d 49 (Colo. App. 1987).

The trial court's statement that defendant's motion for a competency hearing was a "ploy" to delay the trial was adequately supported by what the judge learned in his judicial capacity during argument on pretrial motions concerning the defendant's competency, and such a statement does not constitute the kind of prejudice required for recusal. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), cert denied, 846 P.2d 189 (Colo. 1993).

Court correctly ruled that the issue of competency had not been properly raised where defense counsel refused to give specific reasons to support his opinion that the defendant was incompetent and refused the court's offer of an in camera hearing on the issue, the court had ample opportunity to observe the defendant, and the defendant ably assisted in his case. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), cert denied, 846 P.2d 189 (Colo. 1993).

Determination of issue of insanity after sentence does not require safeguards of a judicial proceeding, since it relates to the consequences of the offense and not to the guilt of a defendant. *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959).

Trial of incompetent violates due process. Subjecting an accused to trial when he or she is incompetent violates due process of law. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

Trial of an incompetent defendant constitutes structural error and requires reversal. *People v. Mondragon*, 217 P.3d 936 (Colo. App. 2009).

Failure to hold hearing on claimed incompetence violates due process. Due process is violated when a trial court does not afford an accused an adequate hearing on his or her claimed incompetency to stand trial. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

But, when a court can conduct a meaningful hearing after the trial to evaluate the defendant's competency at the time of trial, such a competency hearing will not violate due process principles. Where the hearing began 15 months after the defendant's conviction, a psychiatrist performed a competency evaluation of the defendant 2 months after trial and issued a report opining that defendant was competent to proceed with sentencing, and there were several available witnesses who interacted with defendant before and during trial, there was sufficient evidence to permit an accurate assessment of defendant's mental condition at the time of trial and, thus, to render the hearing meaningful. Accordingly, defendant's due process rights were not violated. *People v. Corichi*, 18 P.3d 807 (Colo. App. 2000).

Even where competence issue raised by court. That the issue of defendant's competency is raised by the trial court, and not by the defendant's counsel, or by his advisory counsel, does not result in a weakening of the imperative that he be afforded an adequate hearing on his competency. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

Prohibition against prosecuting incompetent defendant is not restricted to trial and post-trial stages of the case. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

Court to make inquiry where substantial issue as to competency. Where defense attorney's representation to the court raised a substantial issue as to the defendant's competency to stand trial, trial court's refusal to make any inquiry into that issue or to receive any evidence in that regard constituted an abuse of discretion. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

It relates to a reprieve. Postponement of execution because of incompetency bears a close affinity not to trial for a crime, but rather to reprieves of sentences in general. *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959).

The ultimate issue is the competency, or lack of it, of a particular individual as of a date certain. *Garrison v. People*, 151 Colo. 388, 378 P.2d 401 (1963).

The burden is upon a defendant to establish his incompetency. *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959).

The burden is upon the petitioner alleging incompetency to produce sufficient evidence to

overcome the presumption of validity and regularity surrounding entry of his plea of guilty. *Hampton v. Tinsley*, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

The burden is on defendant to prove incompetency by a preponderance of the evidence under pretrial statutory procedure, when a defendant raises the issue of incompetency after the alleged commission of the crime. *Gomez v. District Court*, 179 Colo. 299, 500 P.2d 134 (1972).

Standards for assessing accused's incompetency. An accused's competency must be assessed with specific reference to the nature of the proceeding with which he is confronted and the appropriate level of understanding necessary for meaningful cooperation with his attorney. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

And must allow defendant time to request hearing. Trial court exceeded its jurisdiction when it made a preliminary finding of competency and simultaneously ordered the petitioner's attorney to present his motions on capital punishment issues without affording the petitioner the opportunity, within a time designated by the court, to request a statutory hearing on a final determination of competency in accordance with this section. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980).

A final determination of competency cannot be made by a trial court without first affording a defendant the opportunity to challenge its preliminary finding. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983).

By failing to immediately notify the defendant of preliminary finding of competency, and failing to set a time within which the defendant can request a hearing to challenge its preliminary finding, the trial court exceeded its jurisdiction and abused its discretion. *People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983); *People v. Arkadie*, 692 P.2d 1145 (Colo. App. 1984).

Evidence of defendant rebuts presumption of sanity. When evidence of insanity after commission of a crime is produced by defendant, the presumption that he was sane disappears, so that, if the people are to prevail, they must produce evidence of sanity to rebut that of insanity produced by the defendant. *Gomez v. District Court*, 179 Colo. 299, 500 P.2d 134 (1972).

And it was error not to find incompetency. Where no evidence had been introduced by prosecution to dispute that offered by petitioner that he was incompetent and incapable of conducting his defense in a rational and reasonable manner, trial court erred in not directing determination of incompetency. *Gomez v. District Court*, 179 Colo. 299, 500 P.2d 134 (1972).

Defendant's competence is an issue of fact and the trial court's findings will not be disturbed if adequately supported by evidence in the record. There was sufficient evidence to support the trial court's finding of competence where, although defendant had probably experienced a brief delusional episode during the trial, defendant had failed to prove by a preponderance of the evidence that she suffered from a mental disease or defect that rendered her incapable of understanding the nature and course of the proceedings or made her incapable of participating or assisting in her defense. *People v. Corichi*, 18 P.3d 807 (Colo. App. 2000).

Considerable latitude is allowed by the courts in admitting evidence which has a tendency to throw light on the mental condition of the defendant after the imposition of sentence provided the proof tends to prove or disprove the issue involved. *Garrison v. People*, 151 Colo. 388, 378 P.2d 401 (1963).

If evidence of a general type is otherwise competent, relevant and material, it is not inadmissible solely because it occurred prior to the time judgment and sentence entered in the criminal proceeding, or because it relates to his mental condition prior to such time. *Garrison v. People*, 151 Colo. 388, 378 P.2d 401 (1963).

Every act of the defendant's life relevant to the issue is admissible in evidence when the defense of insanity, general or partial, is set up. *Garrison v. People*, 151 Colo. 388, 378 P.2d 401 (1963).

Evidence of prior mental illness relevant. In a sanity trial evidence of a prior mental illness or abnormal conduct is relevant to the ultimate issue in the case, as such evidence renders the claimed inference of insanity more probable than it would be without the evidence. *People v. Mack*, 638 P.2d 257 (Colo. 1981).

Second competency determination not required. Although placing an accused on trial while he is incompetent violates due process of law, neither due process nor the defendant's right to effective assistance of counsel requires the court to grant a request for a second competency determination after the accused already has been granted an adequate hearing on his

claimed incompetency. *People v. Mack*, 638 P.2d 257 (Colo. 1981).

Defendant failed to establish a due process violation or an abuse of discretion by the trial court in not ordering a second competency examination. *People v. Stephenson*, 165 P.3d 860 (Colo. App. 2007).

A trial court has the discretion to order a competency examination, and the statute does not restrict this discretion to formal examinations. The trial court did not abuse its discretion by relying on a medical examination in lieu of a formal competency examination. *Bloom v. People*, 185 P.3d 797 (Colo. 2008) (decided under repealed § 16-8-111).

Error to exclude cross-examination of medical witness. In a post-conviction proceeding to determine the present mental condition of a defendant, refusal to permit cross-examination of a medical witness, who had testified that defendant was presently insane, as to his previous service on the commission which had determined defendant to be a mental incompetent, is erroneous. *Garrison v. People*, 151 Colo. 388, 378 P.2d 401 (1963).

Judicial review. Certain trial procedure safeguards are not applicable to the process of sentencing. This principle applies more forcefully to an effort to transplant every trial safeguard to a determination of incompetency after conviction. To require judicial review every time a convicted defendant suggests incompetency would make the possibility of carrying out a sentence depend upon fecundity in making suggestion after suggestion of incompetency. *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959).

Trial court applied the incorrect legal standards in finding defendant competent to stand trial and, thus, abused its discretion. Trial court improperly based competency determination solely on defendant's factual understanding of proceedings and cognitive ability with no consideration to whether defendant's perceptions and understandings were grounded in reality. *People v. Mondragon*, 217 P.3d 936 (Colo. App. 2009).

Applied in *Massey v. District Court*, 180 Colo. 359, 506 P.2d 128 (1973); *People v. Scherrer*, 670 P.2d 18 (Colo. App. 1983).

16-8.5-104. Waiver of privilege. (1) When a defendant raises the issue of competency to proceed, or when the court determines that the defendant is incompetent to proceed and orders that the defendant undergo restoration treatment, any claim by the defendant to confidentiality or privilege is deemed waived, and the district attorney, the defense attorney, and the court are granted access, without written consent of the defendant or further order of the court, to:

- (a) Reports of competency evaluations, including second evaluations;
 - (b) Information and documents relating to the competency evaluation that are created by, obtained by, reviewed by, or relied on by an evaluator performing a court-ordered evaluation; and
 - (c) The evaluator, for the purpose of discussing the competency evaluation.
- (2) Upon a request by either party or the court for the information described in

subsection (1) of this section, the evaluator or treatment provider shall provide the information for use in preparing for a hearing on competency or restoration and for use during such a hearing.

(3) An evaluator or a facility providing competency evaluation or restoration treatment services pursuant to a court order issued pursuant to this article is authorized to provide, and shall provide, procedural information to the court, district attorney, or defense counsel, concerning the defendant's location, the defendant's hospital or facility admission status, the status of evaluation procedures, and other procedural information relevant to the case.

(4) Nothing in this section limits the court's ability to order that information in addition to that set forth in subsections (1) and (3) of this section be provided to the evaluator, or to either party to the case, nor does it limit the information that is available after the written consent of the defendant.

(5) The court shall order both the prosecutor and the defendant or the defendant's counsel to exchange the names, addresses, reports, and statements of each physician or psychologist who has examined or treated the defendant for competency.

(6) Statements made by the defendant in the course of any evaluation shall be protected as provided in section 16-8.5-108.

Source: L. 2008: Entire article added, p. 1841, § 2, effective July 1.

16-8.5-105. Evaluations and report. (1) (a) The location for competency evaluations shall be determined by the court. The defendant may be released on bond, if otherwise eligible for bond, or referred or committed for a court-ordered competency evaluation to the department, or the court may direct that the evaluation be done at the place where the defendant is residing or is in custody. In determining the place where the evaluation is to be conducted, the court shall give priority to the place where the defendant is in custody, unless the nature and circumstances of the evaluation require designation of a different facility.

(b) Nothing in this section shall restrict the right of the defendant to procure an evaluation as provided in section 16-8.5-107.

(2) The defendant shall cooperate with the competency evaluator and with other personnel providing ancillary services, such as testing and radiological services. Statements made by the defendant in the course of the evaluation shall be protected as provided in section 16-8.5-108. If the defendant does not cooperate with the competency evaluator and other personnel providing ancillary services and the lack of cooperation is not the result of a developmental disability or a mental disability, the fact of the defendant's noncooperation with the competency evaluator and other personnel providing ancillary services may be admissible in the defendant's competency or restoration hearing to rebut any evidence introduced by the defendant with regard to the defendant's competency.

(3) To aid in forming an opinion as to the competency of the defendant, it is permissible in the course of an evaluation under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with the competency evaluator or personnel providing ancillary services, an opinion of the competency of the defendant may be rendered by the competency evaluator based upon confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and the opinion may be admissible into evidence at the defendant's competency or restoration hearing.

(4) A written report of the evaluation shall be prepared in triplicate and delivered to the clerk of the court that ordered it. The clerk shall provide a copy of the report both to the prosecuting attorney and the counsel for the defendant.

(5) The report of evaluation shall include but need not be limited to:

(a) The name of each physician, psychologist, or other expert who examined the defendant; and

(b) A description of the nature, content, extent, and results of the evaluation and any tests conducted; and

- (c) A diagnosis and prognosis of the defendant's mental disability or developmental disability; and
- (d) An opinion as to whether the defendant suffers from a mental disability or developmental disability; and
- (e) An opinion as to whether the defendant is competent to proceed.

Source: L. 2008: Entire article added, p. 1842, § 2, effective July 1.

16-8.5-106. Evaluation at request of defendant. (1) If a defendant wishes to be examined by a competency evaluator of his or her own choice in connection with any proceeding under this article, the court, upon timely motion, shall order that the competency evaluator chosen by the defendant be given reasonable opportunity to conduct the second evaluation, in accordance with sections 16-8.5-103 and 16-8.5-111.

(2) A copy of the second evaluation shall be furnished to the prosecution in a reasonable amount of time in advance of the competency or restoration hearing.

Source: L. 2008: Entire article added, p. 1843, § 2, effective July 1.

16-8.5-107. Counsel and evaluators for indigent defendants. In all proceedings under this article, the court shall appoint competency evaluators or attorneys for a defendant at state expense upon motion of the defendant with proof that he or she is indigent and without funds to employ competency evaluators or attorneys to which he or she is entitled under this article. If a second evaluation is requested by an indigent defendant, it shall be paid for by the court.

Source: L. 2008: Entire article added, p. 1843, § 2, effective July 1.

16-8.5-108. Evidence. (1) (a) Except as otherwise provided in this subsection (1), evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a competency evaluation or involuntary medication proceeding is not admissible against the defendant on the issues raised by a plea of not guilty, or, if the offense occurred before July 1, 1995, a plea of not guilty by reason of impaired mental condition. Such evidence may be admissible at trial to rebut evidence introduced by the defendant of the defendant's mental condition to show incapacity of the defendant to form a culpable mental state; and, in such case, the evidence may only be considered by the trier of fact as bearing upon the question of capacity to form a culpable mental state, and the jury shall be so instructed at the request of either party.

(b) Evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a competency evaluation or involuntary medication proceeding is admissible at any sentencing hearing held pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., only to prove the existence or absence of any mitigating factor.

(c) If the defendant testifies on his or her own behalf upon the trial of the issues raised by the plea of not guilty or, for offenses that occurred before July 1, 1995, a plea of not guilty by reason of impaired mental condition, or at a sentencing hearing held pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony.

(2) In any hearing concerning competency to proceed or restoration to competency, competency evaluators and other experts may testify as to their conclusions reached from their examination of hospital records, laboratory reports, X rays, electroencephalograms, and psychological test results if the material that they examined in reaching their conclusions is produced at the time of the hearing. Nothing in this section prevents the parties from obtaining the information authorized by section 16-8.5-104 prior to the hearing.

Source: L. 2008: Entire article added, p. 1843, § 2, effective July 1. **L. 2009:** (1)(a) and (1)(b) amended, (HB 09-1253), ch. 128, p. 550, § 1, effective August 5.

16-8.5-109. Advisement on matters to be determined. (1) When a determination is to be made as to a defendant's competency to proceed, the court shall explain to the defendant the nature and consequences of the proceeding and the rights of the defendant under this section. The defendant, if he or she wishes to contest the question, may request a competency hearing that shall then be granted as a matter of right.

(2) At a competency hearing, the defendant and the prosecuting attorney are entitled:

- (a) To be present in person;
- (b) To examine any reports of the evaluation or other matter to be considered by the court as bearing upon the determination;
- (c) To introduce evidence, summon witnesses, cross-examine opposing witnesses or witnesses called by the court; and
- (d) To make opening and closing statements and arguments.

(3) The court may examine or cross-examine any witness called by the defendant or prosecuting attorney at a competency hearing and may summon and examine witnesses on its own motion.

Source: L. 2008: Entire article added, p. 1844, § 2, effective July 1.

16-8.5-110. Testimony of lay witnesses. In any hearing at which the competency of the defendant is an issue, witnesses not specially trained in psychiatry or psychology and not testifying as expert witnesses may testify as to their observation of the defendant's actions and conduct and as to conversations that they have had with the defendant bearing upon the defendant's mental condition. Any such witnesses, as part of their testimony, shall be permitted to give their opinions or conclusions concerning the competency of the defendant.

Source: L. 2008: Entire article added, p. 1845, § 2, effective July 1.

16-8.5-111. Procedure after determination of competency or incompetency. (1) If the final determination made pursuant to section 16-8.5-103 is that the defendant is competent to proceed, the judge shall order that the suspended proceeding continue or, if a mistrial has been declared, shall reset the case for trial at the earliest possible date.

(2) If the final determination made pursuant to section 16-8.5-103 is that the defendant is incompetent to proceed, the court has the following options:

(a) If the defendant is in custody, the court may release the defendant on bond upon compliance with the standards and procedures for such release prescribed by statute and by the Colorado rules of criminal procedure. As a condition of bond, the court may require the defendant to obtain any treatment or habilitation services that are available to the defendant, such as inpatient or outpatient treatment at a community mental health center or in any other appropriate treatment setting, as determined by the court. Nothing in this section authorizes the court to order community mental health centers or other providers to provide treatment for persons not otherwise eligible for these services. At any hearing to determine eligibility for release on bond, the court shall consider any effect the defendant's incompetency may have on the court's ability to ensure the defendant's presence for hearing or trial. There shall be a presumption that the incompetency of the defendant will inhibit the ability of the defendant to ensure his or her presence for trial.

(b) If the court finds that the defendant is not eligible for release from custody, the court may commit the defendant to the custody of the department, in which case the executive director has the same powers with respect to commitment as the executive director has following a commitment under section 16-8-105.5 (4). At such time as the department recommends to the court that the defendant is restored to competency, the defendant may be returned to custody of the county jail or to previous bond status.

Source: L. 2008: Entire article added, p. 1845, § 2, effective July 1.

Editor's note: This section is similar to former § 16-8-112 as it existed prior to 2008.

Cross references: For release on bail, see part 1 of article 4 of this title.

ANNOTATION

Annotator's note. Since § 16-8.5-111 is similar to repealed § 16-8-112, relevant cases construing that provision have been included in the annotations to this section.

Purpose of section. This section considers the interests of both society and the individual accused and strikes a fair balance. A person who is found to be incompetent is treated and confined only to the extent necessary for the protection of society. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

Commitment does not deny defendant due process. The fact that the defendant may be committed to an institution for an indefinite period of time, before trial and pending the regaining of competency, affords and does not deny the defendant due process. *Schwader v. District Court*, 172 Colo. 474, 474 P.2d 607 (1970).

A finding of incompetence to stand trial only results in an abatement of the criminal proceedings. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

Court retains jurisdiction during confinement. During confinement the court which commits the accused retains jurisdiction to oversee his commitment and to protect his constitutional

rights and should do so. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

And it is the trial judge's duty to make periodic checks to determine the status and condition of an incompetent who has criminal charges pending against him under any valid statute and who has been committed after a finding of incompetence to stand trial. *Parks v. Denver District Court*, 180 Colo. 202, 503 P.2d 1029 (1972).

During commitment, there can be no final judgment subject to appeal. Where defendant was committed following a determination that he became incompetent subsequent to alleged offense, and the issue raised by a plea of not guilty remains unresolved until defendant is determined to be able to stand trial, there can be no final judgment from which an appeal can be taken, as the litigation has not yet been terminated on its merits. *Rupert v. People*, 156 Colo. 277, 398 P.2d 434 (1965).

Section does not preclude the release on bail of a person who is determined to be incompetent and charged with a violent crime. *People v. White*, 819 P.2d 1096 (Colo. App. 1991).

Applied in *People v. Chavez*, 629 P.2d 1040 (Colo. 1981).

16-8.5-112. Venue for collateral hearings. (1) If a defendant committed to the custody of the department for evaluation or for restoration treatment meets the constitutional requirements for the administration of involuntary medication, the defendant's treating physician may petition the court for an order requiring that the defendant accept the treatment or, alternatively, that the medication be forcibly administered to the defendant. The department shall, prior to the hearing on the petition, deliver a copy of the petition to the court that committed the defendant to the custody of the department, the prosecuting attorney, and the defendant's legal representation in the criminal case, if such representation exists, and to the defendant directly if he or she does not have legal representation. A physician shall assess and document the defendant's mental status prior to the administration of medication.

(2) A petition for involuntary treatment shall be heard in the court of the jurisdiction where the defendant is located. The department shall promptly deliver a copy of the order granting or denying the petition to the court that committed the defendant to the custody of the department, the prosecuting attorney, and the defendant's legal representation in the criminal case, if such representation exists, and to the defendant directly if he or she does not have legal representation.

(3) If the committing court elects to transfer venue for medication hearings to the court of the jurisdiction in which the defendant is located, the committing county shall reimburse the county in which the proceeding is heard for the reasonable costs incurred in conducting the proceeding. Alternatively, the district attorney for the committing county, or in any county or any city and county having a population exceeding fifty thousand persons the county attorney for the committing county, may prosecute the proceeding as the proponent of the physician's petition.

(4) If a defendant committed to the custody of the department for evaluation or for restoration treatment is ordered by a court to accept treatment as set forth in subsection (1) of this section and is subsequently returned to jail for pending court proceedings, the county jail may require the defendant to continue to receive the same court-ordered treatment that

was administered by the department before the defendant was discharged from inpatient care, or, alternatively, appropriate medical personnel provided by the jail may forcibly administer such court-ordered medication to the defendant.

Source: L. 2008: Entire article added, p. 1846, § 2, effective July 1. **L. 2009:** (1) and (2) amended and (4) added, (HB 09-1253), ch. 128, p. 550, § 2, effective August 5.

16-8.5-113. Restoration to competency. (1) The court may order a restoration hearing at any time on its own motion, on motion of the prosecuting attorney, or on motion of the defendant.

(2) Within fourteen days after receipt of a report from the department or other court-approved provider of restoration services certifying that the defendant is competent to proceed, either party may request a hearing or a second evaluation. The court shall determine whether to allow the second evaluation or proceed to a hearing on competency. If the second evaluation is requested by the court or by an indigent defendant, it shall be paid for by the court.

(3) If a second evaluation is allowed, any pending requests for a hearing shall be continued until receipt of the second evaluation report. The report of the expert conducting the second evaluation report shall be completed and filed with the court within sixty-three days after the court order allowing the second evaluation, unless the time period is extended by the court after a finding of good cause.

(4) If neither party requests a hearing or second evaluation within the time frame set forth in subsection (2) of this section, the court shall enter a final determination, based on the information then available to the court, whether the defendant is or is not competent to proceed.

(5) If a party makes a timely request for a hearing, the hearing shall be held within thirty-five days after the request for a hearing or, if applicable, within thirty-five days after the filing of the second evaluation report, unless the time is extended by the court after a finding of good cause.

(6) At the hearing, the burden of submitting evidence and the burden of proof by a preponderance of the evidence shall be upon the party asserting that the defendant is competent. At the hearing, the court shall determine whether the defendant is restored to competency.

Source: L. 2008: Entire article added, p. 1846, § 2, effective July 1. **L. 2012:** (2), (3), and (5) amended, (SB 12-175), ch. 208, p. 852, § 81, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (2), (3), and (5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-8.5-114. Procedure after hearing concerning restoration to competency. (1) If a defendant is found to be restored to competency after the hearing held pursuant to section 16-8.5-113, the court shall resume the criminal proceedings or order the sentence carried out. The court shall credit any time the defendant spent in confinement while committed pursuant to section 16-8.5-111 against any term of imprisonment imposed after restoration to competency.

(2) If, after the hearing held pursuant to section 16-8.5-113, the court determines that the defendant remains incompetent to proceed, the court may continue or modify any orders entered at the time of the original determination of incompetency and may commit or recommit the defendant or enter any new order necessary to facilitate the defendant's restoration to mental competency.

(3) Evidence of any determination as to the defendant's competency or incompetency is not admissible on the issues raised by a plea of not guilty, not guilty by reason of insanity, or, for offenses that occurred before July 1, 1995, the affirmative defense of impaired mental condition.

Source: L. 2008: Entire article added, p. 1847, § 2, effective July 1.

16-8.5-115. Commitment and observation. Upon the termination of the period of observation of a defendant committed under section 16-8.5-105, the authorities shall present to the court an accounting of the cost, evidenced by a statement thereof based upon the established per diem rate of the place of confinement. If approved by the court, the account shall be paid by the state pursuant to section 13-3-104, C.R.S.

Source: L. 2008: Entire article added, p. 1847, § 2, effective July 1.

16-8.5-116. Commitment - termination of proceedings. (1) A defendant committed to the department or otherwise confined as a result of a determination of incompetency to proceed shall not remain confined for a period in excess of the maximum term of confinement that could be imposed for the offenses with which the defendant is charged, less any earned time to which the defendant would be entitled under article 22.5 of title 17, C.R.S.

(2) The court shall review the case of a defendant committed or confined as incompetent to proceed at least every three months with regard to the probability that the defendant will eventually be restored to competency and with regard to the justification for continued commitment or confinement. The review may be held in conjunction with a restoration hearing under section 16-8.5-113. Prior to each review, the institution treating the defendant shall provide the court with a report regarding the competency of the defendant. If, on the basis of the available evidence, not including evidence resulting from a refusal by the defendant to accept treatment, there is a substantial probability that the defendant will not be restored to competency within the foreseeable future, the court may order the release of the defendant from commitment under this article through one or more of the following means:

(a) Upon motion of the district attorney or the defendant, the court may terminate the criminal proceeding and terminate the commitment or treatment order;

(b) The court may order the release of the defendant on bond, with such conditions as the court deems advisable;

(c) The court or a party may commence civil proceedings under the provisions of article 65 of title 27, C.R.S., if the defendant meets the requirements for commitment pursuant to said article 65; or

(d) In the case of a defendant who has been found eligible for services under article 10.5 of title 27, C.R.S., due to a developmental disability, the court or a party may initiate an action to restrict the rights of the defendant under article 10.5 of title 27, C.R.S.

(3) In each case, the court shall enter a written decision outlining why the court terminated the criminal proceeding or did not terminate the criminal proceeding.

Source: L. 2008: Entire article added, p. 1847, § 2, effective July 1. **L. 2010:** (2)(c) amended, (SB 10-175), ch. 188, p. 783, § 22, effective April 29.

Editor's note: This section is similar to former § 16-8-114.5 as it existed prior to 2008.

Cross references: For liability for the costs of the care and treatment of persons committed to the department of human services pursuant to this article, see § 27-92-101.

ANNOTATION

Annotator's note. Since § 16-8.5-116 is similar to repealed § 16-8-114.5, a relevant case construing that provision has been included in the annotations to this section.

This section as amended in 1989 gives the district attorney the authority to initiate the termination of criminal proceedings against an incompetent defendant. The statute does

not, however, give the district attorney the power to dictate whether the defendant will be released or civilly committed once the trial court determines that there is not a substantial probability that the defendant will be restored to competency in the foreseeable future. *People v. Zapotocky*, 869 P.2d 1234 (Colo. 1994).

Trial court incorrectly declared this statute

to be an unconstitutional violation of due process where it erroneously believed that the defendant has a right to dismissal of criminal charges if it does not appear reasonably likely that he will be competent to stand trial in the future. *People v. Zapotocky*, 869 P.2d 1234 (Colo. 1994).

The decision to request dismissal of pending criminal charges is within the district attorney's discretion and the decision may not be controlled or limited by judicial intervention. Therefore, transferring the decision to dismiss pending criminal proceedings against incompetent defendants from the trial court to the district

attorney is consistent with the traditional powers of the trial court and the prosecutor. *People v. Zapotocky*, 869 P.2d 1234 (Colo. 1994).

Since under the pre-1989 and post-1989 versions of subsection (2), a court cannot terminate criminal proceedings against an incompetent defendant until a finding of indefinite incompetency is made, and the trial court did not make such a finding until after the statute was amended, application of the amended statute did not violate the ex post facto clauses of the United States constitution or Colorado constitution. *People v. Zapotocky*, 869 P.2d 1234 (Colo. 1994).

16-8.5-117. Escape - return to institution. If a defendant committed to the custody of the executive director for a competency evaluation or for restoration to competency escapes from the institution or hospital, it is the duty of the chief officer of the institution or hospital to apply to the district court for the county in which the institution or hospital is located for a warrant of arrest directed to the sheriff of the county, commanding him or her to take all necessary legal action to effect the arrest of the defendant and to return the defendant promptly to the institution or hospital. The fact of an escape becomes a part of the official record of the defendant and shall be certified to the committing court as part of the record in any proceeding to determine whether the defendant is eligible for release on bond or from custody.

Source: L. 2008: Entire article added, p. 1848, § 2, effective July 1.

16-8.5-118. Temporary removal for treatment and rehabilitation. The chief officer of an institution in which a defendant has been committed under this article may authorize treatment and rehabilitation activities involving temporary physical removal of the person from the institution in which the defendant has been placed, according to the procedures and requirements of section 16-8-118.

Source: L. 2008: Entire article added, p. 1848, § 2, effective July 1.

16-8.5-119. Competency evaluation advisory board - creation - membership - duties - rules - repeal. (Repealed)

Source: L. 2008: Entire article added, p. 1848, § 2, effective July 1.

Editor's note: (1) This section is similar to former § 16-8-106.5 as it existed prior to 2008.
(2) Subsection (5) provided for the repeal of this section, effective July 1, 2010. (See L. 2008, p. 1848.)

ARTICLE 9

Preparation for Trial

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1

SUBPOENAS

16-9-101. Right to compel attendance of witnesses.

PART 2

WITNESSES FROM OUTSIDE THE STATE

16-9-201. Definitions.
16-9-202. Summoning witness to testify

- in another state.
 16-9-203. Witness from another state.
 16-9-204. Exemption from arrest.
 16-9-205. Production of tangible evidence.

PART 3

COMPELLING ATTENDANCE
 OF MATERIAL WITNESSES
 WITHIN THE STATE

- 16-9-301. Definitions.
 16-9-302. Summoning witness to testify or produce tangible evidence in another county.
 16-9-303. Protection from arrest or service of process.

PART 4

PRETRIAL MOTIONS IN CLASS 1
 FELONY CASES ALLEGING
 THAT A DEFENDANT IS
 A MENTALLY RETARDED DEFENDANT

- 16-9-401 to
 16-9-405. (Repealed)

PART 1

SUBPOENAS

16-9-101. Right to compel attendance of witnesses. (1) In every criminal case, the prosecuting attorney and the defendant have the right to compel the attendance of witnesses and the production of tangible evidence by service upon them of a subpoena to appear for examination as a witness at any proceeding before the court. Service of a subpoena upon a parent or legal guardian who has physical care of an unemancipated minor that contains wording commanding said parent or legal guardian to produce the unemancipated minor for the purpose of testifying before the court shall be valid service compelling the attendance of both said parent or legal guardian and the unemancipated minor for examination as witnesses. In addition, service of a subpoena as described in this subsection (1) shall compel said parent or legal guardian either to make all necessary arrangements to ensure that the unemancipated minor is available before the court to testify or to appear in court and show good cause for the unemancipated minor's failure to appear.

(2) The issuance and service of subpoenas and all procedures related thereto shall be in conformity with and as required by applicable rule of criminal procedure adopted by the Colorado supreme court.

Source: L. 72: R&RE, p. 233, § 1. C.R.S. 1963: § 39-9-101. L. 98: (1) amended, p. 946, § 1, effective May 27.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky

Mt. L. Rev. 221 (1950).

PART 5

MOTIONS ALLEGING
 AN UNCONSTITUTIONAL LAW

- 16-9-501. Notice to the attorney general when a defendant alleges a law is unconstitutional.

PART 6

PROHIBITION ON
 REPRODUCTION OF
 SEXUALLY EXPLOITATIVE MATERIAL

- 16-9-601. Prohibition on reproduction of sexually exploitative material.

PART 2

WITNESSES FROM OUTSIDE THE STATE

Editor's note: Prior to 1972, this part 2 was cited as "The Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings". (See § 39-6-6, C.R.S. 1963.)

16-9-201. Definitions. As used in this part 2, unless the context otherwise requires:

- (1) "State" includes any territory of the United States and the District of Columbia.
- (2) "Summons" includes a subpoena, order, or other notice requiring the appearance of a witness.
- (3) "Witness" includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding.

Source: L. 72: R&RE, p. 235, § 1. C.R.S. 1963: § 39-9-204.

ANNOTATION

Method for compelling attendance of out-of-state witnesses. This uniform act provides a method whereby, among states that have adopted the act, a court of one state may certify the need for the appearance and testimony of a material witness residing in another state and thereby invoke the authority of the court in the resident state to compel the witness's attendance in the certifying court. Hence, at least under the circumstances specified in the statute, a Colorado court may now compel the attendance of out-of-state witnesses. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Payment for witnesses is the obligation of the state. In concluding that the courts lack the ability to compel the attendance of out-of-state witnesses for an indigent defendant, a court's reliance upon the silence of the uniform act as to the source of any money to be paid to the witness was misplaced in Colorado. The failure of the uniform act to address this issue does not support this conclusion since the statutes and

rules of criminal procedure both create the obligation and provide for payment. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

The provisions of this part 2 do not extend to authorizing a court to subpoena a witness who is residing outside the United States. The district court erred in granting a motion under the provisions of rule 15 of the Colorado rules of criminal procedure to depose a witness residing in Mexico. The rule requires that the deposition be conducted in the presence of the court and requires the court to subpoena the witness. The court does not have jurisdiction to subpoena a witness who resides in another country because the provisions of this part 2 extend only to other states that have adopted a similar law, not to foreign countries. Without another statute authorizing such a subpoena, the court was proceeding without jurisdiction. *People v. Arellano-Avila*, 20 P.3d 1191 (Colo. 2001).

16-9-202. Summoning witness to testify in another state. (1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of the court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of the certificate to any judge of a court of record in the county in which such person is, the judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process in connection with matters which arose before his entering into that state under the summons, he shall issue a summons, with a copy of the certificate attached,

directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing, the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, the judge may, in lieu of notification of the hearing, direct that the witness be forthwith brought before him for the hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, in lieu of issuing subpoena or summons, shall order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and twenty dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Source: L. 72: R&RE, p. 233, § 1. C.R.S. 1963: § 39-9-201.

16-9-203. Witness from another state. (1) If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state, or if the witness appears voluntarily at the request of the prosecution or the defense and the court would have otherwise approved a certificate for such witness pursuant to subsection (1) of this section, he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending or, in the alternative and at the discretion of the court, an airplane ticket and twenty dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If a witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Source: L. 72: R&RE, p. 234, § 1. C.R.S. 1963: § 39-9-202. L. 87: (2) amended, p. 604, § 4, effective July 1.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

Annotator's note. Since § 16-9-203 is similar to repealed § 39-6-3, C.R.S. 1963, and CSA, C. 48, § 467(3), relevant cases construing

those provisions have been included in the annotations to this section.

This section is for the purpose of securing and assuring the presence of the witness at the trial or his testimony. *Kelly v. People*, 121 Colo. 243, 215 P.2d 336 (1950).

Post-conviction hearing is a criminal pro-

ceeding under this section. A post-conviction hearing held pursuant to Crim. P. 35(b) is not a civil proceeding. It is but one phase of a criminal proceeding, governed by the rules of criminal procedure and this uniform act. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

Expenses of obtaining testimony of witnesses for indigent defendant must be paid by state. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Liable for advancements to such witnesses. Since the state will ultimately pay the costs of securing out-of-state witnesses for the defendant, there is no legal justification for holding that it is not liable for advancement of such costs

as mileage and witness fees. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Abuse of discretion in denying continuance. Since testimony of missing out-of-state witnesses might well have led to defendant's acquittal, it follows that it was an abuse of discretion to deny defendant a continuance for the purpose of determining whether the provisions of this section and Crim. P. 17(b) would be applicable or whether some other method of obtaining the witnesses' testimony might be available. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Applied in *Claxton v. People*, 164 Colo. 283, 434 P.2d 407 (1967).

16-9-204. Exemption from arrest. (1) If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, while so passing through this state, he shall not be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

Source: L. 72: R&RE, p. 235, § 1. C.R.S. 1963: § 39-9-203.

16-9-205. Production of tangible evidence. The procedures set forth in this part 2 shall apply to both the compulsory attendance of witnesses and the production of tangible evidence by witnesses located in this state whose presence is required in an action in another state and to witnesses from another state whose presence is required in an action in this state.

Source: L. 81: Entire section added, p. 927, § 4, effective July 1.

PART 3

COMPELLING ATTENDANCE OF MATERIAL WITNESSES WITHIN THE STATE

16-9-301. Definitions. As used in this part 3, unless the context otherwise requires:

(1) "Summons" includes a subpoena, order, or other notice requiring the appearance of a witness.

(2) "Witness" includes a person whose testimony is desired or who is desired to produce tangible evidence in any proceeding or investigation by a grand jury or a criminal action or proceeding in this state.

Source: L. 85: Entire part added, p. 626, § 1, effective April 24.

16-9-302. Summoning witness to testify or produce tangible evidence in another county. (1) In order to secure the attendance of a material witness who either the prosecution or the defense has reasonable grounds to believe will absent himself from the jurisdiction of the requesting court, a judge of a court of record in any county in this state upon such showing may certify that there is a criminal action pending in such court or that a grand jury investigation has commenced or is about to commence, that a person located

within any county or city and county in this state is a material witness in such action or grand jury investigation, and that his presence will be required for a specified number of days. When a court of record in the county in which such person is located receives the certificate, it shall fix a time and place for a hearing and shall make an order directing the witness to appear at the hearing at the time and place specified in the order.

(2) If at the hearing held pursuant to subsection (1) of this section the court determines that the witness is material and necessary and that it will not cause undue hardship to the witness to be compelled to attend and testify in the criminal action or grand jury investigation in the requesting county, the court shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the requesting court at the time and place specified in the summons. In any such hearing, the certificate shall be prima facie evidence of all the facts stated therein.

(3) If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting county to assure his attendance in the requesting county, the receiving court may, in lieu of notification of the hearing, direct that the witness be brought before the court for the hearing. If the court is satisfied at the hearing that the requested custody and delivery is desirable, the court shall order that the witness be taken into custody and delivered to an officer of the requesting county for said hearing, if said hearing is to commence within forty-eight hours of the issuance of the certificate, or for the purpose of the taking of a criminal deposition pursuant to rule 15, Colorado rules of criminal procedure. The certificate shall be prima facie evidence that the requested custody and delivery is desirable. If said witness can post reasonable security, he shall be discharged.

(4) If the witness who is summoned pursuant to subsection (2) of this section, after being paid or tendered the appropriate witness fees, fails without good cause to attend and testify or produce evidence as directed in the summons, he shall be subject to any sanctions available to the requesting court.

Source: L. 85: Entire part added, p. 626, § 1, effective April 24.

Cross references: For witness fees, see § 13-33-102.

16-9-303. Protection from arrest or service of process. When a person enters into or passes through any county in this state in obedience to a summons issued pursuant to section 16-9-302 (2) or when returning from testifying under the summons, he shall not be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into said county in response to the summons.

Source: L. 85: Entire part added, p. 627, § 1, effective April 24.

PART 4

PRETRIAL MOTIONS IN CLASS 1 FELONY CASES ALLEGING THAT A DEFENDANT IS A MENTALLY RETARDED DEFENDANT

16-9-401 to 16-9-405. (Repealed)

Source: L. 2002: Entire part repealed, p. 1463, § 3, effective October 1.

Editor's note: This part 4 was added in 1993. For amendments to this part 4 prior to its repeal in 2002, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. The provisions of this part 4 were relocated to part 11 of article 1.3 of title 18. For the location of specific provisions, see the editor's notes following each section in said part 11 and the comparative table located in the back of the index.

Cross references: For the legislative declaration contained in the 2002 act repealing this part 4, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 5

MOTIONS ALLEGING AN UNCONSTITUTIONAL LAW

16-9-501. Notice to the attorney general when a defendant alleges a law is unconstitutional. If a defendant in a criminal proceeding files a motion or other pleading that includes a claim alleging a state statute or municipal ordinance is unconstitutional, the defendant shall serve the attorney general with a copy of the motion or pleading. The attorney general shall be entitled to be heard on the matter. Failure to comply with this section shall not constitute a waiver of a defendant's constitutional rights or a defendant's right to raise a constitutional challenge.

Source: L. 2006: Entire part added, p. 35, § 1, effective March 13.

PART 6

PROHIBITION ON REPRODUCTION OF SEXUALLY EXPLOITATIVE MATERIAL

16-9-601. Prohibition on reproduction of sexually exploitative material. (1) For purposes of this part 6, "sexually exploitative material" shall have the same meaning as provided in section 18-6-403 (2) (j), C.R.S.

(2) For the reasons stated in section 18-6-403 (1) and (1.5), C.R.S., regarding the harm and victimization related to sexually exploitative material, in a criminal proceeding, all sexually exploitative material shall remain in the care, custody, and control of either the prosecution, a law enforcement agency, or the court.

(3) (a) Notwithstanding any provision of the Colorado rules of criminal procedure, a court shall deny a request by the defendant in a criminal proceeding to copy, photograph, duplicate, or otherwise reproduce sexually exploitative material, so long as the prosecuting attorney makes the material reasonably available to the defendant; except that if, after a hearing, the defendant shows that for reasons specific to the case, the access provided by the prosecuting attorney does not provide ample opportunity for inspection, viewing, and examination by a defense expert, the court may order reproduction of the material with an appropriate protective order.

(b) For purposes of paragraph (a) of this subsection (3), sexually exploitative material shall be deemed to be reasonably available to the defendant if the prosecuting attorney provides ample opportunity for inspection, viewing, and examination, at the prosecutor's office or a law enforcement facility, of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

Source: L. 2008: Entire part added, p. 1719, § 1, effective June 2.

ARTICLE 10

Jury Trials

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1

COMPOSITION AND SELECTION
OF THE JURY

- 16-10-101. Jury trials - statement of policy.
 16-10-102. When jury panel exhausted.
 16-10-103. Challenge of jurors for cause.
 16-10-104. Peremptory challenges.
 16-10-105. Alternate jurors.
 16-10-106. Incapacity of juror.
 16-10-107. Challenge to entire jury panel.
 16-10-108. Verdict.
 16-10-109. Trial by jury for petty offenses.
 16-10-110. Jury instructions - cases involving the possibility of the death penalty.

PART 2

EVIDENCE OF INCONSISTENT
STATEMENTS - VARIANCE

- 16-10-201. Inconsistent statement of wit-

16-10-202.

ness - competency of evidence.

Variance - allegations and proof.

PART 3

EVIDENCE OF SIMILAR TRANSACTIONS

- 16-10-301. Evidence of similar transactions - legislative declaration.

PART 4

TRIAL PROCEEDINGS

- 16-10-401. Trials - authority to exclude victim's advocate from sequestration orders.
 16-10-402. Use of closed-circuit television - child or developmentally disabled witness.

PART 1

COMPOSITION AND SELECTION OF THE JURY

16-10-101. Jury trials - statement of policy. The right of a person who is accused of an offense other than a noncriminal traffic infraction or offense, or other than a municipal charter, municipal ordinance, or county ordinance violation as provided in section 16-10-109 (1), to have a trial by jury is inviolate and a matter of substantive due process of law as distinguished from one of "practice and procedure". The people shall also have the right to refuse to consent to a waiver of a trial or sentencing determination by jury in all cases in which the accused has the right to request a trial or sentencing determination by jury.

Source: L. 72: R&RE, p. 235, § 1. C.R.S. 1963: § 39-10-101. L. 82: Entire section amended, p. 655, § 5, effective January 1, 1983. L. 88: Entire section amended, p. 667, § 1, effective July 1. L. 89: Entire section amended, p. 828, § 35, effective July 1. L. 2001: Entire section amended, p. 859, § 7, effective July 1. L. 2002, 3rd Ex. Sess.: Entire section amended, p. 16, § 11, effective July 12.

Cross references: For the legislative declaration contained in the 2002 act amending this section, see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Fundamental right to trial by jury in criminal cases is paramount constitutional right guaranteed by the sixth amendment to the United States constitution and § 23 of art. II, Colo. Const. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980).

A person does not have a right to a jury trial upon being found in contempt of court if the person is not subject to more than six months incarceration upon issuance of such citation. *People v. Barron*, 677 P.2d 1370 (Colo. 1984); *Kourlis v. Port*, 18 P.3d 770 (Colo. App. 2000).

This section extends a statutory right to a jury trial only to violations of state statutes not contempt charges. *People v. Shell*, 148 P.3d 162 (Colo. 2006).

Death qualified juries are not more prone to convict than to acquit and do not deny a defendant his right to an impartial jury. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

Defendant may waive his right to jury trial; however, that waiver must be understandingly, voluntarily, and deliberately made, and a determination of waiver must be a matter of

certainly and not implication. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980).

But defendant must personally express waiver. Where, the prosecution conceded that prior to the time defendant requested a jury trial he had not personally expressed a waiver of his right to trial by a jury, trial court, which, in reviewing the question of whether to grant a jury trial, questioned defendant concerning his understanding relative to counsel's waiver of his rights the previous day and which concluded that because defendant had concurred in counsel's request the waiver was valid, did not comport with the requirement of *Crim. P. 23(a)(5)* because the waiver must be expressed by defendant personally at the time that the waiver is attempted. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980).

Under unitary trial provisions under § 16-8-104.5 when insanity is raised, even when prosecution stipulates to defendant's insanity, defendant still has a constitutional right to a jury trial that must be personally waived. *People v. Laeke*, __ P.3d __ (Colo. App. 2009).

Valid waiver of jury trial does not require extensive, on-the-record advisements of the kind set out in *United States v. Robertson*, 45 F. 3d 1423 (10th Cir. 1995). *People v. Thompson*, 121 P.3d 273 (Colo. App. 2005).

Defendant voluntarily waived jury. Where, when the jury was assembled in the courtroom ready for trial, defendants' counsel orally announced that defendants had decided to waive their right to a jury trial, and the court inquired of each defendant if that was his desire and both indicated in the affirmative, and, as a further precaution, the court then insisted that a written waiver of jury trial be prepared and be signed by each defendant and counsel, which was done, it will be presumed that defendants understandingly, voluntarily, and deliberately decided to waive the jury. *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Where the record of the trial court discloses that the trial judge orally advised the defendant of his right to a jury, that the defendant read and signed a written waiver, and that he failed to give any indication to the trial court that his waiver was not voluntary, the record was substantial evidence to support the findings that the waiver was voluntary. *People v. Simms*, 185 Colo. 214, 523 P.2d 463 (1974).

Waiver precludes defendant's complaint that judge rules on evidence and renders verdict. Where the defendant voluntarily and with advice of counsel waived a jury trial, defendant in such circumstances cannot be heard to complain when he creates a situation which necessarily makes the trial judge both the one who decides the admissibility of evidence and the one who renders the verdict. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Colorado constitution does not afford criminal defendants the right to waive jury and be tried by the court. *People v. District Court*, 843 P.2d 6 (Colo. 1992); *People v. District Court*, 953 P.2d 184 (Colo. 1998).

A court exceeds its jurisdiction if it allows a defendant to waive his or her right to a jury trial over the objection of the district attorney based on defendant's claim that his due process rights would be violated by testifying and that he would be subject to impeachment about his past criminal convictions and his ties to drug use. It is not a due process violation to be subject to impeachment about prior criminal convictions; the choice to testify or not is part of adversarial trial process and does not create an unfair trial for the defendant. *People v. McKeel*, 246 P.3d 638 (Colo. 2010).

In construing the provisions of this section with § 18-1-406 (2), granting the defendant the right to waive a jury trial, due process compels conclusion that prosecution alone cannot compel trial by jury where defendant may not receive a fair trial. *People v. District Court*, 843 P.2d 6 (Colo. 1992).

Provisions of this section which require the People's consent as a prerequisite to defendant's waiver of trial by jury held facially constitutional; however as applied may violate an accused's right to due process. *People v. District Court*, 843 P.2d 6 (Colo. 1992).

Unqualified prosecution consent requirement to defendant's waiver of trial by jury may violate defendant's constitutional right to due process where defendant contends that such trial would constitute an unfair proceeding before a biased jury. *People v. District Court*, 843 P.2d 6 (Colo. 1992).

It is incumbent upon a criminal defendant, in seeking waiver of jury trial, to raise due process concerns with the trial court; trial court may evaluate whether a defendant's due process rights are violated only after the defendant makes a showing that an inability to waive trial by jury infringes on defendant's due process rights. *People v. District Court*, 843 P.2d 6 (Colo. 1992).

In determining whether defendant's right to a fair trial would be violated by denying defendant's waiver of jury trial, trial court may consider the extent to which a change in venue may cure bias or prejudice against the defendant. *People v. District Court*, 843 P.2d 6 (Colo. 1992).

Due process does not require the prosecution to consent to a waiver of a jury trial in a trial for possession of a weapon by a prior offender merely because the jury will hear evidence of a prior offense even if one of the prior offenses was for a similar weapons offense. *People v. District Court*, 953 P.2d 184 (Colo. 1998).

Applied in *People ex rel. Hunter v. District Court*, 634 P.2d 44 (Colo. 1981).

16-10-102. When jury panel exhausted. In all criminal cases where the panel of jurors is exhausted by challenge or otherwise, and whether any juror has been selected and sworn or not, the court may order the issuance of a venire for any number of jurors not exceeding twenty-four, returnable forthwith, out of which persons so ordered to be summoned it is lawful to impanel a jury for the trial of any criminal case. Should the jurors thus summoned be insufficient, by reason of challenges or otherwise, to form an impartial jury, the court may make further orders for additional jurors, returnable forthwith, until a full jury is obtained.

Source: L. 72: R&RE, p. 235, § 1. C.R.S. 1963: § 39-10-102.

16-10-103. Challenge of jurors for cause. (1) The court shall sustain a challenge for cause on one or more of the following grounds:

(a) Absence of any qualification prescribed by statute to render a person competent as a juror;

(b) Relationship within the third degree, by blood, adoption, or marriage, to a defendant or to any attorney of record or attorney engaged in the trial of the case;

(c) Standing in the relation of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent to, or being a member of the household of, or a partner in business with, or surety on any bond or obligation for any defendant;

(d) The juror is or has been a party adverse to the defendant in a civil action or has complained against or been accused by him in a criminal prosecution;

(e) The juror has served on the grand jury which returned the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information, or on any other investigatory body which inquired into the facts of the crime charged;

(f) The juror was a juror at a former trial arising out of the same factual situation or involving the same defendant;

(g) The juror was a juror in a civil action against the defendant arising out of the act charged as a crime;

(h) The juror was a witness to any matter related to the crime or its prosecution;

(i) The juror occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted;

(j) The existence of a state of mind in the juror evincing enmity or bias toward the defendant or the state; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

(k) The juror is a compensated employee of a public law enforcement agency or a public defender's office.

(2) If any juror knows of anything which would disqualify him as a juror or be a ground for challenge to him for cause, it is his duty to inform the court concerning it whether or not he is specifically asked about it. The jury panel shall be advised of this duty and of the grounds for challenge for cause before any prospective jurors are called to the jury box.

(3) If either party desires to introduce evidence of the incompetency, disqualification, or prejudice of any prospective juror who upon the voir dire examination appears to be qualified, competent, and unprejudiced, such evidence shall be heard, and the competency of the juror shall be determined, by the court, out of the presence of the other jurors, but this action cannot be taken after the jury has been sworn to try the case except upon a motion for mistrial.

Source: L. 72: R&RE, p. 236, § 1. C.R.S. 1963: § 39-10-103. L. 98: (1)(k) amended, p. 466, § 6, effective January 1, 1999.

ANNOTATION

Law reviews. For article, "Challenges for Cause in Criminal Trials", see 12 Colo. Law. 1799 (1983).

Right to impartial jury. It is fundamental to the right to a fair trial that a defendant be provided with an impartial jury. *Nailor v. People*, 200 Colo. 30, 612 P.2d 79 (1980).

This section implements that right. *People v. Russo*, 713 P.2d 356 (Colo. 1986).

A defendant has a fundamental right to a fair trial by a panel of impartial jurors, and, to protect that right, the trial court must exclude prejudiced or biased persons from the jury. *People v. Ferrero*, 874 P.2d 468 (Colo. App. 1993).

However, the trial court may consider a potential juror's assurances that the juror can fairly and impartially serve on the case in determining whether that juror will be able to set aside a preconceived notion and render an impartial verdict according to the law and the evidence admitted at trial. *People v. Ferrero*, 874 P.2d 468 (Colo. App. 1993); *People v. Loggins*, 981 P.2d 630 (Colo. App. 1998); *People v. Young*, 16 P.3d 821 (Colo. 2001); *People v. Arko*, 159 P.3d 713 (Colo. App. 2006), rev'd on other grounds, 183 P.3d 555 (Colo. 2008).

Standard of review is "abuse of discretion". Phrases used in prior case law such as "clear abuse of discretion" and "gross abuse of discretion" are deemed to express this standard and have the same meaning. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999); *People v. Vecchiarelli-McLaughlin*, 984 P.2d 72 (Colo. 1999); *People v. Martinez*, 18 P.3d 831 (Colo. App. 2000); *People v. Dashner*, 77 P.3d 787 (Colo. App. 2003).

The trial court did not abuse its discretion for denying a challenge for cause when there was reasonable evidence that the juror would be impartial. Therefore, the appellate court erred when it overturned a conviction on the basis that the juror thought that being charged was evidence of guilt because subsequent questioning demonstrated to the trial court that the juror would base his decision on "the facts". *People v. Young*, 16 P.3d 821 (Colo. 2001).

The trial court did not abuse its discretion in denying a challenge for cause where, in a case involving a homosexual defendant charged with sexual assault, the prospective juror initially stated she had a religious objection to homosexuality. It was within the court's discretion to rely on the prospective juror's later statements that, based on the evidence presented, she would decide whether the defendant committed an illegal act rather than judge him on his sexual preference. *People v. Hoskay*, 87 P.3d 194

(Colo. App. 2003); *People v. Simon*, 100 P.3d 487 (Colo. App. 2004).

It is within the trial court's prerogative to give considerable weight to a potential juror's statement that he or she can fairly and impartially serve on the case. *People v. Montoya*, 942 P.2d 1287 (Colo. App. 1996); *People v. Young*, 16 P.3d 821 (Colo. 2001).

Absence of qualification is basis for challenge, not absolute prohibition. The failure of a prospective juror to meet a qualification for jury service operates as a basis of a challenge for cause, rather than as an absolute prohibition to service; accordingly, that challenge is waived if counsel does not use reasonable diligence on voir dire to determine if a challenge for cause exists. *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981).

Failure of prospective juror to meet a qualification for jury service operates as a basis of a challenge for cause rather than as an absolute prohibition to service. *People v. Orozco*, 49 P.3d 1212 (Colo. App. 2002).

Trial court's ruling affects a substantial right of the defendant and cannot be deemed harmless error where the court erroneously denies a challenge for cause to a prospective juror, the defendant uses a peremptory challenge to remove that juror, and the defendant exhausts all peremptory challenges. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999); *People v. Orozco*, 49 P.3d 1212 (Colo. App. 2002).

The entire voir dire of the prospective juror must be reviewed by the appellate court in order to determine whether the trial court abused its discretion in ruling on a challenge for cause. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999); *People v. Orozco*, 49 P.3d 1212 (Colo. App. 2002).

Trial court to excuse prejudicial or biased persons. To insure that the right to a fair trial is protected, the trial court must excuse prejudiced or biased persons from the jury. *Nailor v. People*, 200 Colo. 30, 612 P.2d 79 (1980); *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986).

Trial court must grant challenge for cause where prospective juror is unwilling or unable to accept the basic principles of law applicable and render a fair and impartial verdict based upon the trial. *People v. Russo*, 713 P.2d 356 (Colo. 1986); *People v. Mack*, 33 P.3d 1211 (Colo. App. 2001).

No juror should be dismissed for cause if the court is satisfied that the juror will render an impartial verdict. *People v. Romero*, 593 P.2d 365 (Colo. App. 1978); *People v. Veloz*, 946 P.2d 525 (Colo. App. 1997).

If the trial court had genuine doubt about the juror's ability to be impartial, under the circumstances, it should resolve the doubt by sustaining the challenge. *People v. Russo*, 713 P.2d 356 (Colo. 1986).

When potential juror's statements compel inference that he or she cannot decide crucial issues fairly, a challenge for cause must be granted in the absence of rehabilitative questioning or other counterbalancing information. *People v. Merrow*, 181 P.3d 319 (Colo. App. 2007).

Appellate review of a challenge for cause requires consideration of the entire voir dire examination of a juror. *People v. Mack*, 33 P.3d 1211 (Colo. App. 2001).

Number of challenges for cause not limited. There has been no limit set by statute or rule on the number of challenges for cause. *People v. Fink*, 41 Colo. App. 47, 579 P.2d 659 (1978).

Trial court did not abuse its discretion in denying challenge of potential juror for cause. Juror admitted that she had read about the case involving felony child abuse that resulted in death and may have formed an opinion about the defendant's affirmative defense; however, the court sufficiently questioned the juror, who said she would listen to the evidence presented and would apply the court's instruction on the law in reaching a verdict. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Trial court did not abuse its discretion in denying challenge of potential juror for cause in sexual assault case where potential juror had been a victim of sexual assault forty years earlier, displayed the emotional impact of her experience, and expressed her wish that she had killed her attacker, but also indicated that her experience would allow her to be more fair, that she could put her own experience out of her mind, and base her decision on what she heard in the courtroom, and would follow the court's instructions. *People v. Schmidt*, 885 P.2d 312 (Colo. App. 1994).

Trial court did not abuse its discretion in denying a challenge for cause with regard to four jurors where, even though all four had some knowledge of the business at which the crime occurred and other reasons for being potentially biased against the defendant, each one assured the court that he or she could be fair and impartial and follow the law and instructions. *People v. Dore*, 997 P.2d 1214 (Colo. App. 1999).

Trial court did not abuse its discretion in denying a challenge for cause with regard to a juror who attended the same church as that attended by the victim's family, the juror stated that he would be able to consider the possibility that the testimony of his pastor, a witness, might not be entirely truthful or accurate, and the juror stated that he had not formed an opinion about defendant's guilt or innocence. *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

Trial court did not abuse its discretion in denying defendant's challenge for cause where defense counsel asked during voir dire whether anyone believed it would be impossible to be fair if defendant did not testify and juror stated that it would and that it might upset her, but not so much as to affect her decision-making. The trial court found that the juror indicated she would do what the court instructed her to do even though she might not like it. *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

The court did not abuse its discretion in denying defendant's challenge for cause. The juror's responses, as a whole, reflect that, while serving as a juror may have been difficult, he or she would base his or her decision on the evidence and the law and would follow the court's instructions. *People v. Montoya*, 141 P.3d 916 (Colo. App. 2006).

Similarly, trial court did not abuse its discretion in excusing a potential juror for cause when the potential juror expressed a particular aversion to serving as a juror in a sexual assault trial, and asserted her religious beliefs as a reason. *People v. Schmidt*, 885 P.2d 312 (Colo. App. 1994).

Trial court did not abuse its discretion in granting challenge for cause when the potential juror expressed an opinion that he thought the law was unfair because court reasoned that based on juror's opinion of the law, there was a question as to whether the juror would follow the instructions of the law. *People v. Mack*, 33 P.3d 1211 (Colo. App. 2001).

Trial court did not abuse discretion in denying defendant's challenge for cause against a juror who was "concerned of maybe a judge of character kind of thing" when such statement did not establish that she would fail to be fair and impartial. *Morrison v. People*, 19 P.3d 668 (Colo. 2000).

The trial court did not abuse its discretion in denying defendant's challenge for cause to a juror that had multiple associations with law enforcement. The juror understood that the defense had no burden of proof, that the prosecution had the burden of proving every element, and that both sides would get a fair trial from said juror. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

The trial court did not abuse its discretion in denying defendant's challenge for cause to a juror based on said juror's views regarding the death penalty and previous traumatic experiences. The juror did not express any partiality for or bias in favor of or against either side. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

Court did not err in not dismissing for cause two jurors who specifically committed to putting aside what they had read, not telling the other jurors about what they read, and rendering a fair and impartial verdict based only on the

evidence presented at trial. *People v. Shreck*, 107 P.3d 1048 (Colo. App. 2004).

It is incumbent upon challenging party to clearly state on the record the particular ground on which challenge for cause is made, since this statute operates as the legal basis for challenging a juror for cause. Only in this way can the court and opposing counsel direct appropriate questions to the juror to determine whether the challenge is well taken. *People v. Russo*, 713 P.2d 356 (Colo. 1986); *People v. West*, 724 P.2d 623 (Colo. 1986).

Court's questioning and "rehabilitation" of prospective jurors was not improper where the questions were directed to eliciting information on the subject of the prospective jurors' possible bias and were no more leading than necessary. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

Missing portion of transcript of voir dire proceedings does not automatically require reversal. Where trial court held a hearing to reconstruct, to the extent possible, the relevant portion of voir dire, the court's denial of the challenge for cause was upheld. *People v. Loggins*, 981 P.2d 630 (Colo. App. 1998); *People v. Carmichael*, 179 P.3d 47 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 800 (Colo. 2009).

Although the record was incomplete, there was sufficient information in the record to support court's denial of challenge for cause. *People v. Carmichael*, 179 P.3d 47 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 800 (Colo. 2009).

Propriety of questions within discretion of court. The propriety of questions during voir dire is within the discretion of the trial court, and its ruling will not be disturbed absent an abuse of that discretion. *People v. Shipman*, 747 P.2d 1 (Colo. App. 1987).

Trial court did not abuse its discretion in disallowing one of defense counsel's questions which went to the defendant's theory of the case. The court permitted other questions that allowed the defendant to determine whether potential jurors held certain attitudes toward the defendant's affirmative defense. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Grant of challenge for cause within discretion of trial court. The ultimate decision of whether or not to grant a challenge for cause is one for the trial court's sound discretion, since the factors of credibility and appearance which are determinative of bias are best observed at the trial court level. *Nailor v. People*, 200 Colo. 30, 612 P.2d 79 (1980); *People v. Reddick*, 44 Colo. App. 278, 610 P.2d 1359 (1980); *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1983); *People v. Russo*, 713 P.2d 356 (Colo. 1986); *People v. Schmidt*, 885 P.2d 312 (Colo. App. 1994); *People v. Veloz*, 946 P.2d 525 (Colo. App.

1997); *People v. Sherman*, 45 P.3d 774 (Colo. App. 2001).

Defendant must exercise reasonable diligence to determine whether a prospective juror should have been excused. If defendant fails to do so, he or she is considered to have waived his or her opportunity to raise any matters pertaining to the qualifications and competency of the excluded juror on appeal. *People v. Asberry*, 172 P.3d 927 (Colo. App. 2007).

Defendant did not waive his or her right to challenge for cause during the first discussion related to the challenge for cause, since the court did not make it clear that first discussion for cause would be the defendant's only opportunity to challenge for cause. *Ma v. People*, 121 P.3d 205 (Colo. 2005).

As trial court is in position to assess potential jurors. The need for a careful evaluation of the competence of potential jurors to assess the defendant's guilt or innocence solely on the evidence admitted at trial, and the serious practical problems involved with these assessments, are sound reasons for placing great discretion in the trial court in the jury selection procedures. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981).

Since the factors of credibility and appearance which are determinative of bias are best observed at the trial court level, the ultimate decision whether to grant a challenge for cause is left to the trial court's sound discretion. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986).

A decision denying a challenge for cause will be set aside only if the record discloses a clear abuse of discretion by the trial court. *People v. Moya*, 899 P.2d 212 (Colo. App. 1994).

Trial courts have considerable discretion in ruling on challenges for cause, because the trial judge is in the best position to assess the credibility, demeanor, and sincerity of the potential juror's responses, including statements that linguistically may appear to be inconsistent. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

If a court erroneously denies a challenge for cause and the defendant uses all of the defendant's peremptory challenges, including one to remove the disqualified juror, the effect is to deprive the defendant of the guaranteed number of peremptory challenges. This circumstance has always been looked upon as prejudicial. *People v. Macrander*, 817 P.2d 579 (Colo. App. 1991); *People v. Merrow*, 181 P.3d 319 (Colo. App. 2007).

Reversal of conviction is required where trial court erroneously denies a challenge for cause and defendant exhausts his or her peremptory challenges. The jurors' statements of bias were unequivocal, occurred at the close of lengthy voir dire, and were not mitigated by any rehabilitative questioning and responses. *People v. Chavez*, __ P.3d __ (Colo. App. 2011).

While subsection (1)(k) of this section and Crim. P. 24(b)(1)(XII) require a trial court to grant a party's challenge for cause to a juror who is employed by a public law enforcement agency, neither expressly requires the court to excuse a juror *sua sponte*. *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff'd* in part and *rev'd* in part on other grounds, 169 P.3d 662 (Colo. 2007).

For purposes of subsection (1)(k), department of social services is properly characterized as a public assistance and welfare organization and not as a public law enforcement agency. *People v. Zurenko*, 833 P.2d 794 (Colo. App. 1991).

Administrator for a victim advocacy organization was not a "compensated employee of a public law enforcement agency". *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007).

Prospective jurors employed with the transportation security administration (TSA) are not compensated employees of public law enforcement agency, the department of homeland security, for purposes of subsection (1)(k) and, therefore, do not need to be excused for cause since such employees lack the authority to arrest, to prosecute, or to detain suspected criminals. *People v. Speer*, 216 P.3d 18 (Colo. App. 2007).

Prospective juror who was employed as a security officer with the Pueblo depot activity is not a compensated employee of a public law enforcement agency pursuant to subsection (1)(k). That the functions of the department of defense require it to maintain security measures at its facilities, and to hire civil security guards who conduct investigations and searches, does not transform the Army and its various installations into a law enforcement arm of the government. *People v. Urrutia*, 893 P.2d 1338 (Colo. App. 1994).

A law enforcement agency for the purposes of subsection (1)(k) is a police-like division of government that has the authority to investigate crimes and to arrest, to prosecute, or to detain suspected criminals. The army military police corps is a law enforcement agency for the purposes of subsection (1)(k). *Ma v. People*, 121 P.3d 205 (Colo. 2005); *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

An employee of a community corrections facility is an employee of a public law enforcement agency within the meaning of subsection (1)(k) of this section and Crim. P. 24(b)(1)(XII). *People v. Romero*, 197 P.3d 302 (Colo. App. 2008).

The office of the state attorney general is a law enforcement agency for purposes of subsection (1)(k). *People v. Novotny*, __ P.3d __ (Colo. App. 2010).

For purposes of subsection (1)(k) or Crim. P. 24(b)(1)(XII), the environmental protection agency is properly characterized as an

investigatory and rulemaking body and not a law enforcement agency. *People v. Simon*, 100 P.3d 487 (Colo. App. 2004).

Where a juror's final responses to questions on voir dire indicate a clear expression of bias in favor of a significant prosecution witness, it may not be assumed that the juror would render an impartial verdict and challenge for cause should be granted. *People v. Zurenko*, 833 P.2d 794 (Colo. App. 1991).

Prejudice is shown if defendant exhausts all of his peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause. A defendant is not required to request an additional peremptory challenge to preserve this issue on appeal. *People v. Prator*, 833 P.2d 819 (Colo. App. 1992).

No abuse of discretion. Where trial court conducted rehabilitative questioning of jurors and was satisfied of their impartiality, trial court did not abuse discretion in denying defendant's challenge for cause. *People v. Manners*, 713 P.2d 1348 (Colo. App. 1985).

Where trial court conducted requisite inquiry of juror who was related to sheriff's posse members and was satisfied with juror's specific assurances that she could render a fair and impartial verdict, it was not an abuse of discretion to deny challenge for cause. *People v. Goodpaster*, 742 P.2d 965 (Colo. App. 1987).

The test for determining whether a prospective juror should be disqualified for bias is whether that person will render a fair and impartial verdict according to the law and the evidence presented at trial, and the trial court is in the best position to observe the credibility and appearance of the veniremen when deciding the question of bias. *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

The test to be applied is whether the person would be able to set aside any bias or preconceived notion and render an impartial verdict according to the law and the evidence presented at trial. *People v. Moya*, 899 P.2d 212 (Colo. App. 1994).

But appellate courts to insure requirements of fairness fulfilled. The placing of discretion in the trial judge in jury selection procedures does not permit appellate courts to abdicate their responsibility to ensure that the requirements of fairness are fulfilled. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981).

Absent a gross abuse of discretion, the trial court's decision to deny a challenge for cause should not be disturbed on appeal. No abuse of discretion where the record did not show that the jurors' prior knowledge of the case was so extensive that it would preclude them from determining defendant's guilt or innocence solely from the evidence presented at trial. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986).

A trial court must sustain a challenge for cause if a prospective juror is unable or unwilling to accept the basic principles of criminal law. *People v. Blessett*, 155 P.3d 388 (Colo. App. 2006).

A challenge for cause should not be sustained if subsequent examination of the prospective juror clearly demonstrates the juror's original statement that would subject the juror to a cause challenge was the product of mistake, confusion, or some other factor unrelated to the juror's ability to render a fair verdict. *People v. Blessett*, 155 P.3d 388 (Colo. App. 2006).

A challenge for cause should not be sustained when the juror's statement reflects a bias in the abstract, but the juror indicates he or she will decide the case on the law and the evidence. *People v. Blessett*, 155 P.3d 388 (Colo. App. 2006).

One cannot assume juror's ability to exclude unconscious influence of preconceptions. One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may exclude even the unconscious influence of his preconceptions. *Beeman v. People*, 193 Colo. 337, 565 P.2d 1340 (1977).

In a prosecution for rape and deviate sexual intercourse, where the juror was sufficiently upset by defendant's earlier contact with her pregnant daughter that she called his employer to have him reprimanded, and further, the juror had raised the possibility in her mind that it was her daughter's knife which had been used in the alleged rape, a personal and emotional situation concerning the juror and the accused existed rather than an opinion or abstract belief in the defendant's guilt or innocence. *Beeman v. People*, 193 Colo. 337, 565 P.2d 1340 (1977).

Test as to whether prospective juror has been unduly affected by pretrial publicity is whether the nature and strength of the opinion formed or of the information learned from that publicity are such as necessarily raise the presumption of partiality or of the inability of the potential juror to block out the information from his consideration. *People v. Romero*, 42 Colo. App. 20, 593 P.2d 365 (1978); *People v. Bashara*, 677 P.2d 1376 (Colo. App. 1983).

Mere familiarity with a case due to pretrial publicity does not, in itself, create a constitutionally defective jury. *People v. Loscutt*, 661 P.2d 274 (Colo. 1983).

On trial of a criminal case where the issue of insanity is tried separately, questions of both counsel to prospective jurors eliciting answers disclosing that such jurors have no opinions and express none concerning a defendant's sanity, and that they entertain no bias or prejudice against him on the issue of insanity, and that they could try him fairly and impartially on

such issue, presents no grounds of challenge for cause. *Leick v. People*, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L.Ed.2d 1366 (1958) (decided under repealed § 78-5-3, C.R.S. 1963).

A prospective juror who was a first cousin of a local attorney who had done some preliminary work in this case for defense counsel but who had never been an attorney of record and had at no time appeared in court in connection with the case did not fall within the mandate of this section requiring the court to sustain the challenge for cause. *People v. Langford*, 191 Colo. 87, 550 P.2d 329 (1976).

Removal of potential juror who will not follow court's instructions. A fair trial for the accused when a juror has given indications that he would not follow the court's instructions is an improbability; thus, such a juror should be removed from the panel by the trial court. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981).

Impartial juror cannot be dismissed for cause. No juror can be dismissed for cause if the trial court is satisfied the juror will render an impartial verdict. *People v. Romero*, 42 Colo. App. 20, 593 P.2d 365 (1978).

So long as the court is satisfied, from an examination of the prospective juror or from other evidence, that the juror will render an impartial verdict according to the evidence admitted at trial and the court's instructions of law, the court may permit the juror to serve. *People v. Gurule*, 628 P.2d 99 (Colo. 1981); *People v. Sandoval*, 733 P.2d 319 (Colo. 1987).

However, a prospective juror with a previously formed or expressed opinion need not be disqualified if the court is satisfied from the examination of the juror, or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted at trial. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986).

Even if a potential juror expresses some prejudice or predisposition other than a bias against the accused, a disqualification for cause is not necessary if the trial court is reasonably satisfied that he or she is willing to be fair and follow the instructions given by the court. *People v. Schmidt*, 885 P.2d 312 (Colo. App. 1994).

Although the prospective juror may have displayed a preconceived opinion that defendants in general should testify in their own defense, he later confirmed that he would not use the defendant's decision not to testify as evidence of his guilt and therefore the trial court did not abuse its discretion in denying the defendant's challenge for cause. The record of this prospective juror's answers, taken as a whole, demonstrates that he did not have a state of mind evincing enmity or bias against the defendant. *People v. Vecchiarelli-McLaughlin*, 984 P.2d 72 (Colo. 1999).

Challenged jurors did not patently demonstrate any fixed prejudgment. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986).

Where juror demonstrates fixed prejudgment about merits, court errs in refusing to excuse. Where the prospective juror patently demonstrates a fixed prejudgment about the merits of the case and an unwillingness to accept and apply those principles that form the bedrock of a fair trial, the trial court errs in refusing to excuse that juror when causally challenged. *People v. Gurule*, 628 P.2d 99 (Colo. 1981).

Denying challenge to juror with bias against handguns not abuse of discretion. In a prosecution for armed robbery, the court does not abuse its discretion in denying a challenge for cause to a potential juror who admits his long-standing bias against handguns, where the juror is questioned extensively by the court and defendant's counsel on his opinions concerning handguns and the probable effect of his opinions and experiences on his evaluation of the evidence, where the juror reveals no enmity or bias toward the defendant or the state, and where he expresses an understanding of the principles upon which a fair trial is based. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

Automatic challenge for cause of law enforcement employee. Under subsection (1)(k) the actual bias of a law enforcement employee need not be shown to sustain a challenge for cause. *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978); *People v. Maes*, 43 Colo. App. 426, 609 P.2d 1105 (1979).

Employee of the state department of administration was improperly challenged for cause under this section. *People v. Topping*, 764 P.2d 369 (Colo. App. 1988).

Neither the department of social services nor the equal employment opportunity commission constitute a "law enforcement agency", and therefore trial court did not err by refusing defendant's challenge for cause of jurors employed by such entities. *People v. Zurenko*, 833 P.2d 794 (Colo. App. 1991).

A prospective juror whose son is a deputy district attorney in the same judicial district where the defendant is being tried may be challenged for cause even though her son is not involved in the prosecution of the case against the defendant. The prospective juror's son is an attorney of record under the provisions of subsection (1)(b). *People v. Macrander*, 817 P.2d 579 (Colo. App. 1991).

A county official whose office, by statutory mandate, is represented by the prosecutor need not be automatically excluded from serving on a jury on the grounds that the county official is implicitly biased. The relationship between the offices of the clerk and county recorder and of the district attorney, standing alone, does not provide sufficient

grounds to justify a challenge for cause. *People v. Rhodus*, 870 P.2d 470 (Colo. 1994).

Under subsection (1)(j), prospective jurors should be excused if "it appears doubtful" that they will be governed by the instructions of the court as to the law of the case. *Morgan v. People*, 624 P.2d 1331 (Colo. 1981); *People v. Blackmer*, 888 P.2d 343 (Colo. App. 1994).

Failure of trial court to excuse juror in response to challenge for cause did not constitute reversible error when juror indicated that she would need to hear both sides to make a decision; rather, such statement suggested juror's commitment to base her decision on the evidence as presented at trial. *Morrison v. People*, 19 P.3d 668 (Colo. 2000); *People v. Honeysette*, 53 P.3d 714 (Colo. App. 2002).

Failure of trial court to excuse juror in response to the challenge for cause constituted reversible error where the juror indicated she would have difficulty applying the principles of law unless she heard the defendant testify at trial. *People v. Blackmer*, 888 P.2d 343 (Colo. App. 1994).

Challenge for cause valid. Juror's close association with the law enforcement establishment, the crime scene, and the co-employee who attended the murder victim required dismissal for cause. *People v. Rogers*, 690 P.2d 886 (Colo. App. 1984).

Applicable in juvenile proceedings. The rule allowing one charged in an adult criminal prosecution to challenge for cause a prospective juror who is employed by a law enforcement agency must also be applied in juvenile delinquency proceedings. *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978).

Actual function of such employee irrelevant as to challenge. This section does not discriminate on the basis of the particular function served by a challenged employee working in the penitentiary, but mandates that all present employees of law enforcement agencies be excused from jury service. *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978).

State penitentiary deemed law enforcement agency. The state penitentiary, as a state "institution" within the department of institutions, is a law enforcement agency as to the eligibility of employees thereof to serve as jurors. *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978).

Division of youth corrections (DYC) within the department of human services is a public law enforcement agency within the meaning of subsection (1)(k). The court erroneously denied defendant's challenge for cause to a prospective juror employed by the DYC. *People v. Sommerfeld*, 214 P.3d 570 (Colo. App. 2009).

Neither the federal department of homeland security nor the federal transportation safety administration is a public law enforcement agency within the contemplation of the

statute. Neither agency has as its predominant purpose the enforcement of penal laws. *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

Even tenuous relationships with law enforcement agency grounds for challenge. To insure that a jury is impartial in both fact and appearance, a prospective juror who has even a tenuous relationship with any prosecutorial or law enforcement arm of the state should be excused from jury duty in a criminal case. *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978); *People v. Maes*, 43 Colo. App. 426, 609 P.2d 1105 (1979).

Where juror stated that she was acquainted with a police officer who would be a witness for the prosecution, that her husband was a police officer, and that the name of a police officer who was to testify as a defense witness sounded familiar to her and where the juror stated that these factors would not have a bearing upon her ability to be a fair and impartial juror, while no one of these factors alone would have required that this juror be excused for cause, the combination of factors reflecting her close association with the law enforcement establishment required her dismissal for cause, despite her somewhat ambivalent statements that these factors would not affect her ability to be a fair and impartial juror. *People v. Reddick*, 44 Colo. App. 278, 610 P.2d 1359 (1980).

But where the juror has only a passing acquaintance with police officers and states that her impartiality will not be affected, the court may permit the juror to serve. *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

Similarly, where the juror has a casual friendship with a police cadet, and the juror states that he would be fair to the defendant, the court may permit the juror to serve. *People v. Vigil*, 718 P.2d 496 (Colo. 1986).

But former employees not subject to challenge. Since this section does not purport to disqualify former employees of a public law enforcement agency challenged for cause, a defendant's challenge of a retired guard member of the jury panel was properly denied. *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978).

But volunteer reserve police officer not ineligible for jury service. The plain language of the statute makes compensated employees of public law enforcement agencies ineligible for jury service. Compensation by private employers for off-duty work does not bring panel member within reach of statute. Employment at the time of the defendant's trial, and not future employment, is determinative. *People v. Veloz*, 946 P.2d 525 (Colo. App. 1997).

Prospective juror clearly was not an "employee" under this section or under Crim. P. 24(b)(1)(XII), where she volunteered to serve on an on-call basis to work with victims, at the time of trial had been an advocate for a brief period, had been called only approximately six

times, and had only a casual limited time commitment. *People v. Gilbert*, 12 P.3d 331 (Colo. App. 2000).

Statute is not "eliminated" by § 13-71-104. This statute was enacted prior to the passage of § 13-71-104 and general assembly is assumed to have been aware of this statute at that time, both statutes should be read together so as to give effect to each, particular statutes prevail over general and statutory repeal by implication is not favored, and this statute applies only in criminal trials while § 13-71-104 applies generally to all jury trials. *People v. Veloz*, 946 P.2d 525 (Colo. App. 1997).

Being a spouse does not subject a person to a challenge for cause as a compensated employee of a public law enforcement agency under subsection (1)(k). To be an employee of a public law enforcement agency an individual must agree to perform certain services or tasks and to accept direction and control from an authorized representative of the employer for compensation and being a spouse of such an employee even though the recipient of certain benefits by reason of being the spouse does not subject a person to a challenge for cause as a compensated employee under subsection (1)(k). *People v. Coleman*, 844 P.2d 1215 (Colo. App. 1992).

Word "lawyer" includes only those persons licensed to practice law. For challenge for cause to be successful as to a prospective juror who is learned in the law but not licensed to practice, there must be a showing that prospective juror's education has produced state of mind resulting in enmity or bias toward defendant or the state. *People v. Binkley*, 687 P.2d 480 (Colo. App. 1984), *aff'd*, 716 P.2d 1111 (Colo. 1986) (case decided prior to 1998 amendment to subsection (1)(k) that deleted applicability to lawyers).

A prospective juror who retained a license to practice law is a "lawyer" under subsection (1)(k), even if the juror is no longer eligible to practice law because of a transfer to inactive status. *People v. Pope*, 944 P.2d 689 (Colo. App. 1997); *People v. Daniels*, 973 P.2d 641 (Colo. App. 1998) (cases decided prior to 1998 amendment to subsection (1)(k) that deleted applicability to lawyers).

As used in subsection (1)(b), the term "third degree" means a relationship between one person and another based on consanguinity, or blood relationship, and affinity, or relationship by marriage. Each generation is called a degree in determining the particular degree of the relationship. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

A prospective juror would be related to an attorney of record within the third degree "by blood" if the attorney was the juror's child or parent; brother, sister, grandchild, or grandparent; or niece, nephew, great-grandparent, or

great-grandchild. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

A prospective juror would be related to an attorney of record within the third degree "by marriage" if the attorney was the spouse of the prospective juror, or if the attorney was the child, sibling, grandchild, grandparent, uncle, aunt, niece, nephew, great-grandchild, or great grandparent of the spouse of the prospective juror. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

As used in subsection (1)(b), "attorney of record" includes the elected district attorney of a judicial district who initiates a criminal prosecution and also includes any deputy district attorney serving in the office of such elected district attorney at the time of voir dire examination, even though the deputy district attorney may not have formally appeared or participated in the case. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

As used in subsection (1)(b), the phrase "any attorney of record or attorney engaged in the trial of the case" includes not only all prosecuting attorneys on the district attorney's staff, but also includes any defense attorney who previously entered an appearance on behalf of the defendant but who may not be participating in the trial of the case, as well as any attorney who will act on behalf of any party during the trial regardless of the level of the attorney's participation. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

For purposes of a challenge for cause under subsection (1)(b) a prospective juror who is related within the third degree by blood, adoption, or marriage to a deputy district attorney presently serving on the staff of the elected district attorney responsible for the criminal prosecution is related to an "attorney of record." *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

Trial court lacks discretion and shall sustain a challenge to remove a prospective juror from further service on the case where a statutory relationship is established and a party challenges the prospective juror for cause on that ground. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

Exclusion under subsection (1)(b) not automatic. Both prosecution and defense have the right to either challenge for cause or to forgo such challenge. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

A challenge for cause may be for bias that is either actual or implied. An implied bias is a

bias attributable in law to a prospective juror regardless of actual partiality. *People v. Moya*, 899 P.2d 212 (Colo. App. 1994).

Trial court's denial of defendant's challenge for cause under subsection (1)(b) constituted prejudicial error where it failed to remove prospective juror whose son was a deputy district attorney in the same district where defendant was being tried and defendant was required to exercise a peremptory challenge to remove suspect juror and where defendant exhausted all available peremptory challenges on other jurors. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

When court's failure to advise panel rendered harmless. Where the trial court failed to advise the jury panel pursuant to subsection (2) until after 13 prospective jurors had been seated in the jury box and the prosecutor had completed his voir dire, but the defendant failed to show that he was prejudiced by this error or that his substantial rights were in any way affected, the trial court's error was rendered harmless by the trial court's subsequent statements to the jury panel in accordance with subsection (2). *People v. Reddick*, 44 Colo. App. 278, 610 P.2d 1359 (1980).

Prosecution not required to move for mistrial before court could consider sua sponte whether to dismiss juror for alleged inability to follow court's instruction. Where neither party brought juror's misconduct to court's attention, the double jeopardy concerns reflected in subsection (3) are not implicated, and the statute is not applicable. *People v. Garcia*, 964 P.2d 619 (Colo. App. 1998), rev'd on other grounds, 997 P.2d 1 (Colo. 2000).

Investigation into jury deliberations limited. Once the evidence shows any possibility that the juror is attempting to apply the law, further investigation into juror misconduct based upon the deliberations must stop. *People v. Kriho*, 996 P.2d 158 (Colo. App. 1999).

Failure of juror during voir dire to reveal information about juror's beliefs insufficient to establish a charge of contempt. Alleged failure to reveal opposition to enforcement of drug laws through the courts, alleged failure to reveal intent not to follow the judge's instruction on the law, and failure to disclose membership in an association supporting the legalization of marijuana were insufficient to establish contempt of court charge. *People v. Kriho*, 996 P.2d 158 (Colo. App. 1999).

Applied in *People v. Manners*, 708 P.2d 1391 (Colo. App. 1985).

16-10-104. Peremptory challenges. (1) In capital cases, the state and the defendant, when there is one defendant, shall each be entitled to ten peremptory challenges. In all other cases, where there is one defendant and the punishment may be by imprisonment in the correctional facilities operated by the department of corrections, the state and the defendant shall each be entitled to five peremptory challenges, and in all other cases to three peremptory challenges. If there is more than one defendant, each side shall be entitled to an

additional three peremptory challenges for every defendant after the first in capital cases, but not exceeding twenty peremptory challenges to each side; in all other cases, where the punishment may be by imprisonment in the correctional facilities operated by the department of corrections, to two additional peremptory challenges for every defendant after the first, not exceeding fifteen peremptory challenges to each side; and in all other cases, to one additional peremptory challenge for every defendant after the first, not exceeding ten peremptory challenges to each side. In any case where there are multiple defendants, every peremptory challenge shall be made and considered as the joint peremptory challenge of all defendants. In case of the consolidation of any indictments, informations, complaints, or summonses and complaints for trial, such consolidated cases shall be considered, for all purposes concerning peremptory challenges, as though the defendants had been joined in the same indictment, information, complaint, or summons and complaint. When trial is held on a plea of not guilty by reason of insanity, the number of peremptory challenges shall be the same as if trial were on the issue of substantive guilt.

(2) Peremptory challenges shall be exercised as provided by applicable rule of criminal procedure.

Source: L. 72: R&RE, p. 237, § 1. C.R.S. 1963: § 39-10-104. L. 79: (1) amended, p. 678, § 3, effective July 1. L. 81: (1) amended, p. 890, § 3, effective July 1. L. 85: (1) amended, p. 617, § 9, effective July 1.

ANNOTATION

Law reviews. For article, "Curbing the Prosecutor's Abuse of the Peremptory Challenge", see 14 Colo. Law 1629 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to peremptory challenges on the basis of race, see 15 Colo. Law. 1609 (1986).

This section controls over court rule. Peremptory challenges, while not constitutionally required, are deemed to be an effective means of securing a more impartial and better qualified jury and, as such, are an important right of an accused. While also having an incidental effect on trial procedure, this section is primarily an expression of policy concerning this right of the accused, a substantive matter, and, thus, controls over Crim. P. 24(d). People v. Hollis, 670 P.2d 441 (Colo. App. 1983).

Although the statute refers to the number of challenges in capital cases, it does not define "capital case". By contrast, Crim. P. 24(d)(1) does define the term. The rule and the statute, therefore, do not "conflict" in the sense of being irreconcilable or necessarily incompatible with each other, and the rule can be given effect without producing a result irreconcilable with the plain language of the statute. People v. Reynolds, 159 P.3d 684 (Colo. App. 2006).

Denial of right to use all challenges is reversible error. The denial of the right of a party to use all of his peremptory challenges creates a jury which is not a statutory tribunal and therefore constitutes reversible error. People v. Haines, 37 Colo. App. 302, 549 P.2d 786 (1976).

Although right to peremptory challenges is not constitutional, failure to allow defendant

peremptory challenges as provided in this section violates defendant's due process rights. People v. Vieyra, 169 P.3d 205 (Colo. App. 2007).

Trial court need not remind defendant of remaining peremptory challenges because it is counsel's duty, and not a responsibility of the court, to track such challenges. People v. Vieyra, 169 P.3d 205 (Colo. App. 2007).

Defendant failed to prove beyond a reasonable doubt that statute is unconstitutional as applied to defendants jointly tried, as peremptory challenges are not constitutionally required and statute is rationally related to a legitimate state interest. People v. Gardenhire, 903 P.2d 1159 (Colo. App. 1995).

Statute does not unconstitutionally discriminate against a person facing life imprisonment as a result of a habitual criminal conviction. Because class 1 felonies are the most serious offenses, the general assembly could rationally perceive that additional procedural protections are warranted. People v. Turley, 18 P.3d 802 (Colo. App. 2000).

Time for determining the number of peremptory challenges is the time voir dire is commenced. People v. Hollis, 670 P.2d 441 (Colo. App. 1983).

The number of peremptory challenges allowed is governed by the statute and rule in effect at the time voir dire is conducted. People v. Priest, 672 P.2d 539 (Colo. App. 1983); People v. Marquiz, 685 P.2d 242 (Colo. App. 1984), aff'd, 726 P.2d 1105 (Colo. 1986).

Number of peremptory challenges allowed is governed by statute and is not subject to judicial discretion. People v. Macrander, 828 P.2d 234 (Colo. 1992).

Prejudicial error occurred when a defendant was required to exercise a peremptory challenge under this section to remove a suspect juror following trial court's improper denial of defendant's challenge for cause where defendant exhausted all available peremptory challenges on the other jurors. *People v. Macrander*, 828 P.2d 234 (Colo. 1992).

Prejudice is shown, if defendant exhausts all peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause. *People v. Zurenko*, 833 P.2d 794 (Colo. App. 1991).

Prejudice is shown if defendant exhausts all of his peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause. A defendant is not required to request an additional peremptory challenge to preserve this issue on appeal. *People v. Prator*, 833 P.2d 819 (Colo. App. 1992), *aff'd*, 856 P.2d 837 (Colo. 1993).

No error occurred when trial court properly denied defendant's motion for cause challenge to a juror who would base her decision on the evidence presented at trial and who would follow the court's instructions concerning the presumption of innocence; defendant cannot claim prejudice for his choice not to excuse the juror by use of a peremptory challenge; *Morrison v. People*, 19 P.3d 668 (Colo. 2000); *People v. Honeysette*, 53 P.3d 714 (Colo. App. 2002).

Where the trial court improperly removed jurors for cause and the prosecution subsequently used all of its peremptory challenges, the prosecution enjoyed an unfair tactical

advantage in determining the makeup of the jury, detrimentally affecting the rights of the defendant and requiring a new trial. Improperly dismissing some jurors for cause has the effect of granting additional peremptory challenges to the prosecution. It is irrelevant that the defendant has full ability to use his peremptory challenges. The prosecution's relatively greater ability to remove jurors it views as objectionable is independently prejudicial to the defendant's rights, and the court will presume prejudice to the defendant. *People v. Lefebvre*, 5 P.3d 295 (Colo. 2000).

Where defendant was charged with first-degree murder, defendant, as well as the state, was entitled to 15 peremptory challenges. *People v. Haines*, 37 Colo. App. 302, 549 P.2d 786 (1976).

Despite *Furman v. Georgia* (408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972)) which abolished the death penalty in capital cases, the procedural aspects of a capital case, as established by the Colorado constitution or Colorado statutes, remain in effect for crimes which have previously been classified as capital. *People v. Haines*, 37 Colo. App. 302, 549 P.2d 786 (1976).

Where the death penalty was not even a possibility, the trial court correctly limited the appellant to 10 peremptory challenges. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

Applied in *People v. Fink*, 41 Colo. App. 47, 579 P.2d 659 (1978); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Gonzales*, 631 P.2d 1170 (Colo. App. 1981); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984); *People v. Gardenhire*, 903 P.2d 1165 (Colo. App. 1995).

16-10-105. Alternate jurors. The court may direct that a sufficient number of jurors in addition to the regular jury be called and impaneled to sit as Alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror shall be discharged when the jury retires to consider its verdict or at such time as determined by the court. When alternate jurors are impaneled, each side is entitled to one peremptory challenge in addition to those otherwise allowed by law. In a case in which a class 1, 2, or 3 felony, as described in section 18-1.3-401 (1) (a) (IV) and (1) (a) (V), C.R.S., is charged and in any case in which a felony listed in section 24-4.1-302 (1), C.R.S., is charged, the court shall impanel at least one juror to sit as an alternate if requested by any party.

Source: L. 72: R&RE, p. 237, § 1. C.R.S. 1963: § 39-10-105. L. 90: Entire section amended, p. 924, § 5, effective March 27. L. 91: Entire section amended, p. 429, § 6, effective May 24. L. 2012: Entire section amended, (HB 12-1310), ch. 268, p. 1394, § 7, effective June 7.

ANNOTATION

The purpose of seating an alternate juror is to have available another juror when, through

unforeseen circumstances, a juror is unable to continue to serve. *People v. Meis*, 837 P.2d 258

(Colo. App. 1992).

Crim. P. 24(e) is mandatory in its requirement that alternate jurors be discharged at the time the jury retires to deliberate; any replacement of a regular juror by an alternate must occur prior to such time. *People v. Burnette*, 753 P.2d 773 (Colo. App. 1987), *aff'd*, 775 P.2d 583 (Colo. 1989).

A ruling by the trial court which calls an alternative juror to replace a juror who becomes "disqualified" to perform his duties is a matter within the discretion of the trial court and will not be disturbed on review unless an abuse of discretion is shown. *People v. Johnson*, 757 P.2d 1098 (Colo. App. 1988) (decided prior to 1990 and 1991 amendments).

The trial court has authority to dismiss an unbiased juror if there are valid reasons for the dismissal of the juror and the decision was not arbitrary, unreasonable, or unfair, nor was the defendant prejudiced by the juror's dismissal because an alternate was available. *People v. Lee*, 30 P.3d 686 (Colo. App. 2000).

But trial court has the authority under both Crim. P. 24(e) and this section to replace a juror with an alternate after jury deliberations have commenced where discharge is allowed "at such time as determined by the court". *People v. Carrillo*, 946 P.2d 544 (Colo. App. 1997), *aff'd*, 974 P.2d 478 (Colo. 1999).

If a trial court interrupts deliberations of a jury and suspends the jury's fact finding functions to investigate allegations of juror misconduct, the court's inquiry must not intrude into the deliberative process. In the exercise of judicial discretion, before a juror is dismissed from a deliberating jury due to an allegation of juror misconduct, the court must make findings supporting a conclusion that the allegedly offending juror will not follow the court's instructions. *Garcia v. People*, 997 P.2d 1 (Colo. 2000).

In deciding whether to replace a juror with an alternate, the following should be considered: The juror's assurance of impartiality; the nature of the information not disclosed; whether the nondisclosure was deliberate; and any prejudicial effect the non-disclosed information would have had on either party. *People v. Meis*, 837 P.2d 258 (Colo. App. 1992).

Prejudice is presumed when discharged alternate juror replaces regular juror during deliberations. Presumption may be rebutted

only by a showing that trial court took extraordinary precautions to ensure that defendant would not be prejudiced and that, under the circumstances of the case, such precautions were adequate to achieve that result. *People v. Burnette*, 775 P.2d 583 (Colo. 1989); *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

Presumption of prejudice held sufficiently rebutted where juror was replaced for an obvious and bona fide hearing impairment, court carefully instructed remaining jurors and the alternate juror to start their deliberations anew, the jury physically tore up and discarded their notes from the earlier deliberations, and the second set of deliberations took two hours longer than the first. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

Reversible error. Where trial court replaced regular juror with alternate juror during jury deliberations but did not ask regular jurors if they were capable of disregarding their previous deliberations or if they would be receptive to an alternate juror's attempt to assert a non-conforming view and did not ask alternate juror about his activities after being discharged or his present ability to serve on the jury, trial court did not take extraordinary measures to ensure that defendant would not be prejudiced by such mid-deliberation replacement and, as a result thereof, defendant's conviction required reversal. *People v. Burnette*, 753 P.2d 773 (Colo. App. 1987), *aff'd*, 775 P.2d 583 (Colo. 1989).

This section is not in agreement with Crim. P. 24(e) because this section requires that jurors may be replaced with alternate jurors before deliberations begin and not after. Since the court rules govern practice and procedure in civil and criminal cases while the statute affects the substantive right to a fair trial, this section is the operative provision in deciding that the trial court erred by applying Crim. P. 24(e) and allowing the replacement of a regular juror with an alternate juror after the jury had begun its deliberations. *People v. Montoya*, 942 P.2d 1287 (Colo. App. 1996).

This section controls over Crim. P. 24(e) because it provides substantive, in addition to procedural, direction to the trial court. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).

Applied in *People v. Fink*, 41 Colo. App. 47, 579 P.2d 659 (1978); *People v. Evans*, 674 P.2d 975 (Colo. App. 1983); *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

16-10-106. Incapacity of juror. Where a jury of twelve has been sworn to try the case, and any juror by reason of illness or other cause becomes unable to continue until a verdict is reached, the court may excuse such juror. If no alternate juror is available to replace the juror, the parties at any time before verdict may stipulate in writing with court approval that the jury shall consist of any number less than twelve, and the jurors thus remaining shall proceed to try the case and determine the issues unless discharged by the court for inability to reach a verdict.

Source: L. 72: R&RE, p. 237, § 1. C.R.S. 1963: § 39-10-106.

ANNOTATION

Number of challenges for cause not limited. There has been no limit set by statute or rule on the number of challenges for cause. *People v. Fink*, 41 Colo. App. 47, 579 P.2d 659 (1978).

Defence counsel stipulation to a jury of less than 12 in open court and on the record satisfies the statutory requirement that the stipulation must be in writing. *People v. Baird*, 66 P.3d 183 (Colo. App. 2002).

Juror properly dismissed and replaced. A juror, after being sequestered for eight days, was

properly dismissed and replaced with an alternate when the juror was shown to be quite nervous and upset, and no evidence of prejudice against the defendant was shown by the dismissal and replacement of the juror. *People v. Evans*, 674 P.2d 975 (Colo. App. 1983).

Applied in *People v. Waters*, 641 P.2d 292 (Colo. App. 1981).

16-10-107. Challenge to entire jury panel. A challenge to the panel is an objection to the entire panel of prospective trial jurors made by the defendant or by the prosecuting attorney. No challenge to the panel shall be made, except as provided by section 13-71-139, C.R.S.

Source: L. 72: R&RE, p. 238, § 1. C.R.S. 1963: § 39-10-107. L. 89: Entire section amended, p. 776, § 8, effective January 1, 1990.

16-10-108. Verdict. The verdict of the jury shall be unanimous. The jury shall return its verdict in open court, but a sealed verdict may be received as provided by rule of the supreme court of Colorado.

Source: L. 72: R&RE, p. 238, § 1. C.R.S. 1963: § 39-10-108.

ANNOTATION

Although there is a statutory right to a unanimous verdict in criminal cases in Colorado, the state constitution does not explicitly guarantee the right to a unanimous verdict. Nevertheless, there are some cases in which the jury may return a general verdict of guilty when instructed on alternative theories of principal and complicitor liability and in which the state constitution has provided a criminal defendant the right to a unanimous jury verdict. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

The use of a sealed verdict in prosecution for aggravated robbery was not improper. *People v. Herrera*, 182 Colo. 302, 512 P.2d 1160 (1973).

Retrial of defendant on kidnapping charge, after the first trial was declared a mistrial without objection from either party, did not violate statute requiring the verdict of the jury to be unanimous or the defendant's right to due process because the federal constitution does not guarantee a defendant a unanimous verdict of either guilty or not guilty. *People v. Barton*, 58 P.3d 1075 (Colo. App. 2002).

Unanimity is required only with respect to ultimate issue of defendant's guilt or innocence of the crime charged and not with respect to alternative means by which the crime was

committed. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Vigil*, 678 P.2d 554 (Colo. App. 1983); *People v. Marquez*, 692 P.2d 1089 (Colo. 1984).

If the court has not required the prosecution to elect the transaction on which it relies for conviction, to ensure jury unanimity, the jury must be instructed that to convict the defendant it must unanimously agree that the defendant committed the same act or committed all the acts within the period charged. *People v. Rivera*, 56 P.3d 1155 (Colo. App. 2002); *People v. Gookins*, 111 P.3d 525 (Colo. App. 2004).

Failure of trial court to give unanimity instruction constitutes plain error if that failure results in confusion whether jurors' conviction was based upon a true unanimity or whether different incidents formed the basis for the conclusion of individual jurors. In cases involving multiple acts, unanimity instruction assures that the jury does not base its conviction upon some jurors finding that one act was committed while others rely on a different act. *People v. Devine*, 74 P.3d 440 (Colo. App. 2003).

Consideration of lesser charge permitted without acquittal of greater charge. Acquittal of a greater charge by a unanimous vote of the jury is not necessary before the jury can con-

sider a lesser included offense. *People v. McGregor*, 635 P.2d 912 (Colo. App. 1981).

The jury instruction for felony menacing which did not specify a particular victim, coupled with the comments of the prosecutor, invited the jury to convict without regard to the identity of the victim, making it impossible to determine whether the jury unanimously convicted defendant on the basis of menacing the same victim. *People v. Simmons*, 973 P.2d 627 (Colo. App. 1998).

The court did not commit plain error when it failed to instruct the jury that it must unanimously agree on the underlying felony

for the first degree burglary conviction. Because the jury unanimously found defendant guilty of attempted aggravated robbery, the finding satisfied the intent requirement of first degree burglary as well as any requirement that the jury agree unanimously to the underlying offense. Therefore, the court's failure to give a unanimity instruction was not plain error because there was no reasonable possibility that any error contributed to defendant's conviction. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Applied in *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

16-10-109. Trial by jury for petty offenses. (1) For the purposes of this section, "petty offense" means any crime or offense classified as a petty offense or, if not so classified, which is punishable by imprisonment other than in a correctional facility for not more than six months, or by a fine of not more than five hundred dollars, or by both such imprisonment and fine, and includes any violation of a municipal ordinance or offense which was not considered a crime at common law; except that violation of a municipal traffic ordinance which does not constitute a criminal offense or any other municipal charter, municipal ordinance, or county ordinance offense which is neither criminal nor punishable by imprisonment under any counterpart state statute shall not constitute a petty offense. No child under the age of eighteen years shall be entitled to a trial by jury for a violation of a municipal ordinance or a county ordinance for which imprisonment in jail is not a possible penalty. Nothing in this subsection (1) shall prohibit a municipality or county from granting a right to trial by jury for ordinance violations.

(2) A defendant charged with a petty offense shall be entitled to a jury trial if, within twenty-one days after entry of a plea, the defendant makes a request to the court for a jury trial, in writing, and tenders to the court a jury fee of twenty-five dollars unless the fee is waived by the judge because of the indigence of the defendant. The jury shall consist of three jurors unless a greater number, not to exceed six, is requested by the defendant in said jury demand. If the charge is dismissed or the defendant is acquitted of the charge or if the defendant, having paid the jury fee, files with the court at least seven days before the scheduled trial date a written waiver of jury trial, the jury fee shall be refunded.

(3) At the time of arraignment for any petty offense in this state, the judge shall advise any defendant not represented by counsel of the defendant's right to trial by jury, of the requirement that the defendant, if he or she desires to invoke his or her right to trial by jury, request such trial by jury within twenty-one days after entry of a plea, in writing, of the number of jurors allowed by law, and of the requirement that the defendant, if he or she desires to invoke his or her right to trial by jury, tender to the court within twenty-one days after entry of a plea a jury fee of twenty-five dollars unless the fee is waived by the judge because of the indigence of the defendant.

Source: **L. 72:** R&RE, p. 238, § 1. **C.R.S. 1963:** § 39-10-109. **L. 79:** (1) amended, p. 679, § 4, effective July 1. **L. 82:** (1) amended, p. 655, § 6, effective January 1, 1983. **L. 88:** (1) amended, p. 667, § 2, effective July 1. **L. 93:** (1) amended, p. 1728, § 6, effective July 1. **L. 96:** (1) amended, p. 1680, § 3, effective January 1, 1997. **L. 2001:** (1) amended, p. 859, § 8, effective July 1. **L. 2005:** (2) and (3) amended, p. 427, § 9, effective July 28. **L. 2012:** (2) and (3) amended, (SB 12-175), ch. 208, p. 853, § 82, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (2) and (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "Colorado's Municipal System", see 30 Colo. Law. 33 (December 2001).

Defendant's right to trial by jury has been expanded to include petty offenses. *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

Where plaintiff was charged with violations of the Denver municipal code pertaining to overtime parking and the maximum possible punishment for each violation was a \$5 fine, plaintiff was entitled to jury trials on these matters. *Trinen v. Diamond*, 44 Colo. App. 325, 616 P.2d 986 (1980).

Where defendant was a juvenile charged with theft under the Longmont municipal code, which charge is punishable by a maximum \$300 fine and the counterpart state statute to which provides for punishment by imprisonment, the charge qualified as a petty offense and defendant was entitled to a jury trial. *Bradford v. Longmont Municipal Court*, 830 P.2d 1135 (Colo. App. 1992).

Defendants charged with municipal violation that constitutes petty offense are entitled to a jury trial. *Bradford v. Longmont Mun. Court*, 830 P.2d 1135 (Colo. App. 1992).

Right to jury trial not abridged by trial forum. The statutory right to a jury trial cannot be abridged on account of the forum in which the petty offense is tried. *City of Aurora ex rel. People v. Erwin*, 706 F.2d 295 (10th Cir. 1983).

Written jury demand need not specify number of jurors. Subsection (2) does not require a defendant charged with a petty offense in

municipal court to state a particular number of jurors in his written jury demand. *Lininger v. City of Sheridan*, 648 P.2d 1097 (Colo. App. 1982).

A first-time charge of driving while ability impaired is not a petty offense. The general assembly's placement of numerous alcohol and drug-related offenses in a single statute demonstrates an intention not to treat first-time driving while ability impaired offenses as petty offenses. The penalties are dependant upon circumstances that may not be known by the court at the time of arraignment. The penalties for a first-time offense may easily exceed those of a petty offense under this section. Therefore, defendants are not required to file with a court under this section to obtain a trial by jury. *Byrd v. Stavely*, 113 P.3d 1273 (Colo. App. 2005).

Section governs over municipal court rules. Inasmuch as the right to a jury trial in petty offenses is a substantive right granted to all citizens of this state, subsection (2) governs over rule 223(a), C.M.C.R. *Lininger v. City of Sheridan*, 648 P.2d 1097 (Colo. App. 1982).

And over § 13-10-114. This section controls over § 13-10-114 (4). *Lininger v. City of Sheridan*, 648 P.2d 1097 (Colo. App. 1982) (decided prior to 1983 amendment of § 13-10-114).

This section and § 13-10-114 cannot be harmonized on the question of a defendant's duty to designate the jury size in his written jury demand. *Lininger v. City of Sheridan*, 648 P.2d 1097 (Colo. App. 1982) (decided prior to 1983 amendment to § 13-10-114).

16-10-110. Jury instructions - cases involving the possibility of the death penalty. At the trial of any felony in which the prosecution is not seeking the death penalty, upon the request of the prosecution or the defendant, the court shall instruct the jury during voir dire that the prosecution is not seeking the death penalty.

Source: L. 89: Entire section added, p. 828, § 36, effective July 1.

ANNOTATION

Defendant's fundamental right to a fair trial for murder not impaired by court informing jury that the death penalty would not be an option without also explaining the applicable sentencing scheme where the death penalty is the only sentencing decision within the purview of the jury. *People v. Smith*, 848 P.2d 365 (Colo. 1993).

Jury instruction providing supplemental definition of "knowing" for the purposes of second degree murder was unnecessary, but was not reversible error. The trial court's instruction did not pose a barrier to the jury in

considering fully the defendant's affirmative defense. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

Although this section does not address whether the court, on its own motion, may inform the jury that the death penalty is not involved in a case, the trial court did not abuse its discretion in denying the defendant's motion for a mistrial trial on the basis that the court made such statement. *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

It was not error for the trial court to advise the prospective jurors at the outset of voir

dire that, if defendant was convicted, death was a possible penalty. *People v. Martinez*, 24 P.3d 629 (Colo. App. 2000).

PART 2

EVIDENCE OF INCONSISTENT STATEMENTS - VARIANCE

16-10-201. Inconsistent statement of witness - competency of evidence. (1) Where a witness in a criminal trial has made a previous statement inconsistent with his testimony at the trial, the previous inconsistent statement may be shown by any otherwise competent evidence and is admissible not only for the purpose of impeaching the testimony of the witness, but also for the purpose of establishing a fact to which his testimony and the inconsistent statement relate, if:

(a) The witness, while testifying, was given an opportunity to explain or deny the statement or the witness is still available to give further testimony in the trial; and

(b) The previous inconsistent statement purports to relate to a matter within the witness's own knowledge.

Source: L. 72: R&RE, p. 238, § 1. C.R.S. 1963: § 39-10-201.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979). For article, "Prior Inconsistent Statements", see 17 Colo. Law. 1977 (1988).

This section is constitutional. *People v. Mulligan*, 193 Colo. 509, 568 P.2d 449 (1977).

This section is not unconstitutional as ex post facto legislation. *People v. Bastardo*, 646 P.2d 382 (Colo. 1982).

This section changes the common-law rule that one could not impeach his own witness absent surprise or hostility and, in a criminal trial, if a witness has made a prior inconsistent statement purporting to relate to a matter within his knowledge, that fact may be shown where the safeguards of subsection (1)(a) are met. *People v. Stewart*, 39 Colo. App. 142, 568 P.2d 65 (1977).

This section, rather than C.R.E. 613, controls the admissibility of prior inconsistent statements for substantive purposes in a criminal case. *Montoya v. People*, 740 P.2d 992 (Colo. 1987).

Comparing this section to C.R.E. 613, it is clear that the rule is directed to situations in which a prior inconsistent statement is used for impeachment purposes only, but this section eliminates the hearsay impediment to using prior inconsistent statements for proving the truth of matters asserted so long as statutory foundation requirements for admissibility of the evidence have been satisfied. *People v. Madril*, 746 P.2d 1329 (Colo. 1987); *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994); *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), *aff'd in part and rev'd in part on other grounds*, 148 P.3d 178 (Colo. 2006).

The general rule, prior to the adoption of C.R.E. 806, was that inconsistent statements used to impeach a witness were not admissible unless the witness had been asked about the time and place and to whom the statement was made. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

Under this section neither surprise nor hostility is required to impeach one's own witness. *People v. Mulligan*, 193 Colo. 509, 568 P.2d 449 (1977).

Once the statutory foundation has been laid, a witness's prior inconsistent statements become admissible without a showing of surprise or hostility. *People v. Pepper*, 193 Colo. 505, 568 P.2d 446 (1977).

If prior statements of a witness appear inconsistent and the two statutory conditions are adequately established, this section mandates admission of prior inconsistent statements even as against a party's own witness, whether that party be the prosecution or the defense. *People v. Grant*, 40 Colo. App. 46, 571 P.2d 1111 (1977).

When defendant takes stand in own defense, he becomes a "witness" within the meaning of this section. *People v. Evans*, 630 P.2d 94 (Colo. App. 1981).

Requirements of section held met. Where defendant's counsel declined to cross-examine the witness, and at the close of his testimony the court specifically instructed the witness to remain available for recall, the requirements of this section were satisfied. *People v. Grant*, 40 Colo. App. 46, 571 P.2d 1111 (1977).

Requirements for admission of evidence of prior inconsistent statement. Evidence that a witness made a prior inconsistent statement is admissible if the statement is inconsistent, the

witness is given an opportunity to explain or deny the statement or is available for recall, the statement purports to relate to a matter within the witness' personal knowledge, and the evidence offered to prove that the prior inconsistent statement was made is "otherwise competent". *People v. Card*, 42 Colo. App. 259, 596 P.2d 402 (1979); *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), *aff'd* in part and *rev'd* in part on other grounds, 148 P.3d 178 (Colo. 2006).

Prior inconsistent statement properly admissible under this section for both substantive and impeachment purposes where witness was still testifying when the court ruled on admissibility of statement and so had opportunity to explain prior statement, and where witness was testifying regarding matters within his own knowledge. *People v. Jenkins*, 768 P.2d 727 (Colo. App. 1988); *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994).

Statements obtained in violation of Miranda admissible for impeachment only. Prior inconsistent statements obtained in violation of *Miranda* are competent only to the extent that they are introduced for purposes of impeachment; they are not admissible as substantive evidence of guilt. *People v. Evans*, 630 P.2d 94 (Colo. App. 1981).

Where statement admitted for impeachment only, instruction to that effect required. If the court concludes that a prior inconsistent statement may not be offered for the truth of the fact to which it relates, but still may be used for the limited purpose of impeachment, then an instruction to that effect should be given contemporaneously, thus limiting the jury's consideration of the specific evidence to impeachment of the witness. *People v. District Court*, 195 Colo. 570, 580 P.2d 388 (1978).

Witness's memory loss regarding prior inconsistent statements. Where a witness takes the stand and is available for cross-examination, the witness's actual or feigned memory loss even if memory loss is total regarding prior inconsistent statements does not violate a defendant's confrontation right. *People v. Pepper*, 193 Colo. 505, 568 P.2d 446 (1977).

Where witness denied or could not recall any participation by defendant in the alleged drug transaction, the trial court properly allowed the prosecution to bring witness's earlier contradictory statements to her attention after laying a proper foundation under this section. *People v. Aguirre*, 839 P.2d 483 (Colo. App. 1992).

Inability to remember statement deemed denial thereof. For the purpose of introducing the prior testimony of a witness, the witness' inability to remember a statement is tantamount to a denial that he made the statement. *People v. Baca*, 633 P.2d 528 (Colo. App. 1981).

Evidence of prior consistent statements may be used only to rebut prior inconsistent statements. *People v. Fletcher*, 37 Colo. App.

173, 546 P.2d 980 (1975), *rev'd* on other grounds, 193 Colo. 314, 566 P.2d 345 (1977).

In contrast to the common-law rule, this section does not require the predicate of hostility or surprise. *People v. Hawthorne*, 190 Colo. 437, 548 P.2d 124 (1976).

This section prefaces admission of statement admitted at prior trial of witness upon a sequence of events. First, the witness must have made a previous statement, and second, the previous statement must be inconsistent with the testimony of the witness at trial. *People v. Smith*, 192 Colo. 271, 559 P.2d 221 (1976).

Where the codefendant made no statement at trial, the requirements of the statute were not met. Consequently, this section is inapposite. *People v. Smith*, 192 Colo. 271, 559 P.2d 221 (1976).

When a defendant does not testify, the defendant's voluntary, unwarned custodial statements may not be used either to rebut the defendant's theory of defense or to impeach a witness other than the defendant. *People v. Trujillo*, 49 P.3d 316 (Colo. 2002) (following *James v. Illinois*, 493 U.S. 307 (1990)).

When mandate of section fulfilled. The mandate of this section is adequately fulfilled if from all the circumstances it appears that the prior statement was inconsistent and the statutory conditions were adequately established. *People v. Bastardo*, 191 Colo. 521, 554 P.2d 297 (1976).

Court is not required to make certain findings. The court is not required to make findings that proffered statements are in fact inconsistent, that they are based on the direct observations of the witness, and that they are not the result of police coercion or threats of prosecution. *People v. Bastardo*, 191 Colo. 521, 554 P.2d 297 (1976).

Trial court did not err in not holding a hearing, sua sponte, on issue of whether informant's consent to electronic monitoring was obtained by coercion where the trial court held it was not satisfied that the government or law enforcement authorities coerced the informant in any way and that finding was made with ample support. *People v. Moltrier*, 893 P.2d 1331 (Colo. App. 1994).

Trial court did not err in applying the provisions of this section to summaries of electronically monitored conversations where informant was explicitly advised that she could be recalled to testify and yet she persisted in her testimony that she remembered nothing of the transaction, the statement purported to be a matter within the informant's own knowledge, and she was available for cross-examination. *People v. Moltrier*, 893 P.2d 1331 (Colo. App. 1994).

Application of this section in allowing prosecution to impeach its own witness with prior inconsistent statements was not a violation of right to confront accuser, to assistance of counsel, to appear when depositions against one were

taken, or to due process of law. *People v. Bastardo*, 191 Colo. 521, 554 P.2d 297 (1976).

Applied in *People v. Norwood*, 37 Colo. App. 157, 547 P.2d 273 (1975); *People v. Lambert*, 40 Colo. App. 84, 572 P.2d 847 (1977); *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276

(1978); *People v. Esquibel*, 43 Colo. App. 191, 599 P.2d 981 (1979); *People v. Lopez*, 43 Colo. App. 493, 605 P.2d 69 (1979); *People v. Small*, 631 P.2d 148 (Colo. 1981); *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Montoya*, 703 P.2d 606 (Colo. App. 1985).

16-10-202. Variance - allegations and proof. When on the trial of any indictment, information, felony complaint, or complaint for any offense there appears to be any variance between the statements in the indictment, complaint, or information and the evidence offered in proof thereof, of any given name or surname, or both given name and surname, or other description whatever of any person who is therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, such variance is not grounds for the acquittal of the defendant, unless the court before which such trial be had finds such variance is material to the merits of the case or may be prejudicial to the defendant. No indictment, information, felony complaint, or complaint shall be deemed insufficient nor shall the trial, judgment, or other proceedings thereon be reversed or affected by any defect which does not tend to prejudice the substantial rights of the defendant on the merits.

Source: L. 72: R&RE, p. 239, § 1. C.R.S. 1963: § 39-10-202. L. 73: p. 499, § 4.

ANNOTATION

- I. General Consideration.
- II. Prejudice of Substantive Rights.
 - A. In General.
 - B. Defects in Charging Instrument.
 - C. Variances Between Allegations and Proof.

385, 399 P.2d 412 (1965); *Stoudt v. People*, 156 Colo. 568, 400 P.2d 670 (1965).

II. PREJUDICE OF SUBSTANTIVE RIGHTS.

A. In General.

I. GENERAL CONSIDERATION.

Annotator's note. Since § 16-10-202 is similar to repealed § 39-7-17, C.R.S. 1963, § 39-7-17, CRS 53, CSA, C. 48, § 490, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of section. This section was intended to prevent the escape of guilty persons upon purely technical grounds not affecting their substantial rights and to render successful a prosecution which might otherwise fail because of harmless error. *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947).

This section does not apply to rulings of court during trial. In this section the defect for which a reversal should not be had seems to refer to a defect in the indictment or information and not to errors committed by the court in its rulings during the trial. *People v. Heath*, 51 Colo. 182, 117 P. 138 (1911).

Or arraignment and plea of accused. This section does not affect the doctrine that when defendant was not arraigned and did not plead, a reversal must be had. *People v. Heath*, 51 Colo. 182, 117 P. 138 (1911).

Applied in *Straub v. People*, 145 Colo. 275, 358 P.2d 615 (1961); *Duran v. People*, 156 Colo.

Technical errors which do not tend to prejudice the substantial rights of a defendant, do not afford grounds for reversal of a judgment of conviction. *Sweek v. People*, 85 Colo. 479, 277 P. 1 (1929).

Technical errors are not grounds for reversal where verdict and judgment are correct. *Koontz v. People*, 82 Colo. 589, 263 P. 19 (1927).

The general assembly repeatedly has endeavored to make it plain that, in both civil and criminal procedure, substance, not form, is the controlling consideration. *Waite v. People*, 83 Colo. 162, 262 P. 1009 (1928).

Where error, if any committed, was harmless and did not tend to prejudice the substantial rights of the defendants on the merits, it will not warrant a reversal. *Messer v. People*, 65 Colo. 435, 176 P. 828 (1918).

Misnomer of juror, manifest at the reception of the verdict and not then suggested or objected to by the accused, will not, when no prejudice to the accused appears, suffice to reverse judgment of conviction. *Tollifson v. People*, 49 Colo. 219, 112 P. 794 (1910).

Admission of dying declaration in evidence. *Reppin v. People*, 95 Colo. 192, 34 P.2d 71 (1934).

Or other erroneous ruling upon the admission of evidence cannot be made the basis for

the reversal of an adverse judgment where it is without prejudice to the rights of the complaining party. *Schreiner v. People*, 95 Colo. 392, 36 P.2d 764 (1934).

And error in giving instructions may not be fatal. It is not every error in instructions that requires a reversal. Where defendant's guilt is proven by conclusive evidence and his substantial rights are not prejudiced by the giving of an instruction which is in part erroneous, the judgment will not be reversed on that ground. *Stewart v. People*, 83 Colo. 289, 264 P. 720 (1928).

Objections to technical defects are not encouraged. Objections to technical defects that do not tend to prejudice the substantial rights of the defendant on the merits, are not encouraged. *Cliff v. People*, 84 Colo. 254, 269 P. 907 (1928); *Albert v. People*, 90 Colo. 219, 7 P.2d 822 (1932).

B. Defects in Charging Instrument.

Defects not prejudicing substantial rights are not grounds for reversal. Judgment in a criminal case will not be reversed for a defect appearing in the information which does not tend to prejudice the substantial rights of the defendant on the merits. *McClary v. People*, 79 Colo. 205, 245 P. 491 (1926); *Woolsey v. People*, 98 Colo. 62, 53 P.2d 596 (1935).

No appeal shall be sustained for any matter in an information not affecting the real merits of the offense charged. *Gray v. People*, 139 Colo. 583, 342 P.2d 627 (1959).

As erroneous statements in the charging parts of a criminal information which do not prejudice the substantial rights of defendant, and which may properly be rejected as surplusage, afford no ground for the reversal of a judgment of conviction. *Cole v. People*, 92 Colo. 145, 18 P.2d 470 (1933).

Or where an indictment carries an erroneous allegation which could not mislead the defendant, its insertion does not tend to prejudice the substantial rights of the defendant on the merits and therefore is no ground for reversal. *Cole v. Van Horn*, 67 F.2d 735 (10th Cir. 1933); *Cole v. People*, 92 Colo. 145, 18 P.2d 470 (1933).

Or minor objections to form of indictment or information are without force, since the form complained of in no way prejudices the rights of plaintiff in error. *Holt v. People*, 23 Colo. 1, 45 P. 374 (1896).

Or discrepancy in dates of verification and filing of information. Although there is an apparent discrepancy in the dates of verification and filing of an information, no prejudice resulting to the rights of defendant, the error is harmless and without effect under this section. *Grandbouche v. People*, 104 Colo. 175, 89 P.2d 577 (1939).

Or the failure of an information to state the name of the person from whom stolen goods were received does not affect the substantial rights of the accused, and under this section no exception to the omission having been taken before trial, it is without avail after conviction. *Curl v. People*, 53 Colo. 578, 127 P. 951 (1912).

Or mistaken use of singular "offense". Even though the affidavit used the word "offense" rather than "offenses", it nonetheless constitutes compliance where there is no dispute that the facts were legally sufficient to charge both robbery and conspiracy. *Martinez v. People*, 156 Colo. 380, 399 P.2d 415, cert. denied, 382 U.S. 866, 86 S. Ct. 134, 15 L. Ed.2d 104 (1965).

Specific authority to justify a refusal of relief by reason thereof is furnished by this section. *Shaw v. People*, 72 Colo. 142, 209 P. 812 (1922).

Thus, court may refuse to strike matter where no prejudice results. There is no error in the refusal of the trial court to strike from the indictment portions of the pleaded libelous matter where no prejudice resulted to the rights of the defendant. *Bearman v. People*, 91 Colo. 486, 16 P.2d 425 (1932).

But major defects render charging instrument void. Unless a correction or amendment to a charging instrument is of a minor irregularity or minor defect, an information is not merely defective, it is void and of course is not subject to curative action. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

And any conviction based on an information requiring major amendment is void, for the court is without jurisdiction. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

Applied in *Critchfield v. People*, 91 Colo. 127, 13 P.2d 270 (1932).

C. Variances Between Allegations and Proof.

A variance which does not tend to prejudice the substantial rights of a defendant is not fatal. *Ingles v. People*, 90 Colo. 51, 6 P.2d 455 (1931); *Mukuri v. People*, 92 Colo. 306, 19 P.2d 1040 (1933).

Any variance between the allegations and proof not material to the merits of the case, or that does not tend to prejudice the substantial rights of the defendant on the merits, does not constitute reversible error. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

A variance between the copy of an instrument set out in an indictment and the original cannot be successfully invoked by the accused in a criminal prosecution unless such variance is in some way material; that is, a mere variance is of no consequence unless it prejudices the accused. *Johnson v. People*, 36 Colo. 445, 84 P. 819 (1906).

Variance in the description of any matter shall not be deemed grounds for the acquittal of a defendant, unless such variance is material to the merits of the case or is prejudicial to such defendant. *John Doe v. People*, 160 Colo. 215, 416 P.2d 376 (1966).

Such as misnomer of deceased's name in murder charge. In a prosecution for murder, where the information gave the name of the deceased as Lolly Lila Downey, it was held that it was not prejudicial to the defendant nor material to the merits of the case whether the deceased's true name was as set forth in the information or was Lila Lolly Downey and under the provisions of this section it was not error to refuse to give an instruction relating to the variance. *Downey v. People*, 121 Colo. 307, 215 P.2d 892 (1950).

Or variance in sum of forged check. In a prosecution for forgery, where the only variance between the check offered in evidence and the description of the check as contained in the information is the monetary difference of one dollar, and the purported drawer, the named payee, the date, and the drawee bank as such appeared in the proffered check are all accurately described in the information, the slight variance obviously resulting from a typographical error cannot possibly prejudice defendant in any manner. *John Doe v. People*, 160 Colo. 215, 416 P.2d 376 (1966).

Or failure to prove corporate status of owner of goods stolen. Whether company was a de jure or de facto corporation was not an issue in the case and the corporate existence was not a factor in the description either of the owner of the stolen property or of the person by whom it was stolen. The defendant could not have been misled by the allegation of corporate entity, nor prejudiced by failure of the prosecution to prove it; he is fully protected against prosecution for the same offense, and his substantial rights were in no manner adversely affected. Under such

circumstances the failure to prove the corporate status of the victim was an immaterial variance and not prejudicial to the accused. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

Or the fact that a mortgage was not disclosed. In a prosecution for conspiracy to burn a dwelling, the evidence disclosed that the house was mortgaged, a fact not mentioned in the information. Under this section, such a discrepancy is not a variance. *Mukuri v. People*, 92 Colo. 306, 19 P.2d 1040 (1933).

But variance was fatal where offense proved was not the offense charged. There was a fatal variance between the allegations of the count of the information on embezzlement and the proof offered where the defendant was charged with converting with an intent to steal a certain check duly signed by corporation officers and the people's evidence clearly established that the check was not duly signed by an officer of the corporation, but was in fact a forgery, which offense defendant was not charged with. Hence the motion for a directed verdict of not guilty at the conclusion of the people's case should have been sustained. *Burns v. People*, 145 Colo. 559, 360 P.2d 106 (1961).

Or where material variance concerns instrument which is basis of offense charged. In criminal prosecutions for libel, forgery and other cases where the instrument incorporated in the indictment is the basis of the offense charged, a material variance between the instrument pleaded and the original introduced in evidence to support it, will be fatal. *Johnson v. People*, 36 Colo. 445, 84 P. 819 (1906).

Major defects may not be corrected by amendment. Generally, a criminal complaint or affidavit may be amended so as to correct minor irregularities or defects but major defects such as a material misnomer of accused or an omission of essential allegations cannot be cured by amendment on the examination. *Bustamante v. People*, 136 Colo. 362, 317 P.2d 885 (1957).

PART 3

EVIDENCE OF SIMILAR TRANSACTIONS

16-10-301. Evidence of similar transactions - legislative declaration. (1) The general assembly hereby finds and declares that sexual offenses are a matter of grave statewide concern. These frequently occurring offenses are aggressive and assaultive violations of the well-being, privacy, and security of the victims, are severely contrary to common notions of proper behavior between people, and result in serious and long-lasting harm to individuals and society. These offenses often are not reported or are reported long after the offense for many reasons, including: The frequency with which the victims are vulnerable, such as young children who may be related to the perpetrator; the personal indignity, humiliation, and embarrassment involved in the offenses themselves; and the fear of further personal indignity, humiliation, and embarrassment in connection with investigation and prosecution. These offenses usually occur under circumstances in which there are no witnesses except for the accused and the victim, and, because of this and the frequent delays in reporting, there is often no evidence except for the conflicting testimony.

Moreover, there is frequently a reluctance on the part of others to believe that the offenses occurred because of the inequality between the victim and the perpetrator, such as between the child victim and the adult accused, or because of the deviant and distasteful nature of the charges. In addition, it is recognized that some sex offenders cannot or will not respond to treatment or otherwise resist the impulses which motivate such conduct and that sex offenders are extremely habituated. As a result, such offenders often commit numerous offenses involving sexual deviance over many years, with the same or different victims, and often, but not necessarily, through similar methods or by common design. The general assembly reaffirms and reemphasizes that, in the prosecution of sexual offenses, including in proving the corpus delicti of such offenses, there is a greater need and propriety for consideration by the fact finder of evidence of other relevant acts of the accused, including any actions, crimes, wrongs, or transactions, whether isolated acts or ongoing actions and whether occurring prior to or after the charged offense. The general assembly finds that such evidence of other sexual acts is typically relevant and highly probative, and it is expected that normally the probative value of such evidence will outweigh any danger of unfair prejudice, even when incidents are remote from one another in time.

(2) This section applies to prosecution for any offense involving unlawful sexual behavior as defined in section 16-22-102 (9), or first degree murder, as defined in section 18-3-102 (1) (d), C.R.S., in which the underlying felony on which the first degree murder charge is based is the commission or attempted commission of sexual assault, as described in section 18-3-402, C.R.S., sexual assault in the first or second degree as those offenses were described in sections 18-3-402 and 18-3-403, C.R.S., as they existed prior to July 1, 2000, or the commission of a class 3 felony for sexual assault on a child as defined in section 18-3-405 (2), C.R.S.

(3) The prosecution may introduce evidence of other acts of the defendant to prove the commission of the offense as charged for any purpose other than propensity, including: Refuting defenses, such as consent or recent fabrication; showing a common plan, scheme, design, or modus operandi, regardless of whether identity is at issue and regardless of whether the charged offense has a close nexus as part of a unified transaction to the other act; showing motive, opportunity, intent, preparation, including grooming of a victim, knowledge, identity, or absence of mistake or accident; or for any other matter for which it is relevant. The prosecution may use such evidence either as proof in its case in chief or in rebuttal, including in response to evidence of the defendant's good character.

(4) If the prosecution intends to introduce evidence of other acts of the defendant pursuant to this section, the following procedures shall apply:

(a) The prosecution shall advise the trial court and the defendant in advance of trial of the other act or acts and the purpose or purposes for which the evidence is offered.

(b) The trial court shall determine by a preponderance of the evidence whether the other act occurred and whether the purpose is proper under the broad inclusionary expectations of this section.

(c) The trial court may determine the admissibility of other acts by an offer of proof.

(d) The trial court shall, at the time of the reception into evidence of other acts and again in the general charge to the jury, direct the jury as to the limited purpose or purposes for which the evidence is admitted and for which the jury may consider it.

(e) The court in instructing the jury, and the parties when making statements in the presence of the jury, shall use the words "other act or transaction" and at no time shall refer to "other offense", "other crime", or other terms with a similar connotation.

(5) The procedural requirements of this section shall not apply when the other acts are presented to prove that the offense was committed as part of a pattern of sexual abuse under section 18-3-405 (2) (d), C.R.S.

Source: L. 75: Entire part added, p. 614, § 1, effective April 3. L. 85: (1) amended, p. 622, § 4, effective July 1. L. 87: (1) amended, p. 605, § 5, effective July 1. L. 96: Entire section R&RE, p. 1578, § 1, effective July 1. L. 2000: (2) amended, p. 701, § 22, effective July 1. L. 2002: (2) amended, p. 1182, § 7, effective July 1; (4)(c) amended, p. 761, § 10, effective July 1.

Cross references: For the admissibility of evidence of other crimes, wrongs, or acts, see C.R.E. 404(b).

ANNOTATION

Section not circumscribed by statute of limitation. This section establishes the criteria for admission of testimony relating to similar acts and should not be circumscribed by a statute of limitation on sexual offenses. *Adrian v. People*, 770 P.2d 1243 (Colo. 1989) (overruling *Bigcraft v. People*, 70 P. 417 (Colo. 1902); *Curtis v. People*, 211 P. 381 (Colo. 1922); *Abbott v. People*, 299 P. 1053 (Colo. 1931); *People v. Denious*, 196 P.2d 257 (Colo. 1948)).

Guilt of one offense may not be proven by guilt of another. It is a fundamental concept of criminal law that an accused is not to be convicted of one offense by proof that he is guilty of another. *People v. Martin*, 43 Colo. App. 44, 602 P.2d 873 (1979).

"Acts or transactions" need not be criminal in nature. Subsection (1) refers to "acts or transactions", not to offenses or crimes, and thus permits admission of evidence of events, not necessarily criminal in nature, for the limited purposes specified. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980); *People v. Girtman*, 695 P.2d 759 (Colo. App. 1984).

Admissibility of prior criminal transactions discretionary. The trial court has substantial discretion in deciding the admissibility of evidence of a prior criminal transaction, and only where there is an abuse of discretion will the ruling of the trial court be disturbed. *Pigford v. People*, 197 Colo. 358, 593 P.2d 354 (1979); *People v. Delgado*, 890 P.2d 141 (Colo. App. 1994).

Evidence of prior criminal transactions not admissible where defendant was acquitted of similar act. The doctrine of collateral estoppel prevents the introduction of evidence of similar transactions for which a defendant has been acquitted. *People v. Arrington*, 682 P.2d 490 (Colo. App. 1983).

Collateral estoppel does not bar the introduction of prior act evidence relating to charges of which defendant was previously acquitted when it is presented in a subsequent action where the admission of the evidence is governed by a lower standard of proof than the acquittal. *People v. Wallen*, 996 P.2d 182 (Colo. App. 1999) (disagreeing with *People v. Arrington*, 682 P.2d 490 (Colo. App. 1983)).

Evidence admissible that defendant did not commit other similar act. If all the similar acts and circumstances, taken together, may support a finding that the same person was probably involved in both transactions, then evidence that the defendant did not commit the second transaction is relevant and admissible. *People v. Flowers*, 644 P.2d 916 (Colo. 1982), appeal

dismissed for want of substantial federal question, 459 U.S. 803, 103 S. Ct. 25, 74 L. Ed.2d 41 (1982).

Admissibility decided on case-by-case basis. Admissibility of defensive similar offense evidence must be decided on a case-by-case basis, according to general relevancy considerations. *People v. Flowers*, 644 P.2d 916 (Colo. 1982), appeal dismissed for want of substantial federal question, 459 U.S. 803, 103 S. Ct. 25, 74 L. Ed.2d 41 (1982); *People v. Montoya*, 703 P.2d 606 (Colo. App. 1985).

Exclusionary rule inapplicable when defendant offers similar offense evidence. When a defendant offers similar offense evidence for defensive reasons, the concerns which gave rise initially to the exclusionary rule are no longer relevant. *People v. Flowers*, 644 P.2d 916 (Colo. 1982), appeal dismissed for want of substantial federal question, 459 U.S. 803, 103 S. Ct. 25, 74 L. Ed.2d 41 (1982); *People v. Rollins*, 892 P.2d 866 (Colo. 1995).

Evidence of prior similar episodes is proper in sexual assault cases, regardless of whether the evidence of similar episodes relates to acts with persons other than the complaining witness and even if a prima facie case of the defendant's intent is first established. *People v. Pigford*, 40 Colo. App. 523, 580 P.2d 820 (1978), aff'd, 197 Colo. 358, 593 P.2d 354 (1979); *People v. Allen*, 42 Colo. App. 345, 599 P.2d 264 (1979).

Evidence of prior similar transactions is admissible to prove, among other things, plan, scheme, design, and motive, and this is particularly so in sexual assault cases. *People v. Vollentine*, 643 P.2d 800 (Colo. App. 1982); *People v. Montoya*, 703 P.2d 606 (Colo. App. 1985); *People v. Mosley*, 167 P.3d 157 (Colo. App. 2007).

Length of time between two acts. In addition to the degree of similarity between the earlier act and the act in question and the relevance of the similar act, the trial court should consider the length of time between the two acts when deciding whether to admit evidence of a similar sexual offense. An offense committed six years earlier is somewhat remote in time and, considered in light of all the other evidence, would be unduly prejudicial if admitted. *People v. Wells*, 754 P.2d 420 (Colo. App. 1987), rev'd on other grounds, 776 P.2d 386 (Colo. 1989).

Considering the circumstances, prior incidents of sexual abuse were not too remote when there was interval of ten to twelve years between the childhood abuse and the charges for which the defendant was being charged. The defendant

and the victim's mother were divorced during that period and the defendant had had no contact with the victim for four years and only limited contact with her thereafter. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

There are few absolute rules on the number of years that can separate two instances of conduct without destroying the evidentiary value of one. *People v. Adrian*, 744 P.2d 768 (Colo. App. 1987), *aff'd*, 770 P.2d 1243 (Colo. 1989); *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Offenses committed approximately ten to twelve years earlier are not too remote in time where the defendant and victim's mother were divorced and the defendant had had no contact with the victim for four years and only limited contact with her thereafter. Therefore, the prior incidents of sexual abuse were not too remote in time, and, consequently, no undue prejudice to defendant resulted from their admission. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Evidence of prior similar transactions is admissible in cases of sexual assault on a child if such evidence is offered to show a common plan, scheme, design, identity, *modus operandi*, motive, guilty knowledge, or intent. *People v. Adrian*, 744 P.2d 768 (Colo. App. 1987), *aff'd*, 770 P.2d 1243 (Colo. 1989); *People v. Snyder*, 874 P.2d 1076 (Colo. 1994); *People v. Nara*, 964 P.2d 578 (Colo. App. 1998) (decided under law in effect prior to the 1996 repeal and reenactment).

The testimony regarding prior similar acts by four witnesses was logically relevant to defendant's identity and intent, apart from any inference of propensity, thus trial court did not abuse its discretion in admitting it. *People v. Larson*, 97 P.3d 246 (Colo. App. 2004).

Trial court did not abuse discretion in admitting evidence of prior incident of sexual assault on a child where incident had occurred eight years earlier, the evidence was introduced only to prove identity, and the jury was instructed that identity was the only purpose for which the evidence could be considered. *People v. Apodaca*, 58 P.3d 1126 (Colo. App. 2002).

To refute the defense of recent fabrication, evidence of prior similar transactions is admissible in cases of sexual assault on a child. *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

To be admissible, the prior act evidence must relate to a material fact, be logically relevant, and be independent of the intermediate inference of bad character and its probative value must outweigh the danger of unfair prejudice. *People v. Wallen*, 996 P.2d 182 (Colo. App. 1999).

This section, as reenacted in 1996, contains no language that erodes those requirements or the requirement that the defendant engaged in the prior act. Even when evidence of prior similar transactions is introduced in pros-

ecutions specifically mentioned in this section, an analysis under C.R.E. 404(b) is still necessary. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

While it is error for the trial court to rule that this section supercedes previous authority regarding the admissibility of prior similar transactions evidence, reversal is not required if the record supports the court's admission of such evidence under the appropriate standard. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Prerequisites and factors to be considered by the trial court in determining whether to admit evidence of similar transactions are listed in *State v. Janes*, 942 P.2d 1331 (Colo. App. 1997).

Evidence of prior similar transactions is admissible in cases of sexual assault regardless of the age of the victim. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991); *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993).

In order to introduce evidence of other sexual acts committed by the defendant, the prosecution must satisfy, in addition to the requirements of this section, C.R.E. 404(b) and the four-part test established in *People v. Spoto*. *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002); *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007).

Before admitting evidence of other crimes, wrongs, or acts, the other act evidence must satisfy C.R.E. 404(b) and the test in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). *People v. Villa*, 240 P.3d 343 (Colo. App. 2009); *People v. Glasser*, __ P.3d __ (Colo. App. 2011).

Defendant does not necessarily have the right to cross-examine a witness in an evidentiary hearing pursuant to this section. *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007).

Prosecutor's comment that evidence of prior similar transactions between the sexual assault victim and the defendant, her father, explained the victim's response to two assaults and her failure to report them earlier is not improper considering the testimony of the victim and the limiting instructions given by the trial court regarding the proper use of the similar transaction evidence. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Evidence of similar transactions in an incest case is admissible where there is sufficient and substantial similarity between the transactions and offense charged even though there were differences in the type of sexual activity. The evidence is also admissible on the issue of motive, and the trial court was not required to define motive for the jury. *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993).

In order for the court to admit evidence of prior sexual assaults under the doctrine of chances theory, the court must determine that (1) the evidence of the other acts is sim-

ilar to the charged crime; (2) the number of unusual occurrences exceeds the frequency of the general population; and (3) there is a genuine dispute over whether the act occurred. The facts that the victims were blond females and assaulted in the early morning hours after drinking are facts common to many sexual assaults. Therefore, the two previous assaults were not similar enough to be admitted to show common plan, scheme, or design, or to rebut the defense of consent. *People v. Jones*, ___ P.3d ___ (Colo. App. 2011).

Where the similar transaction to be admitted is complex, requiring several steps to completion, a single prior act may be sufficient to demonstrate a common plan. In such a case, the risks of abuse may be reduced by requiring that the methods used in the commission of the acts being compared must be both similar to each other and dissimilar from the methods generally used in such an offense. *People v. Delgado*, 890 P.2d 141 (Colo. App. 1994).

A contemporaneous limiting instruction is not required to permit evidence of similar transactions to be considered by the jury where the trial court instructed in the general charge to the jury that they consider the evidence only to show common plan, scheme, or design and where the prosecution was allowed to wait until the close of the case to elect which specific transactions it was prosecuting. *People v. Cordova*, 854 P.2d 1337 (Colo. App. 1992), *aff'd*, 880 P.2d 1216 (Colo. 1994).

Failure to give limiting instruction does not always constitute plain error. The court must examine all of the particular facts to determine if plain error was committed. *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002).

Trial court's failure to issue a limiting instruction in its final instruction to the jury was not plain error. The error was not substantial, did not affect defendant's substantial rights, and the error did not undermine the fairness of the trial to a significant degree. The court issued a limiting instruction at the time of the introduction of the evidence and the court's final instructions reminded the jury about that instruction even though it was not specific to the particular evidence. *People v. Everett*, 250 P.3d 649 (Colo. App. 2010).

To prove common plan, scheme, or design. Evidence of prior sexual episodes with the victim which goes to prove a common plan, scheme, or design, is admissible under subsection (1). *People v. Whitesel*, 200 Colo. 362, 615 P.2d 678 (1980).

Statute mandates that, at time of reception into evidence and again in general charge to the jury, the trial court shall direct the jury as to the limited purpose for which such evidence is admitted. *People v. Roberts*, 738 P.2d 380 (Colo. App. 1986).

Language of subsection (3) is mandatory and the trial judge may not omit the instructions, even though the defendant objects to them as prejudicial rather than prophylactic. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

Defendant denied fair trial by introduction of prejudicial testimony. Where testimony given in answer to a prosecutor's question revealed an unsavory situation of a highly prejudicial character and was without probative value relevant to the offenses charged, and where no limiting instructions were given, defendant was denied a fair trial. *People v. Martin*, 43 Colo. App. 44, 602 P.2d 873 (1979).

Trial court held not to have abused its discretion in admitting similar transaction evidence. *People v. Youngs*, 665 P.2d 143 (Colo. App. 1983), *aff'd*, 707 P.2d 360 (Colo. 1985); *People v. Adrian*, 744 P.2d 768 (Colo. App. 1987), *aff'd*, 770 P.2d 1243 (Colo. 1989); *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

The trial court did not abuse its discretion when it admitted similar transaction evidence and gave appropriate limiting instructions. *People v. McKibben*, 862 P.2d 991 (Colo. App. 1993); *People v. Delgado*, 890 P.2d 141 (Colo. App. 1994).

Trial court did not abuse its discretion in admitting evidence regarding prior similar acts. The testimony was logically relevant to defendant's identity and intent, apart from any inference of propensity; the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice; and the court gave detailed instructions to the jury multiple times that articulated the proper use of the evidence. *People v. Larson*, 97 P.3d 246 (Colo. App. 2004).

A prior act does not need to be similar in every respect to be admissible. *People v. Masters*, 33 P.3d 1191 (Colo. App. 2001), *aff'd* on other grounds, 59 P.3d 979 (Colo. 2002).

Trial court held to have abused its discretion in admitting similar transaction evidence in case of sexual assault on a child. *People v. Guilbeaux*, 761 P.2d 255 (Colo. App. 1988).

For discussion of evidence sufficient to meet prima facie case requirement, see *People v. Mulligan*, 714 P.2d 493 (Colo. App. 1986).

The election of a transaction upon which the prosecution relies need not be made before the conclusion of the prosecution's case. *People v. Aldrich*, 849 P.2d 821 (Colo. App. 1992).

Trial court could not admit evidence of alleged sexual assault under this section then in effect before prosecution presented prima facie case to jury. Yet child's out-of-court statements could not establish a prima facie case warranting submission to the jury because, under § 13-25-129(1)(b), the statements were not admissible without the corroborative evidence. *People v. Nara*, 964 P.2d 578 (Colo. App.

1998)(decided under law in effect prior to the 1996 repeal and reenactment).

As a result of the interplay of § 13-25-129 and this section then in effect, alleged victim's out-of-court statements could not be corroborated by similar acts, and those statements could not provide the prima facie case necessary for admission of evidence of the similar act. The trial court therefore could not properly admit evidence of either. *People v. Nara*, 964 P.2d 578 (Colo. App. 1998)(decided under law in effect prior to the 1996 repeal and reenactment).

Because the prosecution did not first establish a prima facie case of the corpus delicti element pursuant to subsection (4)(c), evidence of the juvenile's prior sexual assault was improperly admitted. *People ex rel. T.A.O.*, 36 P.3d 180 (Colo. App. 2001).

Applied in *People v. McKnight*, 39 Colo. App. 280, 567 P.2d 811 (1977); *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981); *People v. Martinez*, 652 P.2d 174 (Colo. App. 1981); *People v. Holder*, 687 P.2d 462 (Colo. App. 1984).

PART 4

TRIAL PROCEEDINGS

16-10-401. Trials - authority to exclude victim's advocate from sequestration orders. Notwithstanding any sequestration order entered by the court that excludes members of the general public from a jury trial or a trial before the court, the court may allow a victim's advocate to remain in the courtroom during such trial. For the purposes of this section, "victim's advocate" means any person whose regular or volunteer duties include the support of an alleged victim of physical or sexual abuse or assault.

Source: L. 92: Entire part added, p. 322, § 2, effective July 1.

16-10-402. Use of closed-circuit television - child or developmentally disabled witnesses. (1) (a) When a witness at the time of a trial is a child less than twelve years of age, or is a person who has a developmental disability as defined in section 27-10.5-102 (11) (a), C.R.S., the court may, upon motion of a party or upon its own motion, order that the witness's testimony be taken in a room other than the courtroom and be televised by closed-circuit television in the courtroom if:

(I) The testimony is taken during the proceeding;

(II) The judge determines that testimony by the witness in the courtroom and in the presence of the defendant would result in the witness suffering serious emotional distress or trauma such that the witness would not be able to reasonably communicate; and

(III) Closed-circuit television equipment is available for such use.

(b) To obtain an order authorizing the use of closed-circuit television for testimony by a child or developmentally disabled witness, the party shall file a written motion with the court no less than fourteen days prior to the trial.

(c) Only the prosecuting attorney, the attorney for the defendant, the guardian ad litem, if any, and the judge may question the witness when he or she testifies by closed-circuit television.

(d) The operators of the closed-circuit television equipment shall make every effort to be unobtrusive while the witness is testifying.

(2) (a) Only the following persons may be in the room with the witness when the child or developmentally disabled person testifies by closed-circuit television:

(I) The prosecuting attorney;

(II) The attorney for the defendant;

(III) The guardian ad litem, if any;

(IV) The operators of the closed-circuit television equipment;

(V) A person whose presence, in the opinion of the court, contributes to the welfare and well-being of the witness, including a person who has dealt with the witness in a therapeutic setting; and

(VI) The jury.

(b) During the witness's testimony by closed-circuit television, the judge and the defendant, if present, shall remain in the courtroom.

- (c) The judge and the defendant shall be allowed to communicate with the persons in the room where the witness is testifying by an appropriate electronic method.
- (3) The provisions of this section shall not apply if the defendant is appearing pro se.
- (4) This section shall not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the witness and the defendant in the courtroom at the same time.
- (5) Nothing in this section shall be interpreted to preclude the removal of the defendant, rather than the witness, from the courtroom upon the stipulation of both parties and the approval of the court.

Source: **L. 2005:** Entire section added, p. 424, § 4, effective April 29. **L. 2012:** (1)(b) amended, (SB 12-175), ch. 208, p. 853, § 83, effective July 1.

Editor’s note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Removing defendant from the courtroom, rather than the child, did not violate defendant’s right to confront a witness. People v.

Rodriguez, 209 P.3d 1151 (Colo. App. 2008), aff’d by operation of law, 238 P.3d 1283 (Colo. 2010).

ARTICLE 11

Imposition of Sentence

Editor’s note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor’s note before the article 1 heading.

Law reviews: For article, “Criminal Law”, which discusses Tenth Circuit decisions dealing with questions of criminal sentencing, see 63 Den. U. L. Rev. 291 (1986); for article, “Felony Sentencing in Colorado”, see 18 Colo. Law. 1689 (1989); for article, “Criminal Sentencing” which discusses Tenth Circuit decisions dealing with criminal sentencing, see 67 Den. U. L. Rev. 727 (1990); for article, “1990 Criminal Law Legislative Update”, see 19 Colo. Law. 2049 (1990); for article, “Colorado Felony Sentencing: Law and Practice”, see 24 Colo. Law. 2669 (1995).

PART 1		16-11-102.5.	Drug testing of offenders by judicial department - pilot program. (Repealed)
ALTERNATIVES - INVESTIGATION		16-11-103.	Imposition of sentence in class 1 felonies - appellate review. (Repealed)
16-11-101.	Alternatives in sentencing - repeal. (Repealed)	16-11-104.	Genetic testing - repeal. (Repealed)
16-11-101.5.	Collection of restitution - repeal. (Repealed)	16-11-105.	Local initiative committee pilot program for the management of community-based programs for adults with mental illness who come into contact with the criminal justice system - legislative declaration - creation - duties - report - repeal. (Repealed)
16-11-101.6.	Collection of fines and fees - methods - charges - judicial collection enhancement fund.		
16-11-101.7.	Repayment of crime stopper reward - crime stopper reward reimbursement fund - created.		
16-11-101.8.	State income tax refund offsets - fines, fees, costs, or surcharges - definitions.		
16-11-102.	Presentence or probation investigation.		PART 2
16-11-102.3.	Genetic testing of convicted offenders - repeal. (Repealed)		PROBATION
16-11-102.4.	Genetic testing of convicted offenders.	16-11-201.	Application for probation. (Repealed)

- 16-11-202. Probationary power of court. (Repealed)
- 16-11-203. Criteria for granting probation. (Repealed)
- 16-11-204. Conditions of probation - repeal. (Repealed)
- 16-11-204.3. Genetic testing as a condition of probation - repeal. (Repealed)
- 16-11-204.5. Restitution as a condition of probation. (Repealed)
- 16-11-204.6. Repayment of crime stopper reward as a condition of probation. (Repealed)
- 16-11-205. Arrest of probationer - revocation.
- 16-11-206. Revocation hearing.
- 16-11-207. Absent violator - arrest and return.
- 16-11-208. Officer's appointment - salary - oath.
- 16-11-209. Duties of probation officers.
- 16-11-210. County and juvenile courts.
- 16-11-211. Interdistrict probation department - personnel.
- 16-11-212. Work and education release programs. (Repealed)
- 16-11-213. Intensive supervision probation programs - legislative declaration. (Repealed)
- 16-11-214. Fund created - probation services.

PART 3

SENTENCES TO IMPRISONMENT

- 16-11-301. Sentences - commitments - correctional facilities - county jail - age limit.
- 16-11-302. Duration of sentences for felonies. (Repealed)
- 16-11-302.5. Duration of sentences for misdemeanors. (Repealed)
- 16-11-303. Definite sentence not void. (Repealed)
- 16-11-304. Determinate sentence of imprisonment imposed by court. (Repealed)
- 16-11-305. Sentence not void if for definite period. (Repealed)
- 16-11-306. Credit for presentence confinement. (Repealed)
- 16-11-307. Credit for confinement pending appeal.
- 16-11-308. Custody of department of corrections - procedure.
- 16-11-308.5. Authority to contract with a county or a city and county for placement of prisoners in custody of executive director.

- 16-11-309. Mandatory sentences for violent crimes. (Repealed)
- 16-11-310. Release from incarceration. (Repealed)
- 16-11-311. Sentences - youthful offenders - legislative declaration - powers and duties of district court - authorization for youthful offender system - powers and duties of department of corrections - repeal. (Repealed)
- 16-11-312. Intensive family preservation program - juveniles sentenced to the youthful offender system - legislative declaration - development of a plan for a pilot program - duty of department - report. (Repealed)

PART 4

DEATH PENALTY - EXECUTION

- 16-11-401 to
- 16-11-405. (Repealed)

PART 5

SENTENCES TO PAYMENT
OF FINES - COSTS

- 16-11-501 and
- 16-11-502. (Repealed)

PART 6

RIGHT TO ATTEND SENTENCING

- 16-11-601. Right to attend sentencing.

PART 7

COMMUNITY OR USEFUL
PUBLIC SERVICE

- 16-11-701. Community or useful public service - misdemeanors. (Repealed)

PART 8

APPLICABILITY OF PROCEDURE
IN CLASS 1 FELONY CASES
FOR CRIMES COMMITTED ON OR
AFTER JULY 1, 1988, AND PRIOR
TO SEPTEMBER 20, 1991

- 16-11-801 and
- 16-11-802. (Repealed)

PART 1

ALTERNATIVES - INVESTIGATION

16-11-101. Alternatives in sentencing - repeal. (Repealed)

Source: **L. 72:** R&RE, p. 239, § 1. **C.R.S. 1963:** § 39-11-101. **L. 73:** p. 503, § 1. **L. 76:** IP(1), (1)(a), (1)(b), (1)(c), (1)(d), and (1)(e) amended, p. 545, § 1, effective July 1. **L. 77:** (1)(b) amended, p. 993, § 2, effective July 1; (1)(b), (1)(d), (1)(e), and (1)(h) amended, p. 861, § 2, effective July 1, 1979. **L. 79:** (1)(d) repealed and (1)(h) amended, pp. 672, 664, §§ 24, 1, effective July 1; (1)(h) amended, p. 679, § 5, effective July 1. **L. 85:** (1)(e) amended, p. 1253, § 2, effective January 1, 1986. **L. 88:** (1)(e) amended, p. 1049, § 4, effective July 1. **L. 92:** (1)(b.5) added, p. 262, § 1, effective July 1. **L. 93, 1st Ex. Sess.:** (1)(i) added, p. 13, § 4, effective September 13. **L. 95:** (1)(i)(I) amended, p. 1095, § 11, effective May 31; (1)(b.5) amended and (2) added, p. 1279, § 17, effective June 5. **L. 96:** (1)(e) amended, p. 1842, § 5, effective July 1; (1)(i)(I) amended, p. 1688, § 18, effective January 1, 1997. **L. 98:** (1)(j) added, p. 1290, § 8, effective November 1. **L. 99:** (1)(i)(II) amended, p. 43, § 3, effective March 15; (3) added, p. 316, § 4, effective July 1. **L. 2002:** (3)(a) amended, p. 1182, § 8, effective July 1; entire section repealed, p. 1463, § 3, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1)(c) amended, p. 32, § 23, effective July 12.

Editor's note: (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

(2) Senate Bill 02-010 amended subsection (3)(a). This section as amended by Senate Bill 02-010 was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-104.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (1)(c), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

16-11-101.5. Collection of restitution - repeal. (Repealed)

Source: **L. 88:** Entire section added, p. 669, § 1, effective July 1. **L. 89:** (4) added, p. 862, § 2, effective February 26. **L. 96:** (1) amended and (5) added, p. 1776, § 1, effective June 3. **L. 97:** (1) amended, p. 1551, § 1, effective July 1. **L. 99:** (1.5) added, p. 56, § 7, effective March 15; (6) added, p. 899, § 1, effective May 24. **L. 2000:** Entire section repealed, p. 1044, § 5, effective September 1.

16-11-101.6. Collection of fines and fees - methods - charges - judicial collection enhancement fund. (1) If the defendant is assessed any fines, fees, costs, surcharges, or other monetary assessments with regard to the sentencing, disposition, or adjudication of a felony, misdemeanor, juvenile delinquency petition, petty offense, traffic offense, or traffic infraction and does not pay all amounts assessed in full on the date of the assessment, the defendant shall pay to the clerk of the court an additional time payment fee of twenty-five dollars. The time payment fee may be assessed once per case; except that, if amounts owed in the case have still not been paid in full one year after the date of the assessment, said fee shall be assessed annually until the defendant has fully satisfied his or her financial obligation in the case. In addition, there may be assessed against a defendant a late penalty fee of ten dollars each time a payment toward the fines, fees, costs, surcharges, or other amounts owed is not received on or before the date due. If the court determines that the defendant does not have the financial resources to pay a time payment fee or a late penalty fee, the court may waive or suspend a time payment fee or a late penalty fee. Amounts

collected shall be credited first against the time payment and any late penalty fees assessed under this subsection (1), then against any fines, and finally against any costs.

(2) All time payment fees and late penalty fees collected shall be credited to the judicial collection enhancement fund, which fund is hereby created in the state treasury. In addition, reasonable costs incurred and collected by the state shall be credited to the fund. The general assembly shall make annual appropriations from the fund to the judicial department for administrative and personnel costs incurred in collecting restitution, fines, costs, fees, and other monetary assessments. At the end of any fiscal year, all unexpended and unencumbered moneys and any interest shall remain in the fund for appropriation to the judicial department for ongoing enforcement and collection of restitution, fines, fees, costs, surcharges, and other monetary assessments.

(3) To collect on past due orders of fines or fees, the state may employ any method available to collect state receivables, including assigning such accounts to private counsel or private collection agencies under section 24-30-202.4 (2), C.R.S. Any fees or costs of the private counsel or collection agency shall also be added to the amount due, but such fees and costs shall not exceed twenty-five percent of the amount collected.

(4) (a) On past due orders, the court may, on its own motion or through the use of a collections investigator, direct that a certain portion of a defendant's earnings, not to exceed fifty percent, be withheld and applied to any unpaid fines or fees, if such an order does not adversely impact the defendant's ability to comply with other orders of the court. An attachment of earnings under this section may be modified to a lesser or greater amount based upon changes in a defendant's circumstances as long as the amount withheld does not exceed fifty percent and may be suspended or cancelled at the court's discretion. For purposes of this section, "earnings" shall have the same meaning as set forth in section 13-54.5-101 (2), C.R.S., and shall include profits.

(b) An attachment of earnings or a writ of garnishment to collect judgments from a garnishee's earnings for court assessments, including fines, fees, costs, restitution, and surcharges pursuant to this section or section 16-18.5-105:

(I) Has priority over any other garnishment, lien, or income assignment except for a writ for arrearages for child support, for maintenance when combined with child support, for child support debts, or for maintenance or a writ previously served on the same garnishee pursuant to this section; and

(II) Shall require the garnishee to withhold, pursuant to section 13-54-104 (3), C.R.S., the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until the judgment is satisfied or the garnishment is released by the court or in writing by the judgment creditor.

(5) During any period of time that a defendant is a state inmate as defined in section 17-1-102 (8), C.R.S., the superintendent of the correctional facility to which such defendant is assigned, or his or her designee, may fix the manner and time of payment of fines and fees and may direct that a portion of the wages of such defendant under section 17-24-122 (3), C.R.S., or compensation under section 17-24-114, C.R.S., be applied to any unpaid fines or fees.

(6) (a) The judicial department may enter into a memorandum of understanding with the state treasurer, acting as the administrator of unclaimed property under the "Unclaimed Property Act", article 13 of title 38, C.R.S., for the purpose of offsetting against a claim for unclaimed property the amount of outstanding fines, fees, costs, or surcharges owed pursuant to law or an order entered by a court of this state by the person claiming unclaimed property. When an offset is to be made, the judicial department or the court to which the fines, fees, costs, or surcharges are owed shall notify the defendant in writing that the state intends to offset the defendant's outstanding fines, fees, costs, or surcharges against his or her claim for unclaimed property.

(b) The state court administrator may adopt rules establishing the process by which an unclaimed property claimant may object to an offset and request an administrative review. The sole issues to be determined at the administrative review shall be whether the person is required to pay the fines, fees, costs, or surcharges pursuant to law or an order entered by a court of this state and the amount of the outstanding fines, fees, costs, or surcharges.

(c) For purposes of this subsection (6), “claim for unclaimed property” means a cash claim filed in accordance with section 38-13-117, C.R.S.

Source: **L. 96:** Entire section added, p. 1777, § 2, effective June 3. **L. 2000:** (1), (3), (4), and (5) amended, p. 1044, § 6, effective September 1. **L. 2002:** (5) amended, p. 1016, § 18, effective June 1; (1) amended, p. 1494, § 139, effective October 1. **L. 2005:** (6) added, p. 697, § 1, effective August 8. **L. 2011:** (1) and (2) amended, (HB 11-1076), ch. 178, p. 678, § 1, effective July 1. **L. 2012:** (4) amended, (HB 12-1310), ch. 268, p. 1394, § 8, effective June 7.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

There are no “double collection” efforts inasmuch as only one judgment for restitution is entered and the judgment creditor is not entitled to have the judgment satisfied more than once. *People v. Apodaca*, 998 P.2d 25 (Colo. App. 1999).

Withholding of court costs from an inmate

account is authorized under this section where an inmate’s wage or compensation can be applied to “any unpaid fines or fees”. *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002).

Applied in *People v. Apodaca*, 998 P.2d 25 (Colo. App. 1999).

16-11-101.7. Repayment of crime stopper reward - crime stopper reward reimbursement fund - created. (1) In addition to any other penalty authorized by law, after a defendant has been convicted of or entered a plea of guilty or nolo contendere to a felony offense, or enters into a plea bargain agreement concerning a felony offense which is reduced to a misdemeanor pursuant to such agreement, the court may order such defendant to repay all or part of any reward paid by a crime stopper organization that led to the defendant’s arrest and conviction. The amount of such repayment may not exceed the actual reward paid by any crime stopper organization and shall be used solely for paying rewards.

(2) (a) Upon an order to repay all or part of a crime stopper reward, the court shall assess such repayment against the defendant in the same manner as other costs of prosecution are assessed against a defendant. The court shall order the defendant to:

(I) Pay the entire amount when sentence is pronounced; or

(II) Pay the entire amount on such later date as may be specified by the court.

(b) Any order for the repayment of all or part of a crime stopper reward shall be prioritized in accordance with the provisions of section 18-1.3-204 (2.5), C.R.S.

(3) All moneys collected by the court pursuant to this section, together with transmittal information which includes the court’s docket number, the defendant’s name, and the crime stopper organization which is designated to receive the repayment of reward, shall be promptly forwarded to the division of criminal justice created by section 24-33.5-502, C.R.S. Upon receipt, the division of criminal justice shall promptly transmit the moneys to the state treasurer who shall deposit them in the crime stopper reward reimbursement fund which is hereby created. Moneys in the fund shall be continuously appropriated to the division of criminal justice for the purposes of this section. The disbursement of any such moneys to the designated crime stopper organization shall be made by the division of criminal justice within thirty-five days after the date of deposit in the crime stopper reward reimbursement fund.

(4) As used in this section, “crime stopper organization” has the same meaning as provided in section 16-15.7-102 (1).

Source: **L. 94:** Entire section added, p. 1810, § 2, effective June 1. **L. 2002:** (2)(b) amended, p. 1494, § 140, effective October 1. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 853, § 84, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-101.8. State income tax refund offsets - fines, fees, costs, or surcharges - definitions. (1) In any case in which a defendant has an unsatisfied fine, fee, cost, or surcharge obligation imposed pursuant to law or a court order, the judicial department is authorized to transmit data concerning the obligation to the department of revenue for the purpose of conducting a data match and offsetting the obligation against a state income tax refund pursuant to section 39-21-108 (3), C.R.S. For any obligation identified by the judicial department for offset, the state court administrator shall:

(a) On at least an annual basis, certify to the department of revenue the social security number of the defendant who is obligated to pay the obligation and the amount of the outstanding obligation. The department of revenue may request additional identifying information from the judicial department that is necessary to obtain an accurate data match.

(b) Upon notification by the department of revenue of a data match, notify the appropriate court that a match has occurred and that an offset is pending and provide to the court the identifying information received from the department concerning the defendant whose state income tax refund is subject to the offset;

(c) Provide or require the appropriate court to provide written notice to the defendant that the state intends to offset the defendant's obligation against his or her state income tax refund and that the defendant has the right to object to the offset and request an administrative review; and

(d) Upon receipt of funds for offset from the department of revenue, transmit the funds to the appropriate court.

(2) The clerk of court shall apply funds received pursuant to this section to the defendant's outstanding fines, fees, costs, or surcharges. If the moneys received exceed the defendant's current obligation, the excess may be applied to other financial obligations the defendant owes the court or the judicial department. If no other financial obligations are owed, the clerk of court shall refund any excess moneys to the defendant.

(3) The state court administrator may adopt rules establishing the process by which a defendant may object to an offset and request an administrative review. The sole issues to be determined at the administrative review shall be whether the person is required to pay the fines, fees, costs, or surcharges pursuant to law or an order entered by a court of this state and the amount of the outstanding fines, fees, costs, or surcharges.

(4) The department of revenue is authorized to receive data from the judicial department and execute offsets of state income tax refunds in accordance with this section and section 39-21-108 (3), C.R.S.

(5) As used in this section, "defendant" means any person who has been assessed a fine, fee, cost, or surcharge as an adult or juvenile pursuant to law or a court order.

Source: L. 2004: Entire section added, p. 1256, § 1, effective August 4.

16-11-102. Presentence or probation investigation. (1) (a) Following the return of a verdict of guilty of a felony, other than a class 1 felony, or following a finding of guilt on such charge where the issues were tried to the court, or on a plea of guilty or nolo contendere to such a charge, or upon order of the court in any misdemeanor conviction, the probation officer shall make an investigation and written report to the court before the imposition of sentence. Each presentence report shall include a substance abuse assessment or evaluation made pursuant to article 11.5 of this title and, unless waived by the court, shall include, but not be limited to, information as to the defendant's family background, educational history, employment record, and past criminal record, including the defendant's past juvenile delinquency record, if any, if the defendant has been convicted of unlawful sexual behavior as defined in section 16-22-102 (9), an evaluation of the alternative

dispositions available for the defendant; the information required by the court pursuant to article 18.5 of this title; a victim impact statement; and such other information as the court may require. A victim impact statement shall be prepared by the district attorney's office on and after September 1, 1985. The department of human services shall provide the district attorney's office with the information necessary for the preparation of a victim impact statement. In addition, the court, in cases that it deems appropriate, may require the presentence report to include the findings and results of a professionally conducted psychiatric examination of the defendant. No less than seventy-two hours prior to the sentencing hearing, copies of the presentence report, including any recommendations as to probation, shall be furnished to the prosecuting attorney and defense counsel or to the defendant if he or she is unrepresented. A copy of the presentence report shall be transmitted to the department of corrections together with the mittimus.

(b) Each presentence report prepared regarding a sex offender, as defined in section 16-11.7-102 (2), with respect to any offense committed on or after January 1, 1996, shall contain the results of an evaluation and identification conducted pursuant to article 11.7 of this title; except that, if the offense is a misdemeanor pursuant to the provisions of section 18-3-412.6, C.R.S., an evaluation and identification conducted pursuant to article 11.7 of this title shall not be ordered by the court, and except that, if the offense is a misdemeanor pursuant to title 42, C.R.S., or the history of sex-offending behavior was a misdemeanor sex offense committed when the defendant was a juvenile, an evaluation and identification conducted pursuant to article 11.7 of this title is not required but may be ordered by the court. In addition, the presentence report shall include, when appropriate as provided in section 18-3-414.5, C.R.S., the results of the risk assessment screening instrument developed pursuant to section 16-11.7-103 (4) (d). Notwithstanding the provisions of subsection (4) of this section, a presentence report shall be prepared for each person convicted as a sex offender, and the court may not dispense with the presentence evaluation, risk assessment, and report unless an evaluation and risk assessment has been completed within the last two years and there has been no material change that would affect the evaluation and risk assessment in the past two years.

(c) (I) The state court administrator may implement a mental illness screening program to screen defendants for which the court has ordered an investigation pursuant to this section. If the state court administrator chooses to implement a mental illness screening program, the state court administrator shall use the standardized mental illness screening instrument developed pursuant to section 16-11.9-102 and conduct the screening in accordance with the procedures established pursuant to said section. The findings and results of any standardized mental illness screening conducted pursuant to this paragraph (c) shall be included in the written report to the court prepared and submitted pursuant to this subsection (1).

(II) Prior to implementation of a mental illness screening program pursuant to this paragraph (c), if implementation of the program would require an increase in appropriations, the state court administrator shall submit to the joint budget committee a request for funding in the amount necessary to implement the mental illness screening program. If implementation of the program would require an increase in appropriations, implementation of the mental illness screening program shall be conditional upon approval of the funding request.

(1.1) Repealed.

(1.5) A victim impact statement may include the following:

(a) An identification of the victim of the offense;

(b) An itemization of any economic loss suffered by the victim as a result of the offense, including any loss incurred after the offense and after criminal charges were filed formally against the defendant. The victim impact statement shall be prepared by the district attorney's office at the time the offense is filed and shall be updated to include any loss incurred by the victim after criminal charges were filed.

(c) An identification of any physical injury suffered by the victim as a result of the offense, including information on its seriousness and permanence;

(d) A description of any change in the victim's personal welfare or familial relationships as a result of the offense;

(e) An identification of any request for psychological services initiated by the victim or the victim's family as a result of the offense;

(e.5) An evaluation of the victim's and the victim's children's safety if probation is granted;

(f) Any other information related to the impact of the offense upon the victim that the court requires.

(1.7) Each presentence report shall also include information from the offender and any other source available to the probation officer regarding the offender's estate, as defined in section 18-1.3-701 (5) (b), C.R.S., and other pertinent financial information, for the purpose of determining whether such offender or juvenile has sufficient assets to pay all or part of such offender's or juvenile's cost of care, as defined in section 18-1.3-701 (5) (a), C.R.S. The financial information obtained from the offender shall be submitted in writing and under oath.

(1.8) Upon the request of either the prosecution or the defense, each presentence report prepared regarding a youthful offender, as defined in section 18-1.3-407, C.R.S., who is eligible for sentencing to the youthful offender system pursuant to section 18-1.3-407.5, 19-2-517 (6), or 19-2-518 (1) (d) (II), C.R.S., shall include a determination by the warden of the youthful offender system whether the youthful offender is acceptable for sentencing to the youthful offender system. When making a determination, the warden shall consider the nature and circumstances of the crime, the circumstances and criminal history of the youthful offender, the available bed space in the youthful offender system, and any other appropriate considerations.

(1.9) Each presentence report shall also:

(a) Include the results of an actuarial assessment of the offender's criminological risks and needs;

(b) Provide sufficient information to allow the court to consider:

(I) Whether the offender is a suitable candidate for a sentencing option that does not involve incarceration or a combination of sentencing options that does not involve incarceration; and

(II) The appropriate conditions to impose if a defendant is sentenced to probation;

(c) Describe the projected costs, if known, that are associated with each sentencing option that is available to the court; and

(d) Set forth the purposes of title 18, C.R.S., with respect to sentencing, as such purposes are described in section 18-1-102.5, C.R.S.

(2) The report of the probation officer and the procedures to be followed at the time sentence is imposed and final judgment is entered shall be as required by the Colorado rules of criminal procedure. In addition to the requirements of such rules, the report shall include a statement showing the amount of time during which the defendant was imprisoned awaiting trial upon the charge resulting in conviction.

(3) The court, upon its own motion or upon the petition of the probation officer, may order any defendant who is subject to presentence investigation or who has made application for probation to submit to a mental and physical examination.

(4) The court, with the concurrence of the defendant and the prosecuting attorney, may dispense with the presentence examination and report; except that the information required by section 18-1.3-603 (2), C.R.S., and a victim impact statement shall be made in every case. The amount of restitution shall be ordered pursuant to section 18-1.3-603, C.R.S., and article 18.5 of this title and endorsed upon the mittimus.

(5) After receiving the presentence report and before imposing sentence, the court shall afford the defendant an opportunity to make a statement in his or her own behalf and to present any information in mitigation of punishment. The prosecution also shall be given an opportunity to be heard on any matter material to the imposition of sentence. The court shall then sentence the defendant pursuant to the provisions of this article and section 18-1.3-401, C.R.S.

(6) Following the return of a verdict of guilty of a felony, or a finding of guilt on such charge where the issues were tried to the court, or on a plea of guilty or nolo contendere to such a charge, the district attorney may file with the court identification photographs and fingerprints of the defendant or defendants, and such identification photographs and

fingerprints shall become part of the court record. Such identification photographs and fingerprints of the defendant or defendants shall constitute prima facie evidence of identity under section 18-1.3-802, C.R.S.

Source: **L. 72:** R&RE, p. 240, § 1. **C.R.S. 1963:** § 39-11-102. **L. 77:** (1) and (5) amended, p. 862, § 3, effective July 1, 1979. **L. 81:** (6) added, p. 950, § 2, effective May 27; (1) and (4) amended, p. 941, § 1, effective July 1. **L. 84:** (1) and (4) amended and (1.5) added, p. 651, § 1, effective January 1, 1985. **L. 86:** (1) amended, p. 733, § 2, effective July 1. **L. 88:** (1) amended, p. 680, § 2, effective July 1. **L. 89:** (1) amended, p. 862, § 3, effective February 26. **L. 89, 1st Ex. Sess.:** (1.1) added, p. 76, § 2, effective July 1. **L. 91:** (1) amended, p. 436, § 1, effective May 29. **L. 92:** (1) amended, p. 454, § 1, effective June 2. **L. 94:** (1)(a) amended, p. 2650, § 123, effective July 1; (1.1) repealed and (1.7) added, pp. 1362, 1356, §§ 5, 1, effective July 1; (1.5)(b) amended, p. 1050, § 5, effective July 1; (1.5)(e.5) added, p. 2036, § 16, effective July 1. **L. 95:** (1)(b) amended, p. 465, § 11, effective July 1. **L. 96:** (4) amended, p. 1778, § 3, effective June 3. **L. 98:** (4) amended, p. 519, § 6, effective April 30. **L. 99:** (1)(a) amended, p. 315, § 3, effective July 1. **L. 2000:** (1)(a) and (4) amended, p. 1045, § 7, effective September 1. **L. 2001:** (4) amended, p. 1271, § 20, effective June 5. **L. 2002:** (1)(c) added, p. 573, § 1, effective May 24; (1)(a) amended, p. 1182, § 9, effective July 1; (1.7), (4), (5), and (6) amended, p. 1494, § 141, effective October 1. **L. 2007:** (1)(b) amended, p. 253, § 1, effective March 26. **L. 2009:** (1.8) added, (HB 09-1122), ch. 77, p. 279, § 2, effective October 1. **L. 2010:** (1.8) amended, (HB 10-1413), ch. 264, p. 1204, § 3, effective August 11. **L. 2011:** (1)(b) amended, (HB 11-1138), ch. 236, p. 1027, § 8, effective May 27; (1.9) added, (HB 11-1180), ch. 96, p. 282, § 2, effective August 10. **L. 2012:** (1)(b) amended, (HB 12-1310), ch. 268, p. 1395, § 9, effective June 7; (1)(b) amended, (HB 12-1346), ch. 220, p. 946, § 7, effective July 1.

Editor's note: (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

(2) Amendments to subsection (1)(b) by House Bill 12-1310 and House Bill 12-1346 were harmonized.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1)(a), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsections (1.7), (4), (5), and (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 16-11-102 is similar to repealed § 39-16-2, C.R.S. 1963, and § 39-16-2, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

No right to evidentiary hearing. During a discretionary sentencing proceeding, statutes do not require an evidentiary hearing on the validity of any prior conviction contained in a presentence report. *People v. Padilla*, 907 P.2d 601 (Colo. 1995).

Duration of period of probation is limited to maximum term of imprisonment specified for the offense in question, and the provision of § 16-11-202 permitting the court to grant probation "for such a period and upon such terms and conditions as it deems best", does not give

the court the authority to extend the terms of probation beyond the maximum term of imprisonment. *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980).

The right to a presentence report has not been recognized as a constitutional right. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed.2d 865 (1971).

This section designates in what cases and circumstances an officer must make a presentence investigation and report. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

Written report required. This section requires that, after conviction of crime, an investigation is to be made by a probation officer who shall make a written report to the court contain-

ing his findings on matters bearing upon the sentence to be imposed. *Williams v. People*, 134 Colo. 580, 307 P.2d 466 (1957).

Trial court erred by proceeding to sentencing without a presentence investigation report ("PSIR"). The plain language of this section requires the preparation of a PSIR before sentencing, unless both the defendant and the prosecution agree to proceed to sentencing without the benefit of such a report. Here, the prosecution specifically requested that a PSIR be prepared, and objected to the court's proceeding to sentencing without one. The prosecution thus did not waive the statutory requirement that the PSIR be prepared before the imposition of sentence. *People v. Gretz*, 973 P.2d 110 (Colo. App. 1998).

When an application for probation is made by an eligible person, a district court is required to cause a probation officer to make an investigation of the applicant. The probation officer within such time as the court may prescribe shall make a written report to the court of said investigation, together with his recommendation as to whether or not probation should be granted. *Logan v. People ex rel. Alamosa*, 138 Colo. 304, 332 P.2d 897 (1958).

Which may contain any information helpful to courts. The trial court, before granting or denying an application for probation and before imposing sentence, is to be advised by a written report from the probation officer of any prior criminal record of the defendant and of such information about his characteristics, his financial condition, and circumstances affecting his behavior, and any other information as may be required by the court, as may be helpful in determining the advisability of granting probation, or as may be helpful in imposing sentence in the event probation is denied. *Wolford v. People*, 178 Colo. 203, 496 P.2d 1011 (1972).

Evidence is not limited by strict rules or due process. This section does not contemplate that the probation officer is required to establish the matters reported in the probation report by evidence presented in accordance with the due process procedures required of a guilt trial, nor are strict rules of evidence adhered to. *Wolford v. People*, 178 Colo. 203, 496 P.2d 1011 (1972).

The defendant has the right to be heard concerning matters in the report which he believes to be inaccurate or untrue. *Wolford v. People*, 178 Colo. 203, 496 P.2d 1011 (1972).

Unless shown to be untrue, court may rely on report. When represented by competent counsel and supplied with a copy of the probation report, defendant does not show that the information supplied to the court in the probation report was inaccurate or untrue, a court is entitled to rely upon the report as submitted. *Wolford v. People*, 178 Colo. 203, 496 P.2d 1011 (1972).

If defendant fails to show inaccuracy of information in presentence report or victim impact statement, including restitution amount, at sentencing hearing, he waives the right to contest the information. *People v. Powell*, 748 P.2d 1355 (Colo. App. 1987).

Remand for presentation of evidence in rebuttal to report. Where the presentence report is issued to counsel immediately prior to sentencing, and the trial court's refusal to continue the sentencing hearing to another day unduly abridges the defendant's rights to present evidence in rebuttal to the information and recommendations contained in the report, his sentence must be vacated and the case remanded for resentencing after a full sentencing hearing. *People v. Wright*, 672 P.2d 518 (Colo. 1983).

Court erred in relying for sentencing purposes upon information and evidence not included within the presentence report or disclosed to defendant by some other means prior to the sentencing hearing. *People v. Pourat*, 100 P.3d 503 (Colo. App. 2004).

Error by the court to proceed to sentencing defendant without report was harmless where defendant refused to be interviewed by probation officer, neither defense counsel nor prosecutor objected to proceeding without report, defense counsel submitted memorandum that was functional equivalent of presentence report, and defendant failed to allege on appeal how he was prejudiced by absence of report. *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

Recommendations as to sentences are made by probation officers only upon request by the court. *Smith v. People*, 162 Colo. 558, 428 P.2d 69 (1967).

The totality of discretion rests with the trial court in the imposition of sentence. A recommendation by the probation officer is nothing more nor less than a recommendation. *Smith v. People*, 162 Colo. 558, 428 P.2d 69 (1967).

Provision is made for a mental and physical examination of an applicant for probation. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

Trial court could impose restitution under this section and § 17-2-201 as a condition of parole, even though the restitution provisions of § 16-11-204.5 did not apply since the defendant pleaded guilty to theft by receiving and was not sentenced to probation. *People v. Schmidt*, 700 P.2d 925 (Colo. App. 1985).

Sentence of incarceration precludes order of restitution, but at time of sentencing, court may set amount of restitution for later consideration by parole board when board sets conditions for parole under § 17-2-201. *People v. Powell*, 748 P.2d 1355 (Colo. App. 1987).

This section does not authorize the court to impose restitution unless authorized pursuant to another statutory provision. *People v. Young*,

710 P.2d 1140 (Colo. App. 1985) (decided prior to 1996 amendment to subsection (4)).

Subsection (4), as amended in 1996, requires courts to impose restitution at the time of sentencing, even where a defendant is sentenced to incarceration. *People v. Tipton*, 973 P.2d 713 (Colo. App. 1998); *People v. Apodaca*, 998 P.2d 25 (Colo. App. 1999).

When an offense requires proof of the identity of a particular victim, the court may not order restitution to another. Defendant who pled guilty to a single count of theft in return for a dismissal of other counts may not be ordered to pay restitution to the victims in the counts that were dismissed. *People v. Armijo*, 989 P.2d 224 (Colo. App. 1999).

A codefendant is jointly responsible for restitution when he is also a complicitor in the crime. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

Codefendants were participants and complicitors in the same criminal acts, therefore, each is responsible for the damage he caused and also for the damage caused by the other. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

The sentencing court is required to fix the defendant's criminal liability for restitution by considering the victim's actual monetary losses and, where appropriate, to temper the defendant's restitution obligation by considering his financial ability to pay and his duty of support owed to his dependents and any other outstanding family responsibilities. The statutory scheme, in other words, does not require the sentencing court to determine a defendant's criminal liability for restitution in accordance with the strict rules of damages applicable to a civil case. *People v. Johnson*, 780 P.2d 504 (Colo. 1989); *People v. Duran*, 991 P.2d 313 (Colo. App. 1999).

An order of restitution becomes part of the sentence which, in accordance with Crim. P. 32(c), is part of the judgment of conviction. When a court orders a defendant, over his objection, to pay restitution to the victim or the victim's family as part of the judgment of conviction for a felony, the order of restitution is appealable pursuant to the statutory procedures applicable to the appellate review of a felony sentence. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

An order increasing the amount of restitution has the effect of increasing the punishment originally imposed. Therefore, because restitution is a part of the criminal sentence, once a legal sentence is imposed and a defendant has begun serving it, an increase in the amount of restitution ordered also violates the constitutional prohibition against double jeopardy. *People v. Shepard*, 989 P.2d 183 (Colo. App. 1999).

Statute provides no right to offender to present evidence of ability to pay restitution during revocation hearing when hearing is based on other grounds. *People v. McCarty*, 851 P.2d 181 (Colo. App. 1992).

Order requiring defendant to pay restitution for one-half of the value of property missing from the truck involved in defendant's conviction for theft by receiving was improper. There was no evidence linking the defendant's conduct of theft by receiving the stolen truck and the missing personal property from the truck. The trial court's order, based on speculation, was improper. *People v. Randolph*, 852 P.2d 1282 (Colo. App. 1992).

Although a trial court may establish restitution pursuant to this section, it may not establish the method of payment for restitution. *People v. Randolph*, 852 P.2d 1282 (Colo. App. 1992); *People v. Strock*, 931 P.2d 538 (Colo. App. 1996).

The manner and time of payment of restitution is exclusively within the jurisdiction of the parole board. *People v. Strock*, 931 P.2d 538 (Colo. App. 1996).

The general assembly did not intend to give absolute discretion to a court to comply or not to comply with what appear to be mandatory requirements of a presentence report. *People v. Valencia*, 888 P.2d 319 (Colo. App. 1994), *aff'd*, 906 P.2d 115 (Colo. 1995).

The record of the sentencing hearing must include at least a summary of the information relied upon by the sentencing court but not contained in the presentence report. Absent such a record, no meaningful appellate review of the sentence is possible. *People v. Pourat*, 100 P.3d 503 (Colo. App. 2004).

Because the trial court did not set forth any reasons for its waiver of statutory requirements, the defendant's presentence report did not comport with the requirements of this section. *People v. Valencia*, 888 P.2d 319 (Colo. App. 1994).

Prior to sentencing, the court must grant the defendant an opportunity to make a statement on his or her own behalf. The proper remedy for failing to allow the defendant to make a statement is resentencing. *People v. Marquante*, 923 P.2d 180 (Colo. App. 1995); *People v. Perea*, 74 P.3d 326 (Colo. App. 2002).

However, the right of allocution is a statutory right, not a constitutional one, and reversal is not required if the failure to provide the defendant an opportunity to make a statement prior to sentencing is harmless. If a trial court imposes the minimum sentence permitted and does not have discretion to impose a lesser sentence, the lack of a statement in allocution does not affect the sentence and is harmless. *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

Defendant's right of allocution was not improperly withheld where court asked defense counsel if defendant wished to make a statement to the court, but counsel proceeded to argument. *People v. Loyd*, 902 P.2d 889 (Colo. App. 1995).

When the court dispenses with the presentence report, the probation department, within seventy-two hours prior to the sentencing hearing, should provide the prosecuting attorney and defense counsel, or the defendant if unrepresented, with a copy of the victim impact statement setting forth the amount of the victim's claimed monetary damages and the amount of restitution for which the defendant may be responsible. At the sentencing hearing the defendant must be given the opportunity to controvert the victim's claimed monetary damages. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

"Victim" construed. The transfer of stolen property to a bona fide purchaser necessarily

victimizes the purchaser since his interests must yield to the title of the rightful owner. Therefore, the bona fide purchaser of stolen property was a victim for purposes of ordering restitution and the trial court properly included in the amount of restitution an amount to reimburse the purchaser, an antique dealer, for expenses for restoration of the property. *People v. Schmidt*, 700 P.2d 925 (Colo. App. 1985).

Applied in *Little v. People*, 138 Colo. 572, 335 P.2d 863 (1959); *Rader v. People*, 153 Colo. 134, 384 P.2d 926 (1963); *People v. Palmer*, 42 Colo. App. 460, 595 P.2d 1060 (1979); *People v. Gonzales*, 44 Colo. App. 411, 613 P.2d 905 (1980); *People v. Hunt*, 632 P.2d 572 (Colo. App. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982).

16-11-102.3. Genetic testing of convicted offenders - repeal. (Repealed)

Source: **L. 2000:** Entire section added, p. 1264, § 1, effective May 26. **L. 2001:** Entire section amended, p. 953, § 1, effective March 31, 2002. **L. 2002:** Entire section amended, p. 1147, § 1, effective July 1; (1)(a) amended, p. 1183, § 10, effective July 1; (1)(b) amended, p. 1495, § 142, effective October 1. **L. 2006:** (7) added by revision, pp. 1687, 1693, §§ 1, 17. **L. 2007:** (1)(i) amended and (1)(i.5) added, p. 727, § 9, effective July 1.

Editor's note: (1) House Bill 07-1235 amended subsection (1)(i) and added subsection (1)(i.5), effective July 1, 2007, but those amendments did not take effect due to the repeal of this section, effective July 1, 2007.

(2) Subsection (7) provided for the repeal of this section, effective July 1, 2007. (See L. 2006, pp. 1687, 1693.)

16-11-102.4. Genetic testing of convicted offenders. (1) Beginning July 1, 2007, each of the following convicted offenders shall submit to and pay for collection and a chemical testing of the offender's biological substance sample to determine the genetic markers thereof, unless the offender has already provided a biological substance sample for such testing pursuant to a statute of this state:

(a) Every offender who, on or after July 1, 2007, is in the custody of the department of corrections based on a sentence imposed before that date, including an offender on parole. The department shall collect the sample at least thirty-five days prior to the offender's discharge or release from custody, release on parole, or transfer to community corrections placement.

(b) (I) Every offender who, on or after July 1, 2007, is on probation under a sentence imposed before that date for a conviction of:

(A) An offense involving unlawful sexual behavior or for which the factual basis involved an offense involving unlawful sexual behavior, committed on or after July 1, 1996;

(B) An offense involving unlawful sexual behavior, or for which the factual basis involved an offense involving unlawful sexual behavior, committed before July 1, 1996, if the offender was on probation for the offense as of July 1, 2000;

(C) An offense that is a crime of violence as listed in section 18-1.3-406 (2), C.R.S., committed on or after July 1, 1999;

(D) An offense that is a crime of violence as listed in section 18-1.3-406 (2), C.R.S., committed before July 1, 1999, if the offender was on probation for the offense as of July 1, 2000;

(E) Second degree murder in violation of section 18-3-103 (1), C.R.S., committed on or after July 1, 1999;

(F) Second degree murder in violation of section 18-3-103 (1), C.R.S., committed before July 1, 1999, if the offender was on probation for the conviction as of July 1, 2000;

(G) First degree assault in violation of section 18-3-202 (1), C.R.S., committed on or after July 1, 1999;

(H) First degree assault in violation of section 18-3-202 (1), C.R.S., committed before July 1, 1999, if the offender was on probation for the conviction as of July 1, 2000;

(I) Second degree assault in violation of section 18-3-203 (1) (b), (1) (c), (1) (d), (1) (g), or (2) (b.5), C.R.S., committed on or after July 1, 1999;

(J) Second degree assault in violation of section 18-3-203 (1) (b), (1) (c), (1) (d), (1) (g), or (2) (b.5), C.R.S., committed before July 1, 1999, if the offender was on probation for the conviction as of July 1, 2000;

(K) Second degree kidnapping in violation of section 18-3-302 (4), C.R.S., committed on or after July 1, 1999;

(L) Second degree kidnapping in violation of section 18-3-302 (4), C.R.S., committed before July 1, 1999, if the offender was on probation for the conviction as of July 1, 2000;

(M) First degree arson in violation of section 18-4-102 (3), C.R.S., committed on or after July 1, 1999;

(N) First degree arson in violation of section 18-4-102 (3), C.R.S., committed before July 1, 1999, if the offender was on probation for the conviction as of July 1, 2000;

(O) First degree burglary in violation of section 18-4-202, C.R.S., committed on or after July 1, 1999;

(P) First degree burglary in violation of section 18-4-202, C.R.S., committed before July 1, 1999, if the offender was on probation for the conviction as of July 1, 2000;

(Q) Second degree burglary in violation of section 18-4-203, C.R.S., committed on or after July 1, 2000;

(R) Third degree burglary in violation of section 18-4-204, C.R.S., committed on or after July 1, 2000;

(S) Aggravated robbery in violation of section 18-4-302 (4), C.R.S., committed on or after July 1, 1999;

(T) Aggravated robbery in violation of section 18-4-302 (4), C.R.S., committed before July 1, 1999, if the offender was on probation for the conviction as of July 1, 2000; or

(U) Any other felony, if the offender was on probation for the conviction as of July 1, 2000, and had been previously convicted of an offense involving unlawful sexual behavior or for which the factual basis involved an offense involving unlawful sexual behavior, an offense that is a crime of violence as listed in section 18-1.3-406 (2), C.R.S., second degree murder in violation of section 18-3-103 (1), C.R.S., first degree assault in violation of section 18-3-202 (1), C.R.S., second degree assault in violation of section 18-3-203 (1) (b), (1) (c), (1) (d), (1) (g), or (2) (b.5), C.R.S., second degree kidnapping in violation of section 18-3-302 (4), C.R.S., first degree arson in violation of section 18-4-102 (3), C.R.S., first degree burglary in violation of section 18-4-202, C.R.S., or aggravated robbery in violation of section 18-4-302 (4), C.R.S.

(II) The judicial department or a probation department shall collect the sample required by this subsection (1) at least thirty days prior to the offender's scheduled termination of probation, but, in any event, by December 31, 2007.

(c) Every offender who, on or after July 1, 2007, is on a deferred judgment and sentence as authorized in section 18-1.3-102, C.R.S., that was granted on or after July 1, 1999, but before July 1, 2007, for an offense involving unlawful sexual behavior or for which the factual basis involved an offense involving unlawful sexual behavior. The judicial department or a probation department shall collect the sample required by this subsection (1) at least thirty days prior to the offender's scheduled termination of the deferred judgment, but, in any event, by October 1, 2007.

(d) Every offender who, on or after July 1, 2007, is in a county jail or a community corrections facility pursuant to article 27 of title 17, C.R.S., based on a sentence imposed before that date for a felony conviction. The sheriff or the community corrections program shall collect the sample at least thirty-five days prior to the offender's release from the custody of the county jail or community corrections facility.

(e) Every offender who, on or after July 1, 2007, is in a county jail or a community corrections facility based on a sentence imposed before that date for conviction of a misdemeanor offense involving unlawful sexual behavior or for which the factual basis involved an offense involving unlawful sexual behavior. The sheriff or the community corrections program shall collect the sample at least thirty-five days prior to the offender's release from the custody of the county jail or community corrections facility.

(f) Every offender who, on or after July 1, 2007, is in the custody of the youthful offender system based on a sentence imposed before that date, including an offender on community supervision. The department of corrections shall collect the sample at least thirty-five days prior to the offender's discharge or release from custody or release to community supervision.

(g) Every offender sentenced on or after July 1, 2007, for a felony conviction; except that this paragraph (g) shall not apply to an offender granted a deferred judgment and sentencing as authorized in section 18-1.3-102, C.R.S., unless otherwise required to submit to a sample pursuant to this section, or unless the deferred judgment and sentencing is revoked and a sentence is imposed. The sample shall be collected:

(I) From an offender sentenced to the department of corrections, by the department during the intake process but in any event within thirty-five days after the offender is received by the department;

(II) From an offender sentenced to county jail or community corrections, by the sheriff or by the community corrections program within thirty-five days after the offender is received into the custody of the county jail or the community corrections facility;

(III) From an offender sentenced to probation, by the judicial department within thirty-five days after the offender is placed on probation;

(IV) From an offender sentenced to the youthful offender system, by the department of corrections within thirty-five days after the offender is received at the youthful offender system; and

(V) From an offender who receives any other sentence or who receives a suspended sentence, by the judicial department within thirty-five days after the offender is sentenced or the sentence is suspended.

(h) Every offender who, on or after July 1, 2007, is sentenced for a conviction of, or who receives a deferred judgment and sentence for, an offense involving unlawful sexual behavior or for which the underlying factual basis involves unlawful sexual behavior. The sample shall be collected:

(I) From an offender sentenced to county jail or community corrections, by the sheriff or by the community corrections program within thirty-five days after the offender is received into the custody of the county jail or the community corrections facility;

(II) From an offender sentenced to probation, by the judicial department or a probation department within thirty-five days after the offender is placed on probation;

(III) From an offender who receives a deferred judgment and sentence, by the judicial department or a probation department within thirty-five days after the offender receives the deferred judgment and sentence; and

(IV) From an offender who receives any other sentence or who receives a suspended sentence, by the judicial department or a probation department within thirty-five days after the offender is sentenced or the sentence is suspended.

(2) For purposes of this section:

(a) "Convicted" means having received a verdict of guilty by a judge or jury or having pled guilty or nolo contendere. Except where otherwise indicated, "convicted" does not include deferred judgment and sentencing pursuant to section 18-1.3-102, C.R.S., unless the deferred judgment and sentence is revoked and a sentence is imposed.

(b) "Unlawful sexual behavior" shall have the same meaning as provided in section 16-22-102 (9).

(3) The judicial department, the department of corrections, a probation department, a sheriff, or a contractor may:

(a) Use reasonable force to obtain biological substance samples in accordance with this section using medically recognized procedures. In addition, an offender's refusal to comply with this section may be grounds for revocation or denial of parole, probation, suspension

of sentence, or deferred judgment and sentence. Failure to pay for collection and a chemical testing of a biological substance sample shall be considered a refusal to comply if the offender has the present ability to pay.

(b) Collect biological substance samples notwithstanding that collection was not accomplished within an applicable deadline set forth in this section.

(4) Any moneys received from an offender pursuant to this section shall be deposited in the offender identification fund created in section 24-33.5-415.6, C.R.S.

(5) The Colorado bureau of investigation shall conduct the chemical testing of the biological substance samples obtained pursuant to this section. The Colorado bureau of investigation shall file and maintain the results thereof and shall furnish the results to a law enforcement agency upon request. The Colorado bureau of investigation shall store and preserve all biological substance samples obtained pursuant to this section.

(6) This section shall not apply to juvenile adjudications under title 19, C.R.S.

Source: **L. 2006:** Entire section added, p. 1687, § 2, effective July 1, 2007. **L. 2007:** Entire section R&RE, p. 1611, § 1, effective July 1. **L. 2012:** (1)(a), (1)(d), (1)(e), (1)(f), (1)(g), and (1)(h) amended, (SB 12-175), ch. 208, p. 853, § 85, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(a), (1)(d), (1)(e), (1)(f), (1)(g), and (1)(h) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-11-102.5. Drug testing of offenders by judicial department - pilot program. (Repealed)

Source: **L. 90:** Entire section added, p. 945, § 16, effective June 7. **L. 96:** (2) repealed, p. 1262, § 168, effective August 7. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-212.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-103. Imposition of sentence in class 1 felonies - appellate review. (Repealed)

Source: **L. 72:** R&RE, p. 240, § 1. **C.R.S. 1963:** § 39-11-103. **L. 74:** Entire section R&RE, p. 252, § 4, effective January 1, 1975. **L. 79:** (2), (3), (4), IP(6), and (6)(e) amended and (5.1) and (7) added, p. 673, § 1, effective August 1. **L. 84:** (1), IP(5), (5)(a), and (5)(e) amended, (2), (3), and (6) R&RE, (4) and (5.1) repealed, and (5)(f) to (5)(l) and (8) added, pp. 491, 493, 492, 494, 495, §§ 1, 3, 2, 4, 6, 5, effective July 1. **L. 85:** (1)(b) amended, p. 653, § 8, effective July 1; (1)(b) amended, p. 657, § 3, effective July 1. **L. 87:** (6)(g) amended, p. 625, § 1, effective April 30. **L. 88:** (1)(b), IP(2)(a), (2)(a)(I), (2)(a)(II), (2)(b)(I), IP(5), IP(6), (6)(a), (6)(b), IP(6)(c), IP(6)(f), and (7)(a) amended, (2)(a)(III) repealed, (2)(b)(II) R&RE, and (2)(b)(III) added, pp. 673, 675, §§ 1, 3, 2, effective July 1. **L. 89:** (6)(f.5) added, p. 869, § 1, effective June 1; (6)(j) amended and (6.5) added, p. 828, § 37, effective July 1. **L. 90:** (1)(b) amended and (6)(j.5) and (6)(j.8) added, pp. 927, 928, §§ 1, 2, effective July 1. **L. 91:** (6)(c)(III) amended, p. 359, § 22, effective April 9. **L. 91, 2nd Ex. Sess.:** Entire section R&RE, p. 8, § 1, effective September 20. **L. 93:** (1)(a) amended, p. 544, § 2, effective April 29. **L. 94:** (5)(l) added, p. 51, § 1, effective March 15; (5)(m) added, p. 1057, § 1, effective May 4. **L. 95:** (1)(a), (1)(b), (1)(c), (2), (3), and (7)(b) amended and (1)(a.5) and (1)(a.7) added, p. 1290, § 1, effective July 1. **L. 97:** (1) (b) amended, p. 47, § 2, effective March 21; (6)(a) amended, p. 1582, § 2, effective June 4. **L. 98:** (3.5) added, p. 379, § 1, effective April 21; (5)(m) amended and (5)(n) added, p. 1444, § 34, effective July 1. **L. 2000:** (5)(n) amended and (5)(o) added, p. 395,

§ 1, effective August 2. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1), (2), (3.5), and (7) amended and (3.2) and (8) added, p. 1, § 1, effective July 12.

Editor's note: In 2002, this section was relocated to section 18-1.3-1201.

Cross references: (1) For current provisions relating to the applicability of procedures in class 1 felony cases for crimes committed on or after July 1, 1988, and prior to September 20, 1991, see part 13 of article 1.3 of title 18.

(2) For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsections (1), (2), (3.5), and (7) and enacting subsections (3.2) and (8), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

16-11-104. Genetic testing - repeal. (Repealed)

Source: **L. 99:** Entire section added, p. 1145, § 3, effective July 1. **L. 2000:** (1) and (3) amended, p. 1025, § 3, effective July 1. **L. 2001:** (1)(a) amended, p. 955, § 2, effective July 1. **L. 2002:** Entire section amended, p. 1148, § 2, effective July 1; (5) amended, p. 1183, § 11, effective July 1; (1)(a)(II)(A) amended, p. 1495, § 143, effective October 1. **L. 2006:** (6) added by revision, pp. 1688, 1693, §§ 3, 17. **L. 2007:** (1)(a)(II)(I) and (1)(a)(II)(J) amended and (1)(a)(II)(K) added, p. 727, § 10, effective July 1.

Editor's note: (1) House Bill 07-1235 amended subsections (1)(a)(II)(I) and (1)(a)(II)(J) and added subsection (1)(a)(II)(K), effective July 1, 2007, but those amendments did not take effect due to the repeal of this section, effective July 1, 2007.

(2) Subsection (6) provided for the repeal of this section, effective July 1, 2007. (See L. 2006, pp. 1688, 1693.)

16-11-105. Local initiative committee pilot program for the management of community-based programs for adults with mental illness who come into contact with the criminal justice system - legislative declaration - creation - duties - report - repeal. (Repealed)

Source: **L. 2003:** Entire section added, p. 2082, § 1, effective May 22.

Editor's note: Subsection (6)(a) provided for the repeal of this section, effective July 1, 2008. (See L. 2003, p. 2082.)

PART 2

PROBATION

16-11-201. Application for probation. (Repealed)

Source: **L. 72:** R&RE, p. 241, § 1. **C.R.S. 1963:** § 39-11-201. **L. 82:** (2) amended, p. 308, § 1, effective April 27. **L. 90:** (4) added, p. 941, § 7, effective June 7. **L. 95:** (1) and (4) amended, p. 1281, § 18, effective June 5. **L. 98:** (4)(a)(II) amended, p. 1437, § 11, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-201.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-202. Probationary power of court. (Repealed)

Source: **L. 72:** R&RE, p. 242, § 1. **C.R.S. 1963:** § 39-11-202. **L. 94:** Entire section amended, p. 97, § 1, effective July 1. **L. 96:** Entire section amended, p. 739, § 14, effective July 1. **L. 99:** (1) amended, p. 57, § 9, effective March 15. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-202.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-203. Criteria for granting probation. (Repealed)

Source: **L. 72:** R&RE, p. 242, § 1. **C.R.S. 1963:** § 39-11-203. **L. 76:** IP(1) amended, p. 546, § 2, effective July 1. **L. 77:** (1)(e) added and (2)(o) repealed, pp. 863, 888, §§ 4, 78, effective July 1, 1979. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

(2) In 2002, this section was relocated to section 18-1.3-203.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-204. Conditions of probation - repeal. (Repealed)

Source: **L. 72:** R&RE, p. 243, § 1. **C.R.S. 1963:** § 39-11-204. **L. 73:** p. 505, § 1. **L. 77:** (1) and (2)(e) amended, p. 863, § 5, effective July 1, 1979. **L. 79:** (2)(e.5) and (2.5) added, p. 601, § 26, effective July 1. **L. 82:** (2)(b) amended, p. 309, § 1, effective March 11; (2)(g) amended, p. 253, § 9, effective May 3. **L. 87:** (2)(e) amended, p. 563, § 9, effective July 1. **L. 88:** (2)(k.5) added, p. 708, § 4, effective July 1. **L. 91:** (1) amended, p. 437, § 2, effective May 29. **L. 92:** (1) amended, p. 455, § 2, effective June 2; (2)(d) and (2.5) amended, p. 211, § 13, effective August 1. **L. 94:** (2)(a)(VI.5) added and (2.5) amended, pp. 1811, 1812, §§ 3, 4, effective June 1; (1) amended, p. 2022, § 2, effective June 3; (2) amended, p. 2036, § 17, effective July 1. **L. 95:** (2)(a)(V) amended, p. 160, § 1, effective July 1; (2)(a)(V) amended, p. 742, § 7, effective July 1. **L. 98:** (2)(b)(II) amended, p. 1403, § 55, effective February 1, 1999. **L. 99:** (2.3) added, p. 61, § 4, effective July 1. **L. 2000:** (2)(a)(V) amended, p. 997, § 1, effective May 26; (2)(c) added, p. 234, § 3, effective July 1; (1) and (2.5) amended, p. 1045, § 8, effective September 1. **L. 2001:** (2)(d) added, p. 658, § 5, effective May 30; (4) amended, p. 32, § 1, effective August 8. **L. 2002:** (2)(c)(I) amended, p. 665, § 9, effective May 28; (2)(a)(V) amended, p. 979, § 2, effective July 1; (2)(d) amended, p. 1183, § 12, effective July 1; (2)(e) added, p. 1150, § 3, effective July 1; (2.5)(i.2), (2.5)(i.4), (2.5)(i.6), and (2.5)(i.8) added, p. 1156, § 17, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: (1) Senate Bill 02-018 amended subsection (2)(a)(V). House Bill 02-1229 amended subsection (2)(c)(I). Senate Bill 02-010 amended subsection (2)(d). Senate Bill 02-019 enacted subsections (2)(e), (2.5)(i.2), (2.5)(i.4), (2.5)(i.6), and (2.5)(i.8). This section as amended by Senate Bill 02-010, Senate Bill 02-018, Senate Bill 02-019, and House Bill 02-1229, was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-204.

(2) Subsection (2)(a)(V) was amended in Senate Bill 03-186, effective March 18, 2003. However, those amendments did not take effect due to the repeal of § 16-11-204 by House Bill 02-1046, effective October 1, 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-204.3. Genetic testing as a condition of probation - repeal. (Repealed)

Source: **L. 96:** Entire section added, p. 1580, § 2, effective July 1. **L. 99:** (1) and (3) amended, p. 1167, § 1, effective July 1; (1) amended, p. 1146, § 5, effective July 1. **L. 2000:** (3) amended, p. 1266, § 4, effective May 26; (1) (b.5) added and (3) amended, p. 1025, §§ 1, 2, effective July 1. **L. 2002:** Entire section amended, p. 1150, § 4, effective July 1; (5) amended, p. 1183, § 13, effective July 1; (1)(b)(I) amended, p. 1495, § 144, effective October 1. **L. 2006:** (6) added by revision, pp. 1689, 1693, §§ 4, 17.

Editor's note: Subsection (6) provided for the repeal of this section, effective July 1, 2007. (See L. 2006, pp. 1689, 1693.)

16-11-204.5. Restitution as a condition of probation. (Repealed)

Source: **L. 77:** Entire section added, p. 863, § 6, effective July 1, 1979. **L. 79:** (1) amended, p. 664, § 2, effective July 1. **L. 84:** (3) added, p. 489, § 3, effective July 1. **L. 85:** (4) added, p. 630, § 1, effective April 23; (1) amended, p. 628, § 1, effective July 1. **L. 87:** (3) amended, p. 621, § 3, effective July 1. **L. 96:** (1), (2), and (4) amended and (2.5) added, p. 1778, § 4, effective June 3. **L. 2000:** Entire section amended, p. 1046, § 9, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-205.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-204.6. Repayment of crime stopper reward as a condition of probation. (Repealed)

Source: **L. 94:** Entire section added, p. 1812, § 5, effective June 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-206.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-205. Arrest of probationer - revocation. (1) A probation officer may arrest any probationer when:

- (a) He has a warrant commanding that the probationer be arrested; or
- (b) He has probable cause to believe that a warrant for the probationer's arrest has been issued in this state or another state for any criminal offense or for violation of the conditions of probation; or
- (c) Any offense under the laws of this state has been or is being committed by the probationer in his presence; or
- (d) He has probable cause to believe that a crime has been committed and the probationer has committed such crime; or
- (e) He has probable cause to believe that the conditions of probation have been violated and probable cause to believe that the probationer is leaving or about to leave the state, or that the probationer will fail or refuse to appear before the court to answer charges of violation of the conditions of probation, or that the arrest of the probationer is necessary to prevent physical harm to the probationer or another person or the commission of a crime; or

(f) The probationer, who is on probation as a result of a conviction of any felony except a class 1 felony, has been tested for the illegal or unauthorized use of a controlled substance and the result of such test is positive.

(2) If a probation officer has reason to believe that the conditions of probation have been violated by any probationer, he may issue a summons requiring the probationer to appear before the court at a specified time and place to answer charges of violation of the conditions of probation. The summons, unless accompanied by a copy of a complaint, shall contain a brief statement of the violation and the date and place thereof. Failure of the probationer to appear before the court as required by the summons shall be deemed a violation of the conditions of probation.

(3) If, rather than issuing a summons, a probation officer makes an arrest, without warrant, of a probationer, the probationer shall be taken without unnecessary delay before the nearest available judge of a court of record. Any probationer so arrested shall have all of the rights afforded by the provisions of this code to persons incarcerated before trial of criminal charges and may be admitted to bail pending probation revocation hearing.

(4) Within seven days after the arrest of any probationer as provided in this section, or within a reasonable time after the issuance of a summons under this section, the probation officer shall complete his or her investigation and either:

(a) File a complaint in the court having jurisdiction of the violation of probation; or

(b) Order the release of the probationer, if imprisoned, and notify the probationer that he is relieved of obligation to appear before the court. In such event, the probation officer shall give written notification to the court of his action.

(5) A complaint alleging the violation of a condition of probation may be filed either by the probation officer pursuant to subsection (4) of this section or by the district attorney. Such complaint shall contain the name of the probationer, shall identify the violation charged and the condition of probation alleged to have been violated, including the date and approximate location thereof, and shall be signed by the probation officer or the district attorney. A copy thereof shall be given to the probationer a reasonable length of time before he appears before the court.

(6) A warrant for the arrest of any probationer for violation of the conditions of probation may be issued by any judge of a court of record upon the report of a probation officer or upon the verified complaint of any person, establishing to the satisfaction of the judge probable cause to believe that a condition of probation has been violated and that the arrest of the probationer is reasonably necessary. The warrant may be executed by any probation officer or by a peace officer authorized to execute warrants in the county in which the probationer is found.

Source: L. 72: R&RE, p. 244, § 1. C.R.S. 1963: § 39-11-205. L. 87: (5) amended, p. 605, § 6, effective April 6. L. 89: (1)(f) added, p. 876, § 11, effective June 5. L. 2012: IP(4) amended, (SB 12-175), ch. 208, p. 855, § 86, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion to subsection (4) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Clear purpose of § 16-11-204 (3) is to provide criminal defendant with notice of terms of his probation. People v. Zimmerman, 616 P.2d 997 (Colo. App. 1980).

But failure to comply with § 16-11-204 (3) did not require reversal of revocation. People v. Zimmerman, 616 P.2d 997 (Colo. App. 1980).

Defendant presumed to know that violation may result in revocation. Probation is a privilege, and a criminal defendant is presumed

to know that the violation of any term of his probation may result in revocation. People v. Zimmerman, 616 P.2d 997 (Colo. App. 1980).

Subsection (4) limitation inapplicable to deferred sentence revocation proceeding. Since the five-day limitation specified in subsection (4) is not a procedural safeguard required in a probation revocation hearing pursuant to § 16-11-206, but rather is a prehearing requirement imposed on the probation officer, it is not

within the contemplation of § 16-7-403 (2). *People v. Schoonover*, 654 P.2d 1340 (Colo. App. 1982).

Application for entry of deferred judgment and imposition of sentence was sufficient to notify defendant of the violations he was alleged to have committed. *People v. Allen*, 952 P.2d 764 (Colo. App. 1997), rev'd on other grounds, 973 P.2d 620 (Colo. 1999).

Subsection (3) did not apply to actions of district attorney. *People v. McPherson*, 897 P.2d 923 (Colo. App. 1995).

It would be exalting form over substance for the court to hold that a probation term was not tolled by the filing of a complaint in support of issuance of an arrest warrant to initiate revocation of probation proceedings. *People v. Galvin*, 961 P.2d 1137 (Colo. App. 1997).

To toll the probation period until probation revocation proceedings are completed, it is sufficient that: (1) A probation officer issue a summons requiring the probationer to appear in court; (2) a probation officer arrest the probationer; (3) a complaint be filed for the revocation of probation; or (4) a report be filed by a probation officer or a verified complaint by any person, together with a request for an arrest warrant. *People v. Galvin*, 961 P.2d 1137 (Colo. App. 1997).

Probation is a privilege, not a right. Whether a probationer has violated a probation condition presents a question of fact. Once the court finds that a violation has occurred, whether probation should be revoked lies within the discretion of the court. *People v. Ickler*, 877 P.2d 863 (Colo. 1994); *People v. Colabello*, 948 P.2d 77 (Colo. App. 1997); *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Subsection (5) does not specify particular format for complaint alleging violation of probation. The constitutional sufficiency of notice to a probationer that is written, but provided in an irregular format, should be measured by whether the notice sufficiently fulfilled the central function of informing the probationer of the alleged basis for revocation. The original revocation complaint served on the probationer did not specify that the revocation was based upon conviction for a murder the probationer committed while on probation, but instead included the original charges filed. The probationer received constitutionally sufficient written notice, however, in a motion to continue the revocation hearing that explicitly identified the murder conviction as a ground for revocation. *People v. Robles*, 209 P.3d 1173 (Colo. App. 2009).

Applied in *Adair v. People*, 651 P.2d 389 (Colo. 1982); *People v. Clark*, 654 P.2d 847 (Colo. 1982).

16-11-206. Revocation hearing. (1) At the first appearance of the probationer in court or at the commencement of the hearing, whichever is first in time, the court shall advise the probationer as provided in section 16-7-206 insofar as such matters are applicable; except that there shall be no right to a trial by jury in proceedings for revocation of probation.

(2) At or prior to the commencement of the hearing, the court shall advise the probationer of the charges against him and the possible penalties therefor and shall require the probationer to plead guilty or not guilty.

(3) At the hearing, the prosecution has the burden of establishing by a preponderance of the evidence the violation of a condition of probation; except that the commission of a criminal offense must be established beyond a reasonable doubt unless the probationer has been convicted thereof in a criminal proceeding. When, in a revocation hearing, the alleged violation of a condition is the probationer's failure to pay court-ordered compensation to appointed counsel, probation fees, court costs, restitution, or reparations, evidence of the failure to pay shall constitute prima facie evidence of a violation. The court may, when it appears that the alleged violation of conditions of probation consists of an offense with which the probationer is charged in a criminal proceeding then pending, continue the probation revocation hearing until the termination of the criminal proceeding. Any evidence having probative value shall be received regardless of its admissibility under the exclusionary rules of evidence if the defendant is accorded a fair opportunity to rebut hearsay evidence.

(4) If the probationer is in custody, the hearing shall be held within fourteen days after the filing of the complaint, unless delay or continuance is granted by the court at the instance or request of the probationer or for other good cause found by the court justifying further delay.

(5) If the court determines that a violation of a condition of probation has been committed, it shall, within seven days after the said hearing, either revoke or continue the probation. If probation is revoked, the court may then impose any sentence or grant any probation pursuant to the provisions of this part 2 which might originally have been imposed or granted.

Source: L. 72: R&RE, p. 245, § 1. C.R.S. 1963: § 39-11-206. L. 83: (3) amended, p. 664, § 5, effective July 1. L. 2012: (4) and (5) amended, (SB 12-175), ch. 208, p. 855, § 87, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (4) and (5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 16-11-206 is similar to repealed § 39-16-9, C.R.S. 1963, and § 39-16-9, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Scope of probationer's constitutional rights. Upon a probation revocation hearing the probationer is not entitled to claim the full range of constitutional guarantees available to one not yet convicted of a crime. *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969); *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974).

While the defendant is entitled to certain procedural due process rights at a probation revocation hearing, he is not entitled to the full panoply of constitutional guarantees available to one who has not been convicted of a crime, and thus cannot complain of the admission of illegally seized evidence. *People v. Wilkerson*, 189 Colo. 448, 541 P.2d 896 (1975).

The following "minimum requirements of due process" at parole or probation revocation hearings are required: (a) Written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking probation. *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974); *People v. Thomas*, 42 Colo. App. 441, 599 P.2d 957 (1979).

Prior to a probation revocation hearing, the probationer has a right to be informed of the specific probation violations with which he is charged. *People v. Carr*, 185 Colo. 293, 524 P.2d 301 (1974).

Nothing in this section or the state or federal constitutions requires the trial court to advise the defendant of his or her right to testify at a deferred judgment revocation proceeding. *People v. Allen*, 973 P.2d 620 (Colo. 1999).

Oral findings made by the fact finder on the record satisfy constitutional requirements

of procedural due process, including a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation. *People v. Elder*, 36 P.3d 172 (Colo. App. 2001).

He has rights granted by general assembly. Where there are no constitutional rights involved, the supreme court of the United States has stated that a probationer has only those rights granted to him by the general assembly. *Gehl v. People*, 161 Colo. 535, 423 P.2d 332 (1967).

Clear purpose of § 16-11-204 (3) is to provide criminal defendant with notice of terms of his probation. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

But failure to comply with § 16-11-204 (3) did not require reversal of revocation in and of itself. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

Defendant presumed to know that violation may result in revocation. Probation is a privilege, and a criminal defendant is presumed to know that the violation of any term of his probation may result in revocation. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

Probation revocation proceedings involving deferred sentencing are quite distinct from parole revocation proceedings. The statutes on probation do not provide probationers more in substance than what is accorded parolees. *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 US 934, 91 S. Ct. 1528, 28 L. Ed.2d 868 (1971).

For purposes of determining whether an order is final and appealable, there is no appreciable difference between an order dismissing a petition to revoke probation and an order declining to revoke probation. *Lewis v. People*, 214 P.3d 1059 (Colo. 2009).

The question of whether the probation shall be revoked is within the sound discretion of the judge. *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969); *People v. Ickler*, 877 P.2d 863 (Colo. 1994); *People v. Colabello*, 948 P.2d 77 (Colo. App. 1997); *People v. Elder*, 36 P.3d 172 (Colo. App. 2001).

Probation is a privilege, not a right. Whether a probationer has violated a probation condition presents a question of fact. Once the court finds that a violation has occurred, whether probation should be revoked lies within the discretion of the court. *People v. Ickler*, 877 P.2d

863 (Colo. 1994); *People v. Colabello*, 948 P.2d 77 (Colo. App. 1997); *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

It is better practice to continue a probation revocation hearing until after a trial on new charges, but it lies within the discretion of the trial court. *People v. Ray*, 192 Colo. 391, 560 P.2d 74 (1977).

Issue preclusion does not apply to bar the right of a defendant to a trial where defendant had been charged with the crime of driving with a revoked license, which constituted both a violation of his probation and a new criminal act. Defendant did not have a full and fair opportunity to litigate the issue in the probation revocation hearing. A determination of guilt or innocence in a probation revocation hearing would undermine the function of the criminal trial process. *Byrd v. People*, 58 P.3d 50 (Colo. 2002).

Probation revocation hearings are held for different purposes, governed by different procedures, and do not protect a defendant's rights as does a criminal trial. *Byrd v. People*, 58 P.3d 50 (Colo. 2002).

Continuance of hearing not reversed absent abuse of discretion. A finding of good cause for a continuance is within the discretion of the trial court and will not be reversed appeal absent an abuse of discretion. *People v. Marrow*, 638 P.2d 842 (Colo. App. 1981).

Abuse not found. Where a court ordered a continuance in view of the late filing of an amended complaint against defendant and the defendant's need for additional time to respond to the allegations in the amended complaint, there was no abuse of discretion. *People v. Marrow*, 638 P.2d 842 (Colo. App. 1981).

What constitutes prejudice in denial of continuance at hearing. When a continuance of a sentencing hearing for revocation of probation is denied, the trial court will not be held to have abused its discretion unless the defendant demonstrates prejudice resulting from the failure to continue. Where the defendant subsequently pleads guilty to the charge for which probation was revoked, he fails to establish prejudice. *People v. Abila*, 670 P.2d 432 (Colo. App. 1983).

This section ordains the procedure where a probationer violates the conditions of probation. *Logan v. People*, 138 Colo. 304, 332 P.2d 897 (1958).

It requires a hearing on a revocation of probation. *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969).

To read this section harmoniously with § 16-11-204, the proper standard of proof is a preponderance of the evidence when it is alleged that a condition of probation has been breached, even though the breaching conduct also may have constituted a criminal offense. *People v. Moses*, 64 P.3d 904 (Colo. App. 2002).

Burden of establishing violation. Where an alleged violation of a condition of probation is a

criminal offense, the prosecution has the burden of establishing the violation beyond a reasonable doubt. *People v. Carr*, 185 Colo. 293, 524 P.2d 301 (1974).

Beyond reasonable doubt standard of proof. An adult charged with a probation violation which constitutes a criminal offense has the right to demand that the people's charge that he committed the crime relied upon as a probation violation be proved "beyond a reasonable doubt". *People in Interest of C.B.*, 196 Colo. 362, 585 P.2d 281 (1978); *People v. Van Deusen*, 677 P.2d 402 (Colo. App. 1983).

Presumption that court applied proper standard of proof. Although the court did not articulate the standard of proof it applied in revoking probation, the court is entitled to a presumption that it applied the proper standard. *People v. Carr*, 185 Colo. 293, 524 P.2d 301 (1974).

Plea of not guilty by reason of insanity not allowed in probation revocation hearing. A court, in permitting a plea of "not guilty by reason of insanity" in a probation revocation hearing, exceeds its jurisdiction, as a plea of not guilty by reason of insanity is not a proper means of testing competency at a probation revocation hearing. *People ex rel. Gallagher v. District Court*, 196 Colo. 499, 591 P.2d 1015 (1978).

Formal procedures and rules of evidence not employed. One of the critical differences between criminal trials and probation revocation hearings is that formal procedures and rules of evidence are not employed. *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974).

Hearing may be informally conducted. Where a hearing to revoke probation is called for by statute, it may be informally conducted. *Gehl v. People*, 161 Colo. 535, 423 P.2d 332 (1967).

A hearing must be held on a petition to revoke probation. But the hearing may be informally conducted, and the court may take into consideration all factors normally taken into account during sentencing. *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969).

Two-month delay in scheduling of hearing for probation revocation under subsection (4) did not violate defendant's due process rights. Much of the delay was caused by defendant's failure to inform his defense counsel or the court of his whereabouts, and final two months of delay do not constitute a sufficient time interval to warrant a conclusion that the delay was excessive. Defendant has failed to demonstrate that he has suffered any other prejudice. *People v. Newman*, 867 P.2d 94 (Colo. App. 1993).

Proper sanction for violation of subsection (4) is release of the probationer from custody, and not dismissal of the petition. *People v.*

Clark, 654 P.2d 847 (Colo. 1982); *People v. Newman*, 867 P.2d 94 (Colo. App. 1993).

If an alleged probation violator has been held in custody up to the statutory time limit and has not had a hearing, he must be immediately released from custody, but the complaint may remain pending or be refiled. Only custody is forfeited if a hearing is not held in time. *People v. Clark*, 654 P.2d 847 (Colo. 1982).

Speedy disposition of revocation petition applies to juveniles. The speedy disposition of a revocation petition, guaranteed to adults under subsection (4), must be extended to juveniles. *People in Interest of D.M.*, 650 P.2d 1350 (Colo. App. 1982).

Delay attributable to court calendar congestion may be a permissible cause for delay under subsection (4). *People in Interest of D.M.*, 650 P.2d 1350 (Colo. App. 1982).

Prosecution has burden of proving that docket congestion is sufficiently egregious as to be good cause for the delay. *People in Interest of D.M.*, 650 P.2d 1350 (Colo. App. 1982).

Fifteen-day limitation applies to deferred sentence revocation hearing. Since the 15-day limitation imposed by subsection (4) is a procedural safeguard required for probation revocation hearings, it applies to a deferred sentence revocation pursuant to § 16-7-403. *People v. Schoonover*, 654 P.2d 1340 (Colo. App. 1982).

It is not bound by strict rules of evidence. In a proceeding to determine whether probation should be revoked, the court will not be bound by the strict rules of evidence. The probation officer was subject to cross-examination regarding the hearsay evidence which he offered, and such was not an abuse of discretion by the trial court. *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969).

Hearsay evidence is only admissible at a revocation hearing if the probationer has a fair opportunity to rebut such evidence. *People in Interest of T.M.H.*, 821 P.2d 895 (Colo. App. 1991).

A probation violation may be established by hearsay testimony if the offering witness is subject to cross-examination. *People v. Moses*, 64 P.3d 904 (Colo. App. 2002).

Permitting probation officer to testify about hearsay was harmless beyond a reasonable doubt, because trial court relied upon other evidence to find a probation violation. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

A trial court is not bound by the strict rules of evidence during a probation revocation hearing. *People in Interest of C.J.W.*, 727 P.2d 870 (Colo. App. 1986); *People v. Kelly*, 919 P.2d 866 (Colo. App. 1996).

Since defendant knew that failure to meet conditions of probation might constitute extraordinary aggravating circumstances which would justify sentencing beyond the presumptive range, the court was justified in doubling of

presumptive range of sentence when defendant met neither the community service nor the restitution condition of probation. *Montoya v. People*, 864 P.2d 1093 (Colo. 1993).

Where the only witness lacks personal knowledge of the essential incriminating facts supporting the revocation of probation, the probationer cannot be provided the fair opportunity to rebut as required by the statute. *People in Interest of T.M.H.*, 821 P.2d 895 (Colo. App. 1991).

After acceptance of an Alford plea, court can revoke probation for failure to complete counseling that requires defendant to admit guilt. Prior to accepting plea, court must advise defendant of direct consequences of the conviction that required counseling could not be completed and that probation would be revoked if the defendant did not admit guilt, is a collateral consequence of the guilty plea. *People v. Birdsong*, 958 P.2d 1124 (Colo. 1998).

The trial court's finding that the defendant did not participate or cooperate in a sex offender treatment program was supported by evidence demonstrating that the defendant's test results, interviews, and behavior in the program entrance process convinced the treatment program's personnel that the defendant was not motivated for treatment, was not giving straightforward answers to questions, was not prepared to accept responsibility for his crime, and was not amenable to outpatient treatment. *People v. Ickler*, 877 P.2d 863 (Colo. 1994).

Exclusionary rule not applied in probation revocation hearing. The overwhelming majority of cases from state and federal jurisdictions have refused to apply the exclusionary rule to improperly seized evidence in probation revocation hearings. *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974).

In the absence of egregious police misconduct, the exclusionary rule is inapplicable to probation revocation proceedings. *People v. Ressin*, 620 P.2d 717 (Colo. 1980).

And the general assembly clearly expressed its intent to have all probative evidence considered at the hearing on probation revocation, even if that evidence would be excluded in a criminal trial. *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974).

Subsection (3) is merely a codification of the general policy that the exclusionary rule does not apply to improperly seized evidence in probation revocation hearings. *People v. Wilkerson*, 189 Colo. 448, 541 P.2d 896 (1975).

The U.S. supreme court's decision in Crawford v. Washington, 124 S. Ct. 1354, does not change the rule that a probation violation can be established by hearsay evidence, so long as the offering witness is subject to cross-examination. The right to confrontation in a probation revocation hearing

flows from the due process clause, not the confrontation clause upon which the Crawford court relied. *People v. Turley*, 109 P.3d 1025 (Colo. App. 2004).

Defendant deprived of due process right of confrontation during revocation hearing. There was no good cause to deny confrontation or find that the prosecution's hearsay evidence was substantially reliable. The hearsay evidence was unreliable, consisting of double or triple hearsay, and did not fall within any recognized exception to the hearsay rule. *People v. Loveall*, 203 P.3d 540 (Colo. App. 2008), *aff'd*, 231 P.3d 408 (Colo. 2010).

"Convicted" defined. For the purposes of probation revocation under subsection (3) of this section, the term convicted means convicted upon trial, not when all appellate remedies are exhausted. *People v. Salazar*, 39 Colo. App. 409, 568 P.2d 101 (1977).

Probation can be revoked prior to conviction. *People v. Salazar*, 39 Colo. App. 409, 568 P.2d 101 (1977).

Standard of proof in juvenile proceedings. The same standard of proof that obtains in adult probation revocation hearings, i.e., beyond a reasonable doubt, should also apply in juvenile proceedings. *People in Interest of C.B.*, 40 Colo. App. 43, 572 P.2d 843 (1977); *People in Interest of C.B.*, 196 Colo. 362, 585 P.2d 281 (1978).

The power to alter a sentence at the time of revocation of probation is explicitly recognized in subsection (5) and Crim. P. 32(f) and 35(c). *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977).

But gross official misconduct in gathering evidence not sanctioned. Although the exclusionary rule per se does not apply to probation revocation hearings, gross official misconduct in gathering evidence for a probation revocation will not be sanctioned where an unreasonable search or seizure is such as to shock the conscience of the court. The court will not permit such conduct to be the basis of a state-imposed sanction. *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974).

While the exclusionary rule per se is inapplicable to probation revocation hearings, gross official misconduct by law enforcement officers is not condoned. *People v. Wilkerson*, 189 Colo. 448, 541 P.2d 896 (1975).

Court not bound to apply original sentence upon revocation of probation. Because suspension of a sentence is in conjunction with, rather than contradistinction to, the imposition of a statutorily prescribed alternative to imprisonment, the sentencing court's resentencing options upon revocation were dictated by statutory provisions governing revocation of probation. *Fierro v. People*, 206 P.3d 460 (Colo. 2009).

Revocation without notice improper. A trial judge has no power to impose sentence upon the basis of a violation of the conditions of proba-

tion in the absence of any notice to the probationer that his probation had been extended beyond the original period. Such a sentence violates concepts of fundamental fairness and due process. *Jesseph v. People*, 164 Colo. 312, 435 P.2d 224 (1967).

Where probation conditioned upon child support, finding of ability to pay required before revocation, and such finding should be made by the trial court. *People v. Silcott*, 177 Colo. 451, 494 P.2d 835 (1972).

Requiring the court to either revoke or continue probation within five days of the hearing on revocation is a directory provision, not jurisdictional. There is no basis for reversing the court's revocation of probation when the defendant consented to a hearing outside the statutory time period and the timing did not affect the fairness of the proceeding or cast doubt on the reliability of the outcome. *People v. Heimann*, 186 P.3d 77 (Colo. App. 2007).

Failure to follow statutory procedure voids revocation. The statutory procedure for hearing and revocation was not followed and no evidence was presented to show that defendant had violated any of the terms of his probation. Defendant's application for counsel to initiate appeal proceedings was not inconsistent with probation. *Snook v. People*, 169 Colo. 95, 453 P.2d 806 (1969).

Revocation held fundamentally unfair. It was fundamentally unfair to accept child support payments for a period of six months and then use as a ground for revocation of probation defendant's failure to make payments prior to that period. *People v. Silcott*, 177 Colo. 451, 494 P.2d 835 (1972).

Authority of court to impose sentence upon revocation. Upon revocation, the trial court has full authority to impose a sentence within the minimum and maximum term provided by statute for the crime. *Gehl v. People*, 161 Colo. 535, 423 P.2d 332 (1967).

Consecutive sentencing is an appropriate mechanism for imposing a distinct punishment for each of two criminal acts. *People v. Lorenzo*, 644 P.2d 50 (Colo. App. 1981).

The words "which might have originally been imposed or granted" in subsection (5) mean that the later imposition of sentence shall be done in accordance with the law applicable at the time defendant was originally placed on probation, and they do not mandate concurrent rather than consecutive sentencing. *People v. Lorenzo*, 644 P.2d 50 (Colo. App. 1981).

Time on probation need not be credited against sentence. The granting of probation is not the imposition of sentence or its equivalent, and time served on probation need not be credited against a sentence imposed upon revocation. *Gehl v. People*, 161 Colo. 535, 423 P.2d 332 (1967).

Probation revocation orders are reviewable by direct appeal. *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974).

But the finding that probation has been violated will not be disturbed merely because there is a conflict in evidence. *People v. Trujillo*, 189 Colo. 206, 539 P.2d 1234 (1975).

Statute as basis for jurisdiction. See *People v. Sandoval*, 36 Colo. App. 403, 541 P.2d 105 (1975).

Subsection (5) does not limit sentence to that originally agreed upon as part of a plea bargain but to that which might originally have been imposed pursuant to statute. *People v. McDaniels*, 844 P.2d 1257 (Colo. App. 1992); *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

Unambiguous language of subsection (5) authorizes court, upon revoking probation, to impose any sentence that it could have imposed based on the underlying crime. *People v. Santana*, 961 P.2d 498 (Colo. App. 1997); *People v. Castellano*, 209 P.3d 1208 (Colo. App. 2009).

The fact that defendant had previously received a two and one-half year sentence did not limit the court's authority to consider the full range of sentences authorized under statute. *People v. Santana*, 961 P.2d 498 (Colo. App. 1997).

Subsection (5) is inapplicable where probation was imposed, not as a sentence, but

merely as a condition of a suspended prison sentence. *People v. Frye*, 997 P.2d 1223 (Colo. App. 1999).

Once probation is revoked, a different factual predicate exists upon which the sentence is to be imposed. *People v. McDaniels*, 844 P.2d 1257 (Colo. App. 1992); *People v. Santana*, 961 P.2d 498 (Colo. App. 1997).

Court was authorized by statute to consider a wide range of penalties in sentencing since statute provides no time limitations with respect to the length of a probationary term or the length of the conditions attached to that term. *People v. McCarty*, 851 P.2d 181 (Colo. App. 1992), *aff'd*, 874 P.2d 394 (Colo. 1994).

Despite six-year delay, state had no duty to set defendant's probation revocation hearing until after termination of defendant's incarceration in another jurisdiction. *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

An order declining to revoke probation is not a final judgment within meaning of C.A.R. 1, thus the court of appeals lacked jurisdiction to entertain the appeal. *People v. Guatney*, 214 P.3d 1049 (Colo. 2009).

Applied in *People v. Varner*, 181 Colo. 146, 508 P.2d 390 (1973); *People v. Houpe*, 41 Colo. App. 253, 586 P.2d 241 (1978); *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981); *People v. Dennis*, 649 P.2d 321 (Colo. 1982); *People v. Elder*, 36 P.3d 172 (Colo. App. 2001).

16-11-207. Absent violator - arrest and return. When there is reason to believe that a condition of probation has been violated and the alleged violator is not in the state or cannot be apprehended in the state, the probation officer shall report these facts to the court which granted probation, and the court may forthwith order the issuance of a warrant for the arrest and return of the probationer.

Source: L. 72: R&RE, p. 246, § 1. C.R.S. 1963: § 39-11-207.

16-11-208. Officer's appointment - salary - oath. (1) Probation officers shall be appointed pursuant to the provisions of section 13-3-105, C.R.S., and shall not be removed except for cause.

(2) Before entering upon the duties of his office, each probation officer shall take an oath of office as an officer of the court, as prescribed by law.

Source: L. 72: R&RE, p. 246, § 1. C.R.S. 1963: § 39-11-208.

ANNOTATION

Law reviews. For article, "Proposed Probation and Parole Legislation", see 25 *Dicta* 290 (1948). For note, "One Year Review of Constitutional Law", see 41 *Den. L. Ctr. J.* 77 (1964).

Annotator's note. Since § 16-11-208 is similar to repealed § 39-16-1, CRS 1963, relevant cases construing that provision have been included in the annotations to this section.

A probation officer is an aide of the court. *Smith v. People*, 162 Colo. 558, 428 P.2d 69 (1967).

For the authority of a judge to determine salary of probation officer, see *Kanaly v. Wadlow*, 31 Colo. App. 193, 502 P.2d 83 (1972), modified, 182 Colo. 115, 511 P.2d 484 (1973).

16-11-209. Duties of probation officers. (1) It is the duty of a probation officer to investigate and report upon any case referred to him by the court for investigation. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. The officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court at such times as it directs. Such officers shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvement in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor and shall make at least monthly returns thereof into the registry of the court or as he may be ordered; shall make such reports to the court as are required; and shall perform such other duties as the court may direct.

(2) Any probationer, on probation as a result of a conviction of any felony except a class 1 felony, who is under the supervision of a probation officer pursuant to this part 2 and who is initially tested for the illegal or unauthorized use of a controlled substance and the result of such test is positive shall be subject to any or all of the following actions:

- (a) An immediate warrantless arrest;
 - (b) An immediate increase in the level of supervision, including but not limited to intensive supervision;
 - (c) Random screenings for the detection of the illegal or unauthorized use of a controlled substance, which use may serve as the basis for additional punishment or any other community placement;
 - (d) Referral to a substance abuse treatment program.
- (3) If any probationer described in subsection (2) of this section is subjected to a second or subsequent test for the illegal or unauthorized use of a controlled substance and the result of such test is positive, the probation officer shall take one or more of the following actions:
- (a) Make an immediate warrantless arrest;
 - (b) Seek a probation revocation in accordance with sections 16-11-205 and 16-11-206;
 - (c) Immediately increase the level of supervision, including but not limited to intensive supervision;
 - (d) Increase the number of drug screenings for the illegal or unauthorized use of controlled substances;
 - (e) Refer the probationer to a substance abuse treatment program.

Source: L. 72: R&RE, p. 246, § 1. C.R.S. 1963: § 39-11-209. L. 89: Entire section amended, p. 876, § 12, effective June 5.

ANNOTATION

Law reviews. For article, "The Problem of Compelling Fathers to Support Their Dependent Children", see 27 Dicta 442 (1950).

It is the duty of a probation officer, as outlined in this section, to maintain surveillance and supervision of a probationer, to aid the probationer and to bring about improvement in his conduct and condition, and to otherwise act in a manner beneficial to the probationer. Logan v. People, 138 Colo. 304, 332 P.2d 897 (1958) (decided under repealed § 39-16-8, CRS 53).

The absence of an authorizing law or condition of probation does not necessarily ren-

der unconstitutional a warrantless search of a probationer's residence if based on a reasonable suspicion. The totality of all other relevant circumstances may render such a search reasonable. The defendant's status as a probationer on intensive supervised probation greatly reduced his reasonable expectation of privacy in his residence, and, combined with the other circumstances of the situation, justified the search by his probation officer. People v. Samuels, 228 P.3d 229 (Colo. App. 2009).

16-11-210. County and juvenile courts. Any county court or juvenile court in this state may exercise the powers provided for and granted to district courts in this part 2, and the probation officers provided for in this part 2 shall also serve such courts in the same capacity as required by this part 2 for district courts.

Source: L. 72: R&RE, p. 247, § 1. C.R.S. 1963: § 39-11-210.

ANNOTATION

The plain intent of the Colorado Children's Code militates against the application of § 16-11-202 via this section to a delinquent child under the age of 18 years. People in Interest of A.F., 37 Colo. App. 185, 546 P.2d 972 (1975), aff'd, 192 Colo. 207, 557 P.2d 418 (1976).

A juvenile court does not have the statutory authority to impose a limited or partial confinement in county jail as a condition of probation for a juvenile under 18 years of age. People v. A.F., 192 Colo. 207, 557 P.2d 418 (1976).

16-11-211. Interdistrict probation department - personnel. (1) Any two or more contiguous judicial districts may, by the election of the district judges or a majority of the judges of each district, combine in the formation of an interdistrict probation department; except that such formation shall be approved by the chief justice of the supreme court.

(2) This department, if created, shall have an administrative head who shall be appointed by the judges or the majority of the judges of the districts which comprise the interdistrict probation department, subject to section 13-3-105, C.R.S., and such administrative head shall be the chief probation officer of the department. The department shall consist of such other probation officers as may be appointed, together with such administrative and clerical employees as may be required, as provided pursuant to section 13-3-105, C.R.S.

(3) The chief probation officer shall be charged with the duty of administering the affairs of the department and supervising the probation officers and personnel of the department and conducting the department in accordance with the laws pertaining to probation and the rules of the district courts of the said districts.

(4) Any district which participates in an interdistrict probation department may withdraw from such department by the election of the judges or a majority of the judges of the district and the approval of the chief justice of the supreme court, by giving written notice to the presiding judges of all other judicial districts affected. However, the withdrawal shall not be effective until January 1 of the year following the written notification.

Source: L. 72: R&RE, p. 247, § 1. C.R.S. 1963: § 39-11-211.

16-11-212. Work and education release programs. (Repealed)

Source: L. 72: R&RE, p. 247, § 1. C.R.S. 1963: § 39-11-212. L. 77: (1) amended, p. 864, § 7, effective July 1, 1979. L. 79: (2) amended, p. 601, § 27, effective July 1. L. 84: (1.1) added, p. 497, § 1, effective April 5. L. 2000: (2) amended, p. 1047, § 10, effective September 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: (1) The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See People v. McKenna, 199 Colo. 452, 611 P.2d 574 (1980).

(2) In 2002, this section was relocated to section 18-1.3-207.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-213. Intensive supervision probation programs - legislative declaration. (Repealed)

Source: L. 86: Entire section added, p. 740, § 1, effective May 16. L. 93: (4) amended, p. 718, § 2, effective July 1. L. 95: (7) added, p. 1276, § 12, effective June 5. L. 98: (6) repealed, p. 724, § 2, effective May 18. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-208.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-214. Fund created - probation services. (1) (a) There is hereby created in the state treasury the offender services fund to which shall be credited one hundred percent of any cost of care payments or probation supervision fees paid to the state pursuant to section 18-1.3-204 (2) (a) (V) or 19-2-114 (1), C.R.S., and from which the general assembly shall make annual appropriations for administrative and personnel costs for adult and juvenile probation services as well as for adjunct adult and juvenile probation services in the judicial department, including treatment services, contract services, drug and alcohol treatment services, and program development, and for associated administrative and personnel costs. Any moneys remaining in said fund at the end of any fiscal year shall not revert to the general fund.

(b) Repealed.

(c) Notwithstanding any provision of paragraph (a) of this subsection (1) to the contrary, on April 20, 2009, the state treasurer shall deduct two hundred fifty thousand dollars from the offender services fund and transfer such sum to the general fund.

(d) Notwithstanding any provision of paragraph (a) of this subsection (1) to the contrary, on July 1, 2009, the state treasurer shall deduct two million four hundred ninety-eight thousand four hundred thirty-nine dollars from the offender services fund and transfer such sum to the general fund.

(2) (Deleted by amendment, L. 2000, p. 997, § 2, effective May 26, 2000.)

Source: L. 87: Entire section added, p. 563, § 10, effective July 1. L. 95: (1) amended, p. 1096, § 12, effective May 31; entire section amended, p. 160, § 2, effective July 1. L. 2000: Entire section amended, p. 997, § 2, effective May 26. L. 2001: (1) amended, p. 506, § 1, effective May 18. L. 2002: (1) amended, p. 980, § 3, effective July 1; (1) amended, p. 1190, § 36, effective July 1; (1) amended, pp. 1496, 1567, §§ 145, 392, effective October 1. L. 2009: (1)(c) added, (SB 09-208), ch. 149, p. 621, § 12, effective April 20; (1)(d) added, (SB 09-279), ch. 367, p. 1926, § 4, effective June 1. L. 2010: (1)(a) amended, (HB 10-1422), ch. 419, p. 2069, § 27, effective August 11.

Editor's note: (1) Amendments to this section in House Bill 95-1212 and House Bill 95-1291 were harmonized.

(2) Amendments to subsection (1) by Senate Bill 02-010, Senate Bill 02-018, and House Bill 02-1046 were harmonized.

(3) Subsection (1)(b)(II) provided for the repeal of subsection (1)(b), effective July 1, 2006. (See L. 2002, p. 1190.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 3

SENTENCES TO IMPRISONMENT

16-11-301. Sentences - commitments - correctional facilities - county jail - age limit. (1) As a general rule, imprisonment for the conviction of a felony by an adult offender shall be served by confinement in an appropriate facility as determined by the executive director of the department of corrections. In such cases, the court will sentence the offender to the custody of the executive director of the department of corrections.

(2) Unless otherwise provided in the "Colorado Children's Code", title 19, C.R.S., a defendant convicted of a crime which may be punished by imprisonment in a county jail may be sentenced to a correctional facility other than state correctional facilities if at the time of sentencing the defendant is sixteen years of age or older but under the age of twenty-one years, and if, in the opinion of the court, rehabilitation of the person convicted

can best be obtained by such a sentence, and if it also appears to the court that the best interests of the person and of the public and the ends of justice would thereby be served.

(3) Repealed.

(4) With regard to any juvenile sentenced to the department of corrections, the executive director shall consider the juvenile's safety and well-being in determining the facility in which to house the juvenile, the persons with whom the juvenile has contact, and the activities in which the juvenile engages.

Source: L. 72: R&RE, p. 248, § 1. C.R.S. 1963: § 39-11-301. L. 79: (1) and (2) amended and (3) repealed, pp. 679, 705, §§ 6, 88, effective July 1. L. 93: (2) amended, p. 53, § 14, effective July 1. L. 96: (4) added, p. 1680, § 4, effective January 1, 1997.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952). For article, "One Year Review of Constitutional and Administrative Law", see 34 Dicta 79 (1957). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "One Year Review of Criminal Law and Procedure", see 35 Dicta 26 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "Indeterminate Sentencing of Criminals", see 33 Rocky Mt. L. Rev. 536 (1961). For article, "Comment on Indeterminate Sentencing of Criminals", see 33 Rocky Mt. L. Rev. 544 (1961). For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961).

Annotator's note. Since § 16-11-301 is similar to repealed § 39-10-1, C.R.S. 1963, § 39-10-1, CRS 53, and CSA, C. 48, § 512, relevant cases construing those provisions have been included in the annotations to this section. Most of the cases annotated were decided prior to the 1979 amendments to this section deleting references to the Colorado state reformatory.

The power to confine persons is delegated by legislative enactment; courts have no such inherent power. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

A penitentiary sentence is more severe than a reformatory sentence under Colorado law because it carries the stigma of a felony. *Petsche v. Clingan*, 273 F.2d 688 (10th Cir. 1960).

Sentence to reformatory within discretion of judge. Where a defendant is less than 21 years of age at the time of sentence, a trial judge is vested with a discretion to sentence him to the reformatory or the state penitentiary. *McKinney v. People*, 138 Colo. 294, 332 P.2d 895 (1958).

Under this section persons convicted of a crime punishable by imprisonment in the penitentiary who are under the age of 21 years may, in the discretion of the court, be sentenced to the state reformatory or to the penitentiary, as the

best interest of the person and of the public may require. *Roy v. Tinsley*, 142 Colo. 241, 350 P.2d 564 (1960).

The question of sentence, once there is a conviction, is left to the discretion of the court; this was clearly the intent of the general assembly. *Bitner v. Tinsley*, 151 Colo. 367, 378 P.2d 203 (1963).

The choice of place of confinement is within the sound discretion of the court, just as is the length of term of imprisonment. *People v. Weihs*, 187 Colo. 124, 529 P.2d 317 (1974).

Court not bound by probation reports. A probation officer's finding or recommendation that a defendant would benefit from probation does not require the trial court to grant probation, or to sentence defendant to an indeterminate term in the state reformatory. *Bitner v. Tinsley*, 151 Colo. 367, 378 P.2d 203 (1963).

And sentence stands unless discretion is abused. It is the trial court, having the opportunity to examine a petitioner and the probation reports, who is best equipped to determine where he should be required to serve his sentence, and in the absence of a showing of abuse of judicial discretion the sentence must stand. *Bitner v. Tinsley*, 151 Colo. 367, 378 P.2d 203 (1963).

This section read with statute fixing penalty for crime. In considering whether a sentence is within the provisions of the statute fixing the penalty for the commission of a crime, this section which provides for commitment to the reformatory in certain cases is fully applicable and applies when the pertinent facts are present. *Rivera v. People*, 128 Colo. 549, 265 P.2d 226 (1953); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

It refers to age of defendant at time of sentence and not to the time of the commission of an offense. *McKinney v. People*, 138 Colo. 294, 332 P.2d 895 (1958).

Application of this section is limited to those persons who are of the full age of 18 (now 21) years at the time of sentence. *Gallegos v. Tinsley*, 139 Colo. 157, 337 P.2d 386 (1959).

The age of a defendant on the date of the commission of the crime is not determinative of the punishment to be imposed, but rather his age at the time of sentence is controlling. *Maes v. Tinsley*, 143 Colo. 405, 353 P.2d 586, cert. denied, 364 U.S. 923, 81 S. Ct. 292, 5 L. Ed.2d 264 (1960).

It does not apply to class one felonies. This section has at all times contained the exception pertaining to persons convicted of crimes involving the penalty of imprisonment for life (now class one felonies). *Thompson v. People*, 136 Colo. 336, 316 P.2d 1043 (1957); *Maes v. Tinsley*, 143 Colo. 405, 353 P.2d 586, cert. denied, 364 U.S. 923, 81 S. Ct. 292, 5 L. Ed.2d 264 (1960).

Where court is bound by jury sentencing. Where jury found defendant guilty of first-degree murder and fixed penalty at imprisonment for life, court had no discretion but to give sentence accordingly. *People ex rel. Dunbar v. District Court*, 180 Colo. 107, 502 P.2d 420 (1972).

Absent statute, minor punishable as adult. Unless there is a statute which makes mandatory a sentence, in the case of a minor, other than that applicable to adults, an offense committed by a minor is punishable in the same manner as though committed by an adult. *Gallegos v. Tinsley*, 139 Colo. 157, 337 P.2d 386 (1959).

Court may sentence juvenile as an adult. The district court has the authority to sentence a juvenile charged as an adult to the department of corrections for the term of imprisonment authorized for adults. *Rocha v. People*, 713 P.2d 350 (Colo. 1986).

The court's statutory authority to sentence a defendant to the department of corrections does not expressly include the authority to dictate the conditions of confinement. The management, supervision, and control of department facilities are exclusively vested in its director. *People v. Harris*, 934 P.2d 882 (Colo. App. 1997).

Trial court lacks jurisdiction to order that a juvenile, sentenced as an adult, be placed in a therapeutic program within the department of institutions (now human services). The executive director of the department of corrections has the sole authority to determine where an offender serves his or her sentence. *White v. Adamek*, 907 P.2d 735 (Colo. App. 1995).

The legislative intent of this section is to give the executive director of the department of corrections ultimate responsibility for placing of inmates in particular facilities. Thus, the court could recommend sentencing to an out-of-state facility, but it could not order such placement. *People v. Brack*, 821 P.2d 928 (Colo. App. 1991).

A county court is bound by this section in the sentencing of minors. *Latham v. People*,

136 Colo. 252, 317 P.2d 894, 334 P.2d 437 (1957).

Court may not disregard legislative sentencing mandates. A court is not free to disregard the legislative mandate of §§ 16-11-201 and 16-11-308 and this section, even when it appears to dictate a sentence which the court considers inappropriate to a particular case. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

A sentence providing for incarceration in an institution other than that provided by law is void as beyond the jurisdiction of the sentencing court. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

Habeas corpus is a proper remedy to afford relief from a void sentence, but not from an erroneous sentence. *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

A judgment and sentence to the penitentiary for any term, when the law requires a reformatory confinement, is a void judgment and habeas corpus is a proper remedy to afford relief. *Rivera v. People*, 128 Colo. 549, 265 P.2d 226 (1953); *Barrett v. People*, 136 Colo. 144, 315 P.2d 192 (1957); *Petsche v. Clingan*, 273 F.2d 688 (10th Cir. 1960); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963).

Sentence valid. Where it is within the discretion of a trial court to sentence a defendant to the reformatory or to the penitentiary and the sentence is to the penitentiary, and within the minimum and maximum term of years authorized, the sentence is valid. *Bartell v. People*, 137 Colo. 300, 324 P.2d 378 (1958).

Penitentiary sentence was not abuse of discretion. Where the sentence of one convicted of a crime to the state reformatory or to the penitentiary rests in the discretion of the trial court, a petition for a writ of habeas corpus is properly denied where the record discloses that the petitioners, who were 18 years of age, had four previous convictions for various offenses and the probation officer recommended sentences to the penitentiary rather than to the state reformatory, and petitioners were so sentenced. *Roy v. Tinsley*, 142 Colo. 241, 350 P.2d 564 (1960).

Reformatory sentence in county different from court is proper. Jurisdiction is conferred upon the court to impose the sentence in a reformatory and although the reformatory may be in another county from that in which the particular justice conducts proceedings, whatever authority is essential to commitment therein is necessarily implied. *Aranda v. Patterson*, 146 Colo. 424, 361 P.2d 782 (1961).

Applied in *People v. Baca*, 179 Colo. 156, 499 P.2d 317 (1972); *People v. Ybarra*, 652 P.2d 182 (Colo. App. 1982); *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982); *People v. Lockhart*, 699 P.2d 1332 (Colo. 1985).

16-11-302. Duration of sentences for felonies. (Repealed)

Source: **L. 72:** R&RE, p. 248, § 1. **C.R.S. 1963:** § 39-11-302. **L. 76:** Entire section amended, p. 546, § 3, effective July 1. **L. 77:** Entire section amended, p. 864, § 8, effective July 1, 1979. **L. 79:** Entire section amended, p. 664, § 3, effective July 1; entire section amended, p. 680, § 7, effective July 1. **L. 2002:** Entire section amended, p. 1137, § 1, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-404.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-302.5. Duration of sentences for misdemeanors. (Repealed)

Source: **L. 79:** Entire section added, p. 665, § 4, effective August 1; entire section amended, p. 680, § 8, effective July 1. **L. 85:** Entire section amended, p. 1359, § 9, effective June 28. **L. 87:** Entire section amended, p. 816, § 18, effective October 1. **L. 96:** Entire section amended, p. 1689, § 19, effective January 1, 1997. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-502.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-303. Definite sentence not void. (Repealed)

Source: **L. 72:** R&RE, p. 249, § 1. **C.R.S. 1963:** § 39-11-303. **L. 77:** Entire section repealed, p. 888, § 78, effective July 1, 1979. **L. 79:** Entire section RC&RE, p. 665, § 5, effective August 1; entire section amended, p. 681, § 9, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-508.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-304. Determinate sentence of imprisonment imposed by court. (Repealed)

Source: **L. 72:** R&RE, p. 249, § 1. **C.R.S. 1963:** § 39-11-304. **L. 73:** p. 503, § 2. **L. 76:** (2)(b) amended, p. 530, § 2, effective April 9; (2)(a) amended, p. 547, § 4, effective July 1. **L. 77:** Entire section R&RE, p. 864, § 9, effective July 1, 1979. **L. 79:** Entire section amended, p. 665, § 6, effective July 1. **L. 99:** Entire section amended, p. 1151, § 15, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-408.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-305. Sentence not void if for definite period. (Repealed)

Source: **L. 72:** R&RE, p. 249, § 1. **C.R.S. 1963:** § 39-11-305. **L. 73:** p. 504, § 3. **L. 77:** Entire section repealed, p. 888, § 78, effective July 1, 1979.

16-11-306. Credit for presentence confinement. (Repealed)

Source: L. 72: R&RE, p. 249, § 1. C.R.S. 1963: § 39-11-306. L. 73: p. 506, § 1. L. 74: (4) amended, p. 408, § 25, effective April 11. L. 77: (3) amended, p. 865, § 10, effective July 1, 1979. L. 79: Entire section R&RE, p. 665, § 7, effective July 1. L. 86: Entire section amended, p. 734, § 3, effective July 1. L. 88: Entire section amended, p. 663, § 2, effective July 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to section 18-1.3-405.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-307. Credit for confinement pending appeal. (1) (a) A defendant whose sentence was stayed pending appeal prior to July 1, 1972, but who was confined pending disposition of the appeal, is entitled to credit against the maximum and minimum terms of his sentence for the entire period of confinement served while the stay of execution was in effect.

(b) A defendant whose sentence is stayed pending appeal after July 1, 1972, but who is confined pending disposition of the appeal, is entitled to credit against the term of his sentence for the entire period of such confinement, and this is so even though the defendant could have elected to commence serving his sentence before disposition of his appeal.

(2) The sheriff or other officer having charge of the defendant during such confinement shall endorse the length of such confinement on the mittimus and deliver it to the prison authorities when the defendant is delivered for commitment.

(3) The credit shall be computed by the prison authorities to the date of commitment. The computation shall be made as soon as practicable and the credit automatically awarded. The defendant shall be advised of the credit as soon as it is computed.

Source: L. 72: R&RE, p. 249, § 1. C.R.S. 1963: § 39-11-307. L. 73: p. 507, § 1. L. 79: (1)(b) amended, p. 666, § 8, effective July 1.

ANNOTATION

Defendant who is released on an appeal bond under conditions that do not so limit the defendant's liberty as to constitute "confinement" is not entitled to credit against a sentence for the period spent pending disposition of an appeal. "Confinement" in this section is subject to the same interpretation as used in § 16-11-306. Thus, where the defendant was released on an appeal bond and, like an offender

in community corrections on non-residential status, she was able to carry on a wide range of activities open to persons who have never been convicted of any crime, such as obtaining employment, going to school, and being with her family and friends, the defendant was not entitled to credit against her sentence for the time spent released on appeal bond. *People v. Sloan*, 3 P.3d 497 (Colo. App. 2000).

16-11-308. Custody of department of corrections - procedure. (1) When any person is sentenced to any correctional facility, that person shall be deemed to be in the custody of the executive director of the department of corrections or his designee.

(2) Any person sentenced pursuant to subsection (1) of this section shall initially be confined in the diagnostic center, as defined in section 17-40-101 (1.5), C.R.S., unless otherwise authorized by the executive director or the executive director's designee, to undergo evaluation and diagnosis to determine whether such person should be confined in a correctional facility or any other state institution, or whether such person should participate in a rehabilitation program as provided by law; except that no person subject to the provisions of section 16-11-301 (2) shall serve such person's sentence in any state correctional facility.

(3) When such evaluation and diagnosis is completed, a recommendation shall be made to the executive director of the department of corrections or his designee as to the place of

confinement or rehabilitation program as provided by law which may result in the maximum rehabilitation of the offender.

(4) Copies of the evaluation and diagnosis and the recommendation shall be shown and explained to the offender upon request; except that the executive director of the department of corrections or his designee may withhold any information he deems to be detrimental to the rehabilitation of the offender.

(4.5) Repealed.

(5) The executive director of the department of corrections or his designee is further authorized to transfer said person to any state institution or treatment facility under the jurisdiction of or approved by the department of corrections if he deems it to be in the best interests of said person and the public. Insofar as is practicable, said transfer shall be consistent with the evaluation and diagnosis and recommendation.

Source: **L. 74:** Entire section added, p. 240, § 1, effective May 7. **L. 77:** (1), (3), (4), and (5) amended, p. 901, § 3, effective August 1. **L. 78:** (2) amended, p. 356, § 1, effective April 27. **L. 79:** Entire section amended, p. 681, § 10, effective July 1. **L. 93:** (2) amended, p. 53, § 15, effective July 1. **L. 97:** (2) amended, p. 27, § 3, effective March 20. **L. 2000:** (4.5) added, p. 1027, § 5, effective July 1. **L. 2001:** (4.5)(a)(I) amended, p. 957, § 5, effective July 1. **L. 2002:** IP(4.5)(a) amended, p. 1151, § 5, effective July 1; (4.5)(a)(I) amended, p. 1496, § 146, October 1. **L. 2006:** (4.5)(c) added by revision, pp. 1689, 1693, §§ 5, 17.

Editor's note: Subsection (4.5)(c) provided for the repeal of subsection (4.5), effective July 1, 2007. (See L. 2006, pp. 1689, 1693.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4.5)(a)(I), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Court may not disregard legislative sentencing mandates. A court is not free to disregard the legislative mandate of §§ 16-11-201 and 16-11-301 and this section, even when it appears to dictate a sentence which the court considers inappropriate to a particular case. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

Under this section and § 17-22.5-103, a defendant is entitled to credit against a sentence for time spent in the county jail after sentencing. *People v. Mack*, 681 P.2d 949 (Colo. 1984).

The court's statutory authority to sentence a defendant to the department of corrections does not expressly include the authority to dictate the conditions of confinement. The manage-

ment, supervision, and control of department facilities are exclusively vested in its director. *People v. Harris*, 934 P.2d 882 (Colo. App. 1997).

Subsection (1) does not require a Colorado sentence that is imposed to run consecutively to an out-of-state sentence to begin to run on the date the Colorado sentence is imposed. It simply clarifies a defendant's custodial status after sentencing when the defendant remains in the county jail awaiting transfer to a correctional facility. *People v. Mackey*, 101 P.3d 1143 (Colo. App. 2004).

Applied in *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979); *People v. Baker*, 694 P.2d 377 (Colo. App. 1984).

16-11-308.5. Authority to contract with a county or a city and county for placement of prisoners in custody of executive director. (1) The general assembly hereby finds and declares that the department of corrections needs to reduce the backlog of state prisoners in local jails and that such reduction may occur by means of contracting with local jails for jail space in an amount equal to the number of inmates backlogged in local jails. The general assembly also finds and declares that it is the general assembly's intent that the department of corrections cooperate with each contracting county or city and county to select inmates for placement who will eventually be released in that county, city and county, or geographic area, or who have special protective needs, or who have occupational skills or plans that are compatible with the county's or city and county's needs.

(1.5) For the purposes of this section, “local jail” means a jail or an adult detention center of a county or city and county.

(2) (a) The executive director of the department of corrections may enter into a contract with any county or city and county for the placement in a local jail of any person who is in the custody of the executive director. Subject to appropriations, the executive director may provide an incentive to any county or city and county to encourage such county or city and county to so contract. The incentive shall not exceed ten percent of the daily rate as determined pursuant to section 17-1-112, C.R.S., multiplied by the number of days of confinement of any such person in such local jail.

(b) In any such placement in a local jail, the executive director shall be governed by the provisions of section 16-11-308 and shall retain jurisdiction over any person so placed for the purpose of any transfer to a state institution or treatment facility pursuant to section 16-11-308 (5).

(3) Except for contracts executed in the fiscal year beginning July 1, 1988, the board of county commissioners in each county or city council of each city and county desiring to contract with the department of corrections shall notify said department, on or before September 1 of each year, of the jail space available for contract on July 1 of the following year.

(4) Commencing with the fiscal year beginning July 1, 1988, the department of corrections shall execute contracts with counties or city and counties indicating a willingness to contract for available jail space as soon as is practicable after July 1, 1988.

(5) Beginning with budget requests required to be submitted by November 1, 1988, the executive director of the department of corrections shall include the costs of contracting for jail space in the department’s annual budget request to be submitted to the joint budget committee.

Source: **L. 88:** Entire section added, p. 676, § 1, effective July 1; entire section added, p. 709, § 7, effective July 1. **L. 91:** (1) to (4) amended and (1.5) added, p. 339, § 4, effective May 24. **L. 93:** (1.5) and (2)(a) amended, p. 406, § 4, effective April 19.

Cross references: For the authority of counties to enter into contracts with the executive director of the department of corrections, see § 30-11-101 (1) (h).

ANNOTATION

C.R.C.P. 106 (a)(4) provides a method to review actions taken by county employee based upon the department of corrections code

of penal discipline. *Murphy v. Pakenham*, 923 P.2d 375 (Colo. App. 1996).

16-11-309. Mandatory sentences for violent crimes. (Repealed)

Source: **L. 76:** Entire section added, p. 547, § 5, effective July 1. **L. 77:** (1) amended, p. 902, § 4, effective July 13; (1) amended and (3) repealed, pp. 865, 888, §§ 11, 78, effective July 1, 1979. **L. 79:** (1) amended, p. 666, § 9, effective August 1. **L. 81:** (1) and (2) amended, p. 944, § 1, effective July 1; (1) amended, p. 971, § 2, effective July 1. **L. 82:** (2)(a), (4), and (5) amended and (6) and (7) added, pp. 314, 315, §§ 3, 4, effective July 1. **L. 83:** (2)(a)(I) amended, p. 682, § 1, effective July 1. **L. 85:** (1)(a) amended, p. 647, § 1, effective July 1. **L. 88:** (1) amended, p. 679, § 1, effective July 1. **L. 89:** (8) added, p. 875, § 9, effective June 5. **L. 91:** (1)(b), (2)(a)(I), and (2)(b) amended, p. 1781, § 3, effective July 1. **L. 93:** (1)(b), (2)(a)(I), and (2)(b) amended, p. 1633, § 15, effective July 1. **L. 94:** (1)(b) amended and (2) R&RE, pp. 1714, 1715, §§ 2, 3, effective July 1. **L. 95:** (2)(c) amended, p. 1096, § 13, effective May 31; (1)(b) repealed, p. 1250, § 3, effective July 1. **L. 98:** (1)(c) added, p. 1291, § 9, effective November 1, 1998. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor’s note: In 2002, this section was relocated to section 18-1.3-406.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-310. Release from incarceration. (Repealed)

Source: **L. 77:** Entire section added, p. 865, § 12, effective July 1, 1979. **L. 79:** Entire section R&RE, p. 666, § 10, effective July 1. **L. 88:** Entire section repealed, p. 715, § 25, effective July 1.

16-11-311. Sentences - youthful offenders - legislative declaration - powers and duties of district court - authorization for youthful offender system - powers and duties of department of corrections - repeal. (Repealed)

Source: **L. 93, 1st Ex. Sess.:** Entire section added, p. 13, § 5, effective September 13. **L. 94:** (2)(a) amended, p. 909, § 4, effective April 28; (2)(a), (2)(b), (4), (5)(a), (5)(c), (6), and (10)(a) amended and (2.1), (3.3), and (3.4) added, p. 2089, § 1, effective June 3; (2)(a) amended and (10)(d) added, pp. 2584, 2585, §§ 2, 3, effective July 1. **L. 95:** (4.5) added and (5)(a) amended, p. 871, § 3, effective May 24; (2)(a)(I) and IP(2.1)(a) amended, p. 1096, § 14, effective May 31. **L. 96:** (2)(a)(I), (3.3)(c), and (3.4)(b) amended, p. 1145, § 1, effective July 1; (1)(b), (2)(a)(I), IP(2.1)(a), and (10)(d) amended, p. 1689, § 20, effective January 1, 1997. **L. 98:** (10)(a), (10)(b), and (10)(d) amended, p. 725, § 3, effective May 18. **L. 99:** (10)(a) and (13) amended, p. 43, § 1, effective March 15; (1)(b) and (2)(a)(I) amended, p. 1371, § 3, effective July 1. **L. 2000:** (1)(c), (1)(d), (3.4)(d), and (4.3) added and (2)(a)(I), (2)(a)(II), (2)(a.5), (3)(e), (3.3)(b)(II), (3.4)(b), (3.4)(c), (5), (8), and (10)(c) amended, p. 1003, §§ 1, 2, 3, effective May 26; (11.5) added, p. 925, § 18, effective July 1. **L. 2001:** (3.4)(d) amended, p. 1490, § 11, effective June 8; (2)(a)(IV) added and (3.3)(d) amended, p. 231, §§ 1, 2, effective July 1. **L. 2002:** (11.5) amended, p. 1151, § 6, effective July 1; (11.5)(a)(I) amended, p. 1183, § 14, effective July 1; (10)(a) and (10)(c) amended, p. 881, § 19, effective August 7; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: Amendments to subsections (10)(a) and (10)(c) in House Bill 02-1352 and amendments to subsection (11.5)(a)(I) in Senate Bill 02-019 and Senate Bill 02-010 were harmonized with House Bill 02-1046 and relocated to section 18-1.3-407.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11-312. Intensive family preservation program - juveniles sentenced to the youthful offender system - legislative declaration - development of a plan for a pilot program - duty of department - report. (Repealed)

Source: **L. 94:** Entire section added, p. 2067, § 1, effective July 1.

Editor's note: Subsection (4) provided for the repeal of this section, effective July 1, 1995. (See L. 94, p. 2067.)

PART 4

DEATH PENALTY - EXECUTION

16-11-401 to 16-11-405. (Repealed)

Source: **L. 2002:** Entire part repealed, p. 1463, § 3, effective October 1.

Editor's note: This article was repealed and reenacted in 1972, and this part 4 was subsequently repealed in 2002. For amendments to this part 4 prior to its repeal in 2002, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements

to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. The provisions of this part 4 were relocated to part 12 of article 1.3 of title 18. For the location of specific provisions, see the editor's notes following each section in said part 12 and the comparative tables located in the back of the index.

Cross references: For the legislative declaration contained in the 2002 act repealing this part 4, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 5

SENTENCES TO PAYMENT OF FINES - COSTS

16-11-501 and 16-11-502. (Repealed)

Source: L. 2002: Entire part repealed, p. 1463, § 3, effective October 1.

Editor's note: This article was repealed and reenacted in 1972, and this part 5 was subsequently repealed in 2002. For amendments to this part 5 prior to its repeal in 2002, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. The provisions of this part 5 were relocated to part 7 of article 1.3 of title 18. For the location of specific provisions, see the editor's notes following each section in said part 7 and the comparative tables located in the back of the index.

PART 6

RIGHT TO ATTEND SENTENCING

16-11-601. Right to attend sentencing. The victim of any crime or a relative of the victim, if the victim has died, has the right to attend all sentencing proceedings resulting from a conviction of said crime under any laws of this state. Said person has the right to appear, personally or with counsel, at the sentencing proceeding and to adequately and reasonably express his or her views concerning the crime, the defendant, the need for restitution, and the type of sentence which should be imposed by the court. The court, in imposing sentence, shall consider the statements of such person and shall make a finding, on the record, as to whether or not the defendant would pose a threat to public safety if granted probation.

Source: L. 84: Entire part added, p. 499, § 1, effective July 1.

Cross references: For the right to attend parole hearings, see § 17-2-214; for the right to attend dispositional, review, and restitution proceedings under the "Colorado Children's Code", see § 19-2-112.

PART 7

COMMUNITY OR USEFUL PUBLIC SERVICE

16-11-701. Community or useful public service - misdemeanors. (Repealed)

Source: L. 2002: Entire part repealed, p. 1463, § 3, effective October 1.

Editor's note: This part 7 was added in 1987. For amendments to this part 7 prior to its repeal in 2002, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. The provisions of this part 7 were relocated to § 18-1.3-507.

Cross references: For the legislative declaration contained in the 2002 act repealing this part 7, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 8

APPLICABILITY OF PROCEDURE IN CLASS 1 FELONY CASES
FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1988,
AND PRIOR TO SEPTEMBER 20, 1991

Cross references: For provisions relating to the imposition of sentences in class 1 felonies, see § 18-1.3-1201.

16-11-801 and 16-11-802. (Repealed)

Source: L. 2002: Entire part repealed, p. 1463, § 3, effective October 1.

Editor’s note: This part 8 was added in 1991. For amendments to this part 8 prior to its repeal in 2002, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. The provisions of this part 8 were relocated to part 13 of article 1.3 of title 18. For the location of specific provisions, see the editor’s notes following each section in said part 13 and the comparative table located in the back of the index.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

ARTICLE 11.3

Colorado Commission on
Criminal and Juvenile Justice

16-11.3-101.	Legislative declaration.		
16-11.3-102.	Colorado commission on criminal and juvenile justice - creation - membership - operation.	16-11.3-104.	Colorado commission on criminal and juvenile justice cash fund - created - donations.
16-11.3-103.	Duties of the commission -	16-11.3-105.	Repeal of article.

16-11.3-101. Legislative declaration. (1) The general assembly finds and declares that:

- (a) Ensuring public safety and respecting the rights of victims are paramount concerns of the citizens of Colorado;
- (b) Improving the effective administration of justice involves a comprehensive examination of, and recommendations regarding, the criminal and juvenile justice systems;
- (c) Current commitments to the department of corrections require expending a significant percentage of the state budget for incarceration of offenders;
- (d) The number of offenders projected to be sentenced in the future will require that an even greater percentage of the state budget be dedicated to incarceration;
- (e) The rate of recidivism is high, resulting in the return of many offenders to the justice system with additional significant expense;
- (f) It is in the interest of the people of the state of Colorado to maintain public safety through the most cost-effective use of limited criminal justice resources;
- (g) Many factors may contribute to an offender’s criminal behavior, including but not limited to substance abuse, mental illness, poverty, child abuse, domestic violence, and educational deficiencies. Often times, factors contributing to criminal conduct and re-victimization are not addressed adequately within the justice system.
- (h) Appropriate intervention in a child’s life through the juvenile justice system or prevention programs may limit or prevent future criminal conduct;
- (i) It is in the best interest of the public to engage in a comprehensive, evidence-based analysis of the circumstances and characteristics of the offenders being sentenced to the department of corrections, the alternatives to incarceration, the effectiveness of prevention

programs, and the effectiveness of the criminal code and sentencing laws in securing public safety.

(2) Therefore, the general assembly declares that a commission comprised of experts in criminal justice, corrections, mental health, drug abuse, victims' rights, higher education, juvenile justice, local government, and other pertinent disciplines shall be formed to engage in an evidence-based analysis of the criminal justice system in Colorado and annually report to the governor, the speaker of the house of representatives, the president of the senate, and the chief justice of the Colorado supreme court.

Source: L. 2007: Entire article added, p. 1100, § 1, effective May 23.

16-11.3-102. Colorado commission on criminal and juvenile justice - creation - membership - operation. (1) (a) There is hereby created in the department of public safety the Colorado commission on criminal and juvenile justice, referred to in this article as the "commission". The commission shall have the powers and duties specified in this article.

(b) The commission shall exercise its powers and perform its duties and functions as if the same were transferred to the department of public safety by a **type 2** transfer, as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S.

(2) (a) The commission shall consist of twenty-six voting members, as follows:

- (I) The executive director of the department of public safety, or his or her designee;
- (II) The executive director of the department of corrections, or his or her designee;
- (III) The executive director of the department of human services, or his or her designee;
- (IV) The executive director of the department of higher education, or his or her designee;
- (V) The attorney general, or his or her designee;
- (VI) The state public defender, or his or her designee;
- (VII) The chairperson of the state board of parole, or his or her designee;
- (VIII) The chairperson of the juvenile parole board, or his or her designee;
- (IX) Two members appointed by the chief justice of the Colorado supreme court from the judicial branch, at least one of whom shall be a current or retired judge;
- (X) Four members of the general assembly appointed as follows:
 - (A) One member appointed by the speaker of the house of representatives;
 - (B) One member appointed by the minority leader of the house of representatives;
 - (C) One member appointed by the president of the senate; and
 - (D) One member appointed by the minority leader of the senate; and
- (XI) Twelve members appointed by the governor as follows:
 - (A) A representative of a police department;
 - (B) A representative of a sheriff's department;
 - (C) An expert in juvenile justice issues;
 - (D) Two elected district attorneys;
 - (E) A county commissioner;
 - (F) A criminal defense attorney;
 - (G) A representative of a victims' rights organization;
 - (H) One member who shall be a representative of a community corrections provider, a community corrections board member, or a mental health or substance abuse treatment provider; and

(I) Three members who shall be appointed at-large.

(b) The director of the division of criminal justice in the department of public safety shall serve as a nonvoting member of the commission.

(3) (a) The appointed members of the commission shall serve terms of three years; except that the members first appointed pursuant to sub-subparagraphs (D) to (I) of subparagraph (XI) of paragraph (a) of subsection (2) of this section shall each serve a two-year term. The members appointed after the initial two-year terms shall serve three-year terms.

(b) Each appointing authority shall appoint the initial appointed members of the commission within sixty days after May 23, 2007. An appointed member shall not serve more than two consecutive full terms, in addition to any partial term. In the event of a vacancy in an appointed position by death, resignation, removal for misconduct, incompetence, neglect of duty, or otherwise, the appointing authority shall appoint a member to fill the position for the remainder of the unexpired term.

(4) (a) The governor shall select the chairperson and vice-chairperson of the commission from among its members.

(b) The members of the commission shall serve without compensation; except that the members of the commission may be reimbursed for any actual and necessary travel expenses incurred in the performance of their duties under this article.

(5) The commission may establish by-laws as appropriate for its effective operation.

(6) The commission shall meet at least once per month or on a schedule determined by the chairperson to review information necessary for making recommendations.

(7) Members of the commission, employees, and consultants shall be immune from suit in any civil action based upon any official act performed in good faith pursuant to this article.

Source: L. 2007: Entire article added, p. 1101, § 1, effective May 23.

16-11.3-103. Duties of the commission - mission - staffing - repeal. (1) The mission of the commission is to enhance public safety, to ensure justice, and to ensure protection of the rights of victims through the cost-effective use of public resources. The work of the commission will focus on evidence-based recidivism reduction initiatives and the cost-effective expenditure of limited criminal justice funds.

(2) The commission shall have the following duties:

(a) To conduct an empirical analysis of and collect evidence-based data on sentencing policies and practices, including but not limited to the effectiveness of the sentences imposed in meeting the purposes of sentencing and the need to prevent recidivism and revictimization;

(b) To investigate effective alternatives to incarceration, the factors contributing to recidivism, evidence-based recidivism reduction initiatives, and cost-effective crime prevention programs;

(c) To make an annual report of findings and recommendations, including evidence-based analysis and data;

(d) To study and evaluate the outcomes of commission recommendations as implemented;

(e) To conduct and review studies, including but not limited to work and resources compiled by other states, and make recommendations concerning policies and practices in the criminal and juvenile justice systems. The areas of study shall include, but are not limited to, the reduction of racial and ethnic disparities within the criminal and juvenile justice systems. The commission shall prioritize areas of study based on the potential impact on crime and corrections and the resources available for conducting the work.

(f) To work with other state-established boards, task forces, or commissions that study or address criminal justice issues.

(2.5) (a) Using empirical analysis and evidence-based data, the commission shall study sentences in Colorado.

(b) to (d) Repealed.

(2.7) (a) Using empirical analysis and evidence-based data and research, the commission shall consider the development of a comprehensive drug sentencing scheme for all drug crimes described in article 18 of title 18, C.R.S. The sentencing scheme shall consider:

(I) Development of a sentencing structure that better differentiates drug offenders who are primarily users and addicts from those more serious offenders who are involved in drug distribution, manufacturing, or trafficking;

(II) Development of resources through changes in the criminal code that will enhance intervention, supervision, and treatment in the community and enhance public safety by addressing drug abuse and addiction and by decreasing crime through drug abuse recovery;

(III) Methods by which offenders can gain access to assessment-based treatment services that are based on treatment need regardless of the level or classification of the crime;

(IV) Creation of equivalent penalties for crimes that pose similar risks to public safety;

(V) Enhancement of penalties when behaviors clearly present a public safety risk;

(VI) Development of resources for additional pre-filing diversion programs around the state for drug offenders;

(VII) Use of drug courts and how legislative changes could support more effective use of those resources;

(VIII) Relevant negative impacts related to criminal convictions; and

(IX) Any other issues that the commission determines to be important and relevant to the goals of the commission and the legislative intent of House Bill 12-1310, enacted in 2012.

(b) By December 15, 2012, the commission shall provide to the judiciary committees of the house of representatives and the senate, or their successor committees, a written report of the commission's recommendations for a comprehensive drug sentencing scheme. If the commission is unable to bring forth any recommendations for the general assembly to consider, the commission shall provide in the report the reasons the commission could not make any recommendations and, if possible, describe the specific areas of disagreement that prevented the commission from making any recommendations.

(c) This subsection (2.7) is repealed, effective July 1, 2013.

(3) The commission shall establish advisory committees that focus on specific subject matters and make recommendations to the full commission. The chairperson of the commission shall select the chairpersons for the advisory committees as well as the commission members to serve on the advisory committees. The chairperson of an advisory committee may select noncommission members from interested members of the community to serve on the advisory committee. Each advisory committee shall make findings and recommendations for consideration by the commission. Noncommission members of an advisory committee shall serve without compensation and without reimbursement for expenses.

(4) The commission, at its discretion, may respond to inquiries referred by members of the general assembly, the governor, and the chief justice of the Colorado supreme court, as resources allow.

(5) The division of criminal justice in the department of public safety, in consultation with the department of corrections, shall provide resources for data collection, research, analysis, and publication of the commission's findings and reports.

(6) The commission is encouraged to create and make publicly available a document describing the provisions of section 18-1-711, C.R.S.

Source: **L. 2007:** Entire article added, p. 1103, § 1, effective May 23. **L. 2008:** (2)(e) amended, p. 96, § 1, effective March 19. **L. 2009:** (2.5) added, (SB 09-286), ch. 338, p. 1784, § 2, effective June 1. **L. 2012:** (6) added, (SB 12-020), ch. 225, p. 988, § 3, effective May 29; (2.7) added, (HB 12-1310), ch. 268, p. 1403, § 28, effective June 7.

Editor's note: Subsection (2.5)(d)(II) provided for the repeal of subsections (2.5)(b), (2.5)(c), and (2.5)(d), effective July 1, 2010. (See L. 2009, p. 1784.)

Cross references: (1) For the legislative declaration contained in the 2009 act adding subsection (2.5), see section 1 of chapter 338, Session Laws of Colorado 2009.

(2) For the legislative declaration in the 2012 act adding subsection (6), see section 3 of chapter 225, Session Laws of Colorado 2012.

16-11.3-104. Colorado commission on criminal and juvenile justice cash fund - created - donations. (1) The department of public safety and the commission are authorized to accept gifts, grants, or donations, including in-kind donations from private or public sources, for the purposes of this article. All private and public funds received through gifts, grants, or donations by the department of public safety or by the commission shall be

transmitted to the state treasurer, who shall credit the same to the Colorado commission on criminal and juvenile justice cash fund, which fund is hereby created and referred to in this article as the "cash fund". Any moneys in the cash fund not expended for the purposes of this article shall be invested by the state treasurer as provided in section 24-36-113, C.R.S. All interest and income derived from the investment and deposit of moneys in the cash fund shall be credited to the cash fund. Any unexpended and unencumbered moneys remaining in the cash fund at the end of any fiscal year shall remain in the cash fund and shall not be credited or transferred to the general fund or any other fund.

(2) The department of public safety shall not be required to solicit gifts, grants, or donations from any source for the purposes of this article.

Source: L. 2007: Entire article added, p. 1104, § 1, effective May 23.

16-11.3-105. Repeal of article. This article is repealed, effective July 1, 2013.

Source: L. 2007: Entire article added, p. 1105, § 1, effective May 23.

ARTICLE 11.5

Substance Abuse in the Criminal Justice System

16-11.5-101.	Legislative declaration.	16-11.5-105.	Departments shall develop testing programs - punitive sanctions.
16-11.5-102.	Substance abuse assessment - standardized procedure.	16-11.5-106.	Samples for testing of offenders - collected by probation or community parole officers or contract providers of testing services.
16-11.5-103.	Substance abuse assessment required - convicted felons - controlled substance offenders. (Repealed)	16-11.5-107.	Report to the general assembly. (Repealed)
16-11.5-104.	Sentencing of felons - parole of felons - treatment and testing based upon assessment required. (Repealed)		

16-11.5-101. Legislative declaration. The general assembly hereby declares that substance abuse, specifically the abuse of alcohol and controlled substances, is a major problem in the criminal justice system of the state of Colorado and in the entire nation. Substance abuse is a significant factor in the commission of crimes and it is a significant factor in impeding the rehabilitation of persons convicted of crimes which results in an increased rate of recidivism. Therefore, the general assembly hereby resolves to curtail the disastrous effects of substance abuse in the criminal justice system by providing for consistency in the response to substance abuse throughout the criminal justice system and to improve and standardize substance abuse treatment for offenders at each stage of the criminal justice system and to provide punitive measures for offenders who refuse to cooperate with and respond to substance abuse treatment while such offenders are involved with the criminal justice system.

Source: L. 91: Entire article added, p. 437, § 3, effective May 29.

16-11.5-102. Substance abuse assessment - standardized procedure. (1) The judicial department, the department of corrections, the state board of parole, the division of criminal justice of the department of public safety, and the department of public health and environment shall cooperate to develop and implement the following:

(a) A standardized procedure for the assessment of the use of controlled substances by offenders, which procedure shall include the administration of a chemical test of such offender for the presence of controlled substances or alcohol, or such other test of the offender for the presence of controlled substances or alcohol as deemed appropriate by the

supervising agency. The assessment procedure developed pursuant to this paragraph (a) shall provide an evaluation of the extent of an offender's abuse of substances, if any, and recommend treatment which is appropriate to the needs of the particular offender.

(b) A system of programs for education and treatment of abuse of substances which can be utilized by offenders who are placed on probation, incarcerated with the department of corrections, placed on parole, or placed in community corrections. The programs developed pursuant to this paragraph (b) shall be as flexible as possible so that such programs may be utilized by each particular offender to the extent appropriate to that offender. The programs developed pursuant to this paragraph (b) shall be structured in such a manner that the programs provide a continuum of education and treatment programs for each offender as he proceeds through the criminal justice system and may include, but shall not be limited to, attendance at self-help groups, group counseling, individual counseling, outpatient treatment, inpatient treatment, day care, or treatment in a therapeutic community. Also, such programs shall be developed in such a manner that, to the extent possible, the programs may be accessed by all offenders in the criminal justice system. Any programs developed pursuant to this paragraph (b) shall include a system of periodic or random chemical testing for the presence of controlled substances or alcohol, or such other testing as provided in paragraph (a) of this subsection (1). The frequency of such testing shall be that which is appropriate to the particular offender in accordance with the offender's assessment performed pursuant to paragraph (a) of this subsection (1).

(c) A system of punitive sanctions for offenders who test positive for the use of substances subsequent to the initial test and after being placed in an education or treatment program. The sanctions developed pursuant to this paragraph (c) should allow for appropriate responses by the criminal justice system to each occurrence of a positive test by an offender, each of which shall become a permanent part of the offender's record.

(2) to (9) Repealed.

Source: **L. 91:** Entire article added, p. 437, § 3, effective May 29. **L. 94:** IP(1) and (3) amended, pp. 2731, 2604, §§ 351, 3, effective July 1. **L. 2000:** (3) amended, p. 491, § 2, effective May 4. **L. 2002:** (3)(b)(I) amended, p. 1496, § 147, effective October 1. **L. 2003:** (3)(a) amended and (4) to (9) added, p. 2686, § 5, effective July 1. **L. 2009:** (9) repealed, (SB 09-292), ch. 369, p. 1947, § 27, effective August 5. **L. 2010:** (3)(c) added, (HB 10-1352), ch. 259, p. 1171, § 10, effective August 11. **L. 2011:** (3)(a) amended, (HB 11-1303), ch. 264, p. 1154, § 24, effective August 10. **L. 2012:** (2), (3), (4), (5), (6), (7), and (8) repealed, (HB 12-1310), ch. 268, p. 1411, § 37, June 7.

Editor's note: Subsection (3)(b)(II) provided for the repeal of subsection (3)(b), effective July 1, 2006. (See L. 2000, p. 491.)

Cross references: For the legislative declaration contained in the 1994 act amending the introductory portion to subsection (1) and subsection (3), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (3)(b)(I), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2003 act amending subsection (3)(a) and enacting subsections (4) to (9), see section 1 of chapter 424, Session Laws of Colorado 2003.

16-11.5-103. Substance abuse assessment required - convicted felons - controlled substance offenders. (Repealed)

Source: **L. 91:** Entire article added, p. 439, § 3, effective May 29. **L. 94:** (2) amended, p. 2550, § 37, effective January 1, 1995. **L. 2002:** (2) amended, p. 1919, § 9, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: Senate Bill 02-057 amended subsection (2). This section as amended by Senate Bill 02-057 was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-209.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11.5-104. Sentencing of felons - parole of felons - treatment and testing based upon assessment required. (Repealed)

Source: **L. 91:** Entire article added, p. 439, § 3, effective May 29. **L. 2000:** Entire section amended, p. 235, § 5, effective July 1. **L. 2002:** Entire section amended, p. 665, § 10, effective May 28; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: House Bill 02-1229 amended this section. This section as amended by House Bill 02-1229 was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-211.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-11.5-105. Departments shall develop testing programs - punitive sanctions.

(1) The judicial department, the department of public health and environment, the department of corrections, the state board of parole, and the division of criminal justice of the department of public safety shall cooperate to develop programs for the periodic testing of offenders under the jurisdiction of each agency and programs for the periodic reassessment of appropriate offenders under the jurisdiction of each agency. Any such periodic testing or treatment of an offender shall be based upon recommendations of appropriate treatment and testing made in the initial substance abuse assessment required by section 18-1.3-209, C.R.S., or any subsequent reassessment.

(2) Any offender who tests positive for the use of alcohol or controlled substances subsequent to the initial test required by section 18-1.3-209, C.R.S., shall be subjected to a punitive sanction. The judicial department, the department of corrections, the state board of parole, and the division of criminal justice of the department of public safety shall cooperate to develop and make public a range of punitive sanctions for those offenders under the jurisdiction of each agency which are appropriate to the offenders supervised by each particular agency. Such punitive sanctions shall be formulated in such a way as to promote fairness and consistency in the treatment of offenders and may include, but shall not be limited to, increases in the level of an offender's supervision, increases in the use of electronic monitoring of an offender, loss of earned time granted pursuant to section 17-22.5-405, C.R.S., and referral of the offender to the court or the state board of parole for resentencing or revocation of probation or parole. It is the intent of the general assembly that any offender's test which is positive for the use of controlled substances or alcohol shall result in an intensified level of testing, treatment, supervision, or other sanctions designed to control abuse of substances for such offender.

(3) The judicial department, the department of corrections, the state board of parole, and the division of criminal justice of the department of public safety shall cooperate to develop a range of incentives for offenders under the jurisdiction of each particular agency to discontinue abuse of alcohol or controlled substances.

(4) On or before July 1, 1992, the state board of parole shall develop and make public guidelines for the revocation of parole due to the abuse of alcohol or controlled substances in violation of this article.

Source: **L. 91:** Entire article added, p. 440, § 3, effective May 29. **L. 94:** (1) amended, p. 2732, § 352, effective July 1. **L. 2002:** (1) and (2) amended, p. 1496, § 148, effective October 1.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsections (1) and (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

When read together, the substance abuse in the criminal justice system statutes and § 17-2-103 authorize, but do not require, the board of parole to revoke parole and return a pa-

rolee to the department of corrections based upon a single positive drug test. Whidden v. People, 78 P.3d 1092 (Colo. 2003).

16-11.5-106. Samples for testing of offenders - collected by probation or community parole officers or contract providers of testing services. Any type of sample for the chemical testing of any offender for the presence of controlled substances or alcohol pursuant to this article may be collected from the offender by his or her probation officer, community parole officer, case manager within the department of corrections, or any contract provider of testing services.

Source: L. 91: Entire article added, p. 441, § 3, effective May 29. L. 2008: Entire section amended, p. 654, § 1, effective April 25.

16-11.5-107. Report to the general assembly. (Repealed)

Source: L. 91: Entire article added, p. 441, § 3, effective May 29. L. 94: Entire section amended, p. 2732, § 353, effective July 1. L. 96: Entire section repealed, p. 1268, § 189, effective August 7.

Cross references: For the legislative declaration contained in the 1996 act repealing this section, see section 1 of chapter 189, Session Laws of Colorado 1996.

ARTICLE 11.7

Standardized Treatment Program
for Sex Offenders

16-11.7-101.	Legislative declaration.		
16-11.7-102.	Definitions.		
16-11.7-103.	Sex offender management board - creation - duties - repeal.		vices - contracts with providers - placement on provider list - grievances - fund created.
16-11.7-104.	Sex offenders - evaluation and identification required.	16-11.7-107.	Report to the general assembly. (Repealed)
16-11.7-105.	Sentencing of sex offenders - treatment based upon evaluation and identification required.	16-11.7-108.	Operation and construction of juvenile sex offender treatment facilities and new treatment modalities - repeal. (Repealed)
16-11.7-106.	Sex offender evaluation, treatment, and polygraph ser-	16-11.7-109.	Reporting requirements - legislative declaration.

16-11.7-101. Legislative declaration. (1) The general assembly finds that, to protect the public and to work toward the elimination of sexual offenses, it is necessary to comprehensively evaluate, identify, treat, manage, and monitor adult sex offenders who are subject to the supervision of the criminal justice system and juveniles who have committed sexual offenses who are subject to the supervision of the juvenile justice system.

(2) Therefore, the general assembly declares that it is necessary to create a program that establishes evidence-based standards for the evaluation, identification, treatment, management, and monitoring of adult sex offenders and juveniles who have committed sexual offenses at each stage of the criminal or juvenile justice system to prevent offenders from reoffending and enhance the protection of victims and potential victims. The general assembly does not intend to imply that all offenders can or will positively respond to treatment.

Source: L. 92: Entire article added, p. 455, § 3, effective June 2. L. 2011: Entire section R&RE, (HB 11-1138), ch. 236, p. 1015, § 1, effective May 27.

ANNOTATION

The purpose of this article as stated in the legislative declaration is to standardize procedures for all sex offenders. *People v. Lenzini*,

986 P.2d 980 (Colo. App. 1999) (decided prior to 2011 repeal and reenactment).

16-11.7-102. Definitions. As used in this article, unless the context otherwise requires:

(1) “Adult sex offender” means a person who has been convicted, as described in subparagraphs (I) to (III) of paragraph (a) of subsection (2) of this section, of a sex offense.

(1.3) “Board” means the sex offender management board created in section 16-11.7-103.

(1.5) “Juvenile who has committed a sexual offense” means a juvenile who has been adjudicated as a juvenile or who receives a deferred adjudication on or after July 1, 2002, for an offense that would constitute a sex offense, as defined in subsection (3) of this section, if committed as an adult, or a juvenile who has committed any offense, the underlying factual basis of which involves a sex offense.

(2) (a) “Sex offender” means any person who is:

(I) Convicted in the state of Colorado, on or after January 1, 1994, of any sex offense as defined in subsection (3) of this section; or

(II) Convicted in the state of Colorado on or after January 1, 1994, of any criminal offense, if such person has previously been convicted of a sex offense as described in subsection (3) of this section in the state of Colorado, or if such person has previously been convicted in any other jurisdiction of any offense that would constitute a sex offense as defined in subsection (3) of this section, or if such person has a history of any sex offenses as defined in subsection (3) of this section; or

(III) Convicted in the state of Colorado on or after July 1, 2000, of any criminal offense, the underlying factual basis of which involves a sex offense; or

(IV) A juvenile who has committed a sexual offense.

(b) For purposes of this subsection (2), any person who receives a deferred judgment or deferred sentence for the offenses specified in this subsection (2) is deemed convicted.

(3) “Sex offense” means any felony or misdemeanor offense described in this subsection (3) as follows:

(a) (I) Sexual assault, in violation of section 18-3-402, C.R.S.; or

(II) Sexual assault in the first degree, in violation of section 18-3-402, C.R.S., as it existed prior to July 1, 2000;

(b) Sexual assault in the second degree, in violation of section 18-3-403, C.R.S., as it existed prior to July 1, 2000;

(c) (I) Unlawful sexual contact, in violation of section 18-3-404, C.R.S.; or

(II) Sexual assault in the third degree, in violation of section 18-3-404, C.R.S., as it existed prior to July 1, 2000;

(d) Sexual assault on a child, in violation of section 18-3-405, C.R.S.;

(e) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3, C.R.S.;

(f) Sexual assault on a client by a psychotherapist, in violation of section 18-3-405.5, C.R.S.;

(g) Enticement of a child, in violation of section 18-3-305, C.R.S.;

(h) Incest, in violation of section 18-6-301, C.R.S.;

(i) Aggravated incest, in violation of section 18-6-302, C.R.S.;

(j) Trafficking in children, in violation of section 18-3-502, C.R.S.;

(k) Sexual exploitation of children, in violation of section 18-6-403, C.R.S.;

(l) Procurement of a child for sexual exploitation, in violation of section 18-6-404, C.R.S.;

(m) Indecent exposure, in violation of section 18-7-302, C.R.S.;

(n) Soliciting for child prostitution, in violation of section 18-7-402, C.R.S.;

- (o) Pandering of a child, in violation of section 18-7-403, C.R.S.;
 - (p) Procurement of a child, in violation of section 18-7-403.5, C.R.S.;
 - (q) Keeping a place of child prostitution, in violation of section 18-7-404, C.R.S.;
 - (r) Pimping of a child, in violation of section 18-7-405, C.R.S.;
 - (s) Inducement of child prostitution, in violation of section 18-7-405.5, C.R.S.;
 - (t) Patronizing a prostituted child, in violation of section 18-7-406, C.R.S.;
 - (u) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in this subsection (3);
 - (v) Class 4 felony internet luring of a child, in violation of section 18-3-306 (3), C.R.S.;
 - (w) Internet sexual exploitation of a child in violation of section 18-3-405.4, C.R.S.;
 - (x) Public indecency, committed in violation of section 18-7-301 (2) (b), C.R.S., if a second offense is committed within five years of the previous offense or a third or subsequent offense is committed; or
 - (y) Invasion of privacy for sexual gratification, as described in section 18-3-405.6, C.R.S.
- (4) "Treatment" means therapy, monitoring, and supervision of any sex offender which conforms to the standards created by the board pursuant to section 16-11.7-103.

Source: **L. 92:** Entire article added, p. 455, § 3, effective June 2. **L. 95:** (4) amended, p. 465, § 10, effective July 1. **L. 97:** (2) amended, p. 1554, § 8, effective July 1. **L. 98:** (1) amended, p. 402, § 11, effective April 21. **L. 2000:** (2) amended, p. 920, § 9, effective July 1; (3)(a), (3)(b), and (3)(c) amended, p. 702, § 23, effective July 1. **L. 2006:** (3)(t) amended and (3)(v) and (3)(w) added, p. 2054, § 1, effective July 1. **L. 2010:** (3)(j) amended, (SB 10-140), ch. 156, p. 537, § 5, effective April 21; (3)(v) and (3)(w) amended and (3)(y) added, (SB 10-128), ch. 415, p. 2048, § 9, effective July 1; (3)(v) and (3)(w) amended and (3)(x) added, (HB 10-1334), ch. 359, p. 1709, § 4, effective August 11. **L. 2011:** (1) and (2)(a)(IV) amended and (1.3) and (1.5) added, (HB 11- 1138), ch. 236, p. 1015, § 2, effective May 27.

ANNOTATION

Even assuming that the department of corrections has authority to classify as a sex offender an inmate not found guilty of either a listed sex offense or an offense of which the underlying factual basis was a listed sex offense, due process requires that an inmate be afforded a hearing when the basis for such classification is not a listed sex offense of which the inmate stands convicted. *Fisher v. Colo. Dept. of Corr.*, 56 P.3d 1210 (Colo. App. 2002).

The word "history" in the definition of "sex offender" can include the underlying circumstances of the offense. Thus, although the defendant pled guilty to contributing to the delinquency of a minor, she met the definition of a "sex offender" because she had engaged in soliciting for child prostitution, pandering of a child, procurement of a child for sexual exploitation, and inducement of child prostitution. The trial court therefore appropriately sentenced the defendant to treatment under the provisions of this article and required the defendant to register as a sex offender pursuant to § 18-3-412.5. *People v. Meidinger*, 987 P.2d 937 (Colo. App. 1999).

Although the defendant met the definition of a "sex offender" based on the underlying facts of the offense, the court could not impose the sex offender surcharge pursuant to § 18-21-103, where defendant pled guilty to contributing to the delinquency of a minor, an offense that is not a "sex offense" as defined in subsection (3). *People v. Meidinger*, 987 P.2d 937 (Colo. App. 1999).

Defendant who, in 1989, received a deferred sentence as a juvenile for a sexual offense had a "history" of a sex offense for purposes of subsection (2)(a)(II) and was properly evaluated as a sex offender and ordered to undergo sex offender treatment and supervision as a condition of probation for felony theft and menacing convictions. The juvenile adjudication provision in the statute is not the only way that a juvenile can meet the definition of "sex offender". *People v. Boling*, 261 P.3d 503 (Colo. App. 2011).

16-11.7-103. Sex offender management board - creation - duties - repeal.

(1) There is hereby created in the department of public safety a sex offender management board that shall consist of twenty-five members. The membership of the board shall reflect, to the extent possible, representation of urban and rural areas of the state and a balance of

expertise in adult and juvenile issues relating to persons who commit sex offenses. The membership of the board shall consist of the following persons who shall be appointed as follows:

- (a) The chief justice of the supreme court shall appoint three members as follows:
 - (I) One member who represents the judicial department;
 - (II) One member who is a district court judge; and
 - (III) One member who is a juvenile court judge or juvenile court magistrate;
 - (b) The executive director of the department of corrections shall appoint one member who represents the department of corrections;
 - (c) The executive director of the department of human services shall appoint three members as follows:
 - (I) One member who represents the department of human services and who has recognizable expertise in child welfare and case management;
 - (II) One member who represents the division of youth corrections in the department of human services; and
 - (III) One member who is a provider of out-of-home placement services with recognizable expertise in providing services to juveniles who have committed sexual offenses;
 - (d) The executive director of the department of public safety shall appoint sixteen members as follows:
 - (I) One member who represents the division of criminal justice in the department of public safety;
 - (II) Two members who are licensed mental health professionals with recognizable expertise in the treatment of adult sex offenders;
 - (III) Two members who are licensed mental health professionals with recognizable expertise in the treatment of juveniles who have committed sexual offenses;
 - (IV) One member who is a member of a community corrections board;
 - (V) One member who is a public defender with recognizable expertise related to sexual offenses;
 - (VI) One member who represents law enforcement with recognizable expertise in addressing sexual offenses and victimization;
 - (VII) Three members who are recognized experts in the field of sexual abuse and who can represent sexual abuse victims and victims' rights organizations;
 - (VIII) One member who is a clinical polygraph examiner;
 - (IX) One member who is a private criminal defense attorney with recognizable expertise related to sexual offenses;
 - (X) One member who is a county director of social services, appointed after consultation with a statewide group representing counties; and
 - (XI) Two members who are county commissioners or members of the governing council for a jurisdiction that is a contiguous city and county, one of whom shall represent an urban or suburban county and one of whom shall represent a rural county, appointed after consultation with a statewide group representing counties;
 - (e) The executive director of the Colorado district attorneys' council shall appoint one member who represents the interests of prosecuting attorneys and who has recognizable expertise in prosecuting sexual offenses; and
 - (f) The commissioner of education shall appoint one member who has experience with juveniles who have committed sexual offenses and who are in the public school system.
- (2) The members of the board shall elect presiding officers for the board, including a chair and vice-chair, from among the board members appointed pursuant to subsection (1) of this section, which presiding officers shall serve terms of two years. Board members may re-elect a presiding officer.
- (3) Members of the board shall serve at the pleasure of the appointing authority for terms of four years; except that the member appointed pursuant to subparagraph (IX) of paragraph (d) of subsection (1) of this section prior to July 1, 2011, shall serve the term of years in effect at the time of his or her appointment. The appointing authority may reappoint a member for an additional term or terms. Members of the board shall serve without compensation.
- (4) **Duties of the board.** The board shall carry out the following duties:

(a) **Standards for identification and evaluation of adult sex offenders.** The board shall develop, prescribe, and revise, as appropriate, a standard procedure to evaluate and identify adult sex offenders, including adult sex offenders with developmental disabilities. The procedures shall provide for an evaluation and identification of the adult sex offender and recommend management, monitoring, and treatment based upon existing research demonstrating that sexually offending behavior is often repetitive and that there is currently no way to ensure that adult sex offenders with the propensity to commit sexual offenses will not reoffend. Because there are adult sex offenders who can learn to manage unhealthy patterns and learn behaviors that can lessen their risk to society in the course of ongoing treatment, management, and monitoring, the board shall develop a procedure for evaluating and identifying, on a case-by-case basis, reliably lower-risk sex offenders. The board shall develop and implement methods of intervention for adult sex offenders, which methods have as a priority the physical and psychological safety of victims and potential victims and which are appropriate to the assessed needs of the particular offender, so long as there is no reduction in the safety of victims and potential victims.

(b) **Guidelines and standards for treatment of adult offenders.** The board shall develop, implement, and revise, as appropriate, guidelines and standards to treat adult sex offenders, including adult sex offenders with developmental disabilities, which guidelines and standards can be used in the treatment of offenders who are placed on probation, incarcerated with the department of corrections, placed on parole, or placed in community corrections. Programs implemented pursuant to the guidelines and standards developed pursuant to this paragraph (b) shall be as flexible as possible so that the programs may be accessed by each adult sex offender to prevent the offender from harming victims and potential victims. Programs shall include a continuing monitoring process and a continuum of treatment options available to an adult sex offender as he or she proceeds through the criminal justice system. Treatment options shall be determined by a current risk assessment and evaluation and may include, but need not be limited to, group counseling, individual counseling, family counseling, outpatient treatment, inpatient treatment, shared living arrangements, or treatment in a therapeutic community. Programs implemented pursuant to the guidelines and standards developed pursuant to this paragraph (b) shall, to the extent possible, be accessible to all adult sex offenders in the criminal justice system, including those offenders with mental illness and co-occurring disorders. The procedures for evaluation, identification, treatment, and monitoring developed pursuant to this subsection (4) shall be implemented only to the extent that moneys are available in the sex offender surcharge fund created in section 18-21-103 (3), C.R.S.

(c) **Allocation of moneys in sex offender surcharge fund.** The board shall develop an annual plan for the allocation of moneys deposited in the sex offender surcharge fund created pursuant to section 18-21-103 (3), C.R.S., among the judicial department, the department of corrections, the division of criminal justice in the department of public safety, and the department of human services. In addition, the board shall coordinate the expenditure of moneys from the sex offender surcharge fund with any moneys expended by any of the departments described in this paragraph (c) to identify, evaluate, and treat adult sex offenders and juveniles who have committed sexual offenses. The general assembly may appropriate moneys from the sex offender surcharge fund in accordance with the plan.

(d) **Risk assessment screening instrument.** The board shall consult on, approve, and revise, as necessary, the risk assessment screening instrument developed by the division of criminal justice to assist the sentencing court in determining the likelihood that an adult sex offender will commit one or more of the offenses specified in section 18-3-414.5 (1) (a) (II), C.R.S., under the circumstances described in section 18-3-414.5 (1) (a) (III), C.R.S. In carrying out this duty, the board shall consider research on adult sex offender risk assessment and shall consider as one element the risk posed by an adult sex offender who suffers from psychopathy or a personality disorder that makes the person more likely to engage in sexually violent predatory offenses. If a defendant is found to be a sexually violent predator, the defendant shall be required to register pursuant to article 22 of this title and shall be subject to community notification pursuant to part 9 of article 13 of this title.

(e) **Evaluation of policies and procedures - report.** (I) The board shall research, either through direct evaluation or through a review of relevant research articles and sex

offender treatment empirical data, and analyze, through a comprehensive review of evidence-based practices, the effectiveness of the evaluation, identification, and treatment policies and procedures for adult sex offenders developed pursuant to this article. This research shall specifically include, but need not be limited to, reviewing and researching reoffense and factors that contribute to reoffense for sex offenders as defined in this article, the effective use of cognitive behavioral therapy to prevent reoffense, the use of polygraphs in treatment, and the containment model for adult sex offender management and treatment and its effective application. The board shall revise the guidelines and standards for evaluation, identification, and treatment, as appropriate, based upon the results of the board's research and analysis. The board shall also develop and prescribe a system to implement the guidelines and standards developed pursuant to paragraph (b) of this subsection (4).

(II) (A) On or before December 1, 2011, the board shall submit and present to the judiciary committees of the senate and the house of representatives, or any successor committees, a written report of the board's findings based on the research and analysis, as required in subparagraph (I) of this paragraph (e), on the effectiveness of the evaluation, identification, and treatment procedures developed pursuant to this article.

(B) This subparagraph (II) is repealed, effective July 1, 2012.

(f) **Criteria for measuring progress in treatment.** (I) Pursuant to section 18-1.3-1009, C.R.S., concerning the criteria for release from incarceration, reduction in supervision, and discharge for certain adult sex offenders, the board, in collaboration with the department of corrections, the judicial department, and the state board of parole, shall develop and revise, as appropriate, criteria for measuring an adult sex offender's progress in treatment. The criteria shall assist the court and the state board of parole in determining whether an adult sex offender may appropriately be released from incarceration pursuant to section 18-1.3-1006 (1), C.R.S., or whether the adult sex offender's level of supervision may be reduced pursuant to section 18-1.3-1006 (2) (a) or 18-1.3-1008, C.R.S., or whether the adult sex offender may appropriately be discharged from probation or parole pursuant to section 18-1.3-1006 or 18-1.3-1008, C.R.S. At a minimum, the criteria shall be designed to assist the court and the state board of parole in determining whether the adult sex offender could be appropriately supervised in the community if he or she were released from incarceration, released to a reduced level of supervision, or discharged from probation or parole. The criteria shall not limit the decision-making authority of the court or the state board of parole.

(II) The board, in collaboration with the department of corrections, the judicial department, and the state board of parole, shall establish standards for community entities that provide supervision and treatment specifically designed for adult sex offenders who have developmental disabilities. At a minimum, the standards shall determine whether an entity would provide adequate support and supervision to minimize any threat that the adult sex offender may pose to the community.

(g) **Living arrangements for adult sex offenders - recommendations.** The board shall research, analyze, and make recommendations that reflect best practices for living arrangements for and the location of adult sex offenders within the community, including but not limited to shared living arrangements. At a minimum, the board shall consider the safety issues raised by the location of sex offender residences, especially in proximity to public or private schools and child care facilities, and public notification of the location of sex offender residences. The board shall adopt and revise as appropriate such guidelines as it may deem appropriate regarding the living arrangements and location of adult sex offenders and adult sex offender housing. The board shall accomplish the requirements specified in this paragraph (g) within existing appropriations.

(h) **Data collection from treatment providers.** If the department of public safety acquires sufficient funding, the board may request that individuals or entities providing sex-offender-specific evaluation, treatment, or polygraph services that conform with standards developed by the board pursuant to paragraph (b) of this subsection (4) submit to the board data and information as determined by the board at the time that funding becomes available. This data and information may be used by the board to evaluate the effectiveness of the guidelines and standards developed pursuant to this article to evaluate the effective-

ness of individuals or entities providing sex-offender-specific evaluation, treatment, or polygraph services, or for any other purposes consistent with the provisions of this article.

(i) **Standards for identification and evaluation of juvenile offenders.** The board shall develop, prescribe, and revise, as appropriate, a standard procedure to evaluate and identify juveniles who have committed sexual offenses, including juveniles with developmental disabilities. The procedure shall provide for an evaluation and identification of the juvenile offender and recommend behavior management, monitoring, treatment, and compliance based upon the knowledge that all unlawful sexual behavior poses a risk to the community and that certain juveniles may have the capacity to change their behavior with appropriate intervention and treatment. The board shall develop and implement methods of intervention for juveniles who have committed sexual offenses, which methods have as a priority the physical and psychological safety of victims and potential victims and that are appropriate to the needs of the particular juvenile offender, so long as there is no reduction in the safety of victims and potential victims.

(j) **Guidelines and standards for treatment of juvenile offenders.** The board shall develop, implement, and revise, as appropriate, guidelines and standards to treat juveniles who have committed sexual offenses, including juveniles with developmental disabilities, which guidelines and standards may be used for juvenile offenders who are placed on probation, committed to the department of human services, placed on parole, or placed in out-of-home placement. Programs implemented pursuant to the guidelines and standards developed pursuant to this paragraph (j) shall be as flexible as possible so that the programs may be accessed by each juvenile offender to prevent him or her from harming victims and potential victims. Programs shall provide a continuing monitoring process and a continuum of treatment options available to a juvenile offender as he or she proceeds through the juvenile justice system. Treatment options may include, but need not be limited to, group counseling, individual counseling, family counseling, outpatient treatment, inpatient treatment, shared living arrangements, and treatment in a therapeutic community. Programs implemented pursuant to the guidelines and standards developed pursuant to this paragraph (j) shall be, to the extent possible, accessible to all juveniles who have committed sexual offenses and who are in the juvenile justice system, including juveniles with mental illness or co-occurring disorders.

(k) **Evaluation of policies and procedures for juvenile offenders.** The board shall research and analyze the effectiveness of the evaluation, identification, and treatment procedures developed pursuant to this article for juveniles who have committed sexual offenses. The board shall revise the guidelines and standards for evaluation, identification, and treatment, as appropriate, based upon the results of the board's research and analysis. The board shall also develop and prescribe a system to implement the guidelines and standards developed pursuant to paragraph (j) of this subsection (4).

(l) **Educational materials.** The board, in collaboration with law enforcement agencies, victim advocacy organizations, the department of education, and the department of public safety, shall develop and revise, as appropriate, for use by schools, the statement identified in section 22-1-124, C.R.S., and educational materials regarding general information about adult sex offenders and juveniles who have committed sexual offenses, safety concerns related to such offenders, and other relevant materials. The board shall provide the statement and materials to the department of education, and the department of education shall make the statement and materials available to schools in the state.

(5) **Immunity.** The board and the individual board members shall be immune from any liability, whether civil or criminal, for the good faith performance of the duties of the board.

(6) **Repeal.** (a) This section is repealed, effective September 1, 2016.

(b) Prior to said repeal, the sex offender management board appointed pursuant to this section shall be reviewed as provided for in section 24-34-104, C.R.S.

Source: **L. 92:** Entire article added, p. 457, § 3, effective June 2. **L. 94:** IP(1), (1)(c), (1)(e), and (4)(c) amended, p. 2651, § 125, effective July 1. **L. 95:** (4)(a) and (4)(b) amended, p. 466, § 12, effective July 1. **L. 96:** (4)(b) and (4)(d) amended and (6) added, pp. 734, 735, §§ 1, 2, effective July 1. **L. 97:** IP(1), (1)(f), (1)(j), and (1)(k) amended and (1)(l) and (4)(c.5) added, p. 1565, §§ 11, 12, effective July 1. **L. 98:** IP(1), (4)(c.5), and

(6)(b) amended and (1)(d.5) added, pp. 401, 402, §§ 9, 12, effective April 21; (4)(e) added, p. 1288, § 3, effective November 1. **L. 99:** (4)(c.5) amended, p. 1149, § 10, effective July 1. **L. 2000:** (1.5), (3)(c), (4)(f), (4)(g), (4)(h), and (4)(i) added, pp. 921, 922, §§ 10, 11, 12, effective July 1. **L. 2001:** IP(1), (4)(d), and (6)(a) amended, p. 238, § 1, effective March 28. **L. 2002:** (4)(j) added, p. 143, § 2, effective March 27; (4)(c.5) amended, p. 1184, § 15, July 1; (4)(e) amended, p. 1497, § 149, effective October 1. **L. 2003:** (4)(k) added, p. 632, § 2, effective March 18. **L. 2006:** (4)(c.5) amended, p. 1315, § 9, effective May 30. **L. 2007:** (1.8) and (3)(d) added, p. 111, §§ 1, 2, effective March 16; (1.7) added, p. 556, § 1, effective April 16. **L. 2008:** (4)(d)(II) and (4)(j) amended, p. 1884, § 22, effective August 5. **L. 2010:** (4)(l) added, (HB 10-1374), ch. 261, p. 1180, § 1, effective May 25. **L. 2011:** Entire section RC&RE, (HB 11-1138), ch. 236, p. 1016, § 3, effective May 27.

Editor's note: (1) Subsection (6)(a) provided for the repeal of this section, effective July 1, 2010. (See L. 2001, p. 238.)

(2) Amendments to the introductory portion to subsection (1) were harmonized by sections 9 and 12 of House Bill 98-1177.

(3) Subsection (1.7) was originally numbered as (1.8) in House Bill 07-1315, and subsection (1.8) was originally numbered as (1.7) in Senate Bill 07-017, but have been renumbered on revision for ease of location.

ANNOTATION

The sex offender risk scale meets the statutory requirements for a "risk assessment screening instrument". The sex offender management board satisfied the objectives and criteria set forth in subsection (4)(c.5) for developing the screening instrument. *People v. Brosh*, 251 P.3d 456 (Colo. App. 2010) (decided prior to 2011 recreation and reenactment); *People v. Mendoza*, __ P.3d __ (Colo. App. 2011).

Defendant not entitled to a new sexually violent predator evaluation each time sex offender management board changes the evaluation instrument. The statute requires the board to revise the instrument from time to time, but does not require re-evaluation of offenders. *People v. Mendoza*, __ P.3d __ (Colo. App. 2011).

16-11.7-104. Sex offenders - evaluation and identification required. (1) On and after January 1, 1994, each convicted adult sex offender and juvenile who has committed a sexual offense who is to be considered for probation shall be required, as a part of the presentence or probation investigation required pursuant to section 16-11-102, to submit to an evaluation for treatment, an evaluation for risk, procedures required for monitoring of behavior to protect victims and potential victims, and an identification developed pursuant to section 16-11.7-103 (4).

(2) The evaluation and identification required by subsection (1) of this section shall be at the expense of the person evaluated, based upon such person's ability to pay for such treatment.

Source: **L. 92:** Entire article added, p. 460, § 3, effective June 2. **L. 2011:** (1) amended, (HB 11-1138), ch. 236, p. 1022, § 4, effective May 27.

ANNOTATION

Provision that requires a sex offender specific evaluation be conducted prior to sentencing applies in case of a deferred judgment. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Court may not impose sex offender conditions as a part of a deferred judgment without first ordering a sex offender specific evaluation. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Trial court could not impose sex offender conditions as part of probation without ordering sex offender evaluation as required in this section. Where defendant meets the definition of a "sex offender", an evaluation pursuant to this section is mandatory. *People v. Meidinger*, 987 P.2d 937 (Colo. App. 1999).

Trial court is required under § 16-11.7-105 (1) to order treatment as part of probationary sentence imposed on sex offender as recom-

mended in the evaluation and identification required pursuant to this section. *People v. Hernandez*, 160 P.3d 263 (Colo. App. 2007), *aff'd*, 176 P.3d 746 (Colo. 2008).

A plea agreement cannot dispense with the statutory requirement that the sex offender defendant submit to an evaluation for treat-

ment pursuant to this section. The general assembly created standardized assessment procedures for evaluating and identifying sex offenders, and the procedures require that all sex offenders undergo an evaluation. *Hernandez v. People*, 176 P.3d 746 (Colo. 2008).

16-11.7-105. Sentencing of sex offenders - treatment based upon evaluation and identification required. Each adult sex offender and juvenile who has committed a sexual offense sentenced by the court for an offense committed on or after January 1, 1994, shall be required, as a part of any sentence to probation, commitment to the department of human services, sentence to community corrections, incarceration with the department of corrections, placement on parole, or out-of-home placement to undergo treatment to the extent appropriate to such offender based upon the recommendations of the evaluation and identification made pursuant to section 16-11.7-104 or based upon any subsequent recommendations by the department of corrections, the judicial department, the department of human services, or the division of criminal justice in the department of public safety, whichever is appropriate. The treatment and monitoring shall be provided by an approved provider pursuant to section 16-11.7-106, and the offender shall pay for the treatment to the extent the offender is financially able to do so.

Source: **L. 92:** Entire article added, p. 460, § 3, effective June 2. **L. 94:** (1) amended, p. 2651, § 126, effective July 1. **L. 2000:** Entire section amended, p. 236, § 6, effective July 1. **L. 2011:** Entire section amended, (HB 11-1138), ch. 236, p. 1023, § 5, effective May 27.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Because application of the sex offender treatment program did not affect the legal consequences of defendant's crime or increase his punishment, there is no *ex post facto* violation. The department of corrections reduced the monthly ten days of earned time credit defendant received to seven days when defendant did not participate in the program because he denied the alleged sexually assaultive behavior. Application of the program to defendant did not increase his punishment, however, because he possessed no vested right in a particular parole date or parole hearing date. *Chambers v. Colo. Dept. of Corr.*, 205 F.3d 1237 (10th Cir. 2000).

The stigmatizing consequences of being labeled a sex offender coupled with the mandatory treatment program as preconditions for parole eligibility create the kind of deprivations of liberty that require procedural due process protections. *Chambers v. Colo. Dept. of Corr.*, 205 F.3d 1237 (10th Cir. 2000); *Fisher v. Colo. Dept. of Corr.*, 56 P.3d 1210 (Colo. App. 2002).

Prisoner has a liberty interest in participation in a statutorily mandated sex offender treatment program. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

In evaluating prisoner's substantive due process claim, the court must consider whether prison officials were deliberately indifferent to a liberty interest and deprived prisoner of that interest in such a way that the behavior of the governmental officers was so egregious, so outrageous that it may fairly be said to shock the contemporary conscience. The deliberate indifference standard is sensibly employed when actual deliberation is practical. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

Due process must be provided to a convicted sex offender before he can be excluded from such a program. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

The court must consider first, whether prisoner's exclusion from the treatment program itself constitutes an atypical and significant hardship and, second, whether the failure of the prison officials to provide prisoner with due process before terminating him from sex offender treatment constitutes an atypical and significant hardship. To evaluate whether a prisoner's freedom has been restrained in a manner that imposes atypical and significant hardship, the court must carefully examine the conditions of the prisoner's confinement, including the duration and degree of prisoner's restrictions as com-

pared with other inmates. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

This section requires the court to order a sex offender specific evaluation to be conducted as part of the presentence report for every sex offender sentenced for an offense committed on or after January 1, 1994, whether or not the sex offender is to be considered for probation, and for the court to consider that evaluation in sentencing. *People v. Lenzini*, 986 P.2d 980 (Colo. App. 1999).

Provision that requires a sex offender specific evaluation be conducted prior to sentencing applies in case of a deferred judgment. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Court may not impose sex offender conditions as a part of a deferred judgment without first ordering a sex offender specific eval-

uation. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Subsection (1) does not always require a sentencing court to impose sex offender treatment as a condition of probation when a sex offender commits a subsequent offense of any kind. When the recommendations of the sex offender evaluation and the facts of the case do not support the need for sex offender treatment, a sentencing court is not required to order treatment. *Hernandez v. People*, 176 P.3d 746 (Colo. 2008).

When the sex offender evaluation and recommendations and the facts of the case support the need for sex offender treatment, the sentencing court's discretion is tightly constrained by the statutory language. *Hernandez v. People*, 176 P.3d 746 (Colo. 2008).

16-11.7-106. Sex offender evaluation, treatment, and polygraph services - contracts with providers - placement on provider list - grievances - fund created. (1) The department of corrections, the judicial department, the division of criminal justice in the department of public safety, or the department of human services shall not employ or contract with, and shall not allow an adult sex offender or a juvenile who has committed a sexual offense to employ or contract with, an individual or entity to provide sex-offender-specific evaluation, treatment, or polygraph services pursuant to this article unless the sex-offender-specific evaluation, treatment, or polygraph services to be provided by the individual or entity conform with the guidelines and standards developed pursuant to section 16-11.7-103, and the name of the individual providing services is on the list created pursuant to paragraph (b) of subsection (2) of this section of persons who may provide sex-offender-specific services.

(2) (a) The board shall develop an application and review process for treatment providers, evaluators, and polygraph examiners who provide services pursuant to this article to adult sex offenders and to juveniles who have committed sexual offenses. The application and review process shall allow providers to demonstrate that they are in compliance with the standards adopted pursuant to this article. The application and review process shall consist of the following three parts:

(I) The board shall develop separate application and review processes for standards that apply to the criminal justice component, such as criminal history record checks, for evaluators, individual treatment providers, and polygraph examiners. Applications for the criminal justice components, including fingerprints, shall be submitted to the board. The board shall forward the fingerprints to the Colorado bureau of investigation for use in conducting a state criminal history record check and for transmittal to the federal bureau of investigation for a national criminal history record check. The board may use information obtained from the state and national criminal history record checks to determine an applicant's eligibility for placement on the approved provider list. The board shall be responsible for the implementation of the provisions of this subparagraph (I).

(II) The board shall develop an application and review process for the verification of the qualifications and credentials of evaluators, treatment providers, and polygraph examiners.

(III) The board shall require a person who applies for placement, including a person who applies for continued placement, on the list of persons who may provide sex-offender-specific evaluation, treatment, and polygraph services pursuant to this article to submit to a current background investigation that goes beyond the scope of the criminal history record check described in subparagraph (I) of this paragraph (a). In conducting the current background investigation required by this subparagraph (III), the board shall obtain reference and criminal history information and recommendations that may be relevant to the applicant's fitness to provide sex-offender-specific evaluation, treatment, and polygraph services pursuant to this article.

(b) After the process developed pursuant to paragraph (a) of this subsection (2) is established and providers have met all the criteria of the application and review process, the board may approve the provider. The board and the department of regulatory agencies shall jointly publish at least annually a list of approved providers. The board shall forward the list to the office of the state court administrator, the department of public safety, the department of human services, and the department of corrections. The board shall update and forward the list of approved providers as necessary.

(3) The board shall use the information obtained from the state and national criminal history record checks and the current background investigation in determining whether to place or continue the placement of a person on the approved provider list.

(4) The board may determine the requirements for an evaluator's, treatment provider's, or polygraph examiner's name to be placed on the approved provider list after his or her name has been removed from the list for any reason.

(5) The board shall develop a renewal process for the continued placement of a person on the approved provider list published pursuant to paragraph (b) of subsection (2) of this section.

(6) The board may assess a fee to an applicant for placement on the approved provider list. The fee shall not exceed one hundred twenty-five dollars per application to cover the costs of conducting a current background investigation required by subsection (2) of this section. All moneys collected pursuant to this subsection (6) shall be transmitted to the state treasurer, who shall credit the same to the sex offender treatment provider fund, which fund is hereby created and referred to in this subsection (6) as the "fund". The moneys in the fund shall be subject to annual appropriation by the general assembly to the division of criminal justice in the department of public safety for the direct and indirect costs associated with the current background investigation required by subsection (2) of this section. Any moneys in the fund not expended for the purpose of subsection (2) of this section may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund.

(7) (a) (I) Except as provided in subparagraph (IV) of this paragraph (a), the board shall refer to the department of regulatory agencies for investigation any complaints or grievances against individuals who provide sex-offender-specific treatment or evaluation services pursuant to this article. The department of regulatory agencies shall notify the board of the receipt of any complaint or grievance against a provider if the complaint or grievance was not referred by the board.

(II) The appropriate board, pursuant to article 43 of title 12, C.R.S., and referred to in this subsection (7) as the "DORA board", shall review and investigate all complaints and grievances received by the department of regulatory agencies or referred by the board to the department of regulatory agencies. The DORA board shall investigate any allegations that may constitute a violation of the professional licensing act and the relevant treatment and evaluation standards adopted by the board. The DORA board shall provide the board with the results of the investigation and advise the board of any disciplinary action the DORA board takes against the individual pursuant to any professional licensing act.

(III) Nothing in this subsection (7) shall limit the rights or responsibilities of the department of regulatory agencies with respect to the investigation and resolution of complaints pursuant to article 43 of title 12, C.R.S.

(IV) Complaints or grievances against individuals who provide polygraph services pursuant to this article shall be reviewed and investigated by the board.

(b) (I) Notwithstanding any action taken by the department of regulatory agencies or the DORA board, the board may take appropriate disciplinary action, as permitted by law, against an individual who provides sex offender evaluation, treatment, or polygraph services pursuant to this article, which disciplinary action may include, but need not be limited to, the removal of the individual's name from the list of persons who may provide sex offender evaluation, treatment, or polygraph services pursuant to this article.

(II) Nothing in this subsection (7) shall limit the rights or responsibilities of the board

with respect to the approval or removal of an individual's name from the list of persons who may provide sex offender evaluation, treatment, or polygraph services pursuant to this article.

Source: **L. 92:** Entire article added, p. 461, § 3, effective June 2. **L. 94:** Entire section amended, p. 2652, § 127, effective July 1. **L. 95:** Entire section amended, p. 468, § 15, effective July 1. **L. 99:** Entire section amended, p. 1151, § 16, effective July 1. **L. 2000:** Entire section amended, p. 926, § 21, effective July 1. **L. 2004:** (2) amended, p. 813, § 1, effective July 1. **L. 2011:** Entire section R&RE, (HB 11-1138), ch. 236, p. 1023, § 6, effective May 27.

Cross references: For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

16-11.7-107. Report to the general assembly. (Repealed)

Source: **L. 92:** Entire article added, p. 461, § 3, effective June 2. **L. 95:** Entire section amended, p. 466, § 13, effective July 1. **L. 98:** Entire section repealed, p. 726, § 4, effective May 18.

16-11.7-108. Operation and construction of juvenile sex offender treatment facilities and new treatment modalities - repeal. (Repealed)

Source: **L. 2001:** Entire section added, p. 51, § 1, effective March 11.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2002. (See L. 2001, p. 51.)

16-11.7-109. Reporting requirements - legislative declaration. (1) (a) The general assembly finds and declares that:

(I) As a body, the board is one of Colorado's most important resources on the treatment and management of adult sex offenders and juveniles who have committed sexual offenses;

(II) The board's research and analysis of treatment standards and programs, as well as empirical evidence collected and compiled by the board with respect to the treatment outcomes of adult sex offenders and juveniles who have committed sexual offenses, is vital to inform the decisions of policymakers.

(b) The general assembly therefore finds that it is appropriate for the board to report to the general assembly on an annual basis concerning the status of the treatment and management of adult sex offenders and juveniles who have committed sexual offenses in Colorado.

(2) On or before January 31, 2012, and on or before January 31 each year thereafter, the board shall prepare and present to the judiciary committees of the senate and the house of representatives, or any successor committees, a written report concerning best practices for the treatment and management of adult sex offenders and juveniles who have committed sexual offenses, including any evidence-based analysis of treatment standards and programs as well as information concerning any new federal legislation relating to the treatment and management of adult sex offenders and juveniles who have committed sexual offenses. The report may include the board's recommendations for legislation to carry out the purpose and duties of the board to protect the community.

Source: **L. 2011:** Entire section added, (HB 11-1138), ch. 236, p. 1026, § 7, effective May 27.

ARTICLE 11.8**Management of
Domestic Violence Offenders**

16-11.8-101.	Legislative declaration.		ation - duties - repeal.
11-11.8-102.	Definitions.	16-11.8-104.	Domestic violence offender
16-11.8-103.	Domestic violence offender management board - cre-		treatment - contracts with providers - fund created.

16-11.8-101. Legislative declaration. The general assembly hereby declares that the consistent and comprehensive evaluation, treatment, and continued monitoring of domestic violence offenders who have been convicted of, pled guilty to, or received a deferred judgment or prosecution for any crime the underlying factual basis of which includes an act of domestic violence as defined in section 18-6-800.3 (1), C.R.S., and who are subject to the supervision of the criminal justice system is necessary in order to work toward the elimination of recidivism by such offenders. Therefore, the general assembly hereby creates a program that standardizes the evaluation, treatment, and continued monitoring of domestic violence offenders at each stage of the criminal justice system so that such offenders will be less likely to offend again and the protection of victims and potential victims will be enhanced.

Source: L. 2000: Entire article added, p. 907, § 1, effective July 1.

16-11.8-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Board" means the domestic violence offender management board created in section 16-11.8-103.

(2) "Domestic violence offender" means any person who on or after January 1, 2001, has been convicted of, pled guilty to, or received a deferred judgment and sentence for any domestic violence offense as defined in subsection (3) of this section.

(3) "Domestic violence offense" means any crime the underlying factual basis of which includes an act of domestic violence as defined in section 18-6-800.3 (1), C.R.S.

(4) "Treatment" means counseling, monitoring, and supervision of any domestic violence offender that conforms to the standards created by the board pursuant to section 16-11.8-103.

(5) "Treatment evaluation" means a determination of treatment amenability as recommended by a domestic violence evaluator approved by the domestic violence offender management board.

Source: L. 2000: Entire article added, p. 907, § 1, effective July 1. **L. 2002:** (2) amended, p. 1016, § 19, effective June 1. **L. 2008:** (2) amended, p. 1723, § 1, effective June 2.

16-11.8-103. Domestic violence offender management board - creation - duties - repeal. (1) There is hereby created, in the department of public safety, the domestic violence offender management board that shall consist of nineteen members with recognizable expertise in the field of domestic violence offenders. The membership of the board shall consist of the following persons:

(a) One member representing the judicial department appointed by the chief justice of the supreme court;

(b) One member representing the department of corrections appointed by the executive director of such department;

(c) One member representing the department of human services appointed by the executive director of such department;

(d) One member representing the department of public safety, division of criminal justice, appointed by the executive director of such department;

(e) One member representing the department of regulatory agencies who is appointed by the executive director of such department;

(f) One member appointed by the chief justice of the supreme court who is a judge;

(g) (I) Five members appointed by the executive director of the department of regulatory agencies.

(II) Of the five members appointed pursuant to this paragraph (g), one shall be a social worker licensed pursuant to part 4 of article 43 of title 12, C.R.S., one shall be a psychologist licensed pursuant to part 3 of article 43 of title 12, C.R.S., one shall be a marriage and family therapist licensed pursuant to part 5 of article 43 of title 12, C.R.S., one shall be a professional counselor licensed pursuant to part 6 of article 43 of title 12, C.R.S., and one shall be an unlicensed mental health professional.

(III) Of the five members appointed pursuant to this paragraph (g), two shall be providers on the approved list pursuant to sub-subparagraph (C) of subparagraph (III) of paragraph (a) of subsection (4) of this section.

(IV) Interested parties shall submit nominations for persons to serve as members appointed pursuant to this paragraph (g). The executive director shall appoint members under this paragraph (g) from the nominees submitted by the interested parties.

(h) One member appointed by the executive director of the Colorado district attorney's council who represents the interests of prosecuting attorneys;

(i) One member appointed by the Colorado state public defender who is a public defender;

(j) One member appointed by the executive director of the department of public safety who is a representative of law enforcement;

(k) Two members appointed by the executive director of the department of public safety who can represent domestic violence victims and victim organizations;

(l) One member appointed by the executive director of the department of public safety who is from a rural area and is active in the local coordination of criminal justice and victim services advocacy for domestic violence;

(m) One member appointed by the executive director of the department of public safety who is from an urban area and is active in the local coordination of criminal justice and victim services advocacy for domestic violence; and

(n) One member appointed by the executive director of the department of public safety who is a private criminal defense attorney. The member shall serve a term of three years and shall serve without compensation.

(2) The executive director of the department of public safety shall appoint a presiding officer for the board from among the board members appointed pursuant to subsection (1) of this section, which presiding officer shall serve at the pleasure of such director.

(3) (a) Any member of the board created in subsection (1) of this section who is appointed pursuant to paragraphs (a) to (f) of subsection (1) of this section shall serve at the pleasure of the official who appointed such member. The initial terms for persons appointed pursuant to paragraphs (a) and (d) of subsection (1) of this section shall be two years. The initial terms for persons appointed pursuant to paragraphs (b) and (e) of subsection (1) of this section shall be three years. All other terms including terms after the initial terms shall be four years. Such members shall serve without additional compensation.

(b) Any member of the board created in subsection (1) of this section who is appointed pursuant to paragraphs (g) to (m) of subsection (1) of this section shall serve for a term of four years; except that, the initial term of two of the persons appointed pursuant to paragraph (g) of subsection (1) of this section and the persons appointed pursuant to paragraph (k) of subsection (1) of this section shall be two years and the initial terms of persons appointed pursuant to paragraphs (h), (i), and (j) of subsection (1) of this section shall be three years. Such members shall serve without compensation.

(c) No member shall serve more than eight consecutive years.

(4) (a) The board shall carry out the following duties:

(I) Adopt and implement a standardized procedure for the treatment evaluation of domestic violence offenders. Such procedure shall provide for the evaluation and recommended behavior management, monitoring, and treatment. The board shall develop and implement methods of intervention for domestic violence offenders that have as a priority

the physical and psychological safety of victims and potential victims and that are appropriate to the needs of the particular offender, so long as there is no reduction in the level of safety of victims and potential victims.

(II) Adopt and implement guidelines and standards for a system of programs for the treatment of domestic violence offenders that shall be utilized by offenders who have committed a crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, and who are placed on probation, placed on parole, or placed in community corrections or who receive a deferred judgment and sentence. The programs developed pursuant to this subparagraph (II) shall be as flexible as possible so that the programs may be utilized by each offender to prevent the offender from harming victims and potential victims. The programs shall be structured in such a manner that they provide a continuing monitoring process as well as a continuum of treatment programs for each offender as that offender proceeds through the criminal justice system and may include, but shall not be limited to, group counseling, individual counseling, outpatient treatment, or treatment in a therapeutic community. Also, the programs shall be developed in such a manner that, to the extent possible, the programs may be accessed by all offenders in the criminal justice system.

(III) Develop an application and review process for treatment providers who provide services to domestic violence offenders pursuant to subparagraph (I) or (II) of this paragraph (a). Such standards shall allow providers to demonstrate that they are in compliance with the standards adopted pursuant to subparagraphs (I) and (II) of this paragraph (a). The application and review process shall consist of the following three parts:

(A) The board shall develop separate application and review processes for standards that apply to the criminal justice component, such as criminal history record checks, for individual treatment providers and treatment programs. Applications for the criminal justice components, including fingerprints, shall be submitted to the board. The board shall forward the fingerprints to the Colorado bureau of investigation for use in conducting a state criminal history record check and for transmittal to the federal bureau of investigation for a national criminal history record check. The information obtained from the state and national criminal history record check may be used by the board to determine an applicant's eligibility for placement on the approved provider list. The board shall be responsible for the implementation of this sub-subparagraph (A) of the application and review process.

(B) The board shall develop an application and review process for the verification of the qualifications and credentials of the treatment providers. The applications shall be submitted to the department of regulatory agencies and forwarded to the appropriate board pursuant to part 2 of article 43 of title 12, C.R.S. The department of regulatory agencies shall be responsible for the implementation of this sub-subparagraph (B) of the application and review process. The board shall require that treatment providers complete mandatory continuing education courses in areas related to domestic violence.

(C) After the process to be developed pursuant to sub-subparagraphs (A) and (B) of this subparagraph (III) is established and providers have met the criteria of both parts of the application and review process, the department of regulatory agencies and the board shall jointly publish at least annually a list of approved providers. The list shall be forwarded to the office of the state court administrator, the department of public safety, the department of human services, and the department of corrections. The list of approved providers shall be jointly updated and forwarded as changes are made.

(D) Notwithstanding any action taken by the department of regulatory agencies against a treatment provider, the board may take action against a treatment provider including, but not limited to, removing a treatment provider from the approved provider list. The board may determine the requirements for a treatment provider's name to be placed on the list after his or her name has been removed from the list pursuant to this subparagraph (III).

(III.5) Develop a treatment provider renewal process for the continued placement of a person on the approved provider list published pursuant to sub-subparagraph (C) of subparagraph (III) of this paragraph (a).

(IV) Research and analyze the effectiveness of the treatment evaluation and treatment procedures and programs developed pursuant to this article. The board shall also develop and prescribe a system for implementation of the guidelines and standards developed

pursuant to subparagraphs (I) and (II) of this paragraph (a) and for tracking offenders who have been evaluated and treated pursuant to this article. In addition, the board shall develop a system for monitoring offender behaviors and offender adherence to prescribed behavioral changes. The results of such tracking and behavioral monitoring shall be a part of any analysis made pursuant to this subparagraph (IV).

(b) After the guidelines and standards required pursuant to subparagraphs (I) and (II) of paragraph (a) of this subsection (4) are adopted, the board shall refer any complaints or grievances against domestic violence offender treatment providers to the department of regulatory agencies for resolution. Notwithstanding any other law or administrative rule, the resolution of any complaint or grievance referred by the board pursuant to this paragraph (b) shall be based on such standards. All complaints and grievances shall be reviewed by the appropriate board pursuant to part 2 of article 43 of title 12, C.R.S., whose decision shall be based on accepted community standards as described in subparagraphs (I) and (II) of paragraph (a) of this subsection (4) and the prohibited activities as defined in section 12-43-222 (1), C.R.S. The department of regulatory agencies shall provide notice of the disciplinary action to the board.

(5) The board and the individual members thereof shall be immune from any liability, whether civil or criminal, for the good faith performance of the duties of the board as specified in this section.

(6) Repealed.

(7) (a) This section is repealed, effective September 1, 2017.

(b) Prior to said repeal, the domestic violence offender management board appointed pursuant to this section shall be reviewed as provided in section 24-34-104, C.R.S.

Source: **L. 2000:** Entire article added, p. 908, § 1, effective July 1. **L. 2003:** (1)(g)(III) amended, p. 1990, § 30, effective May 22. **L. 2004:** (4)(b)(III)(A) amended, p. 815, § 3, effective July 1. **L. 2007:** IP(1), (1)(l), and (1)(m) amended and (1)(n) added, p. 556, § 2, effective April 16. **L. 2008:** (4)(a), (4)(b), and (7) amended, p. 1723, § 2, effective June 2; (6) repealed, p. 1884, § 23, effective August 5. **L. 2009:** (7)(a) amended, (SB 09-292), ch. 369, p. 1948, § 28, effective August 5. **L. 2010:** (1)(g)(III) and (4) amended, (HB 10-1422), ch. 419, p. 2070, § 28, effective August 11.

16-11.8-104. Domestic violence offender treatment - contracts with providers - fund created. (1) On and after January 1, 2001, the department of corrections, the judicial department, the division of criminal justice within the department of public safety, or the department of human services shall not employ or contract with and shall not allow a domestic violence offender to employ or contract with any individual or entity to provide domestic violence offender treatment evaluation or treatment services pursuant to this article unless the individual or entity appears on the approved list developed pursuant to section 16-11.8-103 (4).

(2) (a) The board shall require any person who applies for placement, including any person who applies for continued placement, on the approved provider list developed pursuant to section 16-11.8-103 (4) to submit to a current background investigation that goes beyond the scope of the criminal history record check described in section 16-11.8-103 (4) (a) (III) (A). In conducting the current background investigation, the board shall obtain reference and criminal history information and recommendations that may be relevant to the applicant's fitness to provide domestic violence offender treatment evaluation or treatment services pursuant to this article.

(b) The board may assess a fee to a person who applies for initial placement or renewed placement on the approved provider list not to exceed three hundred dollars per application to cover the costs of conducting the current background investigation required by this subsection (2) and the costs associated with the initial application review and the renewal process pursuant to section 16-11.8-103 (4) (a) (III) and other costs associated with administering the program. All moneys collected pursuant to this paragraph (b) shall be transmitted to the state treasurer, who shall credit the same to the domestic violence offender treatment provider fund, which fund is hereby created and referred to in this paragraph (b) as the "fund". The moneys in the fund shall be subject to annual appropri-

ation by the general assembly for the direct and indirect costs associated with the current background investigation required by this subsection (2) and the application review and renewal process and other costs associated with administering the program. Any moneys in the fund not expended for the purpose of this subsection (2) may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund.

Source: **L. 2000:** Entire article added, p. 912, § 1, effective July 1. **L. 2004:** Entire section amended, p. 814, § 2, effective July 1. **L. 2008:** (2) amended, p. 1725, § 3, effective June 2. **L. 2010:** (2) amended, (HB 10-1422), ch. 419, p. 2072, § 29, effective August 11.

ANNOTATION

Law reviews. For article, “Domestic Violence Intervention: 2010 Update”, see 39 Colo. Law. 83 (September 2010).

ARTICLE 11.9

Standardized Screening Process
for Mentally Ill Offenders

16-11.9-101.	Legislative declaration.	16-11.9-103.	Report to the general assembly.
16-11.9-102.	Mental illness screening - standardized process - development.	16-11.9-104.	Repeal of article. (Repealed)
		16-11.9-105.	Periodic review.

16-11.9-101. Legislative declaration. The general assembly hereby finds and declares that, based upon the findings and recommendations of the 1999 interim committee to study the treatment of persons with mental illness in the Colorado criminal justice system, detecting mental illness in persons in the criminal justice system is a difficult process with no current statewide standards or requirements. The lack of a standardized screening process to detect persons with mental illness in the criminal justice system is a significant impediment to consistent identification, diagnosis, treatment, and rehabilitation of all mentally ill offenders, ultimately resulting in an increased rate of recidivism. Therefore, the general assembly hereby resolves to create a standardized screening process to be utilized at each stage of the criminal justice system to identify persons with mental illness.

Source: **L. 2000:** Entire article added, p. 201, § 1, effective March 29.

16-11.9-102. Mental illness screening - standardized process - development.
(1) The director of the division of criminal justice within the department of public safety shall be responsible for ensuring that the head of the department of psychiatry at the university of Colorado health sciences center, the judicial department, the department of corrections, the state board of parole, the division of criminal justice within the department of public safety, and the unit within the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse meet and cooperate to develop a standardized screening procedure for the assessment of mental illness in persons who are involved in the adult criminal justice system. The standardized screening procedure shall include, but is not limited to:
(a) Development or identification of one or more standardized instruments for screening persons who are involved in the adult criminal justice system;
(b) Development of criteria for potential use of such standardized instruments, including consideration of methods of addressing confidential communications by those persons who will be screened for mental illness;

- (c) Identification of those persons who will be utilizing the standardized screening instruments, and consideration of training requirements for such persons;
- (d) Identification of those persons who will be screened for mental illness;
- (e) The stages within the adult criminal justice system at which a person shall be screened for mental illness, including consideration of methods of addressing confidential communications by a person screened for mental illness;
- (f) Consideration of a standard definition of mental illness, including serious mental illness; and
- (g) Development of procedures for referral for further assessment based on the results of the screening.

(2) In conjunction with the development of a standardized mental illness screening procedure for the adult criminal justice system as specified in subsection (1) of this section, the judicial department, the division of youth corrections within the department of human services, the unit responsible for child welfare services within the department of human services, the unit within the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, the division of criminal justice within the department of public safety, and the department of corrections shall cooperate to develop a standardized screening procedure for the assessment of mental illness in juveniles who are involved in the juvenile justice system. The standardized screening procedure shall include, but is not limited to:

- (a) Development or identification of one or more standardized instruments for screening persons who are involved in the juvenile justice system;
- (b) Development of criteria for potential use of such standardized instruments, including consideration of methods of addressing confidential communications by those persons who will be screened for mental illness;
- (c) Identification of those persons who will be utilizing the standardized screening instruments, and consideration of training requirements for such persons;
- (d) Identification of those persons who will be screened for mental illness;
- (e) The stages within the juvenile justice system at which a person shall be screened for mental illness, including consideration of methods of addressing confidential communications by a person screened for mental illness;
- (f) Consideration of a standard definition of mental illness, including serious mental illness; and
- (g) Development of procedures for referral for further assessment based on the results of the screening.

Source: L. 2000: Entire article added, p. 201, § 1, effective March 29. L. 2002: (1)(e), (1)(f), (2)(e), and (2)(f) amended and (1)(g) and (2)(g) added, p. 580, §§ 16, 17, effective May 24. L. 2011: IP(1) and IP(2) amended, (HB 11-1303), ch. 264, p. 1154, § 25, effective August 10.

16-11.9-103. Report to the general assembly. On or before March 1, 2002, the judicial department, the department of corrections, the state board of parole, the division of criminal justice within the department of public safety, and the department of human services shall jointly make a report to a joint meeting of the judiciary committees of the senate and the house of representatives regarding the standardized screening procedures developed pursuant to this article and the need for and utility of further legislation to implement the standardized screening procedures developed pursuant to this article.

Source: L. 2000: Entire article added, p. 203, § 1, effective March 29.

16-11.9-104. Repeal of article. (Repealed)

Source: L. 2000: Entire article added, p. 203, § 1, effective March 29. L. 2002: Entire section repealed, p. 581, § 18, effective May 24.

16-11.9-105. Periodic review. On or before October 1, 2004, and on or before October 1 every two years thereafter, the judicial department, the department of corrections, the state board of parole, the division of criminal justice within the department of public safety, and the department of human services shall jointly review the implementation of the standardized procedures and the use of the standardized screening instruments developed pursuant to this article.

Source: **L. 2002:** Entire section added, p. 581, § 19, effective May 24. **L. 2007:** Entire section amended, p. 756, § 2, effective May 10.

ARTICLE 12

Review of Judgments in Criminal Cases

Editor’s note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor’s note before the article 1 heading.

	PART 1	16-12-202.	Unitary procedure for appeals - scope and applicability.
	REVIEW	16-12-203.	Definitions.
16-12-101.	Review of proceedings resulting in conviction.	16-12-204.	Stay of execution - postconviction review.
16-12-101.5.	Review of proceedings regarding class 1 felony convictions - legislative intent.	16-12-205.	Postconviction review - appointment of new postconviction counsel - qualifications - compensation.
16-12-102.	Appeals by the prosecution.	16-12-206.	Postconviction review - motion.
16-12-103.	Stays of execution.	16-12-207.	Supreme court - appeal - filing of notice.
	PART 2	16-12-208.	Supreme court - rules.
	UNITARY REVIEW IN	16-12-209.	Limitation on postconviction review.
	DEATH PENALTY CASES	16-12-210.	Severability.
16-12-201.	Legislative declaration.		

PART 1

REVIEW

16-12-101. Review of proceedings resulting in conviction. Every person convicted of an offense under the statutes of this state has the right of appeal to review the proceedings resulting in conviction. The procedures to be followed in any such appeal shall be as provided by applicable rule of the supreme court of Colorado.

Source: **L. 72:** R&RE, p. 253, § 1. **C.R.S. 1963:** § 39-12-101.

ANNOTATION

Law reviews. For note, “Former Jeopardy — Effect of State’s Appeal in Colorado”, see 24 Rocky Mt. L. Rev. 94 (1951). For article, “Colorado Criminal Procedure — Does It Meet Minimum Standards?”, see 28 Dicta 14 (1951). For article, “Criminal Law”, see 32 Dicta 409 (1955). For article, “Post-Conviction Remedies in Colorado Criminal Cases”, see 31 Rocky Mt. L. Rev. 249 (1961). For note, “One Year Review of Constitutional Law”, see 41 Den. L. Ctr. J. 77 (1964). For article, “Pronouncements of the

U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986”, which discusses a case relating to the right of appeal, see 15 Colo. Law. 1613 (1986).

Annotator’s note. Since § 16-12-101 is similar to repealed § 39-7-27, CRS 53, and laws antecedent to CSA, C. 48, § 500, relevant cases construing those provisions have been included in the annotations to this section.

Common-law right to review recognized by statute. In Colorado the common-law right of

the defendant to obtain appellate review of criminal proceedings was given statutory recognition and standing as far back as 1861 by the territorial legislature. *Krutka v. Spinuzzi*, 153 Colo. 115, 384 P.2d 928 (1963).

A trial de novo conducted by the district court is not a review of the county court judgment; it is an entirely new proceeding. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

Only in cases tried de novo by the district court will the district court judgment be subject to direct appeal. Justifiably, then, the defendant may seek direct appeal when the district court enters its judgment from a de novo trial. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

Certiorari review does not suffice as an appellate review from a final judgment of the district court. *Bovard v. People*, 99 P.3d 585 (Colo. 2004).

Section gives one appeal as a matter of right. Under this section, one convicted of crime is entitled as a matter of right to one appeal, but where such appeal is dismissed for want of prosecution, he is not entitled as a matter of right to a second. *Caviness v. People*, 27 Colo. 283, 60 P. 565 (1900).

Nothing in this section prohibits a direct appeal of a probation revocation order under C.A.R. 1. *People v. Carr*, 185 Colo. 293, 524 P.2d 301 (1974).

Appellate review may not discriminate on account of poverty. A state is not required by the federal constitution to provide appellate courts or a right to appellate review at all. But a state that does grant appellate review cannot do so in a way that discriminates against some convicted defendants on account of their poverty. *In re Patterson*, 136 Colo. 401, 317 P.2d 1041 (1957).

16-12-101.5. Review of proceedings regarding class 1 felony convictions - legislative intent. (1) The general assembly urges the Colorado supreme court to adopt an expedited process to review class 1 felony convictions where the death penalty has been imposed and any order by the district court granting or denying postconviction relief in such cases. It is the general assembly's intent that the Colorado supreme court give priority to cases in which a sentence of death has been imposed over other cases before the court, except to the extent of any conflict with the requirement that the court give the highest priority to enforcement actions brought in accordance with section 20 (1) of article X of the state constitution.

(2) In any direct appeal of any class 1 felony case in which a conviction is entered and in which a sentence of death is imposed prior to the date upon which the Colorado supreme court adopts rules implementing the unitary system of review established by part 2 of this article, all challenges to any such conviction or sentence, with the exception of any newly discovered evidence or any claim of ineffective assistance of counsel, shall be included in the brief of the person challenging such conviction or sentence, as such brief is defined by rule 28 of the Colorado appellate rules, at the time such brief is filed with the supreme court of the state of Colorado. Any issue which is not raised in the manner prescribed in this section shall be deemed to be irrevocably waived by the person challenging such conviction

Appeals in criminal cases are a matter of right. *In re Patterson*, 136 Colo. 410, 317 P.2d 1041 (1957); *In re Griffin*, 152 Colo. 347, 382 P.2d 202 (1963).

Because this section creates a statutory right of appeal of a conviction, the common law doctrine of abatement ab initio applies if defendant dies after filing the appeal but before the appeal can be decided. However, the order of restitution entered against defendant at the time of conviction created a civil judgment and was not subject to abatement but could be appealed by defendant's estate. *People v. Daly*, — P.3d — (Colo. App. 2011).

An indigent defendant is entitled to obtain a free transcript when necessary to exercise the right of appeal. *People v. Shearer*, 181 Colo. 237, 508 P.2d 1249 (1973).

Appeal without benefit of counsel is unconstitutional. Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, an unconstitutional line has been drawn between rich and poor. *In re Griffin*, 152 Colo. 347, 382 P.2d 202 (1963).

The supreme court is authorized as a matter of procedure to fix the time within which an appeal could issue. *Johnson v. People*, 140 Colo. 256, 344 P.2d 181 (1959), cert. denied, 361 U.S. 943, 80 S. Ct. 409, 4 L. Ed.2d 364 (1960).

Statute as basis for jurisdiction. See *People v. Young*, 139 Colo. 357, 339 P.2d 672 (1959).

Waiver of right to appeal. A defendant cannot waive the right to challenge an illegal sentence because there cannot be a valid agreement to an illegal sentence. Such a sentence cannot validly be imposed and renders the plea agreement with its resulting guilty plea invalid. *People v. Bottenfield*, 159 P.3d 643 (Colo. App. 2006).

or sentence. The failure of such person to file a brief within any time limits ordered by the supreme court of the state of Colorado shall constitute an irrevocable waiver of all issues which could have been raised in such brief.

Source: **L. 91:** Entire section added, p. 430, § 7, effective May 24. **L. 94:** Entire section amended, p. 1473, § 1, effective July 1. **L. 97:** (2) amended, p. 1582, § 4, effective June 4.

16-12-102. Appeals by the prosecution. (1) - The prosecution may appeal any decision of a court in a criminal case upon any question of law. Any order of a court that either dismisses one or more counts of a charging document prior to trial or grants a new trial after the entry of a verdict or judgment shall constitute a final order that shall be immediately appealable pursuant to this subsection (1). If any act of the general assembly is adjudged inoperative or unconstitutional in any criminal case, it is the duty of the district attorney of the judicial district in which the court making such decision is situated to appeal on behalf of the people of the state of Colorado, unless the same issue of constitutionality is already pending before a reviewing court in another case. Nothing in this section shall authorize placing the defendant in jeopardy a second time for the same offense. No docket fee shall be required of the people upon an appeal under this section. The procedure to be followed in filing and prosecuting appeals under this section shall be as provided by applicable rule of the supreme court of Colorado. However, if a statute providing for the imposition of the death penalty is adjudged inoperative or inapplicable for any reason, such adjudication shall constitute a final order that shall be immediately appealable to the supreme court of Colorado, notwithstanding any statute or court rule to the contrary.

(2) The prosecution may file an interlocutory appeal in the supreme court from a ruling of the trial court granting a motion made in advance of trial by the defendant for the return of property and to suppress evidence or granting a motion to suppress an extrajudicial confession or admission if the prosecution certifies to the judge who granted such motion and to the supreme court that the appeal is not taken for the purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant. The prosecution may also file an interlocutory appeal in the supreme court from a ruling of the trial court granting a motion in limine pertaining to the matters described in this subsection (2), or from a ruling on a motion made pursuant to section 18-1-202 (11), C.R.S., challenging the place of trial or from a ruling on a motion to disqualify a district attorney pursuant to section 20-1-107, C.R.S.

Source: **L. 72:** R&RE, p. 253, § 1. **C.R.S. 1963:** § 39-12-102. **L. 86:** Entire section amended, p. 734, § 4, effective July 1. **L. 89:** (2) amended, p. 863, § 4, effective April 12. **L. 91, 2nd Ex. Sess.:** (1) amended, p. 15, § 1, effective October 7. **L. 92:** (2) amended, p. 400, § 8, effective June 3. **L. 93:** (1) amended, p. 1728, § 8, effective July 1. **L. 98:** (1) amended, p. 948, § 9, effective May 27. **L. 2000:** (1) amended, p. 453, § 9, effective April 24. **L. 2002:** (2) amended, p. 759, § 5, effective July 1.

ANNOTATION

Annotator's note. Since § 16-12-102 is similar to repealed § 39-7-26, CRS 1963, § 39-7-27, CRS 53, CSA, C 48, § 500, relevant cases construing those provisions have been included in the annotations to this section.

Appeal by people to review judgment of acquittal did not exist at common law or when the state constitution was adopted in 1876. *Krutka v. Spinuzzi*, 153 Colo. 115, 384 P.2d 928 (1963).

Purpose of appeal. Appeals are not allowed for the mere purpose of delay, or to present

purely abstract legal questions, however, important or interesting, but to correct errors injuriously affecting the right of some party to the litigation. *Miller v. Reeder*, 157 Colo. 134, 401 P.2d 604 (1965).

The purpose of appellate review is essentially twofold: to settle the controversy, and to provide explanation of and to give clarity to questions of law by means of published opinions. *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971); *People v. May*, 182 Colo. 29, 511 P.2d 22 (1973).

An appeal does not lie at the instance of the state unless clearly authorized by this section. People v. Zobel, 54 Colo. 284, 130 P. 837 (1913).

The prosecution may not appeal an evidentiary ruling in a case after the prosecution moves to dismiss the case without prejudice. A motion to dismiss without prejudice does not place the case at final judgment, rather it places the case in the same condition as before the charges were filed. The language in subsection (1) giving the prosecution the right to appeal "any order of a court that dismisses one or more counts of a charging document prior to trial" only applies to situations in which a trial court dismisses a charge over the objection of the prosecution. In this case, the prosecution voluntarily moved to dismiss the charges. To determine that the prosecution's motion to dismiss without prejudice was a final action would in essence give the prosecution an interlocutory order that would not otherwise be subject to an interlocutory appeal. People v. Frye, ___ P.3d ___ (Colo. App. 2010).

Prosecution may file direct appeal as to a question of law following the dismissal of all charges without prejudice at the prosecution's request following trial court's evidentiary ruling that rendered the prosecution unable to proceed to trial. The finality of judgment requirement of C.A.R. 1 was satisfied when all charges were dismissed and the case was ended. People v. Gabriesheski, 262 P.3d 653 (Colo. 2011) (disagreeing with People v. Frye annotated above).

The plain text of the statute allows the prosecution to appeal dismissal of a count when other counts remain against the defendant. People v. Collins, 32 P.3d 636 (Colo. App. 2001); People v. Beck, 187 P.3d 1125 (Colo. App. 2008).

The prosecution may appeal a dismissal of a count prior to trial even when the appeal is not based on a question of law. People v. Collins, 32 P.3d 636 (Colo. App. 2001).

As where there is a question to decide for future guidance of trial courts. Where, on appeal in behalf of the state, there is no proper question to decide for guidance of trial courts in the future, the appeal will be dismissed. People v. Denver Athletic Club, 63 Colo. 189, 164 P. 1158 (1917).

Or where a legislative act has been held invalid. An appeal may be issued on behalf of the people to review court judgments holding legislative acts inoperative or unconstitutional. People v. Bristol, 92 Colo. 325, 20 P.2d 309 (1933).

Or question of law. This section permits appeals on behalf of the people to review decisions of the trial court upon questions of law arising in any criminal case. People v. Spinuzzi, 149 Colo. 391, 369 P.2d 427 (1962).

The people are limited on appeal to questions of law. People v. Ware, 187 Colo. 28, 528 P.2d 224 (1974).

Prosecution's appeal, which raises no questions of law, is improper under this section. People v. Chmielewski, 187 Colo. 268, 529 P.2d 1337 (1975).

Or where complaint dismissed for lack of indictment. Under this section an appeal will lie on behalf of the people to review a judgment of a justice dismissing a complaint charging defendants with commission of a misdemeanor on the ground that the prosecution was not instituted by indictment or information. People v. Read, 132 Colo. 390, 288 P.2d 347 (1955).

An order granting a new trial is a final order pursuant to this section, therefore, prosecution must file its appeal within 45 days of the order. People v. Curren, 228 P.3d 253 (Colo. App. 2009).

Appropriateness of exclusion of witnesses a question of law. Whether the sanction imposed by the trial court — exclusion of the witnesses — for failure to comply with Crim. P. 16 (pt.II)(c), was appropriate under the facts and circumstances of this case matter within the sound discretion of the trial court, and an appropriate question of law under this section. People v. Lyle, 200 Colo. 236, 613 P.2d 896 (1980).

Trial court's interpretation of phrase in statute under which defendant was charged is a question of law reviewable under this section. People v. Miller, 97 P.3d 171 (Colo. App. 2003).

Appropriateness and validity of technically defective notice of appeal is a question of law. People v. Bost, 770 P.2d 1209 (Colo. 1989).

Suppression of evidence is a question of law; therefore the prosecution may pursue an interlocutory appeal when a motion to suppress evidence is granted. People v. Lewis, 813 P.2d 813 (Colo. App. 1991).

Suppression of a confession given in the absence of a Miranda advisement was warranted where a defendant was vigorously chased, threatened at gunpoint, sprayed with mace, and ultimately subdued and handcuffed, because, despite the arresting officers' belief that they did not have probable cause to arrest the defendant, it would appear to a reasonable person that the defendant's freedom of action or movement had been curtailed to a degree associated with a formal arrest in terms of both severity and duration. People v. Mangum, 48 P.3d 568 (Colo. 2002).

Suppression of incriminating statements warranted when defendant was subject to interrogation by police officers before being advised of Miranda rights. A routine encounter turned into a custodial situation, as defendant was physically surrounded by officers, was not free to go during questioning, and had "objective reasons to believe that he was under arrest";

such circumstances constituted custody. *People v. Null*, 233 P.3d 670 (Colo. 2010).

Suppression of involuntary blood alcohol test results in a vehicular homicide prosecution was erroneous because probable cause to administer the test existed when eyewitnesses saw the defendant's car veer into oncoming traffic, no other cause for the accident was apparent, and police officers found beer bottles and smelled alcohol in the defendant's car. *People v. Schall*, 59 P.3d 848 (Colo. 2002).

Only three circumstances for interlocutory appeal of a suppression order. Review is proper where evidence was suppressed due to: (1) An unlawful search and seizure; (2) an involuntary confession or admission; or (3) an improperly ordered or insufficiently supported, nontestimonial identification. *People v. Braunthal*, 31 P.3d 167 (Colo. 2001).

Review pursuant to subsection (1) not appropriate where argument in essence challenges trial court's assessment of the evidence and does not properly pose a question of law. *People v. Fagerholm*, 768 P.2d 689 (Colo. 1989).

No proper jurisdiction to hear an appeal when appeal involves an evidentiary issue that implicates factual as well as legal issues. *People v. Martinez*, 22 P.3d 915 (Colo. 2001).

Court of appeals has jurisdiction to decide if trial court erred in granting new trial under a postconviction relief motion when issues in motion were brought pursuant to the "other remedies" portion of Crim. P. 35. *People v. Naranjo*, 821 P.2d 836 (Colo. App. 1991).

Trial court's finding in the preliminary hearing that a killing was completely independent of a burglary was not binding on the appellate court. *People v. Lewis*, 791 P.2d 1152 (Colo. App. 1989).

Dismissal of prosecution based solely on reviewing content of document was matter of law and therefore reviewable. *People v. Marston*, 772 P.2d 615 (Colo. 1989).

A denial of the prosecution's request for a presentence investigation report, when such a report is mandated by statute, clearly presents a question of law appealable under this section. *People v. Gretz*, 973 P.2d 110 (Colo. App. 1998).

Legal significance of delays in defendant's trial appealable matter. Where the trial court ruled that the delays in defendant's trial were at the request and for the benefit of the defendant, the facts are undisputed, and the only question is their legal significance, which is an appealable matter. *People v. Reliford*, 186 Colo. 6, 525 P.2d 467 (1974).

But questions of fact cannot be the subject of appeal proceedings by which the people seek disapproval of an action of the trial court. *People v. Ledesma*, 171 Colo. 407, 468 P.2d 27 (1970).

Where determination that delays in bringing defendant to trial involved resolutions of fact

questions, the district attorney could not appeal such determinations. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

C.A.R. 4(b) and this section give the district attorney the right to appeal a judgment of a trial court in a criminal case upon any question of law. However, such an appeal, involving sufficiency of the evidence, is seldom productive of any precedential value. The district attorney's time and efforts can be better utilized than prosecuting appeals such as this. Appeals by district attorneys should be avoided in cases which do not involve egregious error by the trial court. *People v. Samora*, 188 Colo. 74, 532 P.2d 946 (1975).

Subsection (1) does not permit interlocutory appeals in all cases where a trial court declares a statute unconstitutional. Where ruling that statute was unconstitutional was not analogous to a final judgment but instead represented one step toward the resolution of the defendant's Crim. P. 35 (c) motion, and where immediate appellate review was not necessary, appeal was dismissed for lack of appellate jurisdiction. *People v. Romero*, 801 P.2d 1192 (Colo. 1990).

Nor will sufficiency of evidence be reviewed. The accused being acquitted, the court will not entertain an appeal on behalf of the people merely to determine the sufficiency of the evidence to warrant a conviction, where it is improbable that a similar state of facts will again be presented, or where a consideration of the testimony, and any declarations upon it, will neither establish any principle of law nor be a guide in subsequent prosecutions. *People v. Kippy*, 64 Colo. 597, 173 P. 395 (1918), overruled insofar as inconsistent, *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

If the question of the sufficiency of the evidence as a whole is not reviewable on an appeal prosecuted by the people, certainly the question of the sufficiency of that evidence as to any particular element of a crime such as the venue, the identity of the defendant, or the corpus delicti, where there is nothing in the testimony to make it specially applicable to other cases which may follow, is not so reviewable. *People v. Archer*, 173 Colo. 299, 477 P.2d 791 (1970), overruled insofar as inconsistent, *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Appeals by prosecution where the sole issue is the sufficiency of the evidence to sustain a conviction are not favored. *People v. Thompson*, 748 P.2d 793 (Colo. 1988).

The state may appeal a grant of a new trial. *People v. Smith*, 921 P.2d 80 (Colo. App. 1996).

Appellate review precluded by the failure of the people to object at the sentencing hearing to the imposition of a sentence within the presumptive range when the defendant was convicted of possession of contraband while in a correctional institution, or to request the trial court, pursuant

to Crim. P. 35(a), to correct the sentence. *People v. Gallegos*, 764 P.2d 76 (Colo. 1988).

Acquittal on motion involving sufficiency is question of law. The issue of sufficiency of the evidence as postured where the trial court has granted the defendant's motion for judgment of acquittal involves a question of law, and as such, the district attorney is given authority to appeal. *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

The final judgment for purposes of appeal was entered when trial court reversed its previous order imposing costs on the defendant, and therefore state's appeal taken more than 30 days after sentencing was proper. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

For purposes of appeal, a final judgment must include the sentence. Therefore, after the sentence was vacated on appeal, an order withdrawing plea of guilty was not a final judgment. *Ellsworth v. People*, 987 P.2d 264 (Colo. 1999).

Prosecutor's appeal pursuant to this section is subject to the final judgment requirement of C.A.R. 1. *People v. Guatney*, 214 P.3d 1049 (Colo. 2009).

An order declining to revoke probation is not a final judgment within meaning of C.A.R. 1, thus the court of appeals lacked jurisdiction to entertain the appeal. *People v. Guatney*, 214 P.3d 1049 (Colo. 2009).

Interlocutory appeals permitted. This section contains no language which would limit the people's right to appeal solely to final judgments of the trial court and, therefore, it permits interlocutory appeals. *People v. Traubert*, 199 Colo. 322, 608 P.2d 342 (1980).

Generally, interlocutory appeals authorized by statute are permissive rather than mandatory, and failure to pursue an immediate appeal does not preclude appeal of the issue when it merges into the final judgment. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

People's appeal filed within 45 days after defendant's sentencing was timely. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

In order to toll the time for filing an interlocutory appeal, a motion to reconsider a trial court order of suppression must be filed within ten days of the date of the order of suppression. *People v. Powers*, 47 P.3d 686 (Colo. 2002).

Only mechanism for review of district court's determination on appeal from county court is by certiorari to the supreme court as specified in § 13-6-310 (4). *People v. Gonzales*, 198 Colo. 546, 603 P.2d 139 (1979); *People v. Luna*, 648 P.2d 624 (Colo. 1982).

Only parties aggrieved may appeal. The word aggrieved refers to a substantial grievance, the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation. *Miller v. Reeder*, 157 Colo. 134, 401 P.2d 604 (1965).

Only a party to the original proceeding may sue out an appeal. Where the district attorney was not a party to the proceedings below, the parties being the people of the state of Colorado versus Reeder, and is not a party aggrieved, he cannot be an appellant in the supreme court. *Miller v. Reeder*, 157 Colo. 134, 401 P.2d 604 (1965).

Error asserted by state must be prejudicial. Under this section the district attorney is authorized to raise by appeal certain questions, but that right must be predicated upon the theory that the errors committed were prejudicial to the people. *People v. Wolff*, 111 Colo. 46, 137 P.2d 693 (1943).

Although the district attorney is entitled to the judgment of the supreme court on questions important to the prosecution of similar cases in the future, it is essential that material errors, prejudicial to the state in the particular case and covered by the statement of errors, be disclosed by the record. *People v. Hill*, 116 Colo. 436, 181 P.2d 360 (1947).

Erroneous rulings should be enumerated in opening brief. When the people appeal under this section upon a question of law following an acquittal, they should enumerate in their opening brief the erroneous rulings of which complaint is made. The supreme court will direct its attention only to such issues so mentioned, unless manifest error appears. *People v. Martin*, 192 Colo. 491, 561 P.2d 776 (1977).

Trial court's findings of fact are entitled to deference by a reviewing court, but when the absence of factual findings regarding key contested issues hinders appellate review, or when unresolved evidentiary conflicts exist with regard to material facts, case must be remanded to the trial court for further fact-finding. *People v. Brazzel*, 18 P.3d 1285 (Colo. 2001).

Review by state not available in delinquency proceeding. Appellate courts traditionally limit their jurisdiction to consideration of actual controversies and refuse to give opinions on moot questions or abstract propositions. An exception to this rule is created by this section which provides for appeal on behalf of the people to review decisions of trial courts on questions of law arising in criminal cases, but such statutory review is not available in a proceeding in delinquency, which is not a criminal case. *People in Interest of GDK v. GDK*, 30 Colo. App. 54, 491 P.2d 81 (1971).

Constitutional jeopardy saving clause not applicable to review by state. Section 18 of art. II, Colo. Const., providing that if a judgment in a criminal case is reversed for errors of law the accused shall not be deemed to have been in jeopardy, must be reviewed as of the time of its adoption and construed in the sense in which the framers understood it, and it cannot be deemed to apply in a situation where the people on review by appeal obtain disapproval of a judg-

ment of acquittal in a criminal proceeding, since at the time of its adoption the people did not have the right to sue out an appeal in a criminal case. *Krutka v. Spinuzzi*, 153 Colo. 115, 384 P.2d 928 (1963).

The exception permitting a district attorney not to appeal a finding of unconstitutionality when the same issue of constitutionality is already before another court applies only if it is the same issue of constitutionality, it does not apply if the question of constitutionality is before a reviewing court on a different issue. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

This section expressly provides that accused shall not be placed in jeopardy a second time. An accused person is not to be twice put in jeopardy by the judgment of the supreme court in an appeal prosecuted by the people under this section. *People v. Fitzgerald*, 51 Colo. 175, 117 P. 135 (1911).

When an accused person is arraigned, tried and acquitted, he is, by the express words of this section, allowing an appeal by the people, not to be again put in jeopardy. *People v. Denver Athletic Club*, 63 Colo. 189, 164 P. 1158 (1917).

Where habitual criminal counts have been dismissed by the trial court after jeopardy has already attached on substantive charges, the Colorado double jeopardy clause, § 18 of Art. II, Colo. Const., prohibits a retrial of the defendant on habitual criminality. Appellate review under these circumstances is limited to approval or disapproval of the judgment. *People v. Deason*, 670 P.2d 792 (Colo. 1983); *People v. Leonard*, 673 P.2d 37 (Colo. 1983); *People v. Germany*, 674 P.2d 345 (Colo. 1983); *People v. Moody*, 674 P.2d 366 (Colo. 1984); *People v. Trujillo*, 731 P.2d 649 (Colo. 1986).

The prosecution may not cure a failure to timely file an interlocutory appeal of a suppression order by dismissing without prejudice the case against the defendant and then appealing the issues raised in the suppression order. *People v. Donahue*, 750 P.2d 921 (Colo. 1988).

Lower court's declaration of unconstitutionality and dismissal of some charges in a multi-count information is basis for appellate court jurisdiction under this statute. *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988).

Lower court's interlocutory ruling that statute creating procedure for determining whether imposition of death penalty is unconstitutional is not reviewable under subsection (1). *People v. Young*, 814 P.2d 834 (Colo. 1991).

By definition, it could not be used to appeal the ruling on a jeopardy issue. *People v. Voss*, 191 Colo. 338, 552 P.2d 1012 (1976).

Where jeopardy has attached and the trial cannot be resumed, there is no justification for reviewing a ruling suppressing the evidence as an appeal under this section. *People v. Voss*, 191 Colo. 338, 552 P.2d 1012 (1976).

It precludes a second trial if acquittal is disapproved. The provision that nothing in this section shall be construed so as to place a defendant in jeopardy for a second time for the same offense precludes a second trial for the same offense, even though judgment of acquittal is disapproved by the supreme court. *Krutka v. Spinuzzi*, 153 Colo. 115, 384 P.2d 928 (1963).

Double jeopardy held no bar to prosecution of burglary and assault charges. *People v. Mendoza*, 190 Colo. 519, 549 P.2d 766 (1976).

The supreme court merely approves or disapproves the ruling complained of by the state on an appeal. *People v. Fitzgerald*, 51 Colo. 175, 117 P. 135 (1911).

This section permits a state to appeal from a verdict of acquittal in felony cases for the purpose of obtaining a decision on the correctness of a ruling made by the trial court, but not for the purpose of affecting the verdict in any way. *Krutka v. Spinuzzi*, 153 Colo. 115, 384 P.2d 928 (1963).

Trial court applied an improper collateral estoppel standard when it determined that the intent issue was precluded because it was "more likely than not" that the jury found a lack of intent. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

This section must be interpreted consistently with applicable rules of procedure and judicial precedent indicative of the legislative intent underlying the statute. *People v. Hinchman*, 40 Colo. App. 9, 574 P.2d 866 (1977), aff'd in part and rev'd in part, 196 Colo. 526, 589 P.2d 917 (1978), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed.2d 311 (1979).

Applied in *People v. Rael*, 198 Colo. 225, 597 P.2d 584 (1979); *People v. Hight*, 198 Colo. 299, 599 P.2d 885 (1979); *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979); *People v. Waggoner*, 199 Colo. 450, 610 P.2d 106 (1980); *People v. District Court*, 623 P.2d 55 (Colo. 1981); *People v. Torres*, 625 P.2d 368 (Colo. 1981); *People v. Boyd*, 642 P.2d 1 (Colo. 1982); *People v. Ray*, 678 P.2d 1019 (Colo. 1984); *People v. Washington*, 865 P.2d 145 (Colo. 1994); *People v. Holmes*, 981 P.2d 168 (Colo. 1999); *People v. Smith*, 40 P.3d 1287 (Colo. 2002); *People v. Reed*, 56 P.3d 96 (Colo. 2002); *People v. Crippen*, 223 P.3d 114 (Colo. 2010).

16-12-103. Stays of execution. When a person has been convicted of an offense and a notice of appeal is filed, he shall be entitled to a stay of execution by compliance with the provisions and requirements of the applicable rules of the supreme court of Colorado.

Cross references: For stay of execution in criminal appeals from county courts, see Crim. P. 37(f); for stay of execution in criminal appeals from district courts, see C.A.R. 8.1.

ANNOTATION

Law reviews. For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 Dicta 14 (1951).

Annotator's note. Since § 16-12-103 is similar to repealed § 39-7-28, CRS 53, and laws antecedent to CSA, C. 48, § 501, relevant cases construing those provisions have been included in the annotations to this section.

A stay of execution supersedes the judgment of the court below, and provides that no steps should be taken towards execution. *Ritchey v. People*, 22 Colo. 251, 43 P. 1026 (1896).

It is not dependent upon the question of bail; but if, in the opinion of the court, the party

ought to be let to bail pending the proceedings, an order for that purpose may also be made. *Ritchey v. People*, 22 Colo. 251, 43 P. 1026 (1896).

Refusal to stay execution was abuse of discretion. Where a petitioner is adjudged guilty of contempt of court for refusal to answer questions before the grand jury and is sentenced to four months in jail, refusal of the trial court to stay execution or admit the petitioner to bail pending review by the supreme court is an abuse of discretion. *Smaldone v. People*, 153 Colo. 208, 385 P.2d 127 (1963).

PART 2

UNITARY REVIEW IN DEATH PENALTY CASES

16-12-201. Legislative declaration. (1) The general assembly hereby declares that the purpose of this part 2 is to establish an expedited system of unitary review of class 1 felony cases in which a death sentence is imposed.

(2) The general assembly finds that enactment of this part 2 will accomplish the following goals:

(a) Ensuring compliance with the requirements of the federal "Antiterrorism and Effective Death Penalty Act of 1996", 28 U.S.C. sec. 2261 et seq.;

(b) Improving the accuracy, completeness, and justice of review proceedings by requiring that postconviction review commence immediately after the imposition of a sentence of death;

(c) Allowing for the full and fair examination of all legally cognizable postconviction and appellate issues by the trial court and the Colorado supreme court; and

(d) Eliminating, to the fullest extent possible, unreasonable and unjust delays in the resolution of postconviction issues by combining and reducing the number of proceedings in class 1 felony cases.

Source: L. 97: Entire part added, p. 1573, § 1, effective June 4.

16-12-202. Unitary procedure for appeals - scope and applicability. (1) Notwithstanding any state statute or rule of the Colorado supreme court to the contrary, this part 2 and the supreme court rules adopted pursuant to this part 2 establish the only procedure for challenging a sentence of death or the conviction that resulted in the sentence of death.

(2) This part 2 does not apply to class 1 felony cases in which a sentence of death is not sought or to class 1 felony convictions for which the death penalty is not imposed.

(3) This part 2 shall apply to any class 1 felony conviction for which the death penalty is imposed as punishment, regardless of whether the sentence is imposed pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., which death sentence is imposed on or after the date upon which the supreme court adopts rules implementing the unitary system of review established by this part 2.

(4) For cases in which a death sentence is imposed prior to the date upon which the Colorado supreme court adopts rules implementing the unitary system of review established by this part 2, appellate review and postconviction review shall be as otherwise provided by law.

Source: L. 97: Entire part added, p. 1574, § 1, effective June 4. **L. 2002:** (3) amended, p. 1497, § 150, effective October 1. **L. 2002, 3rd Ex. Sess.:** (3) amended, p. 33, §§ 25, 26, effective July 12.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (3), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

The use of the phrase “class 1 felony conviction” in this part 2 does not eliminate issues concerning lesser felonies from its statutory scope. The context of this reference establishes a threshold requirement for the stat-

ute’s application, rather than limiting the issues or convictions that can be reviewed in a case in which a death sentence has been imposed. *People v. Owens*, 219 P.3d 379 (Colo. App. 2009).

16-12-203. Definitions. As used in this part 2, unless the context otherwise requires:

(1) “Direct appeal” means the appeal to the Colorado supreme court of any issues raised at the entry of a guilty plea, before trial, at trial, at the penalty phase hearing, or in a motion for new trial.

(2) “Direct appeal counsel” means the attorney retained by the defendant, or appointed by the trial court to represent an indigent defendant, as the successor to trial counsel for purposes of representing the defendant in direct appeal proceedings.

(3) “New postconviction counsel” means the attorney retained by the defendant, or appointed by the trial court to represent an indigent defendant, for the purposes of representing the defendant in postconviction review and postconviction review appeal proceedings. New postconviction counsel cannot have previously represented the defendant with regard to the class 1 felony charge.

(4) “Postconviction review” means review as provided in this part 2 by the trial court that occurs after conviction in a class 1 felony case in which the death penalty is imposed as punishment.

(5) “Postconviction review appeal” means the appeal to the Colorado supreme court of any issues raised in postconviction review proceedings.

(6) “Trial counsel” means the attorney who represents the defendant with regard to the class 1 felony charge: For the purposes of any guilty plea; before trial; at trial; at the penalty phase hearing; for the purposes of a motion for new trial; for the purposes of postconviction review if the defendant chooses to continue with trial counsel for purposes of postconviction review; and for the purposes of direct appeal if the defendant chooses to continue with trial counsel for purposes of direct appeal. “Trial counsel” does not include new postconviction counsel appointed pursuant to section 16-12-205 or direct appeal counsel.

Source: L. 97: Entire part added, p. 1574, § 1, effective June 4.

16-12-204. Stay of execution - postconviction review. (1) The trial court, upon the imposition of a death sentence, shall set the time of execution pursuant to section 18-1.3-1205, C.R.S., and enter an order staying execution of the judgment and sentence until receipt of an order from the Colorado supreme court. The trial court shall direct the clerk of the trial court to mail to the Colorado supreme court immediately a copy of the judgment, sentence, and mittimus.

(2) The trial court shall order the defendant, trial counsel, and the prosecution to attend a hearing to be held after the date upon which the sentence of death is imposed. At the hearing, the trial court shall:

- (a) Advise the defendant of the nature of review as provided in this part 2;
- (b) Advise the defendant of the right to direct appeal counsel;
- (c) Advise the defendant that the issue of ineffective assistance of trial counsel before trial, at trial, or during the penalty phase hearing may only be raised on postconviction review and on postconviction review appeal;

(d) Advise the defendant that the issue of ineffective assistance of counsel during direct appeal by trial counsel or direct appeal counsel may only be raised by way of a petition for rehearing filed in the Colorado supreme court by new postconviction counsel or the defendant pursuant to the rules adopted by the Colorado supreme court to implement this part 2;

(e) Determine whether the defendant intends to pursue postconviction review; and

(f) If the defendant intends to pursue postconviction review, determine whether the defendant intends to proceed with or without counsel.

(3) After a full discussion on the record, if the defendant knowingly, voluntarily, and intelligently waives the right to pursue postconviction review, trial counsel or direct appeal counsel, if appointed or retained, or the defendant, if proceeding without counsel, may file any notice of appeal with the Colorado supreme court, as provided by Colorado supreme court rule.

Source: **L. 97:** Entire part added, p. 1575, § 1, effective June 4. **L. 2002:** (1) amended, p. 1497, § 151, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1) amended, p. 14, §§ 5, 6, effective July 12. **L. 2012:** (1) amended, (SB 12-175), ch. 208, p. 856, § 88, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (1), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

16-12-205. Postconviction review - appointment of new postconviction counsel - qualifications - compensation. (1) At the hearing held pursuant to section 16-12-204 (2), if the defendant chooses to pursue postconviction review, the trial court shall enter an order appointing new postconviction counsel for the defendant if the trial court finds that the defendant is indigent and either the defendant requests and accepts such appointment or the trial court finds that the defendant is unable to competently decide whether to accept or reject the appointment. However, the trial court shall not appoint new postconviction counsel if:

(a) The defendant has retained new postconviction counsel; or

(b) The defendant has elected to proceed without counsel and the trial court finds, after a full discussion on the record, that the defendant's election to proceed without counsel is knowing, intelligent, and voluntary; or

(c) The defendant elects to have trial counsel continue representing the defendant for purposes of postconviction review and the trial court finds, after a full discussion on the record, that:

(I) The defendant understands that new postconviction counsel can be retained by the defendant for purposes of postconviction review or appointed by the trial court for the defendant if the defendant is indigent;

(II) The defendant understands that, by electing to have trial counsel continue to represent the defendant for purposes of postconviction review, the defendant waives the right to challenge the effectiveness of trial counsel's representation at any stage of the proceedings;

(III) The defendant's election to have trial counsel continue to represent the defendant for purposes of postconviction review is knowing, intelligent, and voluntary; and

(IV) Trial counsel agrees to continue representing the defendant for purposes of postconviction review.

(2) In appointing new postconviction counsel to represent an indigent defendant, the trial court shall appoint one or more attorneys who, alone or in combination, meet all of the following minimum qualifications:

(a) Each appointed attorney shall be licensed to practice law in Colorado or be admitted to practice in Colorado solely for the purpose of representing the defendant;

(b) At least one of the appointed attorneys shall have a minimum of five years' experience in criminal law litigation, including work on trials and postconviction proceedings;

(c) At least one of the appointed attorneys shall have a minimum of three years' experience in trying felony cases, including having tried at least five felony cases to verdict in the preceding five years or having tried a minimum total of twenty-five felony cases; and

(d) At least one of the appointed attorneys shall have a minimum of three years' experience in handling appeals of felony cases, having served as counsel in at least five appeals in felony cases.

(3) In appointing new postconviction counsel, the trial court may also consider the following factors:

(a) Whether the attorney under consideration has previously appeared as counsel in a class 1 felony case in which the death penalty was sought;

(b) Whether the attorney under consideration has tried at least one first degree murder case to verdict;

(c) Whether, within the preceding five years, the attorney under consideration has taught or attended a continuing legal education course that dealt in substantial part with the trial, appeal, and postconviction review of class 1 felony cases in which the death penalty is sought;

(d) The workload of the attorney under consideration and how that workload would affect the attorney's representation of the defendant;

(e) The diligence and ability of the attorney under consideration; and

(f) Any other factor that may be relevant to a determination of whether the attorney under consideration will fairly, efficiently, and effectively represent the defendant for purposes of postconviction review.

(4) In any case in which the trial court appoints new postconviction counsel or new postconviction counsel is retained, said new postconviction counsel shall not be retained or appointed to act as co-counsel with trial counsel and shall not be associated or affiliated with trial counsel. New postconviction counsel shall exercise independent judgment and act independently from trial counsel.

(5) The ineffectiveness of counsel during postconviction review shall not be a basis for relief.

(6) The office of the public defender or the office of alternate defense counsel, created in section 21-2-101, C.R.S., whichever is appropriate, shall pay the compensation and reasonable litigation expenses of defendant's counsel incurred during the unitary review proceeding.

Source: L. 97: Entire part added, p. 1576, § 1, effective June 4. **L. 2009:** (6) amended, (SB 09-292), ch. 369, p. 1948, § 29, effective August 5.

16-12-206. Postconviction review - motion. (1) (a) In any case in which a defendant has been convicted of a class 1 felony and been sentenced to death, all motions for postconviction review and all postconviction review proceedings are governed by this part 2 and by the supreme court rules adopted to implement this part 2.

(b) Any motion for postconviction review shall state with particularity the grounds upon which the defendant intends to rely, including a statement of the facts and citations of law. A motion for postconviction review may include only those issues specified in paragraph (c) of this subsection (1) and shall not include any issues that were raised at the entry of any guilty plea, before trial, at trial, at the penalty phase hearing, or in the motion for new trial.

(c) A motion for postconviction review may raise only the following issues:

(I) Whether there exists evidence of material facts, not previously presented and heard, which by the exercise of reasonable diligence could not have been known or learned by the defendant or trial counsel prior to the imposition of the sentence and which require that the conviction or the death sentence be vacated in the interests of justice; or

(II) Whether the conviction was obtained or the sentence was imposed in violation of the constitution or laws of the United States or Colorado; or

(III) Whether the defendant was convicted under a statute that violates the constitution of the United States or Colorado or whether the conduct for which the defendant was prosecuted was constitutionally protected; or

(IV) Whether the judgment was rendered without jurisdiction over the defendant or the subject matter; or

(V) Any other grounds that are properly the basis for collateral attack upon a criminal judgment; or

(VI) Whether trial counsel rendered ineffective assistance.

(2) By alleging that trial counsel rendered ineffective assistance, the defendant automatically waives confidentiality pursuant to the provisions of section 18-1-417, C.R.S., between the defendant and trial counsel but only with respect to the information that is related to the defendant's claim of ineffective assistance.

(3) Neither the defendant nor the prosecution may file a motion for reconsideration or rehearing of the trial court's ruling on the motion for postconviction review. The granting or denying of a motion for postconviction review under this section is a final order reviewable on appeal by the Colorado supreme court.

Source: L. 97: Entire part added, p. 1578, § 1, effective June 4. L. 2005: (2) amended, p. 424, § 3, effective April 29.

16-12-207. Supreme court - appeal - filing of notice. (1) (a) If the defendant waives his or her right to postconviction review as provided in section 16-12-204, but intends to proceed with direct appeal, trial counsel, direct appeal counsel, if appointed or retained, or the defendant, if proceeding on direct appeal without counsel, shall file any notice of appeal for purposes of direct appeal in the Colorado supreme court.

(b) If the trial court conducts postconviction review and the defendant intends to seek direct appeal or postconviction review appeal, the notices of appeal, including both direct appeal and postconviction review appeal issues, shall be filed in the Colorado supreme court.

(2) Any appeal to the Colorado supreme court filed by the defendant pursuant to this part 2 shall consolidate and resolve, in one proceeding, all direct appeal and postconviction review appeal issues.

(3) The prosecution may appeal any final ruling by the trial court in the course of proceedings pursuant to this part 2, including but not limited to:

(a) A ruling granting a motion for new trial or other relief; and

(b) A ruling by the trial court granting postconviction relief; and

(c) A ruling by the trial court that any statute, including but not limited to a statute providing for the imposition of the death penalty, is adjudged inoperative or unconstitutional for any reason.

(4) Any appeal filed by the defendant or by the prosecution pursuant to this part 2 shall be taken directly to the Colorado supreme court.

Source: L. 97: Entire part added, p. 1579, § 1, effective June 4.

16-12-208. Supreme court - rules. (1) No later than January 1, 1998, the Colorado supreme court shall adopt rules to establish procedures, including time limits, for the postconviction review and unitary appeal process created by this part 2.

(2) The rules adopted by the Colorado supreme court pursuant to subsection (1) of this section shall address, but are not limited to:

(a) Filing and resolution of motions for new trial;

(b) The timing of the advisement hearing described in section 16-12-204 (2);

(c) The preparation of transcripts for postconviction review and unitary appeal;

(d) Filing and resolution of motions for postconviction review, including but not limited to provisions for determining whether evidentiary hearings are necessary to resolve such motions;

(e) Reciprocal discovery for the defendant and the prosecution during the postconviction review process;

(f) Prompt access by new postconviction counsel to trial counsel's files and materials;

(g) Waiver of a defendant's right to postconviction review and appeal of a conviction and sentence of death;

(h) Resolution of claims of ineffective assistance of counsel on direct appeal by way of a petition for rehearing;

(i) Filing of notices of appeal in the supreme court;

(j) Certification of the appellate record to the supreme court;

(k) Filing of briefs in the supreme court;

(l) Establishment of expedited procedures for resolving second or subsequent requests for relief filed by a defendant after conclusion of the process established by this part 2, including but not limited to motions filed under section 16-12-209;

(m) Creation of meaningful sanctions for violations of the rules promulgated by the supreme court; and

(n) Issuance and dissolution of stays of execution.

(3) The supreme court rules adopted pursuant to subsection (1) of this section shall ensure that all proceedings for postconviction review, the certification of the record, and all appellate briefing shall be completed within two years after the date upon which the sentence of death is imposed. There shall be no extensions of time of any kind beyond the two-year period.

(4) Unless otherwise provided in this part 2, the Colorado appellate rules govern the procedures to be followed in appeals to the Colorado supreme court of trial court rulings under this part 2.

(5) The general assembly urges the Colorado supreme court to render its decisions expeditiously in review of class 1 felony convictions where the death penalty has been imposed and any order by the trial court granting or denying postconviction relief in such cases. It is the general assembly's intent that the Colorado supreme court give priority to cases in which a sentence of death has been imposed over all other cases before the court, except to the extent of any conflict with the requirement that the court give the highest priority to enforcement actions brought in accordance with section 20 (1) of article X of the state constitution.

Source: L. 97: Entire part added, p. 1580, § 1, effective June 4.

ANNOTATION

Subsection (3) does not impose an absolute two-year time limit on presenting a unitary appeal to the supreme court. Rather the statute directs the supreme court to create the limit in court rules. An absolute two-year time extension prohibition does not exist either in statute or rule. Crim. P. 32.2 implements the legislature's

direction by imposing a series of highly specific time limits designed to meet the two-year goal when it can be accomplished without violating the defendant's constitutional rights or the legislature's expressly articulated goals. *People v. Owens*, 228 P.3d 969 (Colo. 2010).

16-12-209. Limitation on postconviction review. (1) No further postconviction review is available to the defendant after the time specified by supreme court rule for filing a petition for postconviction review has expired. Any claim or petition filed thereafter shall be deemed waived and shall be dismissed summarily unless the defendant establishes that:

(a) The failure to raise the claim within the time limit was the direct result of interference by government officials with the presentation of the claim in a manner which violated the constitution or laws of the United States or Colorado; or

(b) The facts upon which the claim are based were unknown to the defendant and could not have been ascertained by the exercise of due diligence; or

(c) The right asserted by the defendant is a constitutional right that was recognized by the supreme court of either the United States or Colorado after the time limits specified by supreme court rule for the filing of the petition for postconviction review had expired and the constitutional right applies retroactively.

(2) If the defendant files a motion for postconviction review raising any of the grounds specified in subsection (1) of this section, the motion shall be filed with the trial court within thirty-five days after the date upon which the grounds are discovered.

Source: **L. 97:** Entire part added, p. 1581, § 1, effective June 4. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 856, § 89, effective July 1.

Editor’s note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-12-210. Severability. If any provision of this part 2 or the application of this part 2 to any person or circumstance is held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this part 2 that can be given effect without the invalid or unconstitutional provision or application. Therefore, to this end, the provisions of this part 2 are declared to be severable.

Source: **L. 97:** Entire part added, p. 1581, § 1, effective June 4.

ARTICLE 13

Special Proceedings

Editor’s note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor’s note before the article 1 heading.

Law reviews: For article, “Colorado Felony Sentencing - an Update”, see 14 Colo. Law. 2163 (1985); for article, “Felony Sentencing in Colorado”, see 18 Colo. Law. 1689 (1989).

PART 1		16-13-208.	Report of probation department. (Repealed)
SENTENCING OF HABITUAL CRIMINALS		16-13-209.	Termination of proceedings. (Repealed)
16-13-101 to		16-13-210.	Evidentiary hearing. (Repealed)
16-13-103.	(Repealed)	16-13-211.	Findings of fact and conclusions of law. (Repealed)
PART 2		16-13-212.	Appeal. (Repealed)
SENTENCING OF SEX OFFENDERS		16-13-213.	Time allowed on sentence. (Repealed)
16-13-201.	Short title. (Repealed)	16-13-214.	Costs. (Repealed)
16-13-201.5.	Applicability of part. (Repealed)	16-13-215.	Diagnostic center as receiving center. (Repealed)
16-13-202.	Definitions. (Repealed)	16-13-216.	Powers and duties of the board.
16-13-203.	Indeterminate commitment. (Repealed)	PART 3	
16-13-204.	Requirements before acceptance of a plea of guilty. (Repealed)	ABATEMENT OF PUBLIC NUISANCE	
16-13-205.	Commencement of proceedings. (Repealed)	16-13-301.	Definitions.
16-13-206.	Defendant to be advised of rights. (Repealed)	16-13-302.	Public nuisances - policy.
16-13-207.	Psychiatric examination and report. (Repealed)	16-13-303.	Class 1 public nuisance.
		16-13-304.	Class 2 public nuisance.
		16-13-305.	Class 3 public nuisance.
		16-13-306.	Class 4 public nuisance.

- 16-13-307. Jurisdiction - venue - parties - process.
 16-13-308. Temporary restraining order - preliminary injunction - when to issue.
 16-13-309. Judgment - relief.
 16-13-310. Redelivery of seized premises.
 16-13-311. Disposition of seized personal property.
 16-13-312. Violation of injunction.
 16-13-313. Fees - costs and fines - lien and collection.
 16-13-314. Disposition of forfeited real property.
 16-13-315. Seizure of personal property.
 16-13-316. Prior liens not subject to forfeiture - vesting of title.
 16-13-317. Reporting of proceeds. (Repealed)

PART 4

PRESERVATION OF THE PEACE

- 16-13-401. Recognizance to prevent offense. (Repealed)

PART 5

COLORADO CONTRABAND FORFEITURE ACT

- 16-13-501. Short title.
 16-13-501.5. Legislative declaration.
 16-13-502. Definitions.
 16-13-503. Subject acts.
 16-13-504. Forfeiture of vehicle, fixtures and contents of building, personal property, or contraband article - exceptions.
 16-13-505. Forfeiture proceedings.
 16-13-506. Final order - disposition of property.
 16-13-507. Disposition of contraband article or property.
 16-13-508. Forfeitures.

- 16-13-509. Evidentiary presumption.
 16-13-510. Money placed in account.
 16-13-511. Severability.

PART 6

RECEIPT OF FEDERALLY FORFEITED PROPERTY

- 16-13-601. Receipt of federally forfeited property.

PART 7

REPORTING AND DISPOSITION OF FORFEITED PROPERTY

- 16-13-701. Reporting of forfeited property.
 16-13-702. Disposition of forfeited property.

PART 8

LIFETIME SUPERVISION OF SEX OFFENDERS

- 16-13-801 to
 16-13-812. (Repealed)

PART 9

COMMUNITY NOTIFICATION CONCERNING SEXUALLY VIOLENT PREDATORS

- 16-13-901. Legislative declaration.
 16-13-902. Definitions.
 16-13-903. Sexually violent predator subject to community notification - determination - implementation.
 16-13-904. Sex offender management board - duties.
 16-13-905. Local law enforcement - duties - immunity.
 16-13-906. Division of criminal justice - technical assistance team.

PART 1

SENTENCING OF HABITUAL CRIMINALS

16-13-101 to 16-13-103. (Repealed)

Source: L. 2002: Entire part repealed, p. 1463, § 3, effective October 1.

Editor's note: This article was repealed and reenacted in 1972, and this part 1 was subsequently repealed in 2002. For amendments to this part 1 prior to its repeal in 2002, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. The provisions of this part 1 were relocated to part 8 of article 1.3 of title 18. For the location of specific provisions, see the editor's notes following each section in said part 8 and the comparative tables located in the back of the index.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 2

SENTENCING OF SEX OFFENDERS

16-13-201. Short title. (Repealed)

Source: L. 72: R&RE, p. 255, § 1. C.R.S. 1963: § 39-13-201. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-901.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-201.5. Applicability of part. (Repealed)

Source: L. 98: Entire section added, p. 1288, § 2, effective November 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-902.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-202. Definitions. (Repealed)

Source: L. 72: R&RE, p. 255, § 1. C.R.S. 1963: § 39-13-202. L. 75: (5) R&RE, p. 631, § 2, effective July 1. L. 77: (3) amended, p. 902, § 5, effective August 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-903.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-203. Indeterminate commitment. (Repealed)

Source: L. 72: R&RE, p. 256, § 1. C.R.S. 1963: § 39-13-203. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-904.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-204. Requirements before acceptance of a plea of guilty. (Repealed)

Source: L. 72: R&RE, p. 256, § 1. C.R.S. 1963: § 39-13-204. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-905.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-205. Commencement of proceedings. (Repealed)

Source: L. 72: R&RE, p. 256, § 1. C.R.S. 1963: § 39-13-205. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-906.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-206. Defendant to be advised of rights. (Repealed)

Source: L. 72: R&RE, p. 256, § 1. C.R.S. 1963: § 39-13-206. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-907.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-207. Psychiatric examination and report. (Repealed)

Source: L. 72: R&RE, p. 256, § 1. C.R.S. 1963: § 39-13-207. L. 91: (1)(a) and (1)(b) amended, p. 1142, § 4, effective May 18. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-908.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-208. Report of probation department. (Repealed)

Source: L. 72: R&RE, p. 257, § 1. C.R.S. 1963: § 39-13-208. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-909.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-209. Termination of proceedings. (Repealed)

Source: L. 72: R&RE, p. 257, § 1. C.R.S. 1963: § 39-13-209. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-910.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-210. Evidentiary hearing. (Repealed)

Source: L. 72: R&RE, p. 257, § 1. C.R.S. 1963: § 39-13-210. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-911.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-211. Findings of fact and conclusions of law. (Repealed)

Source: L. 72: R&RE, p. 258, § 1. C.R.S. 1963: § 39-13-211. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-912.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-212. Appeal. (Repealed)

Source: L. 72: R&RE, p. 258, § 1. C.R.S. 1963: § 39-13-212. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-913.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-213. Time allowed on sentence. (Repealed)

Source: L. 72: R&RE, p. 258, § 1. C.R.S. 1963: § 39-13-213. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-914.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-214. Costs. (Repealed)

Source: L. 72: R&RE, p. 258, § 1. C.R.S. 1963: § 39-13-214. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-915.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-215. Diagnostic center as receiving center. (Repealed)

Source: L. 72: R&RE, p. 258, § 1. C.R.S. 1963: § 39-13-215. L. 79: Entire section amended, p. 684, § 17, effective July 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-916.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-13-216. Powers and duties of the board. (1) (a) Within six months after a person is committed pursuant to section 18-1.3-904, C.R.S., and at least once during each twelve months thereafter, the board shall review all reports, records, and information

concerning said person, for the purpose of determining whether said person shall be paroled.

(b) The board shall, in each instance, make a written ruling and shall serve a copy of the ruling upon the said person.

(2) The board is authorized and it is its duty to order the transfer of any person committed pursuant to section 18-1.3-904, C.R.S., if the board deems it to be in the best interests of said person and the public, to any facility under the jurisdiction of the department or to the department of human services subject to the availability of staff and housing.

(3) The board is granted exclusive control over the parole and reparole of all persons committed pursuant to section 18-1.3-904, C.R.S., regardless of the facility in which those persons are confined.

(4) The board is authorized to parole and reparole, and to commit and recommit for violation of parole, any person committed pursuant to section 18-1.3-904, C.R.S.

(5) The board is authorized to issue an absolute release to any person committed pursuant to section 18-1.3-904, C.R.S., if the board deems it in the best interests of that person and the public and that the person, if at large, would not constitute a threat of bodily harm to members of the public.

(6) Except as otherwise provided in this part 2, the board has all the powers conferred and duties imposed upon it with respect to the parole of prisoners generally, in the parole and supervision of persons committed pursuant to section 18-1.3-904, C.R.S.

Source: L. 72: R&RE, p. 259, § 1. C.R.S. 1963: § 39-13-216. L. 80: (2) amended, p. 524, § 1, effective March 25. L. 94: (2) amended, p. 2652, § 128, effective July 1. L. 2002: Entire section amended, p. 1498, § 152, effective October 1.

Cross references: (1) For liability for the costs of the care and treatment of persons transferred to a facility under the jurisdiction of the department of human services pursuant to this section, see § 27-92-101.

(2) For the legislative declaration contained in the 1994 act amending subsection (2), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 16-13-216 is similar to repealed § 39-19-6, CRS 53, a relevant case construing that provision has been included in the annotations to this section.

This section does not confer judicial or sentencing powers on board. Section 16-13-203 providing for commitment to a state institution of not less than one day nor more than life, and subsection (2) of this section authorizing the parole board to transfer such persons after sentence to other institutions to effectuate purposes of act, do not confer judicial powers on the parole board or involve the sentencing authority of the court. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

Purpose of section. The sex offenders act is concerned with the more efficient control, treatment, and rehabilitation of persons convicted of sex offenses. Control of the person must be assured before treatment and rehabilitation is undertaken; this may require incarceration in the penitentiary. *Trueblood v. Tinsley*, 148 Colo.

503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 507, 8 L.Ed.2d 507 (1962).

It empowers the parole board to transfer persons sentenced under this act among institutions when deemed appropriate to effectuate purposes of act. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

Habeas corpus is not the remedy to rectify failure of the parole board to perform its duty to transfer prisoners under this section. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

Parole is a mere matter of privilege, grace, or favor and a prisoner is not entitled thereto as a matter of right. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

If a parole board determines an inmate is in need of further treatment, it can condition parole upon participation in a sex offender treatment program. *Christensen v. People*, 869 P.2d 1256 (Colo. 1994).

Once a sex offender is sentenced to an indeterminate term under the sex offenders act, the authority to make parole or release decisions rests with the parole board. Because sex offender's habeas corpus petition did not set forth facts which, if proven, would entitle him to immediate release and he alleged no facts showing that the parole board's denial of parole or release was unconstitutional, defendant's petition must be dismissed. *Christensen v. People*, 869 P.2d 1256 (Colo. 1994).

The provisions of subsection (1) granting yearly parole consideration for persons sentenced to an indeterminate term pursuant to § 16-13-203 conflict with the provisions of § 17-2-201 (4)(a), which allow the parole board to consider parole for sex offenders every three years. Since § 17-2-201 (4)(a) is the later enacted statute, the provisions of that section prevail. A person sentenced to an indeterminate sentence pursuant to § 16-13-203 is entitled to parole consideration only every three years. *White v. Van Pelt*, 55 P.3d 823 (Colo. App. 2002).

Review satisfies procedural due process. The mandated review by the board of parole within six months after the individual is committed and every year thereafter satisfies continuing procedural due process requirements. *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Kibel*, 701 P.2d 37 (Colo. 1985).

An order of mandamus to require the parole board to place the defendant in a facility where he had access to sex offender treatment was properly denied. This section gives the parole board discretion as to whether to order a transfer based upon the best interests of the inmate and public. Since an order of mandamus may only issue where the plaintiff establishes both a clear right to the relief sought and a clear duty on the part of the defendant to act, the court will not issue an order for relief that lies within the statutory discretion of the parole board. *White v. Van Pelt*, 55 P.3d 823 (Colo. App. 2002).

PART 3

ABATEMENT OF PUBLIC NUISANCE

Law reviews: For article, "Using Local Police Powers to Protect the Environment", see 24 Colo. Law. 1063 (1995).

16-13-301. Definitions. As used in this part 3, unless the context otherwise requires:

(1) "Action to abate a public nuisance" means any action authorized by this part 3 to restrain, remove, terminate, prevent, abate, or perpetually enjoin a public nuisance.

(2) "Building" means a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, including any house, office building, store, warehouse, or structure of any kind, whether or not such building is permanently affixed to the ground upon which it is situate, and any trailer, semitrailer, trailer coach, mobile home, or other vehicle designed or used for occupancy by persons for any purpose.

(2.1) "Conviction" means a verdict of guilty by a judge or jury or a plea of guilty or nolo contendere that is accepted by the court or adjudication for an offense that would constitute a criminal offense if committed by an adult.

(2.2) "Drive-by crime" means a first degree assault as defined in section 18-3-202, C.R.S., second degree assault as defined in section 18-3-203, C.R.S., attempted first degree or second degree assault, felony menacing as defined in section 18-3-206, C.R.S., or illegal discharge of a firearm as defined in section 18-12-107.5, C.R.S., any of which is committed while utilizing a vehicle for means of concealment or transportation.

(2.3) "Instrumental" means a substantial connection exists between the property and the public nuisance act.

(2.4) "Proceeds traceable" or "traceable proceeds" means all property, real and personal, corporeal and incorporeal, which is proceeds attributable to, derived from, or realized through, directly or indirectly, a public nuisance act, whether proved by direct, circumstantial, or documentary evidence. There shall be no requirement of showing a trail of documentary evidence to trace proceeds provided that the standard of proof by clear and convincing evidence is met.

(2.5) "Public nuisance act" means any of the crimes, offenses, or violations set forth in section 16-13-303 (1) (a) to (1) (n), regardless of the location where the act occurred.

(2.6) "Real property" means all lands and franchises and interests in land located within this state, including water rights, mineral rights, oil and gas rights, space rights,

condominium rights, and air rights, and any and all other things usually included within said term. "Real property" includes any and all interests in such property less than full title, such as easements, incorporeal hereditaments, and every estate, interest, or right, legal or equitable.

(2.7) "Seizing agency" means any agency that is charged with the enforcement of the laws of this state, of any other state, or of the United States and that has participated in a seizure or has been substantially involved in effecting a forfeiture through the development of evidence underlying the claim for forfeiture or through legal representation pursuant to this part 3. The department of corrections, the division of parks and wildlife in the department of natural resources, and a multijurisdictional law enforcement task force shall be deemed to be included under this definition.

(3) "Vehicle" means any device of conveyance capable of moving itself or of being moved from place to place upon wheels or track or by water or air, whether or not intended for the transport of persons or property, and includes any place therein adapted for overnight accommodation of persons or animals or for the carrying on of business.

Source: L. 72: R&RE, p. 259, § 1. C.R.S. 1963: § 39-13-301. L. 73: p. 236, § 12. L. 75: (2) amended, p. 1466, § 7, effective July 18. L. 81: (2) amended and (3) added, p. 954, § 1, effective July 1. L. 83: (2.5) added, p. 683, § 1, effective July 1. L. 87: (2.3) and (2.7) added, p. 630, § 1, effective July 1. L. 89: (2.2) added, p. 875, § 7, effective June 5. L. 92: (2.3) amended, p. 2171, § 19, effective June 2. L. 93: (2.2) amended, p. 969, § 4, effective July 1. L. 95: (2.7) amended, p. 872, § 4, effective May 24. L. 96: (2.7) amended, p. 375, § 1, effective April 17. L. 2000: (2.3) amended, p. 1108, § 5, effective August 2. L. 2002: (2.1) and (2.4) added and (2.3) and (2.7) amended, p. 916, § 1, effective July 1. L. 2003: (2.4) and (2.5) amended and (2.6) added, p. 903, § 14, effective July 1.

Editor's note: Subsection (2.3) was amended by section 1 of chapter 244, Session Laws of Colorado 2002, resulting in a new definition being added as subsection (2.3). The former subsection (2.3) was relocated by the same act to subsection (2.4).

ANNOTATION

To the extent § 42-6-108 and this article are inconsistent in the context of civil forfeiture proceedings, the specific provisions contained in the forfeiture statute prevail and the timing of the delivery of the certificate of title

was not dispositive. *People v. One 1968 Chevrolet 2-Door*, 895 P.2d 1177 (Colo. App. 1995).

Applied in *Barker v. District Court*, 199 Colo. 416, 609 P.2d 628 (1980); *People v. Taube*, 843 P.2d 79 (Colo. App. 1992).

16-13-302. Public nuisances - policy. (1) It is the policy of the general assembly that every public nuisance shall be restrained, prevented, abated, and perpetually enjoined. It is the duty of the district attorney in each judicial district of this state to bring and maintain an action, pursuant to the provisions of this part 3, to restrain, prevent, abate, and perpetually enjoin any such public nuisance and to seek the forfeiture of property as provided in this part 3. The general assembly intends that proceedings under this part 3 be remedial and equitable in nature. Nothing contained in this part 3 shall be construed as an amendment or repeal of any of the criminal laws of this state, but the provisions of this part 3, insofar as they relate to those laws, shall be considered a cumulative right of the people in the enforcement of such laws. The provisions of this part 3 shall not be construed to limit or preempt the powers of any court or political subdivision to abate or control nuisances.

(2) It is also the policy of the general assembly that asset forfeiture pursuant to this part 3 shall be carried out pursuant to the following:

- (a) Generation of revenue shall not be the primary purpose of asset forfeiture.
- (b) No prosecutor's or law enforcement officer's employment or level of salary shall depend upon the frequency of seizures or forfeitures which such person achieves.
- (c) All seizures of real property pursuant to this part 3 shall be made pursuant to a temporary restraining order or injunction based upon a judicial finding of probable cause.

(d) Each seizing agency shall have policies and procedures for the expeditious release of seized property which is not subject to forfeiture pursuant to this part 3, when such release is appropriate.

(e) Each seizing agency retaining forfeited property for official law enforcement use shall ensure that the property is subject to controls consistent with controls which are applicable to property acquired through the normal appropriations process.

(f) Each seizing agency which receives forfeiture proceeds shall conform with reporting, audit, and disposition procedures enumerated in this article.

(g) Each seizing agency shall prohibit its employees from purchasing forfeited property.

Source: L. 72: R&RE, p. 259, § 1. C.R.S. 1963: § 39-13-302. L. 87: Entire section amended, p. 630, § 2, effective July 1. L. 92: Entire section amended, p. 446, § 1, effective July 1.

Cross references: For the authority of counties and municipalities to control public nuisances, see § 31-15-401.

ANNOTATION

Law reviews. For article, "Civil Remedies for Criminal Wrongs: The Colorado Public Nuisance Act", see 20 Colo. Law. 2061 (1991).

The purpose of the Colorado public nuisance statute is to restrain, prevent, abate, and perpetually enjoin every public nuisance. *People v. Garner*, 732 P.2d 1194 (Colo. 1987).

The general assembly has declared that forfeiture proceedings of public nuisances are remedial and equitable in nature and the trial court properly determined that intervenor acquired an equitable interest in the vehicle based upon his payment of \$500. *People v. One 1968 Chevrolet 2-Door*, 895 P.2d 1177 (Colo. App. 1995).

Purpose is the suppression of the unlawful nuisance. Since the purpose of this part is not the infliction of punishment against the offender, that being left to the criminal law, but the suppression of the unlawful keeping, the claim that keeping a bawdy house is a criminal offense under the statute makes no difference and there

can be no successful assault upon this part because it provides an action to enjoin the violation of a criminal statute. *Gregg v. People*, 65 Colo. 390, 176 P. 483 (1918) (decided under repealed laws antecedent to CSA, C 1, § 3).

The principle upon which forfeiture statutes are based is that the property itself is the offender and may therefore be subject to forfeiture even though the owners of the property might be innocent of any wrongdoing. *People v. Garner*, 732 P.2d 1194 (Colo. 1987).

Legislative intent was to divest owner of all legal title as of the date of seizure, since otherwise the owner could alter the ownership rights prior to a final order under § 16-13-309. *United States v. Wilkinson*, 686 P.2d 790 (Colo. 1984), *aff'd*, 628 F. Supp. 29 (D. Colo. 1985).

But only if there is a subsequent judgment of forfeiture. *Eggleston v. Colo.*, 636 F. Supp. 1312 (D. Colo. 1986).

The principle of laches contravenes this section. *People v. Perez*, 192 Colo. 562, 561 P.2d 7 (1977).

16-13-303. Class 1 public nuisance. (1) Every building or part of a building including the ground upon which it is situate and all fixtures and contents thereof, every vehicle, and any real property shall be deemed a class 1 public nuisance when:

(a) Used as a public or private place of prostitution or used as a place where the commission of soliciting for prostitution, as defined in section 18-7-202, C.R.S.; pandering, as defined in section 18-7-203, C.R.S.; keeping a place of prostitution, as defined in section 18-7-204, C.R.S.; pimping, as defined in section 18-7-206, C.R.S.; trafficking in adults, as defined in section 18-3-501, C.R.S.; trafficking in children, as defined in section 18-3-502, C.R.S.; or coercion of involuntary servitude, as defined in section 18-3-503, C.R.S., occurs;

(b) (I) Used, or designed and intended to be used, as gambling premises, as defined in section 18-10-102 (5), C.R.S., or as a place where any gambling device or gambling record, as such terms are defined in section 18-10-102 (3) and (7), C.R.S., is kept;

(II) Used for transporting gambling proceeds, records, or devices as defined in section 18-10-102 (3), (6), and (7), C.R.S.;

(c) (I) Used for unlawful manufacture, cultivation, growth, production, processing, sale, or distribution or for storage or possession of any unlawful manufacture, sale, or

distribution of any controlled substance, as defined in section 18-18-102 (5), C.R.S., or any other drug the possession of which is an offense under the laws of this state, or any imitation controlled substance, as defined in section 18-18-420 (3), C.R.S.;

(II) Used for unlawful possession of any controlled substance, as defined in section 18-18-102 (5), C.R.S., except for possession of less than sixteen ounces of marijuana;

(d) Used for a purpose declared by a statute of this state to be a class 1 public nuisance;

(e) (I) Used as a place where the commission of felony theft by receiving, as specified in section 18-4-410, C.R.S., occurs or as a place where misdemeanor theft by receiving, as specified in said section, repeatedly occurs;

(II) Used for transporting property which is the subject of felony theft by receiving, as specified in section 18-4-410, C.R.S., or used for repeatedly transporting property which is the subject of misdemeanor theft by receiving, as specified in said section;

(f) Used for the unlawful manufacture, sale, or distribution of drug paraphernalia, as defined in section 18-18-426, C.R.S.;

(g) Used for prostitution of a child, as defined in section 18-7-401, C.R.S., or used as a place where the commission of soliciting for child prostitution, as defined in section 18-7-402, C.R.S., pandering of a child, as defined in section 18-7-403, C.R.S., keeping a place of child prostitution, as defined in section 18-7-404, C.R.S., pimping of a child, as defined in section 18-7-405, C.R.S., or inducement of child prostitution, as defined in section 18-7-405.5, C.R.S., occurs;

(h) Used for the sexual exploitation of children pursuant to part 4 of article 6 of title 18, C.R.S.;

(h.5) Repealed.

(h.6) Used in violation of section 43-10-114, C.R.S.;

(i) Used in the commission of any felony not otherwise included in this section;

(j) Used in the commission of felony vehicular eluding pursuant to section 18-9-116.5, C.R.S.;

(k) Used in the commission of hit and run with serious bodily injury or death pursuant to section 42-4-1601 (1), (2) (b), and (2) (c), C.R.S.;

(l) Used in committing a drive-by crime, as defined in section 16-13-301 (2.2);

(m) (I) Used, or designed and intended to be used, as gaming premises, or as a place where any gaming device, as such term is defined in section 12-47.1-103 (10), C.R.S., or gaming record is kept, in violation of article 47.1 of title 12, C.R.S., or in violation of article 20 of title 18, C.R.S.;

(II) Used for transporting adjusted gross proceeds or gaming devices as such terms are defined in section 12-47.1-103 (1) and (10), C.R.S., or records in violation of the provisions of article 47.1 of title 12, C.R.S., or in violation of article 20 of title 18, C.R.S.;

(III) Used for the unlawful manufacture, production, sale, distribution, or for storage or possession for any unlawful manufacture, sale, or distribution of any gaming device, as defined in section 12-47.1-103 (10), C.R.S., or any other gaming device, equipment, key, electronic or mechanical device, slot machine, bogus chips, counterfeit chips, cards, coins, gaming billets, cheating device, thieving device, tools, drills, or wires used in violation of article 47.1 of title 12, C.R.S., or in violation of article 20 of title 18, C.R.S.; or

(n) Used in committing, attempting to commit, or conspiring to commit against an elderly person any felony set forth in part 4 of article 4 of title 18, C.R.S., in part 1, 2, 3, or 5 of article 5 of title 18, C.R.S., article 5.5 of title 18, C.R.S., or section 11-51-603, C.R.S. For purposes of this paragraph (n), an "elderly person" means a person sixty years of age or older.

(1.5) All equipment, mechanical systems, or machinery, or parts thereof, shall be deemed to be a class 1 public nuisance at the location of the automatic dialing system when used for soliciting with an automatic dialing system containing a prerecorded message in violation of section 18-9-311 (1), C.R.S.

(2) All fixtures and contents of any building, structure, vehicle, or real property which is a class 1 public nuisance under subsection (1) of this section and all property which is a class 1 public nuisance under subsection (1.5) of this section are subject to seizure, confiscation, and forfeiture as provided in this part 3. In addition, the personal property of every kind and description, including currency and other negotiable instruments and

vehicles, used in conducting, maintaining, aiding, or abetting any class 1 public nuisance is subject to seizure, confiscation, and forfeiture, as provided in this part 3.

(3) The following shall be deemed class 1 public nuisances and be subject to forfeiture and distributed as provided in section 16-13-311 (3), and no property rights shall exist in them:

(a) All currency, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any public nuisance act; or

(b) All proceeds traceable to any public nuisance act; or

(c) All currency, negotiable instruments, and securities used or intended to be used to facilitate any public nuisance act; or

(d) All equipment of any kind, including but not limited to computers and any type of computer hardware, software, or other equipment, used in committing sexual exploitation of a child, as described in section 18-6-403, C.R.S., or computer crime, as described in section 18-5.5-102, C.R.S.

(4) Whenever it is established, in an action brought pursuant to this part 3, that a person has received proceeds derived from any public nuisance act, the court shall award to the plaintiff a money judgment of forfeiture for the amount of said proceeds shown to have been derived from any public nuisance act or for an amount shown to have been derived from a series of similar acts which fall within a pattern of public nuisance acts. The person subjected to such a money judgment may claim a setoff equal to the fair market value of the property forfeited if he shows that said property is traceable to the public nuisance act upon which the money judgment is predicated.

(5) (a) In any action seeking forfeiture of property pursuant to this part 3, any person contesting the forfeiture shall establish by a preponderance of the evidence such person's standing as a true owner of the property or a true owner with an interest in the property.

(b) To establish standing, the person shall first prove that the person had a recorded or registered interest in the property, or a bona fide marital interest in the property, prior to title-vesting in the state, if the property is of the type for which interests can be, and customarily are, recorded or registered in a public office.

(c) The person shall also prove that he or she is a true owner of the property or a true owner of an interest in the property. The factors to be considered by the court in determining whether a person is a true owner shall include, but need not be limited to:

(I) Whether the person had the primary use, benefit, possession, or control of the property;

(II) How much of the consideration for the purchase or ownership of the property was furnished by the person, and whether the person furnished reasonably equivalent value in exchange for the property or interest;

(III) Whether the transaction by which the person acquired the property or interest was secret, concealed, undisclosed, hurried, or not in the usual mode of doing business;

(IV) Whether the transaction by which the person acquired the property or interest was conducted through the use of a shell, alter ego, nominee, or fictitious party;

(V) Whether the person is a relative, a co-conspirator, complicitor, or an accessory in the public nuisance act or acts or other criminal activity, a business associate in a legal or illegal business, one who maintains a special or close relationship with, or an insider with respect to the perpetrator of the alleged public nuisance act or acts;

(VI) Whether the person is silent or fails to call parties to testify or to produce available evidence explaining the acquisition of the property or factors which may be badges of fraud or deceit, or show lack of true ownership;

(VII) Whether the timing of the transaction by which the person acquired the property was during the pendency or threat of litigation, or during any time when the person knew, should have known, or had notice of the public nuisance act or acts or the threat of a forfeiture action;

(VIII) Whether the placing of the title in the name of, or the putative ownership in, or transfer to, the person was done with intent to delay, hinder, or avoid a forfeiture, or for some purpose other than ownership of the property;

(IX) Whether the perpetrator of the alleged public nuisance act or acts has absconded or is a fugitive from justice and the conveyance occurred after the flight, or before the flight, in any of the circumstances set forth in subparagraph (III) of this paragraph (c);

(X) Whether the subject matter property is of a kind in which property or ownership rights can legally exist;

(XI) Any other badge or indicia of fraud under article 8 of title 38, C.R.S., or the general law of fraudulent transfers or conveyances.

(d) The court shall consider the totality of the circumstances in determining whether a person is a true owner. A person contesting the forfeiture does not necessarily have to show that all of the factors enumerated in paragraph (c) of this subsection (5) support the claim of true ownership, nor does the person necessarily establish true ownership by showing the absence of fraudulent intent or badges of fraud.

(e) No private sale or conveyance of a used motor vehicle shall be deemed to make a party eligible to assert standing to contest the forfeiture thereof, unless the title to the motor vehicle, with transfer duly executed to the party, has been filed with the division of motor vehicles in the department of revenue prior to the physical seizure of the vehicle and the recording of a notice of seizure, or the party attempting to assert standing has exclusive possession of the vehicle at the time of seizure. A party eligible to assert standing under this paragraph (e) must nevertheless establish that the party is a true owner of the vehicle or has an interest therein pursuant to paragraph (c) of this subsection (5).

(f) Unless the standing of a particular party is conceded in the complaint initiating the public nuisance action, a party must assert standing in the answer and fully describe the party's interest in the property which is the subject matter of the action, and submit a verified statement, supported by any available documentation, of the party's ownership of or interest in the property.

(5.1), (a) In any action to forfeit property pursuant to this part 3, the plaintiff, in addition to any other matter which must be proven in the plaintiff's case in chief, shall prove by clear and convincing evidence that possession of the property is unlawful or that the owner of the property was a party to the creation of the public nuisance. The plaintiff shall also prove by clear and convincing evidence that the property was instrumental in the commission or facilitation of a crime creating a public nuisance or the property constitutes traceable proceeds of the crime or related criminal activity.

(a.5) (I) The defendant in an action brought pursuant to this part 3 may petition the court to determine whether a forfeiture was constitutionally excessive. Upon the conclusion of a trial resulting in a judgment of forfeiture in an action brought pursuant to this part 3, if the evidence presented raises an issue of proportionality under this paragraph (a.5), the defendant may petition the court to set a hearing, or the court may on its own motion set a hearing, to determine whether a forfeiture was constitutionally excessive. This determination shall be made prior to any sale or distribution of forfeited property.

(II) In making this determination, the court shall compare the forfeiture to the gravity of the public nuisance act giving rise to the forfeiture and related criminal activity.

(III) The defendant shall have the burden of establishing by a preponderance of the evidence that the forfeiture is grossly disproportional.

(IV) If the court finds that the forfeiture is grossly disproportional to the public nuisance act and related criminal activity, it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the excessive fines clause of the eighth amendment of the United States constitution or article II, section 20, of the Colorado constitution.

(V) and (VI) (Deleted by amendment, L. 2003, p. 889, § 1, effective July 1, 2003.)

(b) As used in paragraph (a) of this subsection (5.1), an owner was a "party to the creation of the public nuisance" if it is established that:

(I) The owner was involved in the public nuisance act; or

(II) (A) The owner knew of the public nuisance act or had notice of the acts creating the public nuisance or prior similar conduct.

(B) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (II), if the plaintiff proves by clear and convincing evidence the owner knew or had notice of the public nuisance, the owner must prove by a preponderance of the evidence that the owner

took reasonable steps to prohibit or abate the unlawful use of the property for the court to find the owner was not a party to the creation of the public nuisance.

(5.2) (a) With respect to a partial or whole ownership interest in existence at the time the conduct constituting a public nuisance took place, "innocent owner" means any owner who:

(I) Did not have actual knowledge of the conduct constituting a public nuisance, or notice of an act or circumstance creating the public nuisance or prior similar conduct, notice being satisfied by, but not limited to, sending notice of an act or circumstance creating the public nuisance by certified mail; or

(II) Upon learning of the conduct constituting a public nuisance, took reasonable action to prohibit such use of the property. An owner may demonstrate that he or she took reasonable action to prohibit the conduct constituting a public nuisance if the owner:

(A) Timely revoked or attempted to revoke permission for the persons engaging in such conduct to use the property; or

(B) Took reasonable action to discourage or prevent the use of the property in conduct constituting a public nuisance.

(b) With respect to a partial or whole ownership interest acquired after the conduct constituting a public nuisance has occurred, "innocent owner" means a person who, at the time he or she acquired the interest in the property, had no knowledge or notice that the illegal conduct subjecting the property to seizure had occurred or that the property had been seized for forfeiture, and:

(I) Acquired an interest in the property in a bona fide transaction for value; or

(II) Acquired an interest in the property through probate or inheritance; or

(III) Acquired an interest in the property through dissolution of marriage or by operation of law.

(c) An innocent owner's interest in property shall not be forfeited under any provision of state law. An innocent owner has the burden of proving by a preponderance of the evidence that he or she has an ownership interest in the subject property. Otherwise, the burden of proof under this subsection (5.2) shall be as provided in subsection (5.1) of this section.

(d) A person who is convicted of a criminal offense arising from the same activity giving rise to the forfeiture proceedings in accordance with section 16-13-307 (1.5) shall not be eligible to assert an innocent owner defense.

(6) Whenever clear and convincing evidence adduced in an action pursuant to this part 3 shows a substantial connection between currency and the acts specified in subparagraph (I) of paragraph (c) of subsection (1) of this section, a rebuttable presumption shall arise that said currency is property subject to forfeiture. A substantial connection exists if:

(a) Currency in the aggregate amount of one thousand dollars or more was seized at or close to the time that evidence of the acts specified in subparagraph (I) of paragraph (c) of subsection (1) of this section was developed or recovered; and

(b) (I) Said amount of currency was seized on the same premises or in the same vehicle where evidence of said acts was developed or recovered; or

(II) Said amount of currency was seized from the possession or control of a person engaged in said acts; or

(III) Traces of a controlled substance were discovered on the currency or an animal trained in the olfactory detection of controlled substances indicated the presence of the odor of a controlled substance on the currency as testified to by an expert witness.

(6.5) Notwithstanding any other provision of this part 3 to the contrary, the plaintiff shall have the burden of proving, by clear and convincing evidence, only the facts that give rise to the presumption that currency is property subject to forfeiture pursuant to subsection (6) of this section. However, when a preponderance of credible evidence is adduced to rebut a presumption that has arisen pursuant to subsection (6) of this section, the burden of proof shall revert to the plaintiff to prove, by clear and convincing evidence, the elements of the plaintiff's case with respect to the currency.

(7) Currency seized pursuant to this part 3 may be placed in an interest-bearing account during the proceedings pursuant to this part 3 if so ordered by the court upon the motion of any party. Photocopies of portions of the bills shall serve as evidence at all hearings. The

account and all interest accrued shall be forfeited or returned to the prevailing party in lieu of the currency.

(8) The provisions of subsection (6) of this section shall not be construed so as to limit the introduction of any other competent evidence offered to prove that seized currency is a public nuisance.

Source: **L. 72:** R&RE, p. 260, § 1. **C.R.S. 1963:** § 39-13-303. **L. 77:** (1)(b), (1)(c), (1)(d), and (2) amended and (1)(e) added, p. 889, § 1, effective July 1. **L. 80:** (1)(f) added, p. 472, § 2, effective July 1. **L. 81:** IP(1), (1)(a), (1)(b), (1)(d), (1)(e), (1)(f), and (2) amended and (1)(g) to (1)(i) and (3) added, pp. 954, 956, §§ 2, 3, effective July 1; (1)(c) amended, p. 737, § 17, effective July 1. **L. 83:** IP(3) amended, p. 686, § 1, effective April 21; IP(1), (1)(c), and (2) amended, p. 683, § 2, effective July 1; (1)(c) amended, p. 704, § 2, effective July 1. **L. 87:** (1)(b), (1)(c), (1)(e), (1)(h), (2), and (3)(a) to (3)(c) amended and (1)(j), (1)(k), and (4) to (8) added, p. 631, §§ 3, 4, effective July 1. **L. 88:** (1)(h.5) added, p. 1354, § 1, effective July 1; (1.5) added and (2) amended, p. 346, § 11, effective July 1; (1)(h.6) added, p. 1090, § 2, effective January 1, 1989. **L. 89:** (1)(h.5) repealed, p. 1645, § 18, effective June 5; (1)(l) added, p. 875, § 8, effective June 5. **L. 91:** (1)(m) added, p. 1581, § 5, effective June 4; (1)(h.6) amended, p. 1057, § 12, effective July 1. **L. 92:** (1)(m) amended, p. 2171, § 20, effective June 2; (1)(c)(I) and (1)(f) amended, p. 391, § 16, effective July 1; (5) amended and (5.1) and (5.2) added, p. 447, § 2, effective July 1. **L. 94:** (1)(k) amended, p. 2551, § 38, effective January 1, 1995. **L. 95:** (1)(m)(I) and (1)(m)(II) amended, p. 1110, § 62, effective May 31; (1)(c)(II) amended, p. 463, § 5, effective July 1. **L. 99:** (3)(d) added, p. 799, § 18, effective July 1. **L. 2000:** (1)(n) added, p. 1108, § 6, effective August 2. **L. 2002:** (5.1) and (5.2) amended, p. 917, § 2, effective July 1. **L. 2003:** (5), (5.1)(a), (5.1)(a.5), (5.1)(b)(II), (5.2)(a)(I), IP(5.2)(b), (5.2)(c), and IP(6) amended and (5.2)(d) and (6.5) added, pp. 898, 889, 902, 896, §§ 10, 1, 12, 6, effective July 1. **L. 2010:** (1)(c)(II) amended, (HB 10-1352), ch. 259, p. 1172, § 14, effective August 11. **L. 2012:** (1)(a) amended, (HB 12-1151), ch. 174, p. 621, § 3, effective August 8.

Editor's note: Subsections (5.1)(b)(II)(A) and (5.1)(b)(II)(B) were numbered as (5.1)(b)(II) and (5.1)(b)(III), respectively, but were renumbered on revision in 2010 to conform to statutory format.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

Two-pronged test to determine whether a statutory forfeiture proceeding is essentially criminal in character for purposes of double jeopardy clause: (1) Whether general assembly expressly or impliedly indicated a preference for criminal or civil categorization; and (2) in the event the general assembly did indicate an intent to treat a forfeiture proceeding as civil, whether the statutory scheme is so punitive either in purpose or effect as to negate the legislative intention. *People v. Milton*, 732 P.2d 1199 (Colo. 1987); *People v. Ferrel*, 929 P.2d 65 (Colo. App. 1996); *People v. Coolidge*, 953 P.2d 949 (Colo. App. 1997).

Forfeiture action pursuant to Colorado public nuisance statute is essentially civil in nature, does not violate double jeopardy provisions of the constitution, and is not subject to constitutional or statutory speedy trial provisions applicable to criminal prosecutions. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

Based upon the civil nature of civil forfeiture proceeding, defendant did not have a constitutional right to counsel and ineffective assistance of counsel is not a basis for overturning the judgment of forfeiture. *People v. Cobb*, 944 P.2d 574 (Colo. App. 1996).

Forfeiture action not dependent upon conviction in underlying criminal case. *People ex rel. Sandstrom v. District Ct.*, 884 P.2d 707 (Colo. 1994).

Function of forfeiture action is separate from the punitive function of a criminal conviction. *People ex rel. Sandstrom v. District Ct.*, 884 P.2d 707 (Colo. 1994).

The fact that statute defines a public nuisance to include every vehicle used in the commission of any felony not otherwise included in the section did not transform forfeiture action into a criminal proceeding subject to double jeopardy provisions. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

Forfeiture action initiated under this section did not violate the forfeiture of estate provision of section 9 of article II of the Colorado

constitution. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

Action for abatement of class 1 public nuisance is equitable in nature, and while the court in the exercise of its equity powers may not act contrary to the statutory mandate, it does retain a considerable degree of discretion and flexibility in fashioning a decree which achieves a fair result, so that in forfeiture situation, the court retains the authority to protect the interest of an innocent party to the extent practicable and within the statutory dispositional alternatives. *People v. Garner*, 732 P.2d 1194 (Colo. 1987).

The general assembly has declared that forfeiture proceedings of public nuisances are remedial and equitable in nature and the trial court properly determined that intervenor acquired an equitable interest in the vehicle based upon his payment of \$500. *People v. One 1968 Chevrolet 2-Door*, 895 P.2d 1177 (Colo. App. 1995).

Trial court's determination that party contesting the forfeiture was true owner of automobile was supported by evidence because in its analysis of the totality of the circumstances, court considered intervenor's equitable interest, his good faith purchase for value without notice of the forfeiture, and the undue hardship laced on intervenor if the vehicle were forfeited. *People v. One 1968 Chevrolet 2-Door*, 895 P.2d 1177 (Colo. App. 1995).

Reasonable notice of conduct within section's scope. This section makes reasonably clear to those intended to be affected what conduct is within its scope. *People v. Perez*, 192 Colo. 562, 561 P.2d 7 (1977).

Property seized pursuant to this section is forfeited at the time of seizure, not upon entry of a final order. *United States v. Wilkinson*, 686 P.2d 790 (Colo. 1984), *aff'd*, 628 F. Supp. 29 (D. Colo. 1985).

But only if there is a subsequent judgment of forfeiture. *Eggleston v. Colo.*, 636 F. Supp. 1312 (D. Colo. 1986).

Subsection (1)(c) is not unconstitutionally vague. The language is specific, persons of common intelligence have no difficulty understanding the term "used" and in comprehending the definition of "controlled substance", and the language is sufficiently plain to give defendant and others reasonable notice of the kind of conduct prohibited by its terms. *People v. One 1967 Pontiac (GTO)*, 678 P.2d 1016 (Colo. 1984).

This section does not require any number of incidents of prostitution before a public nuisance may be found. *People v. Perez*, 192 Colo. 562, 561 P.2d 7 (1977).

Subsection (3) permits classification of a vehicle as a class one public nuisance on the basis of a single sale of a controlled substance which transpires within a vehicle. *People v. One*

1967 Pontiac (GTO), 678 P.2d 1016 (Colo. 1984).

No requirement of "close proximity" standard for forfeiture of contents of building declared a public nuisance. Since forfeiture statute is a civil statute, once the people make a *prima facie* case that contents of a house were used in criminal activity, burden shifts to the owner of the property to show why it should not be seized. *People v. Lot 23*, 735 P.2d 184 (Colo. 1987).

The use of the term "traceable" in subsection (3)(b) reveals legislative intent to require that a direct connection be established between the alleged proceeds and the unlawful activity. *People v. Cerrone*, 780 P.2d 562 (Colo. App. 1989), *cert. denied*, 785 P.2d 917 (Colo. 1989).

The word "control" in subsection (6)(b)(II) encompasses any currency that is legally the property of the defendant, as well as any currency that the defendant has the authority or the power to manage or direct, even if such currency is not in the defendant's actual physical possession when it is seized. Thus, it is the general assembly's intention that any currency seized from the control of a defendant who engaged in a drug-related public nuisance is presumptively forfeitable. *People v. Thirty-Three Thousand Two Hundred and Twelve Dollars (\$33,212.00) in U.S. Currency*, 83 P.3d 1206 (Colo. App. 2003).

The inclusion of subsection (1)(i) is a clear indication that the general assembly did not intend for the enumeration of specific felonies in the statute to be exhaustive. Legislative history indicates that the general assembly did not intend to override the residual effect of subsection (1)(i) and omit felony theft from the statute's coverage. *People v. One 1988 Mazda 323*, 857 P.2d 569 (Colo. App. 1993).

Storage for purposes of statute denotes that an item is left at a location for some period of time. It is not synonymous with possession. Generally the term indicates duration and not a transient situation. *People v. One 1967 Ford Mustang*, 781 P.2d 186 (Colo. App. 1989).

Vehicle used in the commission of a robbery is a class 1 public nuisance and the entire vehicle is subject to forfeiture, not just the contents of the vehicle. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

Motor vehicle used to transport stolen items home was not subject to forfeiture. The stipulated facts and evidence presented were inadequate to prove that the motor vehicle was sufficiently connected to the thefts to allow forfeiture. *People v. One 1988 Mazda 323*, 857 P.2d 569 (Colo. App. 1993).

This section requires the forfeiture of a vehicle which has been determined to be a class 1 public nuisance when there is at least one owner of the vehicle who participated or acqui-

esced in the prohibited use which led to the vehicle being declared a public nuisance, notwithstanding the fact that a co-owner had no knowledge of or a role in the creation of the nuisance. *People v. Garner*, 732 P.2d 1194 (Colo. 1987).

Evidence showed only that defendant drove a vehicle to a location where marijuana was cultivated, which would not compel every reasonable person to draw the inference that the vehicle was used in the manufacture, cultivation, growth, production, or processing of marijuana. *People v. Wilson*, 826 P.2d 404 (Colo. App. 1992).

Forfeiture is proper even though the vehicle was not used as a place where illegal activities were conducted. This section requires only that the vehicle was used to aid the illegal activity. *People v. 1979 Volkswagen*, 773 P.2d 619 (Colo. App. 1989).

Summary judgment ordering forfeiture of real property, its contents, and currency was proper where motion was supported by affidavits describing a history of sales and use of crack cocaine on the property by the defendant and her tenants, where the defendant admitted to making sales of crack cocaine on one of the parcels of property, and where repeated illegal drug use and sales took place on the property. *People v. Cobb*, 944 P.2d 574 (Colo. App. 1996).

This section mitigates some of the harshness inherent in the principle of forfeiture by exempting property from forfeiture if the court finds that the possession of the property is not unlawful and the owner was not a party to the creation of a nuisance and would suffer undue hardship by the sale, confiscation, or destruction of the property. *People v. Garner*, 732 P.2d 1194 (Colo. 1987).

There was no undue hardship by the confiscation and sale of the fixtures and contents of the premises, which were being used for prostitution, where appellant knew of and profited

from his deliberate illegal activity. *People v. Perez*, 192 Colo. 562, 561 P.2d 7 (1977).

Burden of proof in forfeiture action under Colorado public nuisance statute rests on the state and must be proven by a preponderance of the evidence. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

The defendant need not be charged under the precise section defining solicitation of prostitution in order for the provisions of the forfeiture section to apply. *People v. 1979 Volkswagen*, 773 P.2d 619 (Colo. App. 1989).

Ample evidence in record to support finding that business "was continuously being used as a place of prostitution". *People v. Perez*, 192 Colo. 562, 561 P.2d 7 (1977).

Former statute providing for abatement of houses of prostitution held valid. *Mongone v. People*, 84 Colo. 516, 271 P. 617 (1928) (decided under repealed laws antecedent to CSA, C 1, § 1).

Statute as basis for jurisdiction. See *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

State claim to acquire currency used in a drug transaction may be pursued under either the Contraband Forfeiture Act or the Public Nuisance Act, each intended to create different procedures with different remedies. *People v. \$4338.00 in US Currency*, 819 P.2d 1105 (Colo. App. 1991).

Any person contesting an action for forfeiture must establish his or her standing as a true owner of the property subject to forfeiture. The trial court is to consider the totality of the circumstances in determining whether a person asserting the contest is a true owner. *People v. Grell*, 950 P.2d 660 (Colo. App. 1997).

Applied in *Rueda v. District Court*, 194 Colo. 327, 575 P.2d 370 (1977); *Barker v. District Court*, 199 Colo. 416, 609 P.2d 628 (1980); *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

16-13-304. Class 2 public nuisance. (1) The following are deemed to be a class 2 public nuisance:

(a) Any place where people congregate, which encourages a disturbance of the peace, or where the conduct of persons in or about that place is such as to annoy or disturb the peace of the occupants of or persons attending such place, or the residents in the vicinity, or the passersby on the public street or highway; or

(b) Any public or private place or premises which encourages professional gambling, unlawful use, sale, or distribution of imitation controlled substances, as defined in section 18-18-420 (3), C.R.S., drugs, controlled substances, as defined in section 18-18-102 (5), C.R.S., or other drugs the possession of which is an offense under the laws of this state, furnishing or selling intoxicating liquor to minors, furnishing or selling fermented malt beverages to persons under the age of twenty-one, solicitation for prostitution, or traffic in stolen property; or

(b.5) Any public or private place or premises used for soliciting by means of a prerecorded message in violation of section 18-9-311 (1), C.R.S.; or

(c) Any public or private place used for a purpose declared to be a class 2 public nuisance by any other statute of this state.

Source: L. 72: R&RE, p. 260, § 1. C.R.S. 1963: § 39-13-304. L. 81: (1)(b) amended, p. 737, § 18, effective July 1. L. 83: (1)(b) amended, p. 704, § 3, effective July 1. L. 88: (1)(b.5) added and (1)(c) amended, p. 346, § 12, effective July 1. L. 92: (1)(b) amended, p. 391, § 17, effective July 1. L. 95: (1)(b) amended, p. 463, § 6, effective July 1.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

Annotator's note. Since § 16-3-304 is similar to repealed § 39-15-2, CRS 1963, and laws antecedent to CSA, C 1, § 2, relevant cases construing those provisions have been included in the annotations to this section.

Information alleging encouragement of illegal acts sufficient. In an information charging that defendant kept a disorderly house to the encouragement of drinking, gambling, or lewdness, it is not essential that particular acts should

be set out in the information, because the charge is that the house was kept to the encouragement of those acts, and not that the defendant was guilty of the acts themselves. *Howard v. People*, 27 Colo. 396, 61 P. 595 (1900).

Evidence sufficient to establish conduct of patrons was nuisance requiring abatement. *Steinberg v. People ex rel. Keating*, 154 Colo. 264, 390 P.2d 811 (1964).

Evidence sufficient to support finding of knowledge of solicitation for prostitution on premises. *Edelweiss, Inc. v. People ex rel. Keating*, 154 Colo. 154, 389 P.2d 189 (1964).

16-13-305. Class 3 public nuisance. (1) The following are a class 3 public nuisance:

(a) The conducting or maintaining of any business, occupation, operation, or activity prohibited by a statute of this state; or

(b) The continuous or repeated conducting or maintaining of any business, occupation, operation, activity, building, land, or premises in violation of a statute of this state; or

(c) Any building, structure, or land open to or used by the general public, the condition of which presents a substantial danger or hazard to public health or safety; or

(d) Any dilapidated building of whatever kind which is unused by the owner, or uninhabited because of deterioration or decay, which condition constitutes a fire hazard, or subjects adjoining property to danger of damage by storm, soil erosion, or rodent infestation, or which becomes a place frequented by trespassers and transients seeking a temporary hideout or shelter; or

(e) Any unlawful pollution or contamination of any surface or subsurface waters in this state, or of the air, or any water, substance, or material intended for human consumption, but no action shall be brought under this paragraph (e) if the state department of public health and environment or any other agencies of state or local government charged by and acting pursuant to statute or duly adopted regulation have assumed jurisdiction by the institution of proceedings on that pollution or contamination. Nothing in this paragraph (e) shall abridge the right of any person to institute a private nuisance action or of any district attorney to institute a public nuisance action under the common law or other statutory law of this state.

(f) Any activity, operation, or condition which, after being ordered abated, corrected, or discontinued by a lawful order of an agency or officer of the state of Colorado, continues to be conducted or continues to exist in violation of:

(I) Any statute of this state;

(II) Any regulation enacted pursuant to the authority of a statute of this state; or

(g) Any condition declared by a statute of this state to be a class 3 public nuisance.

Source: L. 72: R&RE, p. 261, § 1. C.R.S. 1963: § 39-13-305. L. 94: (1)(e) amended, p. 2732, § 354, effective July 1.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1)(e), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

16-13-306. Class 4 public nuisance. If any person carries on or practices any profession or calling or operates any business required to be licensed by the laws of the state of Colorado without first procuring a license therefor, or carries on or practices such profession or calling or operates such business after the license therefor required by the laws of the state of Colorado has been lawfully cancelled or revoked, the carrying on or practicing of such profession or calling, or the operation of such business without a license is a class 4 public nuisance and may be restrained and abated.

Source: L. 72: R&RE, p. 261, § 1. C.R.S. 1963: § 39-13-306.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

Annotator's note. Since § 16-13-306 is similar to repealed § 39-15-2, CRS 53, a relevant case construing that provision has been included in the annotations to this section.

The fact that no property or pecuniary interest of the plaintiff is involved is no answer to a suit to enjoin practice of a profession without a license, where the action is in behalf of the public. *Conway-Bogue Realty Inv. Co. v.*

Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957).

As public need not prove irreparable injury. In general, a court will grant an injunction only where there is imminent danger, irreparable injury, or damage to the plaintiff; however, in order to restrain an unlicensed person from practicing a profession it is not necessary to prove irreparable injury or the threat thereof, where the suit is in behalf of the public. *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957).

16-13-307. Jurisdiction - venue - parties - process. (1) The several district courts of this state shall have original jurisdiction of proceedings under this part 3.

(1.5) No judgment of forfeiture of property in any forfeiture proceeding shall be entered unless and until an owner of the property is convicted of an offense listed in section 16-13-301 or 16-13-303, or a lesser included offense of an eligible offense if the conviction is the result of a negotiated guilty plea. Nothing in this section shall be construed to require the conviction to be obtained in the same jurisdiction as the jurisdiction in which the forfeiture action is brought. In the event criminal charges arising from the same activity giving rise to the forfeiture proceedings are filed against any individual claiming an interest in the property subject to the forfeiture proceeding, the trial and discovery phases of the forfeiture proceeding shall be stayed by the court until the disposition of the criminal charges. A stay shall not be maintained during an appeal or post-conviction proceeding challenging a criminal conviction. Nothing in this section shall be construed to prohibit or prevent the parties from contemporaneously resolving criminal charges and a forfeiture proceeding arising from the same activity.

(1.6) Upon acquittal or dismissal of a criminal action against a person named in a forfeiture action related to the criminal action, unless the forfeiture action was brought pursuant to one or more of paragraphs (a) to (f) of subsection (1.7) of this section, the forfeiture claim shall be dismissed and the seized property shall be returned as respects the subject matter property or interest therein of that person, if the case has been adjudicated as to all other claims, interests, and owners, unless possession of the property is illegal. If the forfeiture action is dismissed or judgment is entered in favor of the claimant, the claimant shall not be subject to any monetary charges by the state for storage of the property or expenses incurred in the preservation of the property, unless at the time of dismissal the plaintiff shows that those expenses would have been incurred to prevent waste of the property even if it had not been seized.

(1.7) Notwithstanding the provisions of subsection (1.5) of this section:

(a) (I) A person shall lack standing for and shall be disallowed from pursuit of a claim or defense in a civil forfeiture action upon a finding that a warrant or other process has been issued for the apprehension of the person, and, in order to avoid criminal prosecution, the person:

- (A) Purposely leaves the state; or
- (B) Declines to enter or reenter the state to submit to its jurisdiction; or
- (C) Otherwise evades the jurisdiction of the court in which a criminal case is pending against the person or from which a warrant has been issued, by failing to appear in court or surrender on a warrant; and
- (D) Is not known to be confined or held in custody in any other jurisdiction within the United States for commission of criminal conduct in that jurisdiction.

(II) If a person lacks standing pursuant to this paragraph (a), the forfeiture action may proceed and a judgment of forfeiture may be entered without a criminal conviction of an owner, upon motion and notice as provided in the rules of civil procedure.

(b) If, following notice to all persons known to have an interest, or who have asserted an interest in the property subject to forfeiture, an owner fails to file an answer or other appropriate pleading with the court claiming an interest in the subject matter property, or no person establishes standing to contest the forfeiture action pursuant to section 16-13-303 (5), a forfeiture action may proceed and a judgment of forfeiture may be entered without a criminal conviction of an owner.

(c) If the plaintiff proves by clear and convincing evidence that the property was instrumental in the commission of an offense listed in section 16-13-303 (1) or that the property is traceable proceeds of the offense or related criminal activity by a nonowner and the plaintiff proves by clear and convincing evidence that an owner is not an innocent owner pursuant to section 16-13-303 (5.2) (a), a judgment of forfeiture may be entered without a criminal conviction of an owner.

(d) If an owner of the property who was involved in the public nuisance act or conduct giving rise to the claim of forfeiture subsequently dies, and was not an innocent owner pursuant to section 16-13-303 (5.2) (a), a judgment of forfeiture may be entered without a criminal conviction of an owner.

(e) If an owner received a deferred judgment, deferred sentence, or participated in a diversion program, or in the case of a juvenile a deferred adjudication or deferred sentence or participated in a diversion program for the offense, a judgment of forfeiture may be entered without a criminal conviction.

(f) A defendant or claimant shall be permitted to waive the requirement of a criminal conviction in order to settle a forfeiture action.

(1.8) Nothing in this section shall be construed to limit the temporary seizure of property for evidentiary, investigatory, or protective purposes.

(2) An action to abate a public nuisance shall be brought in the county in which the subject matter of the action, or some part thereof, is located or found or in the county where the public nuisance act, or any portion thereof, was committed.

(2.5) All forfeiture actions shall proceed in state district court if the property was seized by a local or state law enforcement agency as a result of an ongoing state criminal investigation and the owner is being prosecuted in state court. Unless directed by an authorized agent of the federal government, no state or local law enforcement agency may transfer any property seized by the state or local agency to a federal agency for forfeiture under federal law unless an owner of the property is being prosecuted in federal court.

(3) Except as otherwise provided in this part 3, the practice and procedure in an action to abate a public nuisance shall be governed by the Colorado rules of civil procedure.

(3.5) An action brought pursuant to this part 3 regarding a class 1 public nuisance shall be filed within sixty-three days following the seizure of the property pursuant to section 16-13-315. The plaintiff may file the complaint after the expiration of sixty-three days from the date of seizure only if the complaint is accompanied by a written petition for late filing. Such petition for late filing shall demonstrate good cause for the late filing of the complaint. The sixty-three-day time limitation established by this subsection (3.5) shall not apply where the seizure of the property occurred pursuant to a warrant authorizing such seizure

or otherwise under any statute or rule of criminal procedure, if the property is held as evidence in a pending criminal investigation or in a pending criminal case.

(4) An action to abate a public nuisance may be brought by the district attorney, or the attorney general with the consent of the district attorney, in the name of the people of the state of Colorado or in the name of any officer, agency, county, or municipality of this state whose duties or functions include or relate to the subject matter of the action. Any action to abate a class 3 public nuisance as defined by section 16-13-305 (1) (f) may be brought only upon the request of the agency or officer issuing the order or under whose authority the order was issued when such order relates to unlawful pollution or contamination.

(5) An action to abate a public nuisance, other than a class 4 public nuisance, and any action in which a temporary restraining order, temporary writ of injunction, or preliminary injunction is requested, shall be commenced by the filing of a complaint, which shall be verified or supported by affidavit. Summons shall be issued and served as in civil cases; except that a copy of the complaint and copies of any orders issued by the court at the time of filing shall be served with the summons.

(6) During all discovery procedures in actions brought pursuant to this part 3, a witness or party may refuse to answer any question if said witness or party makes a good faith assertion that the disclosure would tend to identify, directly or indirectly, a confidential informant for a law enforcement agency, unless the district attorney intends to call said informant as a witness at any adversarial hearing. On a motion to compel discovery, no witness or party shall be sanctioned in any manner for withholding information pursuant to this subsection (6).

(7) Actions to abate a public nuisance shall be heard by the court, without a jury, at all stages of the proceedings.

(8) Repealed.

(9) Part 2 of article 41 of title 38, C.R.S., shall not apply to any action under this part 3.

(10) (a) Continuance of the trial of a public nuisance action shall be granted upon stipulation of the parties or upon good cause shown.

(b) (Deleted by amendment, L. 2003, p. 897, § 8, effective July 1, 2003.)

(c) Public nuisance actions shall be included in the category of "expedited proceedings" specified in rules 16 and 26 of the Colorado rules of civil procedure; except that each party may conduct limited discovery as provided for in rule 26 (b) (2) of the Colorado rules of civil procedure. In addition, each party may move the court to authorize additional discovery upon good cause shown.

(11) No claim for relief shall be asserted by any party other than the plaintiff in a public nuisance action; except that the defendant may make a request for the return of property seized pursuant to this part 3.

(12) If a public nuisance trial pursuant to this part 3 results in an order to return subject personal property and the prosecution states an intent to appeal and proceeds to appeal that judgment or order, the court shall stay the judgment or order pending appeal, unless the court finds that the appeal was taken in bad faith or for the purpose of delay. No appeal bond shall be required, but the court may make appropriate orders to preserve the value of the property pending appeal.

(13) Unknown persons who may claim an interest in the property, persons whose whereabouts are unknown despite a diligent good faith search, and persons upon whom the plaintiff has been unable to effect service as otherwise provided in the Colorado rules of civil procedure despite diligent good faith efforts may be served pursuant to a court order by publishing a copy of a summons twice in a newspaper of general circulation. The summons shall describe the property and state where the complaint and attendant documents may be obtained, and a party shall have thirty-five days after the last publication date to respond.

Source: L. 72: R&RE, p. 262, § 1. C.R.S. 1963: § 39-13-307. L. 87: (2) and (4) amended and (6) to (13) added, p. 633, § 5, effective July 1. L. 90: (8) repealed, p. 988, § 14, effective April 24. L. 92: (3.5) added and (10) and (13) amended, p. 449, § 3, effective July 1. L. 97: (10)(a) amended and (10)(c) added, p. 1552, § 3, effective July 1.

L. 2002: (1.5), (1.6), (1.7), (1.8), and (2.5) added, p. 919, § 3, effective July 1. **L. 2003:** (1.5), (1.6), (1.7), (10)(a), and (10)(b) amended, pp. 892, 897, §§ 4, 8, effective July 1. **L. 2012:** (3.5) and (13) amended, (SB 12-175), ch. 208, p. 856, § 90, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (3.5) and (13) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the issuance of summons, see C.R.C.P. 4.

ANNOTATION

Annotator's note. Since § 16-13-307 is similar to repealed laws antecedent to CSA, C 1, § 3, relevant cases construing those provisions have been included in the annotations to this section.

Public nuisance suits may be either criminal or civil in nature. *People v. Cory*, 183 Colo. 1, 514 P.2d 310 (1973).

The statute authorizing forfeiture for a public nuisance is penal in nature. In an action premised on a penal statute as opposed to a civil claim, the statute of limitations is jurisdictional in nature, in that it specifies the time period during which a cause of action exists. Since the statute of limitations is jurisdictional, it may be raised at any stage of the proceeding, including a motion to dismiss. *People v. Steinberg*, 672 P.2d 543 (Colo. App. 1983).

Where a civil action is brought to abate a public nuisance, the only remedy is injunctive relief. *People v. Cory*, 183 Colo. 1, 514 P.2d 310 (1973).

And rules of civil procedure followed. Where a civil action for injunctive relief is brought to abate a public nuisance, the rules of civil procedure must be followed. *People v. Cory*, 183 Colo. 1, 514 P.2d 310 (1973); *Barker v. District Court*, 199 Colo. 416, 609 P.2d 628 (1980).

An action to enjoin the operation of premises as a nuisance is aimed at the unlawful use, irrespective of ownership. *Gaskins v. People*, 84 Colo. 582, 272 P. 662 (1928).

Personal judgment against owner not served with process is invalid. In an action to enjoin maintenance of a nuisance, personal judgment against the owner of the property who was not served with process and did not appear, held invalid, although her property was bound by the decree. *Gaskins v. People*, 84 Colo. 582, 272 P. 662 (1928).

Owner of leased premises may be enjoined. Even though there is no evidence that defendant owner kept a place constituting a nuisance, or that he leased the premises for such use; nevertheless under this section the owner may be enjoined from permitting their use for such purposes. *Gregg v. People*, 65 Colo. 390, 176 P. 483 (1918).

A forfeiture action is commenced and jurisdiction of the trial court is invoked by the filing of a complaint in district court. *People v. Grell*, 950 P.2d 660 (Colo. App. 1997).

The 60-day time frame for filing a complaint and the exceptions under this section are procedural requirements, therefore, failure to file a complaint within such time frame is not a jurisdictional defect that would divest court of subject matter jurisdiction. *People v. Grell*, 950 P.2d 660 (Colo. App. 1997).

Statute provides no basis for treating seized property differently once it has been distributed. To do so would leave the party without a remedy, especially when the property at issue — cash — is fungible. *People v. \$11,200 U.S. Currency*, __ P.3d __ (Colo. App. 2011).

16-13-308. Temporary restraining order - preliminary injunction - when to issue. (1) (a) If probable cause for the existence of a class 1 public nuisance is shown to the court by means of a complaint supported by an affidavit, the court shall issue a temporary restraining order to abate and prevent the continuance or recurrence of the nuisance or to secure property subject to forfeiture pursuant to this part 3. Such temporary restraining order shall:

(I) Direct the sheriff or a peace officer to seize and, where applicable, close the public nuisance and keep the same effectually closed against its use for any purpose until further order of the court;

(II) Direct the seizure or holding, if previously seized, of all personal property subject to the provisions of this part 3; and

(III) Restrain and enjoin persons from selling, transferring, encumbering, damaging, destroying, or using as security for a bond any property subject to this part 3.

(b) The temporary restraining order may make such provisions as the court finds

reasonable for the maintenance, utilities, insurance, and security with respect to real property subject to a public nuisance temporary restraining order, including imposing those responsibilities on the owner or defendant, if said owner or defendant is allowed reasonable access to the property consistent with those limited purposes.

(c) The court may order that all fixtures and contents of a public nuisance be stored on the premises of such public nuisance while an action under this part 3 is pending.

(d) The court may require that documents evidencing title or registration or that keys to property subject to this part 3 be deposited with a sheriff or peace officer, to be kept in the constructive custody of the court, while an action under this part 3 is pending.

(e) The court may require the sheriff or peace officer executing the order to post a copy of the order on property subject to the order.

(f) Any person with an ownership interest adversely affected by a temporary restraining order issued pursuant to this subsection (1) may file a motion to vacate the temporary restraining order. Such motion shall be filed within fourteen days of the time said person is served with or otherwise has notice of the temporary restraining order. The motion shall be set for hearing within fourteen days after its filing. At said hearing, the court shall determine whether the various provisions of the temporary restraining order should remain in effect pending final determination of the action. No part of the temporary restraining order shall be vacated unless the proponent of the motion demonstrates that there is no probable cause to believe that a public nuisance exists or that the public nuisance acts underlying the action occurred, or that the proponent has a reasonable likelihood of prevailing on the merits of the case with respect to the temporary seizure or closure of the property. No issue regarding the forfeiture of the property shall be raised at the hearing on the motion, except the court may consider an innocent owner defense pursuant to section 16-13-303 (5.2) by a proponent who has not been charged in a parallel criminal action arising from the same activity giving rise to the forfeiture proceedings. When the innocent owner defense is raised as grounds for vacating the order, the issues at the hearing shall be limited to modifying the order to provide for the use of the property during the pendency of the action by an innocent owner, but only if such use is consistent with preserving it for forfeiture as to any other interest. Such a modifying order may include, without limitation, reasonable provisions for the continued occupancy of a residence, or the operation of a business and the sale or disposition of business inventory. However, no such modifying order shall include the release of currency. The determination of the facts by the court at the hearing is independent of and shall not be considered in the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrences. Any motion to vacate a temporary restraining order shall state specifically the factual and legal grounds upon which it is based, and only those grounds may be considered at the hearing. Until vacated, the temporary restraining order shall remain in full force and effect.

(2) In an action to abate a class 2 public nuisance, the court may, as a part of a preliminary injunction, direct the sheriff to seize and close such public nuisance and to keep the same effectually closed against its use for any purpose, until further order of the court. While the preliminary injunction remains in effect, the building or place seized and closed, and all personal property seized thereunder, shall be subject to the orders of the court.

(3) Temporary restraining orders and preliminary injunctions for public nuisances other than class 1 public nuisances may be issued as provided by the Colorado rules of civil procedure. No bond or security shall be required of the district attorney or the people of the state in any action to abate a public nuisance.

Source: L. 72: R&RE, p. 262, § 1. C.R.S. 1963: § 39-13-308. L. 81: (1) amended, p. 956, § 4, effective July 1. L. 83: (1) amended, p. 684, § 3, effective July 1. L. 87: (1) and (3) R&RE, p. 635, § 6, effective July 1. L. 95: (1)(f) amended, p. 1097, § 15, effective May 31. L. 2002: (1)(f) amended, p. 920, § 4, effective July 1. L. 2003: (1)(f) amended, p. 891, § 3, effective July 1. L. 2012: (1)(f) amended, (SB 12-175), ch. 208, p. 856, § 91, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(f) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For preliminary injunctions, see C.R.C.P. 65(a).

ANNOTATION

Annotator's note. Since § 16-13-308 is similar to repealed laws antecedent to CSA, C 1, § 3, relevant cases construing those provisions have been included in the annotations to this section.

The injunctive features of this section are broad with no designation of the parties who shall be made defendants. It may, therefore, be assumed that it was intended that the owner of the premises, as well as the keeper of the place operating as a nuisance, might be made parties. *Gregg v. People*, 65 Colo. 390, 176 P. 483 (1918).

Restraining order under this section analogous to order involving execution of a writ of attachment and levy upon a debtor's property; thus sheriff had the duty of care of a bailee and the jury should have been so instructed. *Kessman v. City and County of Denver*, 709 P.2d 975 (Colo. App. 1985).

Temporary restraining order may be issued to abate a nuisance and to secure property subject to forfeiture only upon a showing of probable cause to believe that such property is a public nuisance; People must establish probable cause to believe that there is a substantial connection between property to be forfeited and nuisance activity. *People v. Taube*, 843 P.2d 79 (Colo. App. 1992).

16-13-309. Judgment - relief. (1) The judgment in an action to abate a public nuisance may include a permanent injunction to restrain, abate, and prevent the continuance or recurrence of the nuisance and an order directing the confiscation and forfeiture of property. The court may grant declaratory relief, mandatory orders, or any other relief deemed necessary to accomplish the purposes of the injunction or order and enforce the same, and the court may retain jurisdiction of the case for the purpose of enforcing its orders.

(2) If the existence of a class 1 public nuisance is established in an action authorized by this part 3, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building, place, vehicle, or real property and the forfeiture of all fixtures and contents thereof and the confiscation and forfeiture of all personal property, including vehicles, seized or subject to seizure as provided in section 16-13-303 and shall direct the sale of the personal property, including vehicles, as provided in this part 3. If the building, place, or real property is not forfeited pursuant to this part 3, the order shall direct the effectual closing of such property against its use for any purpose for a period of one year, unless sooner released by the court pursuant to the provisions of this part 3. While the order remains in effect as to closing, such building, place, or real property shall remain in the custody of the court. The court shall cause a copy of the order of abatement to be recorded in the office of the county clerk and recorder of the county in which the property is located.

(3) The judgment in an action to abate a class 2 public nuisance may include an order directing the sheriff to seize and close the public nuisance, and to keep the same effectually closed until further order of the court, not to exceed one year.

(4) The judgment in an action to abate a class 3 public nuisance may include, in addition to or in the alternative to other injunctive relief, an order requiring the removal,

Error in preliminary injunction immaterial. In an action brought under this part 3, whether or not error was committed in the granting of a temporary injunction was held to be of no consequence where a final decree of abatement was properly entered. *Mongone v. People*, 84 Colo. 516, 271 P. 617 (1928).

Property seized pursuant to this section is forfeited at the time of seizure, not upon entry of a final order. *United States v. Wilkinson*, 686 P.2d 790 (Colo. 1984).

A sheriff or officer who takes custody of the property of another pursuant to a temporary restraining order may be a constructive bailee and may be sued for negligence for property lost or injured during bailment. *People v. Taube*, 843 P.2d 79 (Colo. App. 1992).

Order under this section does not amount to an order authorizing warrantless entry and search of premises. *People v. Taube*, 864 P.2d 123 (Colo. 1993).

Court's finding of probable cause to believe that a house constituted a public nuisance was not equivalent to a finding that probable cause existed to enter and search the contents of the house. *People v. Taube*, 864 P.2d 123 (Colo. 1993).

Applied in *Barker v. District Court*, 199 Colo. 416, 609 P.2d 628 (1980).

correction, or other abatement of a public nuisance, in whole or in part, by the sheriff, at the expense of the owner or operator of the public nuisance.

(5) The judgment in an action to abate a public nuisance may include, in addition to or in the alternative to any other relief authorized by the provisions of this part 3, the imposition of a fine, within the limits provided in section 16-13-312, conditioned upon failure or refusal of compliance with the orders of the court within any time limits therein fixed.

Source: L. 72: R&RE, p. 263, § 1. C.R.S. 1963: § 39-13-309. L. 81: (2) amended, p. 956, § 5, effective July 1. L. 83: (2) amended, p. 684, § 4, effective July 1. L. 87: (1) and (2) amended, p. 636, § 7, effective July 1.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

Annotator's note. Since § 16-13-309 is similar to repealed laws antecedent to CSA, C. 1, §§ 3 and 7, relevant cases construing those provisions have been included in the annotations to this section.

The purpose of this section is to abate the nuisance by stripping the house of its furniture and fixtures and selling them at sheriff's sale to pay the costs, closing the house against all purposes for one year, and permanently enjoining the owner from permitting such future use of his premises. *Gregg v. People*, 65 Colo. 390, 176 P. 483 (1918).

Injunction may order the closing of the property. In an action brought against an occupying tenant of property to abate a nuisance, an injunctive order and decree closing the property would be valid, although the owner was not made a party to the action. *Gaskins v. People*, 84 Colo. 582, 272 P. 662 (1928).

Forfeiture of property dates from the time of seizure, not from entry of the order under this section. *United States v. Wilkinson*, 686 P.2d 790 (Colo. 1984).

No one-year closing of property determined to be a public nuisance is required prior to forfeiture or sale of the property. *People v. 21020 Colo. Highway 74*, 791 P.2d 1189 (Colo. App. 1989).

16-13-310. Redelivery of seized premises. (1) If the owner of a building, a place, or any real property seized and closed as a class 1 public nuisance has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees, and allowances which are declared by this section to be a lien on the building, place, or real property, and files a bond in the amount fixed by the court not to exceed the full value of said property, with sureties to be approved by the court, conditioned that he will immediately abate any such nuisance that exists at the building, place, or real property and prevent the same from being established or kept thereat within a period of one year thereafter, the court, if satisfied of his good faith and satisfied that such owner had not conducted, used, maintained, or knowingly permitted the conducting, using, or maintaining of such public nuisance, may order the building, place, or real property to be delivered to said owner and the order of abatement cancelled so far as the same relates to said property. If any property is found not to be a public nuisance pursuant to this part 3 or if said property fits the description of property specified in section 16-13-303 (2) and (3) and the property is not subject to forfeiture or an affirmative defense has been proven, said property shall be released to the owner without conditions. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it is subject by law.

(2) If the owner or operator of a building or place seized and closed as a class 2 public nuisance has not been guilty of any contempt of court in the proceedings, and demonstrates by evidence satisfactory to the court that the public nuisance has been abated and will not recur, the court may order the premises delivered to the owner or operator. As a condition of such order, the court may require the posting of bond, in an amount fixed by the court, for the faithful performance of the obligation of the owner or operator thereunder to prevent recurrence or continuance of the public nuisance.

(3) If the tenant or occupant, other than the owner, of a building, a place, or any real property is involved in conducting or maintaining a public nuisance, the owner need not be

made a party to the action until the tenant or occupant is evicted or the district attorney seeks to enforce the remedies of this part 3 against the owner. However, the owner may intervene in the action at any time.

Source: L. 72: R&RE, p. 263, § 1. C.R.S. 1963: § 39-13-310. L. 81: (1) amended, p. 957, § 6, effective July 1. L. 83: (1) amended, p. 684, § 5, effective July 1. L. 87: (1) amended and (3) added, p. 636, § 8, effective July 1; (1) amended, p. 1586, § 57, effective July 1.

ANNOTATION

This section affords an ample remedy to the owner, although he is not made a party to the abatement suit. *Gaskins v. People*, 84 Colo.

582, 272 P. 662 (1928) (decided under repealed laws, antecedent to CSA, C. 1, § 9).

16-13-311. Disposition of seized personal property. (1) Any personal property subject to seizure, confiscation, forfeiture, or destruction under the provisions of this part 3, and which is seized as a part of or incident to proceedings under this part 3 for which disposition is not provided by another statute of this state, shall be disposed of as provided in this section.

(2) Any such property which is required by law to be destroyed, or the possession of which is illegal, or which in the opinion of the court is not properly the subject of a sale may be destroyed pursuant to a warrant for the destruction of personal property issued by the court and directed to the sheriff of the proper county or any peace officer and returned by the sheriff or peace officer after execution thereof. The court shall stay the execution of any such warrant during the period in which the property is used as evidence in any pending criminal or civil proceeding.

(3) (a) If the prosecution prevails in the forfeiture action, the court shall order the property forfeited. Such order shall perfect the state's right and interest in and title to such property and shall relate back to the date when title to the property vested in the state pursuant to section 16-13-316. Except as otherwise provided in paragraph (c) of this subsection (3), the court shall also order such property to be sold at a public sale by the law enforcement agency in possession of the property in the manner provided for sales on execution, or in another commercially reasonable manner. Property forfeited under this section or proceeds therefrom shall be distributed or applied in the following order:

(I) To payment of the balances due on any liens perfected on or before the date of seizure preserved by the court in the forfeiture proceedings, in the order of their priority;

(II) To compensate an innocent partial owner for the fair market value of his or her interest in the property;

(III) To any person who suffers bodily injury, property damage, or property loss as a result of the conduct constituting a public nuisance that resulted in such forfeiture, if said person petitions the court therefor prior to the hearing dividing the proceeds pursuant to this section and the court finds that such person suffered said damages as a result of the subject acts that resulted in the forfeiture;

(IV) To the law enforcement agency in possession of the property for reasonable fees and costs of sale, maintenance, and storage of the property;

(V) To the district attorney for actual and reasonable expenses related to the costs of prosecuting the forfeiture proceeding and title transfer not to exceed ten percent of the value of the property;

(VI) One percent of the value of the property to the clerk of the court for administrative costs associated with compliance with this section;

(VII) The balance shall be delivered, upon order of the court, as follows:

(A) Fifty percent to the general fund of the governmental body or bodies with budgetary authority over the seizing agency for public safety purposes or, if the seizing agency was a multijurisdictional task force, fifty percent to be distributed in accordance with the appropriate intergovernmental agreement; and

(B) The remaining amount to the managed service organization contracting with the unit within the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, serving the judicial district where the forfeiture proceeding was prosecuted to fund detoxification and substance abuse treatment. Moneys appropriated to the managed service organization shall be in addition to, and shall not be used to supplant, other funding appropriated to such unit.

(b) (Deleted by amendment, L. 2002, p. 921, § 5, effective July 1, 2002.)

(c) If, in a forfeiture proceeding, a partial owner is determined to be an innocent owner under law, at the option of the innocent partial owner, in lieu of a public sale, the innocent partial owner may purchase the forfeited items from the state at a private sale for fair market value. Proceeds received by the state shall be disposed of pursuant to this section.

(d) After a judgment of forfeiture has been entered, any seizing agency in possession of any money forfeited shall deposit the money in the registry of the court where the forfeiture order was entered. Upon the sale of forfeited real or personal property, the seizing agency responsible for overseeing the sale shall ensure that any lienholders are compensated from the proceeds of the sale pursuant to the priorities specified in paragraph (a) of this subsection (3) for their interests in the forfeited property. The seizing agency shall deposit all remaining proceeds from the sale in the registry of the court immediately upon completion of the sale. The seizing agency shall notify the court and the district attorney when all property subject to the forfeiture order has been sold and all proceeds and money have been deposited in the registry of the court where the forfeiture order was entered.

(e) Within thirty-five days after the date the order of forfeiture is entered, the district attorney may submit a motion, an affidavit, and any supporting documentation to the court to request compensation consistent with this section. Within thirty-five days after the date the order of forfeiture is entered, any victim of the criminal act giving rise to the forfeiture may submit a request for compensation, an affidavit, and supporting documentation to the district attorney to request compensation from the forfeiture proceeds.

(f) Within fourteen days after the date a seizing agency notifies the court that all property forfeited has been sold and all proceeds and money have been deposited in the registry of the court where the forfeiture order was entered, the seizing agency may submit a motion, an affidavit, and supporting documentation to the court for reimbursement of expenses consistent with this section. In its motion, the seizing agency shall identify any other seizing agencies that participated in the seizure and specify the details of any intergovernmental agreement regarding sharing of proceeds. The seizing agency shall send a copy of this motion to the district attorney.

(g) The district attorney shall prepare a motion and proposed order for distribution based upon the motions and requests submitted by the parties. The order shall include allocation of one percent of the value of the property to the clerk of the court for the direct and indirect costs incurred by the clerk in implementing the provisions of this subsection (3). The district attorney shall send copies to all remaining interested parties.

(h) Any party shall have fourteen days after filing of the proposed order to file any objections to the proposed order filed by the district attorney.

(3.5) Instead of liens and encumbrances on real property being satisfied from the proceeds of sale, real property may be sold subject to all liens or encumbrances on record. The purchase of the property by the successful bidder under this subsection (3.5) shall be conditioned on the bidder satisfying and obtaining the release of the first and second priority liens within sixty-three days after the sale, or obtaining written authorization from those lien holders for the bidder to receive the sheriff's deed which shall be issued after such satisfaction or authorization. The purchaser of the property shall take title free of any lien, encumbrance, or cloud on the title recorded after title vests in the state pursuant to section 16-13-316.

(4) It is the intent of the general assembly that moneys allocated to a seizing agency pursuant to subsection (3) of this section shall not be considered a source of revenue to meet normal operating needs.

(5) If more than one seizing agency was substantially involved in effecting the forfeiture, the agencies shall enter into a stipulation with regard to costs incurred by the agencies and the percentage of any remaining proceeds to be deposited for the benefit of the

agencies or any property to be directly forfeited for use of such agencies. Upon the filing by such agencies of such stipulation with the court, the court shall order the proceeds or property so distributed. If the agencies are unable to reach an agreement, the court shall take testimony and equitably distribute the proceeds.

(6) The state shall issue a certificate of title for a vehicle to the purchaser or seizing agency if said vehicle is acquired pursuant to this part 3.

Source: L. 72: R&RE, p. 264, § 1. C.R.S. 1963: § 39-13-311. L. 81: (3) amended, p. 957, § 7, effective July 1. L. 87: (2) and (3)(b) amended and (4) to (6) added, p. 637, § 9, effective July 1. L. 2002: (3) amended, p. 921, § 5, effective July 1. L. 2003: IP(3)(a) amended and (3.5) added, p. 904, § 16, effective July 1. L. 2011: (3)(a)(VII)(B) amended, (HB 11-1303), ch. 264, p. 1155, § 26, effective August 10. L. 2012: (3)(e), (3)(f), (3)(h), and (3.5) amended, (SB 12-175), ch. 208, p. 857, § 92, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (3)(e), (3)(f), (3)(h), and (3.5) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For provisions on reporting and disposition of forfeited property, see part 7 of this article.

ANNOTATION

A court is not free to ignore the provisions of this section and dispose of the vehicle in a manner other than as set forth in this section, although the court does retain the authority to protect the interest of an innocent party to the extent practicable and within the statutory dispositional alternatives. *People v. Garner*, 732 P.2d 1194 (Colo. 1987).

Although the trial court had no authority to order entire interest of vehicle determined to be a class 1 public nuisance be vested in innocent co-owner of vehicle, the court did retain the authority to order a sheriff's sale of the vehicle

on the condition that one-half of the proceeds of the sale, after deduction of fees and costs, be paid to innocent co-owner or that the innocent co-owner be given the opportunity to bid at the sheriff's sale, or that, upon delivery of the vehicle to the seizing agency, the agency pay the innocent co-owner one-half of the fair market value of the vehicle. *People v. Garner*, 732 P.2d 1194 (Colo. 1987).

This section does not provide for distribution of forfeiture proceeds to lien creditors or to pay tax liability. *United States v. Wilkinson*, 628 F. Supp. 29 (D. Colo. 1985).

16-13-312. Violation of injunction. Any violation or disobedience of any injunction or order issued by the court in an action to abate a public nuisance shall be punished as a contempt of court by a fine of not less than two hundred dollars nor more than two thousand dollars; but the court may treat each day on which the violation or disobedience of an injunction or order continues or recurs as a separate contempt and may impose a fine, in addition to the fine provided in this section, in an amount not to exceed five hundred dollars per day.

Source: L. 72: R&RE, p. 264, § 1. C.R.S. 1963: § 39-13-312.

ANNOTATION

Unlicensed party punished for contempt for holding himself out as an attorney at law. *People ex rel. Attorney Gen. v. Brown*, 126

Colo. 222, 247 P.2d 682 (1952) (decided under repealed CSA, C 1, § 1).

16-13-313. Fees - costs and fines - lien and collection. (1) For removing and selling personal property as provided in this part 3, the sheriff shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution.

(2) For seizing and closing any building, premises, or vehicle as provided in this part 3, or for performing other duties pursuant to the direction of the court pursuant to the

provisions of this part 3, the sheriff shall be entitled to a reasonable sum fixed by the court, in addition to the actual costs incurred or expended.

(3) All fees and costs allowed by the provisions of this section, the costs of court action to abate any public nuisance, and all fines levied by the court in contempt proceedings incident to an action to abate a public nuisance shall be a first and prior lien upon any real or personal property seized under the provisions of this part 3, and the same shall be enforceable and collectible by execution issued by order of the court, from the property of any person liable therefor.

Source: L. 72: R&RE, p. 265, § 1. C.R.S. 1963: § 39-13-313. L. 81: (2) amended, p. 958, § 8, effective July 1.

16-13-314. Disposition of forfeited real property. (1) In an action to abate a class 1 public nuisance, if the court finds that such class 1 public nuisance exists and that the same has been conducted, used, or maintained by the owner of a building, place, or any real property seized and closed as a class 1 public nuisance, or that the nuisance has been conducted, used, or maintained by any person with the actual knowledge and consent of the owner, a permanent order of abatement shall be entered as a part of the judgment in the case. The order of abatement shall direct the sheriff to sell such building or place and the ground upon which such building or place is situate or any other real property, to the extent of the interest of such owner therein, at public sale in the manner provided for sales of property upon execution. In no event shall real property that is neither proceeds of nor part of the same lot or tract of land used for the public nuisance act that was the underlying subject matter of the public nuisance action, be subject to seizure and forfeiture, excepting access and egress routes.

(2) The proceeds of such sale shall be applied in the same manner and priority as enumerated in section 16-13-311 (3).

(3) It is the intent of the general assembly that moneys allocated to a seizing agency pursuant to subsection (2) of this section shall not be considered a source of revenue to meet normal operating needs.

(4) If more than one seizing agency was substantially involved in effecting the forfeiture, the agencies shall enter into a stipulation with regard to costs incurred by the agencies and the percentage of any remaining proceeds to be deposited for the benefit of the agencies. Upon the filing by such agencies of such stipulation with the court, the court shall order the proceeds so distributed. If the agencies are unable to reach an agreement, the court shall take testimony and equitably distribute the proceeds.

Source: L. 72: R&RE, p. 265, § 1. C.R.S. 1963: § 39-13-314. L. 81: Entire section amended, p. 958, § 9, effective July 1. L. 83: (1) amended, p. 685, § 6, effective July 1. L. 87: (3) and (4) added, p. 638, § 10, effective July 1. L. 99: (1) amended, p. 798, § 15, effective July 1. L. 2002: (2) amended, p. 923, § 6, effective July 1.

Cross references: For provisions on reporting and disposition of forfeited property, see part 7 of this article.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

Proceeding to abate public nuisance is civil and equitable in nature, and thus protections of criminal proceedings, including right to jury trial, are not available. *People v. Allen*, 767 P.2d 798 (Colo. App. 1988).

Preponderance of evidence is standard of proof in abatement proceedings. People must

establish by a preponderance that property was a nuisance maintained as such by owner or with her consent. *People v. Allen*, 767 P.2d 798 (Colo. App. 1988).

No one-year closing of property determined to be a public nuisance is required prior to forfeiture or sale of the property. *People v. 21020 Colo. Highway 74*, 791 P.2d 1189 (Colo. App. 1989).

16-13-315. Seizure of personal property. (1) Any personal property subject to seizure, confiscation, or forfeiture under the provisions of this part 3 may be seized:

(a) Pursuant to any writ, order, or injunction issued under the provisions of this part 3; or

(b) Under the authority of a search warrant; or

(c) By any peace officer or agent of a seizing agency with probable cause to believe that such property is a public nuisance or otherwise subject to confiscation and forfeiture under this part 3 if the seizure is incident to a lawful search or arrest.

(2) The provisions of this section shall not be construed to limit or forbid the seizure of any such personal property in any manner now or hereafter required, authorized, or permitted by law.

(3) If a rental motor vehicle is seized pursuant to this part 3, the seizing agency shall notify the motor vehicle rental company of the seizure if the motor vehicle is identified as a rental motor vehicle. The motor vehicle rental company may appear at the seizing agency and request the return of the rental motor vehicle. The rental motor vehicle shall be returned to the motor vehicle rental company unless the motor vehicle must be maintained in the custody of the seizing agency for evidentiary purposes or if the seizing agency has probable cause to believe the motor vehicle rental company, at the time of rental, had knowledge or notice of the criminal activity for which the rental car was used.

Source: L. 72: R&RE, p. 265, § 1. C.R.S. 1963: § 39-13-315. L. 87: (1)(b) amended and (1)(c) added, p. 638, § 11, effective July 1. L. 2002: (3) added, p. 924, § 7, effective July 1.

ANNOTATION

In civil suit for abatement of defendant's home and its contents as a public nuisance probable cause must be established showing that there is a substantial connection between property to be seized and nuisance activity. *People v. Taube*, 843 P.2d 79 (Colo. App. 1992).

Warrantless entry and search of defendant's home were invalid, and evidence would be suppressed, where conditions of subsection

(1) were not met and search was not otherwise justified. *People v. Taube*, 864 P.2d 123 (Colo. 1993).

Court's finding of probable cause to believe that a house constituted a public nuisance was not equivalent to a finding that probable cause existed to enter and search the contents of the house. *People v. Taube*, 864 P.2d 123 (Colo. 1993).

16-13-316. Prior liens not subject to forfeiture - vesting of title. (1) Nothing in this part 3 shall be construed in such manner as to destroy the validity of a bona fide lien upon real or personal property appearing of record prior to the seizure of personal property, prior to the filing of a notice of seizure, as provided in subsection (3) of this section, prior to the filing of a notice of lis pendens on real property, or prior to actual or constructive notice to the lienholder of the state's potential claim of public nuisance.

(2) Title to real or personal property subject to forfeiture pursuant to the provisions of this section shall vest in the state and the seizing agency at the earliest of: For currency, the time of the commission of the public nuisance act; the time of the physical seizure of said property, except for real property; the time of filing of a notice of seizure, as provided in subsection (3) of this section; the time of the filing of a notice of lis pendens on real property; or the time of the issuance of court process for seizure of property, as against anyone with prior actual notice thereof.

(3) Before or after the commencement of litigation regarding a vehicle or real property for which seizure or forfeiture is sought, the prosecuting attorney or seizing agency shall file a notice of seizure with the office of the clerk and recorder in the county where the property is located. A notice of seizure for real property shall expire within seventy days after filing unless an action is filed in court for abatement or forfeiture, under this part 3 or other applicable law. A notice of seizure shall contain: A description of the property for which seizure or forfeiture is being sought, including the street address and legal description for real property and the make, model, year, license number, and vehicle identification number for a vehicle; the date and location of the seizure if the property has already been seized;

the identity of the seizing agency and prosecuting attorney; and the name of any person who is an owner of record or registered owner of the property or who is known to have, or who has asserted an interest in, the property. The notice of seizure shall also contain a statement giving notice that seizure or forfeiture of the property may be sought pursuant to this part 3, or other applicable law, and that any interest acquired in the property after the filing of the notice of the seizure will be subject to the forfeiture action in the event the property is forfeited.

Source: **L. 73:** p. 508, § 1. **C.R.S. 1963:** § 39-13-316. **L. 87:** Entire section amended, p. 638, § 12, effective July 1. **L. 2003:** Entire section amended, p. 905, § 17, effective July 1.

ANNOTATION

Conclusion that forfeiture dates from the time of seizure is supported by this section. *United States v. Wilkinson*, 686 P.2d 790 (Colo. 1984); *People v. Elvin L. Gentry, P.C.*, 107 P.3d 1094 (Colo. App. 2004).

Although a *lis pendens* was evidence of the state's seizure of property, the expiration of the *lis pendens* in no way interfered with the state's

title to the property. The state's interest in the property dates back to the seizure. Therefore, deeds of trust recorded on property after the state's seizure did not become superior to the state's interest once the *lis pendens* expired. *People v. Elvin L. Gentry, P.C.*, 107 P.3d 1094 (Colo. App. 2004).

16-13-317. Reporting of proceeds. (Repealed)

Source: **L. 87:** Entire section added, p. 638, § 13, effective July 1. **L. 92:** Entire section repealed, p. 450, § 4, effective July 1.

PART 4

PRESERVATION OF THE PEACE

16-13-401. Recognizance to prevent offense. (Repealed)

Source: **L. 94:** Entire part repealed, p. 2038, § 18, effective July 1.

Editor's note: This article was repealed and reenacted in 1972, and this part 4 was not amended prior to its repeal in 1994. For the text of this part 4 prior to 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

PART 5

COLORADO CONTRABAND FORFEITURE ACT

16-13-501. Short title. This part 5 shall be known and may be cited as the "Colorado Contraband Forfeiture Act".

Source: **L. 84:** Entire part added, p. 505, § 1, effective July 1.

16-13-501.5. Legislative declaration. (1) It is the intent of the general assembly that proceedings under this part 5 be remedial in nature and designed to benefit the public good by appropriating contraband property for use by law enforcement.

(2) It is also the policy of the general assembly that asset forfeiture pursuant to this part 5 shall be carried out pursuant to the following:

(a) Generation of revenue shall not be the primary purpose of asset forfeiture.

(b) No prosecutor's or law enforcement officer's employment or level of salary shall depend upon the frequency of seizures or forfeitures which such person achieves.

(c) Each seizing agency shall have policies and procedures for the expeditious release of seized property which is not subject to forfeiture pursuant to this part 5, when such release is appropriate.

(d) Each seizing agency retaining forfeited property for official law enforcement use shall ensure that the property is subject to controls consistent with controls which are applicable to property acquired through the normal appropriations process.

(e) Each seizing agency which receives forfeiture proceeds shall conform with reporting, audit, and disposition procedures enumerated in this article.

(f) Each seizing agency shall prohibit its employees from purchasing forfeited property.

Source: **L. 87:** Entire section added, p. 639, § 14, effective July 1. **L. 93:** Entire section amended, p. 626, § 1, effective July 1.

16-13-502. Definitions. As used in this part 5, unless the context otherwise requires:

(1) "Contraband article" means any controlled substance, as defined in section 18-18-102 (5), C.R.S., any other drug the possession of which is an offense under the laws of this state, any imitation controlled substance, as defined in section 18-18-420 (3), C.R.S., or any drug paraphernalia, as defined in section 18-18-426, C.R.S.

(1.5) "Conviction" means a verdict of guilty by a judge or jury or a plea of guilty or nolo contendere that is accepted by the court or adjudication for an offense that would constitute a criminal offense if committed by an adult.

(1.7) "Instrumental" means a substantial connection exists between the property and the unlawful use of the property.

(1.8) "Proceeds traceable" or "traceable proceeds" means all property, real and personal, corporeal and incorporeal, which is proceeds attributable to, derived from, or realized through, directly or indirectly, a subject act described in section 16-13-503, whether proved by direct, circumstantial, or documentary evidence. There shall be no requirement of showing of a trail of documentary evidence to trace proceeds if the standard of proof by clear and convincing evidence is met.

(2) "Seizing agency" means any agency that is charged with the enforcement of the laws of this state, of any other state, or of the United States relating to controlled substances and that has participated in a seizure or has been substantially involved in effecting a forfeiture through legal representation pursuant to this part 5; except that the filing of any lien against property forfeited under this part 5 by the governing body or agency thereof of any seizing agency after the date of seizure shall preclude such agency from participating pursuant to this part 5 as a seizing agency and shall deny any such agency from receiving any proceeds under this part 5. The department of corrections and a multijurisdictional task force shall be deemed to be included under this definition.

(3) "Vehicle" means any device of conveyance capable of moving itself or of being moved from place to place upon wheels, tracks, or water or through the air, whether or not intended for the transport of persons or property, and includes any place therein adapted for overnight accommodation of persons or animals or for the carrying on of business.

Source: **L. 84:** Entire part added, p. 505, § 1, effective July 1. **L. 87:** (2) amended, p. 639, § 15, effective July 1. **L. 92:** (1) amended, p. 391, § 18, effective July 1. **L. 95:** (2) amended, p. 872, § 5, effective May 24. **L. 2002:** (1.5) and (1.7) added and (2) amended, p. 924, § 8, effective July 1. **L. 2003:** (1.8) added, p. 904, § 15, effective July 1.

16-13-503. Subject acts. (1) The following acts are subject to this part 5:

(a) Engaging in the unlawful manufacture, cultivation, growth, production, processing, or distribution for sale of, or sale of, or storing or possessing for any unlawful manufacture or distribution for sale of, or for sale of, any controlled substance, as defined in section 18-18-102 (5), C.R.S., any other drug the possession of which is an offense under the laws

of this state, or any imitation controlled substance, as defined in section 18-18-420 (3), C.R.S.;

(b) Engaging in the unlawful manufacture, sale, or distribution of drug paraphernalia, as defined in section 18-18-426, C.R.S.;

(c) Transporting, carrying, or conveying any contraband article in, upon, or by means of any vehicle for the purpose of sale, storage, or possession of such contraband article;

(d) Concealing or possessing any contraband article in or upon any vehicle for the purpose of sale of such contraband article;

(e) Using any vehicle to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, or purchase for sale of any contraband article, or the sale, barter, exchange, or giving away of any contraband article; and

(f) Concealing or possessing any contraband article for the purpose of sale.

(2) Mere possession of less than sixteen ounces of marijuana shall not be an act subject to the provisions of this part 5.

Source: **L. 84:** Entire part added, p. 506, § 1, effective July 1. **L. 85:** (1)(a) amended, p. 1360, § 10, effective June 28. **L. 87:** (2) added, p. 639, § 16, effective July 1. **L. 92:** (1)(a) and (1)(b) amended, p. 392, § 19, effective July 1. **L. 2010:** (2) amended, (HB 10-1352), ch. 259, p. 1173, § 15, effective August 11.

16-13-504. Forfeiture of vehicle, fixtures and contents of building, personal property, or contraband article - exceptions. (1) Any vehicle or personal property, including fixtures and contents of a structure or building, as defined in section 16-13-301 (2), currency, securities, or negotiable instruments, which has been or is being used in any of the acts specified in section 16-13-503 or in, upon, or by means of which any act under said section has taken or is taking place; or any currency, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any of the acts listed in section 16-13-503; or any proceeds traceable to the acts listed in section 16-13-503; or any currency, negotiable instruments, or securities used or intended to be used to facilitate any of the acts listed in section 16-13-503 are contraband property and shall be seized, as well as any contraband article. Any peace officer or agent of a seizing agency may seize and hold such property or articles if there is probable cause to believe that such property or articles are contraband and the seizure is incident to a lawful search. All rights and interest in and title to contraband property shall immediately vest in the state upon seizure by a seizing agency, subject only to perfection of title, rights, and interests in accordance with this part 5. Neither replevin nor any other action to recover any interest in such property shall be maintained in any court except as provided in this part 5.

(1.5) If a rental motor vehicle is seized pursuant to this part 5, the seizing agency shall notify the motor vehicle rental company of the seizure if the motor vehicle is identified as a rental motor vehicle. The motor vehicle rental company may appear at the seizing agency and request the return of the rental motor vehicle. The rental motor vehicle shall be returned to the motor vehicle rental company unless the motor vehicle must be maintained in the custody of the seizing agency for evidentiary purposes or if the seizing agency has probable cause to believe the motor vehicle rental company, at the time of rental, had knowledge or notice of the criminal activity for which the rental car was used.

(2) (a) In any action seeking forfeiture of property pursuant to this part 5, any person, including a lienholder, who seeks to contest the forfeiture shall establish by a preponderance of the evidence such person's standing as a true owner of the property or a true owner with an interest in the property.

(b) To establish standing, the person shall first prove that the person has a recorded or registered interest in the property, or a bona fide marital interest in the property, if the property is of a type for which interests can be, and customarily are, recorded or registered in a public office.

(c) The person shall also prove that the person is a true owner of the property or a true owner of an interest in the property. The factors to be considered by the court in determining whether a person is a true owner shall include, but need not be limited to:

(I) Whether the person had the primary use, benefit, possession, or control of the property;

(II) How much of the consideration for the purchase or ownership of the property was furnished by the person, and whether the person furnished reasonably equivalent value in exchange for the property or interest;

(III) Whether the transaction by which the person acquired the property or interest was secret, concealed, undisclosed, hurried, or not in the usual mode of doing business;

(IV) Whether the transaction by which the person acquired the property or interest was conducted through the use of a shell, alter ego, nominee, or fictitious party;

(V) Whether the person is a relative, a co-conspirator, complicitor, or an accessory in the public nuisance act or acts or other criminal activity, a business associate in a legal or illegal business, one who maintains a special or close relationship with, or an insider with respect to the perpetrator of the alleged public nuisance act or acts;

(VI) Whether the person is silent or fails to call parties to testify or to produce available evidence explaining the acquisition of the property or factors which may be badges of fraud or deceit, or show lack of true ownership;

(VII) Whether the timing of the transaction by which the person acquired the property was during the pendency or threat of litigation, or during any time when the person knew, should have known, or had notice of the public nuisance act or acts or the threat of a forfeiture action;

(VIII) Whether the placing of the title in the name of, or the putative ownership in, or transfer to, the person was done with intent to delay, hinder, or avoid a forfeiture, or for some purpose other than ownership of the property;

(IX) Whether the perpetrator of the alleged public nuisance act or acts has absconded or is a fugitive from justice and the conveyance occurred after the flight, or before the flight, in any of the circumstances set forth in subparagraph (III) of this paragraph (c);

(X) Whether the subject matter property is of a kind in which property or ownership rights can legally exist;

(XI) Any other badge or indicia of fraud under article 8 of title 38, C.R.S., or the general law of fraudulent transfers or conveyances.

(d) The court shall consider the totality of the circumstances in determining whether a person is a true owner. A person contesting the forfeiture does not necessarily have to show that all of the factors enumerated in paragraph (c) of this subsection (2) support the claim of true ownership, nor does the person necessarily establish true ownership by showing the absence of fraudulent intent or badges of fraud.

(e) No private sale or conveyance of a used motor vehicle shall be deemed to make a party eligible to assert standing to contest the forfeiture thereof, unless the title to the motor vehicle, with transfer duly executed to the party, has been filed with the division of motor vehicles in the department of revenue prior to the physical seizure of the vehicle and the recording of a notice of seizure, or the party attempting to assert standing has exclusive possession of the vehicle at the time of seizure. A party eligible to assert standing under this paragraph (e) must nevertheless establish that the party is a true owner of the vehicle or has an interest therein pursuant to paragraph (c) of this subsection (2).

(f) Unless the standing of a particular party is conceded in the complaint initiating the public nuisance action, a party must assert standing in the answer and fully describe the party's interest in the property which is the subject matter of the action, and submit a verified statement, supported by any available documentation, of the party's ownership of or interest in the property.

(2.1) (a) In any action to forfeit property pursuant to this part 5, the plaintiff, in addition to any other matter which must be proven in the plaintiff's case in chief, shall prove by clear and convincing evidence that possession of the property is unlawful, or that the owner of the property or interest therein was involved in or knew of the subject act. The plaintiff shall also prove by clear and convincing evidence that the property was instrumental in the commission or facilitation of the crime or the property constitutes traceable proceeds of the crime or related criminal activity.

(a.5) (I) The claimant in an action brought pursuant to this part 5 may petition the court to determine whether a forfeiture was constitutionally excessive. Upon the conclusion of a

trial resulting in a judgment of forfeiture in an action brought pursuant to this part 5, if the evidence presented raises an issue of proportionality under this paragraph (a.5), the defendant may petition the court to set a hearing, or the court may on its own motion set a hearing to determine whether a forfeiture was constitutionally excessive. This determination shall be made prior to any sale or distribution of forfeited property.

(II) In making this determination, the court shall compare the forfeiture to the gravity of the public nuisance act giving rise to the forfeiture and related criminal activity.

(III) The defendant shall have the burden of establishing by a preponderance of the evidence that the forfeiture is grossly disproportional.

(IV) If the court finds that the forfeiture is grossly disproportional to the public nuisance act and related criminal activity, it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the excessive fines clause of the eighth amendment of the United States constitution or article II, section 20, of the Colorado constitution.

(V) and (VI) (Deleted by amendment, L. 2003, p. 890, § 2, effective July 1, 2003.)

(b) As used in paragraph (a) of this subsection (2.1), an owner was “involved in or knew of the subject act” if it is established that:

(I) The owner was involved in the subject act; or

(II) (A) The owner knew of the subject act or had notice of the acts facilitating the criminal activity or prior similar conduct and failed to take reasonable steps to prohibit or abate the illegal use of the property;

(B) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (II), if the plaintiff proves by clear and convincing evidence that the owner knew or had notice of the unlawful use of the property, the owner must prove by a preponderance of the evidence that the owner took reasonable steps to prohibit or abate the unlawful use of the property for the court to find the owner was not a party to the offense or related criminal activity.

(2.2) (a) With respect to a partial or whole ownership interest in existence at the time the conduct subjecting the property to seizure took place, the term “innocent owner” means any owner who:

(I) Did not have actual knowledge of the conduct subjecting the property to seizure or notice of an act or circumstance facilitating the criminal activity or prior similar conduct, notice being satisfied by, but not limited to, sending notice of an act or circumstance facilitating the criminal activity by certified mail; or

(II) Upon learning of the conduct subjecting the property to seizure, took reasonable steps to prohibit the conduct. An owner may demonstrate that he or she took reasonable action to prohibit such conduct if the owner:

(A) Timely revoked or attempted to revoke permission for those engaging in such conduct to use the property; or

(B) Took reasonable actions to discourage or prevent the use of the property in conduct subjecting the property to seizure.

(b) With respect to a partial or whole ownership interest acquired after the conduct subjecting the property to seizure has occurred, the term “innocent owner” means a person who, at the time he or she acquired the interest in the property, had no knowledge that the illegal conduct subjecting the property to seizure had occurred or that the property had been seized for forfeiture, and:

(I) Acquired an interest in the property in a bona fide transaction for value;

(II) Acquired an interest in the property through probate or inheritance; or

(III) Acquired an interest in the property through dissolution of marriage or by operation of law.

(c) An innocent owner’s interest in property shall not be forfeited under any provision of state law. An innocent owner has the burden of proving by a preponderance of the evidence that he or she has an ownership interest in the subject property. Otherwise, the burden of proof under this subsection (2.2) shall be as provided in subsection (2.1) of this section.

(d) A person who is convicted of a criminal offense arising from the same activity giving rise to the forfeiture proceedings in accordance with section 16-13-505 (1.5) shall not be eligible to assert an innocent owner defense.

(2.3) The prosecuting attorney shall set forth in the petition initiating the forfeiture action pursuant to this part 5 the existence of any liens and whether forfeiture of any liens will be sought. If forfeiture of a lien is not sought, the lienholder does not need to appear to preserve any interest in the property which is the subject of the forfeiture action which such lienholder may possess.

(3) (Deleted by amendment, L. 93, p. 627, § 2, effective July 1, 1993.)

Source: L. 84: Entire part added, p. 506, § 1, effective July 1. L. 87: (1) and (3) amended and (2) R&RE, pp. 639, 640, §§ 17, 18, effective July 1. L. 93: (2) and (3) amended and (2.1), (2.2), and (2.3) added, p. 627, § 2, effective July 1. L. 2002: (1.5) added and (2.1) and (2.2) amended, p. 924, § 9, effective July 1. L. 2003: (2), (2.1)(a), (2.1)(a.5), (2.1)(b)(I), (2.1)(b)(II), (2.2)(a)(I), and (2.2)(c) amended and (2.2)(d) added, pp. 900, 890, 903, §§ 11, 2, 13, effective July 1. L. 2004: (2.1)(b) amended, p. 1197, § 48, effective August 4.

ANNOTATION

Procedures set forth in the Colorado Contraband Forfeiture Act are exclusive, precluding other remedies for persons claiming interest in forfeited property. People v. Merrill, 816 P.2d 958 (Colo. App. 1991).

State claim to acquire currency used in a drug transaction may be pursued under ei-

ther the Contraband Forfeiture Act or the Public Nuisance Act, each intended to create different procedures with different remedies. People v. \$4338.00 in US Currency, 819 P.2d 1105 (Colo. App. 1991).

16-13-505. Forfeiture proceedings. (1) The several district courts of this state shall have original jurisdiction in proceedings under this part 5.

(1.5) No judgment of forfeiture of property in any forfeiture proceeding shall be entered unless and until an owner of the property is convicted of an offense involving the conduct listed in section 16-13-503, or a lesser included offense of an eligible offense if the conviction is the result of a negotiated guilty plea. Nothing in this section shall be construed to require the conviction to be obtained in the same jurisdiction as the jurisdiction in which the forfeiture action is brought. In the event criminal charges arising from the same activity giving rise to the forfeiture proceedings are filed against any individual claiming an interest in the property subject to the forfeiture proceeding, the trial and discovery phases of the forfeiture proceeding shall be stayed by the court until the disposition of the criminal charges. A stay shall not be maintained during an appeal or post-conviction proceeding challenging a criminal conviction. Nothing in this section shall be construed to prohibit or prevent the parties from contemporaneously resolving criminal charges and a forfeiture proceeding arising from the same activity.

(1.6) Upon acquittal or dismissal of a criminal action against a person named in a forfeiture action related to the criminal action, unless the forfeiture action was brought pursuant to one or more of paragraphs (a) to (f) of subsection (1.7) of this section, the forfeiture claim shall be dismissed and the seized property shall be returned as respects the subject matter property or interest therein of that person, if the case has been adjudicated as to all other claims, interests, and owners, unless possession of the property is illegal. If the forfeiture action is dismissed or judgment is entered in favor of the claimant, the claimant shall not be subject to any monetary charges by the state for storage of the property or expenses incurred in the preservation of the property, unless at the time of dismissal the plaintiff shows that those expenses would have been incurred to prevent waste of the property even if it had not been seized.

(1.7) Notwithstanding the provisions of subsection (1.5) of this section:

(a) (I) A person shall lack standing for and shall be disallowed from pursuit of a claim or defense in a civil forfeiture action upon a finding that a warrant or other process has been issued for the apprehension of the person, and, in order to avoid criminal prosecution, the person:

(A) Purposely leaves the state; or

(B) Declines to enter or reenter the state to submit to its jurisdiction; or

(C) Otherwise evades the jurisdiction of the court in which a criminal case is pending against the person or from which a warrant has been issued, by failing to appear in court or surrender on the warrant; and

(D) Is not known to be confined or held in custody in any other jurisdiction within the United States for commission of criminal conduct in that jurisdiction.

(II) If a person lacks standing pursuant to this paragraph (a), the forfeiture action may proceed and a judgment of forfeiture may be entered without a criminal conviction of an owner, upon motion and notice as provided in the rules of civil procedure.

(b) If, following notice to all persons known to have an interest or who have asserted an interest in the property subject to forfeiture, an owner fails to file an answer or other appropriate response with the court claiming an interest in the subject matter property, or no person establishes standing to contest the forfeiture action pursuant to section 16-13-504 (2), a forfeiture action may proceed and a judgment of forfeiture may be entered without a criminal conviction of an owner.

(c) If the plaintiff proves by clear and convincing evidence that the property was instrumental in the commission of an offense listed in section 16-13-503 (1) or that the property is traceable proceeds of the offense or related criminal activity by a nonowner and the plaintiff proves by clear and convincing evidence that an owner is not an innocent owner pursuant to section 16-13-504 (2.2), a judgment of forfeiture may be entered without a criminal conviction of an owner.

(d) If an owner of the property who was involved in the public nuisance act or conduct giving rise to the claim of forfeiture subsequently dies, and was not an innocent owner pursuant to section 16-13-504 (2.2), a judgment of forfeiture may be entered without a criminal conviction of an owner.

(e) If an owner received a deferred judgment, deferred sentence, or participated in a diversion program, or in the case of a juvenile a deferred adjudication or deferred sentence or participated in a diversion program for the offense, a judgment of forfeiture may be entered without a criminal conviction.

(f) A defendant or claimant shall be permitted to waive the requirement of a criminal conviction in order to settle a forfeiture action.

(2) (a) The prosecuting attorney shall file a petition in forfeiture to perfect title in seized contraband property no later than sixty-three days after the seizure. The prosecuting attorney may file the petition after the expiration of sixty-three days from the date of seizure only if the petition is accompanied by a written statement of good cause for the late filing. The sixty-three-day time limitation established by this paragraph (a) shall not apply where the seizure of the property occurred pursuant to a warrant authorizing such seizure or otherwise under any statute or rule of criminal procedure if the property is held as evidence in a pending criminal investigation or in a pending criminal case. The petition shall be accompanied by a supporting affidavit, and both shall describe the property seized with reasonable particularity and shall include a list of witnesses to be called in support of the claim for forfeiture, including the addresses and telephone numbers thereof.

(b) If the court finds from the petition and supporting affidavit that probable cause exists to believe that the seized property is contraband property as defined in this part 5, it shall, without delay, issue a citation directed to interested parties to show cause why the property should not be forfeited. The citation shall fix the date and time for a first appearance on the petition. The date fixed shall be no less than thirty-five days and no more than sixty-three days from the date of the issuance of the citation.

(c) At the first appearance on the petition, the court shall set a date and time for a hearing on the merits of the petition within forty-nine days after the first appearance.

(d) The only responsive pleading shall be designated a response to petition and citation to show cause and shall be filed with the court at or before the first appearance on the petition and shall include:

(I) A statement admitting or denying the averments of the petition;

(II) A statement setting forth with particularity why the seized property should not be forfeited. The statement shall include specific factual and legal grounds supporting it and any affirmative defense to forfeiture as provided in this part 5.

(III) A list of witnesses whom the respondent intends to call at the hearing on the merits, including the addresses and telephone numbers thereof; and

(IV) A verified statement, supported by documentation, that the claimant is the true owner of the property or an interest therein.

(e) No claim for relief against the plaintiff shall be set forth in the response, except a request for return of the seized property.

(2.5) All forfeiture actions shall proceed in state district court if the property was seized by a local or state law enforcement agency as a result of an ongoing state criminal investigation and the owner is being prosecuted in state court. Unless, directed by an authorized agent of the federal government, no state or local law enforcement agency may transfer any property seized by the state or local agency to a federal agency for forfeiture under federal law unless an owner of the property is being prosecuted in federal court.

(3) The citation specified in paragraph (b) of subsection (2) of this section shall:

(a) Describe the property;

(b) State the county, place, and date of seizure;

(c) State the name of the agency holding the seized property;

(d) State the date and time of the first appearance and the court in which it will be held;

(e) State that judgment in favor of the plaintiff shall enter forthwith against any party who fails to file a response pursuant to paragraph (d) of subsection (2) of this section or who fails to appear personally or by counsel at the first appearance before the court; and

(f) Advise the defendant of the right to continue the action under the circumstances stated in subsection (5) of this section.

(4) Except as otherwise provided in this part 5, the practice and procedure in an action to perfect title to contraband property shall be governed by the Colorado rules of civil procedure. Actions to perfect title to contraband property shall be included in the category of "expedited proceedings" specified in rules 16 and 26 of the Colorado rules of civil procedure; except that each party may conduct limited discovery as provided for in rule 26 (b) (2) of the Colorado rules of civil procedure. In addition, each party may move the court to authorize additional discovery upon good cause shown.

(5) Continuance of the hearing on the merits shall be granted upon stipulation of the parties or upon good cause shown.

(6) The hearing on the merits shall be heard by the court without a jury.

(7) If the seized property is of a type for which title or registration is required by law, or if the owner of the property and his or her address are known in fact, or if the seized property is subject to a perfected security interest, the prosecuting attorney shall give notice of the forfeiture action to the claimant, either by personal service of the petition, supporting affidavit, and citation upon him or her or by sending copies of such documents by certified mail, return receipt requested, to the last-known address of such claimant. If the documents are properly mailed to an address which the prosecutor has reasonable grounds to believe is the last-known address of the potential claimant, said documents shall be deemed served whether or not the claimant responds to the notice to claim them at the post office. Unknown persons who may claim any interest in the property, persons whose addresses are unknown, and persons upon whom the prosecutor has been unable to effect service as otherwise provided in this subsection (7) despite diligent good faith efforts may be served pursuant to a court order by publishing a copy of the citation twice in a newspaper of general circulation in the county in which the proceeding is instituted. The fact of such publication shall be conclusively established by the publisher's affidavit of publication. The first publication shall be more than fourteen days and the last publication not less than seven days before the first appearance date on the citation.

(8) If any claimant to the property subject to a forfeiture action, including a claimant unknown to the plaintiff, is properly served with the citation according to the procedures specified in subsection (7) of this section and fails to appear personally or by counsel on the first appearance date or fails to file a response as required by this section, the court shall forthwith find said person in default and enter an order forfeiting said person's interest in the property and distributing the proceeds of forfeiture as provided in this part 5. A default order of forfeiture entered pursuant to this section shall only be set aside upon an express finding by the court that a claimant was improperly served through no fault of such claimant

and had no notice of the first appearance on the citation or was prevented from appearing and responding due to an emergency situation caused by events beyond such claimant's control when such claimant had made diligent, good faith, and reasonable efforts to prepare a response and appear.

(9) If a forfeiture hearing held pursuant to this part 5 results in an order to return the subject property to a claimant and the prosecution states an intent to appeal and proceeds to initiate an appeal of the order, the court shall stay execution of the order pending appeal, unless the court finds that the appeal is taken in bad faith or for the purpose of delay. No appeal bond shall be required, but the court may make appropriate orders to preserve the value of the property pending appeal.

(10) The evidentiary burdens at a forfeiture hearing brought pursuant to this part 5 shall be as follows:

(a) The claimant shall first prove by a preponderance of the evidence that such claimant is the true owner of the property.

(b) If the claimant establishes that such claimant is the true owner of the property sought to be forfeited, the prosecuting attorney shall have the burden of going forward with the evidence and proving the allegations of the petition by clear and convincing evidence.

(c) (Deleted by amendment, L. 93, p. 629, § 3, effective July 1, 1993.)

(11) Actions pursuant to this part 5 shall be brought in the name of the people of the state of Colorado by the district attorney in the county in which the property was seized or in the county in which any subject act occurred. With the consent of the district attorney, the attorney general may also bring such an action.

Source: L. 84: Entire part added, p. 507, § 1, effective July 1. L. 86: (2) amended, p. 735, § 5, effective July 1. L. 87: Entire section R&RE, p. 640, § 19, effective July 1. L. 93: (2), (3), (5), (7), (8), and (10) amended, p. 629, § 3, effective July 1. L. 2002: (1.5), (1.6), (1.7), and (2.5) added and (10)(b) amended, p. 927, § 10, effective July 1. L. 2003: (1.5), (1.6), (1.7), (4), and (5) amended, pp. 894, 907, 897, §§ 5, 20, 9, effective July 1. L. 2012: (2)(a), (2)(b), (2)(c), and (7) amended, (SB 12-175), ch. 208, p. 858, § 93, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (2)(a), (2)(b), (2)(c), and (7) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Procedures set forth in the Colorado Contraband Forfeiture Act are exclusive, precluding other remedies for persons claiming interest in forfeited property. *People v. Merrill*, 816 P.2d 958 (Colo. App. 1991).

Failure of defendant to tender filing fee with the response, without any other aggravating factor, does not constitute an extreme circumstance justifying striking the pleading. Since the pleading was improperly stricken, it was error to enter a default judgment at the first hearing. *People v. Davenport*, 998 P.2d 473 (Colo. App. 2000).

Respondent's written statement asserting privilege against self-incrimination and requesting leave to submit documentation of ownership of confiscated money at a later date did not comply with subsection (2)(d)(IV) requirements for a "verified statement, supported by documentation". Therefore,

respondent was in default and court properly determined that she had not demonstrated standing entitling her to contest \$10,000 forfeiture. *People v. Merrill*, 816 P.2d 958 (Colo. App. 1991).

Under this section, trial court had no authority to stay forfeiture proceedings on basis of privilege against self-incrimination or to allow resolution of related criminal proceedings. *People v. Merrill*, 816 P.2d 958 (Colo. App. 1991).

Nor could court grant use immunity to respondent for statements made in response to forfeiture petition. Courts possess no inherent power to grant immunity in these circumstances, nor is such power conferred by this section. Controlling provisions are in § 13-90-118, which allows grant of immunity only upon request of the prosecuting attorney. *People v. Merrill*, 816 P.2d 958 (Colo. App. 1991).

16-13-506. Final order - disposition of property. (1) If the prosecution prevails in the forfeiture action, the court shall order the property forfeited and perfect the state's right and interest in and title to such property. The court shall also order such property to be sold at public sale by the law enforcement agency in possession of the property in the manner provided for sales on execution or in another commercially reasonable manner. The proceeds of sale shall be applied in the manner and priority enumerated in section 16-13-311. The order for sale shall perfect the state's right and interest in and title to the property and shall relate back to the date when title to the property vested in the state pursuant to section 16-13-316.

(2) In the event that the seizing agency is a state agency, proceeds allocated to such agency pursuant to subsection (1) of this section shall be distributed directly to said state agency.

(3) It is the intent of the general assembly that moneys allocated to a seizing agency pursuant to subsection (1) of this section shall not be considered a source of revenue to meet normal operating needs.

(4) If more than one seizing agency was substantially involved in effecting the forfeiture, the agencies shall enter into a stipulation with regard to costs incurred by the agencies and the percentage of any remaining proceeds which shall be deposited for the benefit of the agencies, and, upon filing such stipulation with the court, the court shall order the proceeds so distributed. If the agencies are unable to reach an agreement, the court shall take testimony and equitably distribute the proceeds according to the formula set out in subsection (1) of this section.

(4.5) If the court finds that a vehicle or personal property forfeited pursuant to this part 5 can be used for law enforcement purposes by a seizing agency, the court shall order that the vehicle or personal property be delivered to the agency instead of sold. If more than one seizing agency was substantially involved in effecting the forfeiture, the priority for receiving such vehicle or personal property shall be established by stipulation pursuant to subsection (4) of this section.

(5) Any forfeited money or currency shall be in addition to the proceeds obtained from sale of forfeited personalty and shall be equitably distributed pursuant to subsection (1) of this section.

(6) Upon the sale of any vehicle, the state shall issue a certificate of title to the purchaser thereof.

(7) In any order issued by the court pursuant to subsections (1) and (4) of this section, the court shall only order the amounts to be distributed and to whom, and the courts shall not have the power to dictate the use for which the moneys are to be appropriated, employed, received, or expended by the seizing agency or injured person.

(8) (a) (Deleted by amendment, L. 92, p. 450, § 5, effective July 1, 1992.)

(b) Repealed.

Source: L. 84: Entire part added, p. 507, § 1, effective July 1. L. 87: IP(1) amended, (1)(c)(I) R&RE, and (1)(c)(I.5) and (4.5) added, p. 643, §§ 20, 21, 22, effective July 1. L. 92: (8) amended, p. 450, § 5, effective July 1. L. 95: (1)(c) amended, p. 872, § 6, effective May 24. L. 98: (8)(b) repealed, p. 726, § 5, effective May 18. L. 2002: (1) amended, p. 928, § 11, effective July 1. L. 2003: (1) amended, p. 906, § 18, effective July 1.

Cross references: For provisions on reporting and disposition of forfeited property, see part 7 of this article.

16-13-507. Disposition of contraband article or property. Any property seized pursuant to section 16-13-504 which is required by law to be destroyed, or the possession of which is illegal, or which in the opinion of the court is not properly the subject of a sale may be destroyed pursuant to a warrant for the destruction of personal property issued by the court and directed to the sheriff of the proper county or any peace officer and returned

by the sheriff or peace officer after execution thereof. The court shall stay the execution of any such warrant during the period in which the property is used as evidence in any pending criminal or civil proceeding.

Source: L. 84: Entire part added, p. 509, § 1, effective July 1. L. 87: Entire section amended, p. 643, § 23, effective July 1.

Cross references: For provisions on reporting and disposition of forfeited property, see part 7 of this article.

16-13-508. Forfeitures. Notwithstanding anything contained in this part 5, this part 5 shall not be construed as an amendment or repeal of any of the criminal laws of this state, but the provisions of this part 5, insofar as they relate to those laws, shall be considered a cumulative right of the people in the enforcement of such laws. Nothing in this part 5 shall be construed to limit or preempt the powers of any court or political subdivision to abate or control public nuisances, and this part 5 shall be an additional remedy in those situations where an action could be brought under part 3 of this article.

Source: L. 84: Entire part added, p. 509, § 1, effective July 1.

16-13-509. Evidentiary presumption. (1) Whenever clear and convincing evidence adduced in an action pursuant to this part 5 shows a substantial connection between currency and the acts specified in section 16-13-503, a rebuttable presumption shall arise that said currency is contraband property. A substantial connection exists if:

(a) Currency in the aggregate amount of one thousand dollars or more was seized at or close to the time of the occurrence of the subject act or of the recovery of evidence of the subject act; and

(b) (I) Said amount of currency was seized on the same premises or in the same vehicle where the subject acts occurred or where evidence of said acts was developed or recovered; or

(II) Said amount of currency was seized from the possession or control of a person engaged in said acts; or

(III) Traces of a controlled substance were discovered on the currency or an animal trained in the olfactory detection of controlled substances indicated the presence of the odor of a controlled substance on the currency as testified to by an expert witness.

(1.5) Notwithstanding any other provision of this part 5 to the contrary, the plaintiff shall have the burden of proving, by clear and convincing evidence, only the facts that give rise to the presumption that currency is contraband property pursuant to subsection (1) of this section. However, when a preponderance of credible evidence is adduced to rebut a presumption that has arisen pursuant to subsection (1) of this section, the burden of proof shall revert to the plaintiff to prove, by clear and convincing evidence, the elements of the plaintiff's case with respect to the currency.

(2) The provisions of subsection (1) of this section shall not be construed so as to limit the introduction of any other competent evidence offered to prove that seized currency is contraband property.

Source: L. 87: Entire section added, p. 644, § 24, effective July 1. L. 2003: IP(1) amended and (1.5) added, p. 896, § 7, effective July 1.

16-13-510. Money placed in account. Currency seized pursuant to this part 5 may be placed in an interest-bearing account during the proceedings pursuant to this part 5 if so ordered by the court upon the motion of any party. Photocopies of portions of the bills shall serve as evidence at all hearings. The account and all interest accrued shall be forfeited or returned to the prevailing party in lieu of the currency.

Source: L. 87: Entire section added, p. 644, § 24, effective July 1.

16-13-511. Severability. If any provision of this part 5 is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of this part 5 are valid, unless it appears to the court that the valid provisions of this part 5 are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed that the general assembly would have enacted the valid provisions without the void provision or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent of this part 5.

Source: L. 87: Entire section added, p. 644, § 24, effective July 1.

PART 6

RECEIPT OF FEDERALLY FORFEITED PROPERTY

16-13-601. Receipt of federally forfeited property. Any agency charged with the enforcement of the laws of this state, including the Colorado National Guard when participating in operations pursuant to the drug interdiction and enforcement plan required by part 13 of article 3 of title 28, C.R.S., is authorized to accept, receive, dispose of, and expend the property or proceeds from any property forfeited to the federal government and allocated to such agency by the United States attorney general pursuant to 21 U.S.C. sec. 881 (e). Such revenues shall be in addition to the moneys appropriated to such law enforcement agency by the general assembly or any unit of local government. Said property or proceeds may be credited to any lawfully created fund designated to receive proceeds of forfeitures. Any proceeds received pursuant to this section are exempt from the distribution requirements of section 16-13-311 (3) (a).

Source: L. 86: Entire part added, p. 750, § 1, effective April 3. **L. 2002:** Entire section amended, p. 929, § 12, effective July 1. **L. 2007:** Entire section amended, p. 444, § 2, effective August 3.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 117, Session Laws of Colorado 2007.

PART 7

REPORTING AND DISPOSITION OF FORFEITED PROPERTY

Cross references: For provisions on disposition of seized personal property, see § 16-13-311; for provisions on disposition of forfeited real property, see § 16-13-314; for provisions on forfeited property relating to controlled substances, see part 5 of this article.

16-13-701. Reporting of forfeited property. (1) Any provision of law to the contrary notwithstanding, the elected district attorney for each judicial district shall file an annual forfeiture report on or before April 1 for the previous calendar year. Such report shall include:

(a) A description of all property that was the subject of a forfeiture action filed in the judicial district, including the forfeiture case number;

(b) The criminal charges filed against the owner of the property and the criminal case number;

(c) Disposition or status of the criminal and forfeiture actions, including the value of the property forfeited or the amount of proceeds of the forfeiture, if the property is liquidated;

(d) A description and the value of any property seized by the district attorney's office that was transferred to the United States for forfeiture under federal law, including the federal forfeiture case number and the criminal case number, whether the criminal action was filed in state or federal court, and the grounds for the transfer; and

(e) The total proceeds received by the district attorney in the judicial district from all federal forfeiture actions arising in the judicial district.

(2) The report required in this section shall be filed with the department of local affairs and shall constitute a public record and shall be open to inspection as provided in the "Colorado Open Records Act", part 2 of article 72 of title 24, C.R.S.

(3) Any state or local law enforcement agency or multijurisdictional task force that receives proceeds from federal forfeiture actions shall submit a copy to the department of local affairs of any accounting report filed by such agency pursuant to federal law or regulation. The federal annual accounting report shall constitute a public record and shall be open to inspection as provided in the "Colorado Open Records Act", part 2 of article 72 of title 24, C.R.S. Such information shall be subject to audit in accordance with part 6 of article 1 of title 29, C.R.S.

(4) The unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, shall prepare an annual accounting report of moneys received by the managed service organization pursuant to section 16-13-311 (3) (a) (VII) (B), including revenues, expenditures, beginning and ending balances, and services provided. The unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, shall provide this information in its annual report pursuant to section 27-80-110, C.R.S.

(5) Any report submitted pursuant to this section shall be subject to audit in accordance with part 6 of article 1 of title 29, C.R.S.

Source: L. 92: Entire part added, p. 451, § 6, effective July 1. L. 2002: Entire section amended, p. 930, § 13, effective July 1. L. 2003: (1) and (4) amended, p. 906, § 19, effective July 1. L. 2009: (2) and (3) amended, (SB 09-292), ch. 369, p. 1948, § 30, effective August 5. L. 2010: (4) amended, (SB 10-175), ch. 188, p. 783, § 23, effective April 29.

16-13-702. Disposition of forfeited property. (1) No forfeited property shall be used nor shall any forfeited proceeds be expended by any seizing agency to whom section 16-13-701 (1) applies unless such use or expenditure has been approved by a committee on disposition of forfeited property which is created in subsection (2) of this section.

(2) There is hereby created, for each seizing agency, a committee on disposition of forfeited property. The committee on disposition of forfeited property shall meet as necessary to approve the use of forfeited property or the expenditure of forfeited proceeds by the seizing agency.

(3) The composition of the committee for a seizing agency shall, at a minimum, include the district attorney of the judicial district having jurisdiction over the forfeited property, or a designee of such district attorney; the head of the seizing agency, or the designee of such person; and a representative of the governmental body having budgetary authority over the seizing agency appointed by the governmental body. The required members of the committee may select other members to serve on the committee by unanimous agreement.

(4) The composition of the committee, where the seizing agency is a district attorney's office, shall, at a minimum, include the district attorney or the designee of such district attorney; the head of a law enforcement agency from among the law enforcement agencies in the district attorney's judicial district, who is appointed by the district attorney; and one representative of one of the governmental bodies having budgetary authority over the district attorney's budget, to be selected by the unanimous agreement of all of the governmental bodies in the judicial district which have budgetary authority over the district attorney's budget. The required members of the committee may select other members to serve on the committee by unanimous agreement.

(5) The composition of the committee for any group of law enforcement agencies which have associated and are authorized to perform special law enforcement functions shall include the district attorney of the judicial district having jurisdiction over the property forfeited under this article, or the designee of such district attorney; the head of the seizing agency having jurisdiction over the property forfeited under this article, or such person's

designee; and a representative from the governing body having budgetary authority over the seizing agency. The required members of the committee may select other members to serve on the committee by unanimous agreement.

(6) Nothing in this article shall be construed to prevent multiple seizing agencies from combining to form a single committee on disposition of forfeited property which has a membership different from the committees described in subsection (3), (4), or (5) of this section so long as the membership of such committee is approved by all governing bodies which have approval over the budgets of each of the seizing agencies which have combined to form the committee.

Source: L. 92: Entire part added, p. 451, § 6, effective July 1.

PART 8

LIFETIME SUPERVISION OF SEX OFFENDERS

16-13-801 to 16-13-812. (Repealed)

Source: L. 2002: Entire part repealed, p. 1463, § 3, effective October 1.

Editor's note: This part 8 was added in 1998. For amendments to this part 8 prior to its repeal in 2002, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. The provisions of this part 8 were relocated to part 10 of article 1.3 of title 18. For the location of specific provisions, see the editor's notes following each section in said part 10 and the comparative tables located in the back of the index.

Cross references: For the legislative declaration contained in the 2002 act repealing this part 8, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 9

COMMUNITY NOTIFICATION CONCERNING SEXUALLY VIOLENT PREDATORS

16-13-901. Legislative declaration. The general assembly hereby finds that persons who are convicted of offenses involving unlawful sexual behavior and who are identified as sexually violent predators pose a high enough level of risk to the community that persons in the community should receive notification concerning the identity of these sexually violent predators. The general assembly also recognizes the high potential for vigilantism that often results from community notification and the dangerous potential that the fear of such vigilantism will drive a sex offender to disappear and attempt to live without supervision. The general assembly therefore finds that sex offender notification should only occur in cases involving a high degree of risk to the community and should only occur under carefully controlled circumstances that include providing additional information and education to the community concerning supervision and treatment of sex offenders.

Source: L. 99: Entire part added, p. 1151, § 17, effective July 1. **L. 2006:** Entire section amended, p. 1311, § 1, effective May 30.

16-13-902. Definitions. As used in this part 9, unless the context otherwise requires:

- (1) "Department" means the department of corrections created in section 24-1-128.5, C.R.S.
- (2) "Management board" means the sex offender management board created in section 16-11.7-103.
- (3) "Parole board" means the state board of parole created in section 17-2-201, C.R.S.
- (4) "Sex offender" means a person sentenced pursuant to part 10 of article 1.3 of title 18, C.R.S.

(5) “Sexually violent predator” means a sex offender who is identified as a sexually violent predator pursuant to section 18-3-414.5, C.R.S., or who is found to be a sexually violent predator or its equivalent in any other state or jurisdiction, including but not limited to a military or federal jurisdiction. For purposes of this subsection (5), “equivalent”, with respect to an offender found to be a sexually violent predator or its equivalent, means a sex offender convicted in another state or jurisdiction, including but not limited to a military, tribal, territorial, or federal jurisdiction, who has been assessed or labeled at the highest registration and notification levels in the jurisdiction where the conviction was entered and who satisfies the age, date of offense, and conviction requirements for sexually violent predator status pursuant to Colorado law.

(6) “Technical assistance team” means the group of persons established by the division of criminal justice pursuant to section 16-13-906 to assist local law enforcement in carrying out community notification and to provide general community education concerning sex offenders.

Source: L. 99: Entire part added, p. 1152, § 17, effective July 1. L. 2006: (5) amended, p. 1311, § 2, effective May 30. L. 2011: (5) amended, (HB 11-1278), ch. 224, p. 959, § 1, effective May 27.

16-13-903. Sexually violent predator subject to community notification - determination - implementation. (1) A sexually violent predator shall be subject to community notification as provided in this part 9, pursuant to criteria, protocols, and procedures established by the management board pursuant to section 16-13-904.

(2) (Deleted by amendment, L. 2006, p. 1312, § 3, effective May 30, 2006.)

(3) (a) When a sexually violent predator is sentenced to probation or community corrections or is released into the community following incarceration, the sexually violent predator’s supervising officer, or the official in charge of the releasing facility or his or her designee if there is no supervising officer, shall notify the local law enforcement agency for the jurisdiction in which the sexually violent predator resides or plans to reside upon release from incarceration. The local law enforcement agency shall notify the Colorado bureau of investigation, and the sexually violent predator’s status as being subject to community notification shall be entered in the central registry of persons required to register as sex offenders created pursuant to section 16-22-110.

(b) When a sexually violent predator living in a community changes residence, upon registration in the new community or notification to the new community’s law enforcement agency, that agency shall notify the Colorado bureau of investigation and implement community notification protocols.

(4) Nothing in this section shall be construed to abrogate or limit the sovereign immunity granted to public entities pursuant to the “Colorado Governmental Immunity Act”, article 10 of title 24, C.R.S.

(5) A sex offender convicted in another jurisdiction who is designated as a sexually violent predator by the department of public safety for purposes of Colorado law shall be notified of his or her designation and shall have the right to appeal the designation in district court.

Source: L. 99: Entire part added, p. 1152, § 17, effective July 1. L. 2002: (3) amended, p. 1185, § 18, effective July 1. L. 2006: Entire section amended, p. 1312, § 3, effective May 30. L. 2011: (5) added, (HB 11-1278), ch. 224, p. 959, § 2, effective May 27.

ANNOTATION

Trial court’s adjudication of defendant as a sexually violent predator subjecting him to community notification did not violate defendant’s right to trial under Appendi v. New

Jersey. Community notification is not additional punishment giving rise to right to trial by jury. *People v. Rowland*, 207 P.3d 890 (Colo. App. 2009).

16-13-904. Sex offender management board - duties. (1) The management board, in collaboration with the department of corrections, the judicial department, and the parole board, shall establish and revise when necessary:

(a) (Deleted by amendment, L. 2006, p. 1312, § 4, effective May 30, 2006.)

(b) Criteria to be applied by a local law enforcement agency in determining when to carry out a community notification;

(c) Protocols and procedures for carrying out community notification.

(2) The management board shall collaborate with the technical assistance team in establishing the protocols and procedures for carrying out community notification. Such protocols and procedures shall be designed to ensure that notice is provided in a manner that is as specific as possible to the population within the community that is at risk. Such protocols and procedures shall also include provision to the community of general information and education concerning sex offenders, including treatment and supervision of sex offenders, and procedures to attempt to minimize the risk of vigilantism.

(3) (Deleted by amendment, L. 2006, p. 1312, § 4, effective May 30, 2006.)

Source: L. 99: Entire part added, p. 1153, § 17, effective July 1. L. 2000: (1)(b) amended, p. 924, § 15, effective July 1. L. 2006: IP(1), (1)(a), and (3) amended, p. 1312, § 4, effective May 30.

16-13-905. Local law enforcement - duties - immunity. (1) The local law enforcement agency for the jurisdiction in which a sexually violent predator who is subject to community notification resides shall be responsible for carrying out any community notification regarding said sexually violent predator. Such community notification shall only occur under the circumstances and in the manner specified by the management board pursuant to section 16-13-904. The local law enforcement agency may apply to the division of criminal justice for assistance from the technical assistance team in carrying out any community notification.

(2) Nothing in this section shall be construed to abrogate or limit the sovereign immunity granted to public entities pursuant to the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

Source: L. 99: Entire part added, p. 1154, § 17, effective July 1. L. 2006: (2) amended, p. 1313, § 5, effective May 30.

16-13-906. Division of criminal justice - technical assistance team. (1) The division of criminal justice of the department of public safety shall establish a technical assistance team to provide assistance to local law enforcement agencies in carrying out community notification. The technical assistance team shall include persons with expertise in sex offender management, sex offender supervision, and law enforcement.

(2) The technical assistance team shall also be available upon request to assist communities in providing general information concerning sex offenders, including treatment, management, and supervision of sex offenders within society. Such education may be provided in situations that are not related to the provision of notice concerning a specific sexually violent predator.

(3) Nothing in this section shall be construed to abrogate or limit the sovereign immunity granted to public entities pursuant to the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

Source: L. 99: Entire part added, p. 1154, § 17, effective July 1. L. 2000: (3) added, p. 924, § 16, effective July 1. L. 2006: (3) amended, p. 1313, § 6, effective May 30.

UNIFORM MANDATORY DISPOSITION OF DETAINERS ACT

ARTICLE 14

Uniform Mandatory Disposition
of Detainers Act

16-14-101.	Short title.	16-14-104.	Trial or dismissal.
16-14-102.	Request for disposition of untried complaint or infor- mation.	16-14-105.	Escape voids request.
		16-14-106.	Article does not apply.
16-14-103.	Duties of superintendent upon delivery of request.	16-14-107.	Prisoners to be informed of provisions of article.
		16-14-108.	Construction of article.

16-14-101. Short title. This article shall be known and may be cited as the "Uniform Mandatory Disposition of Detainers Act".

Source: L. 69: p. 292, § 8. C.R.S. 1963: § 39-23-8.

ANNOTATION

Prospective challenge. Prospectively, and not retroactively, a prisoner subject to a detainer under the interstate agreement on detainers will have the right to challenge the procedures to determine whether the interstate compact and the uniform act have been complied with. *Moen v. Wilson*, 189 Colo. 85, 536 P.2d 1129 (1975).

Act implements speedy trial right. The uniform act is one of several Colorado statutes implementing a defendant's right to a speedy trial as provided in § 16 of art. II, Colo. Const. *People v. Bean*, 650 P.2d 565 (Colo. 1982); *People v. Lewis*, 680 P.2d 226 (Colo. 1984).

Rights under the act. All rights under the act are statutorily and not constitutionally based; thus, waiver of them must be voluntary but need not be knowing and intelligent. *People v. Martin*, 707 P.2d 1005 (Colo. App. 1985), *aff'd*, 738 P.2d 789 (Colo. 1987).

The purpose of the Uniform Mandatory Disposition of Detainers Act (UMDDA) is to provide a mechanism for the disposition of detainers; without a detainer, the act has no applicability. *People v. Bolin*, 712 P.2d 1002 (Colo. 1986).

The primary purpose of the UMDDA and the Interstate Agreement on Detainers (IAD) is to provide a mechanism for prisoners to insist upon speedy and final disposition of untried charges that are the subjects of detainers so that a prisoner's speedy trial rights and any prison rehabilitation programs initiated for the prisoners' benefit will not be disrupted or precluded by the existence of these untried charges. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986); *People v. Naulls*, 937 P.2d 778 (Colo. App. 1996).

Policies of IAD and this article are similar. *People v. Bean*, 44 Colo. App. 373, 619 P.2d 72 (1980), *rev'd* on other grounds, 650 P.2d 565 (Colo. 1982).

The IAD and the UMDDA embody like policies, and, generally, the principles of one may be applied to the other. *People v. Morgan*, 712 P.2d 1004 (Colo. 1986); *Sweaney v. District Court*, 713 P.2d 914 (Colo. 1986).

Policy same as § 18-1-405 and Crim. P. 48. The policies underlying § 18-1-405 and Crim. P. 48 are the same as those relative to the uniform act. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978); *People v. Boos*, 199 Colo. 15, 604 P.2d 272 (1979).

In determining whether to dismiss charges for lack of prompt notification, a court must consider more than the general factors underlying the constitutional right to a speedy trial because the UMDDA effectuates other policies besides the speedy trial rights. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

A defendant is entitled to the dismissal of charges against him that underlie a detainer as a sanction for violation of the prompt notification requirement of § 16-14-102 (2) of the uniform act unless the prosecution can demonstrate a lack of prejudice to the defendant resulting from that violation. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986); *People v. Glasser*, __ P.3d __ (Colo. App. 2011).

In the absence of an express statutory sanction for violation of the prompt notification requirement, automatic dismissal is not required as a remedy for such a violation. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

Failure to hold trial within prescribed time period requires dismissal of charges. This article by its express terms is jurisdictional, hence

dismissal is required regardless of whether defendant was prejudiced by the delay. *People v. Naulls*, 937 P.2d 778 (Colo. App. 1996).

16-14-102. Request for disposition of untried complaint or information. (1) Any person who is in the custody of the department of corrections pursuant to section 16-11-301 or parts 8 and 9 of article 1.3 of title 18, C.R.S., may request final disposition of any untried indictment, information, or criminal complaint pending against him in this state. The request shall be in writing addressed to the court in which the indictment, information, or criminal complaint is pending and to the prosecuting official charged with the duty of prosecuting it and shall set forth the place of confinement.

(2) It is the duty of the superintendent of the institution where the prisoner is confined to promptly inform each prisoner, in writing, of the source and nature of any untried indictment, information, or criminal complaint against him of which the superintendent has knowledge, and of the prisoner's right to make a request for final disposition thereof.

(3) Failure of the superintendent of the institution where the prisoner is confined to inform a prisoner, as required by subsection (2) of this section, within one year after a detainer from this state has been filed with the institution where the prisoner is confined shall entitle the prisoner to a dismissal with prejudice of the indictment, information, or criminal complaint.

Source: L. 69: p. 291, § 8. C.R.S. 1963: § 39-23-1. L. 76: (2) and (3) amended, p. 532, § 7, effective April 9. L. 77: (1) amended, p. 902, § 6, effective August 1.

ANNOTATION

Provisions similar to interstate agreement on detainers (IAD). Provisions in this article mandating that prison authorities "forthwith" furnish the certified statement and request, and directing that failure to comply with the specified time requirements for commencing trial will result in dismissal, are almost identical to the analogous provision in the IAD. *People v. Bean*, 44 Colo. App. 373, 619 P.2d 72 (1980), rev'd on other grounds, 650 P.2d 565 (Colo. 1982).

The Uniform Mandatory Disposition of Detainers Act (UMDDA) and the IAD embody like policies and, generally, the principles of one may be applied to the other. *People v. Morgan*, 712 P.2d 1004 (Colo. 1986); *Sweeney v. District Court*, 713 P.2d 914 (Colo. 1986).

Failure to hold trial within prescribed time period requires dismissal of charges. This article by its express terms is jurisdictional, hence dismissal is required regardless of whether defendant was prejudiced by the delay. *People v. Naulls*, 937 P.2d 778 (Colo. App. 1996).

The general speedy trial statute, § 18-1-405, and not this act, applies to the retrial of charges on convictions overturned on appeal. The UMDDA applies only to untried charges, and the charges against this defendant, while still pending, were not untried. *People v. Campbell*, 885 P.2d 327 (Colo. App. 1994).

Filing of detainer not required. The right of a person in the custody of the department of corrections to request final disposition of criminal charges and thereby to obtain a right to trial within 90 days on those charges is not depen-

dent upon the filing of a detainer. *People v. Campbell*, 742 P.2d 302 (Colo. 1987); *People v. Trancoso*, 776 P.2d 374 (Colo. 1989).

Sufficiency of request. Addressing the request for disposition to the chief judge of the appropriate court constitutes substantial compliance within the requirement that the defendant give the court notice that he wishes to invoke the provisions of the act. *People v. Campbell*, 742 P.2d 302 (Colo. 1987).

A prisoner's written request for disposition under this act, when sent to the superintendent, is sufficient to satisfy the requirements of this section. A prisoner's rights under this act cannot be defeated by the superintendent's failure to comply with his statutory duties under § 16-14-103. *People v. Trancoso*, 776 P.2d 374 (Colo. 1989).

Prison authorities must have "actual knowledge" of charges against a prisoner before a duty arises to promptly inform the prisoner of such charges. *People v. Lewis*, 680 P.2d 226 (Colo. 1984).

Mere awareness that charges are pending against an inmate in another jurisdiction does not trigger the superintendent's duty to inform the defendant of his rights under this article. *People v. Yellen*, 704 P.2d 306 (Colo. 1985), cert. denied, 474 U.S. 1036, 106 S. Ct. 603, 88 L. Ed.2d 582 (1985).

A superintendent only has "knowledge" of an untried charge when a detainer has been filed. *People v. Yellen*, 704 P.2d 306 (Colo. 1985), cert. denied, 474 U.S. 1036, 106 S. Ct. 603, 88 L. Ed.2d 582 (1985).

A person on parole is in custody of department of corrections for purposes of this section. *People v. Gess*, 250 P.3d 734 (Colo. App. 2010).

Revocation of parole not required for custody. A person placed on parole remains in the legal custody of the department of corrections and, therefore, revocation of parole is not required to invoke the protection of the uniform act. *People v. Campbell*, 742 P.2d 302 (Colo. 1987).

Where defendant was in jail for a parole violation, defendant, for purposes of this section, was considered to be in the custody of the department of corrections while in county jail. *People v. Slusher*, 43 P.3d 647 (Colo. App. 2001).

An outstanding arrest warrant for a prisoner is not an indictment, information, or criminal complaint and, therefore, does not trigger application of notice and speedy trial provisions of the uniform act. *People v. Gonzales*, 679 P.2d 1085 (Colo. 1984).

The existence of an untried indictment, information, or criminal complaint is necessary before a criminal may invoke the UMDDA procedural protection. A petition for a speedy disposition that predates the filing of an indictment, information, or complaint is a nullity with no legal effect on subsequently filed felony charges. *People v. Calhoon*, 897 P.2d 855 (Colo. App. 1994).

The UMDDA applies to all of a prisoner's untried charges, not just charges that occurred before incarceration. *People v. Gess*, 250 P.3d 734 (Colo. App. 2010).

A writing that makes a claim under the UMDDA must not be misleadingly labeled as a motion for habeas corpus relief and must be sent to both the court and prosecution. *People v. Gess*, 250 P.3d 734 (Colo. App. 2010).

Prisoner cured defects in original UMDDA claim by filing a written motion with the court and asking the court to dismiss the charges at a subsequent hearing at which the prosecution was present. *People v. Gess*, 250 P.3d 734 (Colo. App. 2010).

Notice of detainer. The prosecution has the burden of proving that a defendant is not prejudiced, as measured against the purposes of the uniform act, by the failure on the part of the superintendent of the institution in which the prisoner is confined to inform the defendant promptly of the existence of the detainer and of the defendant's rights, as required by subsection (2). *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

The appropriate measure for determining the imposition of a sanction for violations of subsection (2) properly begins with an examination of purposes furthered by the UMDDA. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

A violation of the prompt notification requirement in subsection (2) does not mandate an automatic dismissal of the charges against a defendant. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

There is no reason in the language or purpose of the statute to require that a prisoner request final disposition of a charge as a condition precedent to filing a motion to dismiss the charge because of an alleged violation of the prompt notification requirement of subsection (2). *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

A superintendent's obligation to inform a prisoner pursuant to subsection (2) does not arise until a detainer has in fact been filed; "knowledge" of untried charges for the purposes of subsection (2) does not occur until a detainer has been filed. *People v. Bolin*, 712 P.2d 1002 (Colo. 1986).

If a detainer is never filed, then a superintendent's duty required by § 16-14-102 (2) does not arise. *People v. Morgan*, 712 P.2d 1004 (Colo. 1986).

Violation of the provisions of subsection (3) does not automatically deprive the court of jurisdiction. It does entitle the prisoner to dismissal of the charges, regardless of whether he or she suffered any prejudice from the delay in notification. But defendant could not overcome the time bar imposed by § 16-5-402 on the basis that his motion alleged a jurisdictional defect. *People v. Slusher*, 43 P.3d 647 (Colo. App. 2001).

Statute as basis for jurisdiction. See *Buffalo v. Tanksley*, 189 Colo. 45, 536 P.2d 827 (1975).

The procedural requirements of the UMDDA and the IAD do not apply to a detainer placing a hold on a prisoner based on an unresolved sentencing determination in another jurisdiction where the defendant has already been convicted on the charges. *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993).

Time constraints of this section were not applicable to prosecution's motion to revoke deferred judgment and sentence where defendant's guilty plea had previously been accepted by the court. The phrase "untried indictment, information, or complaint" as used in this section does not apply to those situations in which a defendant has entered a guilty plea and the sentence is deferred. *People v. Hastings*, 903 P.2d 23 (Colo. App. 1994).

The provisions of this article govern interstate detainers, which involve prisoners in the custody of the department of corrections in Colorado who have Colorado charges pending against them and the provisions of § 24-60-501, govern interstate detainers, filed by a compact state that has charges pending against a person imprisoned in another compact state. *Johnson v. People*, 939 P.2d 817 (Colo. 1997).

Applied in *People v. Buggs*, 186 Colo. 13, 525 P.2d 421 (1974); *People v. Lopez*, 41 Colo.

App. 206, 587 P.2d 792 (1978); *People v. Gonzales*, 42 Colo. App. 517, 601 P.2d 644 (1979); *People v. Swazo*, 199 Colo. 486, 610 P.2d 1072

(1980); *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983); *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004).

16-14-103. Duties of superintendent upon delivery of request. (1) Any request made pursuant to section 16-14-102 shall be delivered to the superintendent where the prisoner is confined who shall forthwith:

(a) Certify the term of commitment under which the prisoner is being held, the time already served on the sentence, the time remaining to be served, the earned time earned, the time of parole eligibility of the prisoner, and any decisions of the state board of parole relating to the prisoner; and

(b) Send, by registered mail, a copy of the request made by the prisoner and a copy of the information certified under paragraph (a) of this subsection (1) to both the court having jurisdiction of the untried offense and to the prosecuting official charged with the duty of prosecuting the offense.

Source: L. 69: p. 291, § 8. C.R.S. 1963: § 39-23-2. L. 76: IP(1) amended, p. 532, § 8, effective April 9. L. 90: (1)(a) amended, p. 954, § 21, effective June 7.

Cross references: For provisions concerning good time and parole, see article 22.5 of title 17.

ANNOTATION

Provisions similar to interstate agreement on detainers (IAD). Provisions in this article mandating that prison authorities "forthwith" furnish the certified statement and request, and directing that failure to comply with the specified time requirements for commencing trial will result in dismissal, are almost identical to the analogous provision in the IAD. *People v. Bean*, 44 Colo. App. 373, 619 P.2d 72 (1980), rev'd on other grounds, 650 P.2d 565 (Colo. 1982).

There is no requirement in this section that defendant demonstrate prejudice as a result of prison officials' violation of the requirement to act "forthwith" on his behalf. *People v. Bean*, 44 Colo. App. 373, 619 P.2d 72 (1980), rev'd on other grounds, 650 P.2d 565 (Colo. 1982).

Burden of establishing that request was "forthwith" transmitted to the court rests on the state. *People v. Bean*, 650 P.2d 565 (Colo. 1982).

Notice of detainer. The prosecution has the burden of proving that a defendant is not prejudiced, as measured against the purposes of the uniform act, by the failure on the part of the superintendent of the institution in which the prisoner is confined to inform the defendant promptly of the existence of a detainer and of the defendant's rights, as required by § 16-14-102 (2). *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

Neither classification reviews or transportation orders constitute a "detainer" sufficient to trigger a superintendent's duty to promptly notify a prisoner of source and nature of untried indictment, information, or criminal complaint against such prisoner. *People v. Morgan*, 712 P.2d 1004 (Colo. 1986).

A superintendent's obligation to inform a prisoner pursuant to § 16-14-102 (2) does not arise until a detainer has in fact been filed; "knowledge" of untried charges for the purposes of § 16-14-102 (2) does not occur until a detainer has been filed. *People v. Bolin*, 712 P.2d 1002 (Colo. 1986).

Where defendant suffered no prejudice from superintendent's delay in sending copy of request to trial court and prosecutor, dismissal of charges is not warranted. *Martin v. People*, 738 P.2d 789 (Colo. 1987).

Superintendent's duties are invoked by prisoner's request. The superintendent's duties under this section are invoked whenever a prisoner's request under § 16-14-102 (1) is delivered to the superintendent, notwithstanding the absence of a detainer lodged against the prisoner. *People v. Trancoso*, 776 P.2d 374 (Colo. 1989).

Prisoner who mails a UMDDA motion directly to the court has delivered it incorrectly. *People v. Gess*, 250 P.3d 734 (Colo. App. 2010).

16-14-104. Trial or dismissal. (1) Within one hundred eighty-two days after the receipt of the request by the court and the prosecuting official, or within such additional time as the court for good cause shown in open court may grant, the prisoner or the prisoner's counsel being present, the indictment, information, or criminal complaint shall be brought to trial; but the parties may stipulate for a continuance or a continuance may be

granted on notice to the prisoner's attorney and opportunity to be heard. If, after such a request, the indictment, information, or criminal complaint is not brought to trial within that period, no court of this state shall any longer have jurisdiction thereof, nor shall the untried indictment, information, or criminal complaint be of any further force or effect, and the court shall dismiss it with prejudice.

(2) Any prisoner who requests disposition pursuant to section 16-14-102 may waive the right to disposition within the time specified in subsection (1) of this section by express waiver on the record after full advisement by the court. If a prisoner makes said waiver, the time for trial of the indictment, information, or criminal complaint shall be extended as provided in section 18-1-405 (4), C.R.S., concerning waiver of the right to speedy trial.

Source: L. 69: p. 291, § 8. C.R.S. 1963: § 39-23-3. L. 95: Entire section amended, p. 463, § 7, effective July 1. L. 2004: (1) amended, p. 1377, § 1, effective July 1. L. 2012: (1) amended, (SB 12-175), ch. 208, p. 859, § 94, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Purpose of act. The uniform act is intended to render constitutional guarantees of speedy trial more effective. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

The general speedy trial statute, § 18-1-405, and not this act, applies to the retrial of charges on convictions overturned on appeal. The Uniform Mandatory Disposition of Detainers Act (UMDDA) applies only to untried charges, and the charges against this defendant, while still pending, were not untried. *People v. Campbell*, 885 P.2d 327 (Colo. App. 1994).

This section applies only when the defendant is in the custody of the department of corrections. Where, at time of request for speedy trial, defendant was incarcerated in a county jail in Mississippi, and his deferred sentence was not yet revoked, 90-day time limit did not apply. *People v. McPherson*, 897 P.2d 923 (Colo. App. 1995).

The issue of physical custody is irrelevant when determining the applicability of the UMDDA. *People v. Carr*, 205 P.3d 471 (Colo. App. 2008).

Prisoner's right to invoke procedural protection of UMDDA depends on the existence of formal charges at the time UMDDA request is filed. Consequently, petition for a speedy disposition that predates the filing of an indictment, information, or complaint is a nullity with no legal effect on subsequently filed felony charges. *People v. Dehmer*, 931 P.2d 460 (Colo. App. 1996).

Prisoner may challenge his or her conviction on UMDDA grounds even if he or she pled guilty. A trial court loses jurisdiction if it fails to comply with this section, and that defect is not waived by a subsequent guilty plea. *People v. Gess*, 250 P.3d 734 (Colo. App. 2010).

Provisions similar to interstate agreement on detainers. Provisions in this article mandating that prison authorities "forthwith" furnish the certified statement and request, and directing that failure to comply with the specified time requirements for commencing trial will result in dismissal, are almost identical to the analogous provision in the interstate agreement on detainers. *People v. Bean*, 44 Colo. App. 373, 619 P.2d 72 (1980), rev'd on other grounds, 650 P.2d 565 (Colo. 1982).

Article controls over general speedy trial provisions. This article is a special statute designed to foster more effective prisoner treatment and rehabilitation; thus, when there is a conflict with the general speedy trial provisions, §§ 16-14-101 et seq., 18-1-405, and 24-60-501 et seq., and Crim. P. 48, the provisions of this article control. *People v. Swazo*, 199 Colo. 486, 610 P.2d 1072 (1980).

Continuance and its length determined by circumstances of case. The peculiar circumstances of each case are significant factors in providing guidance for the trial court in determining what must be shown to obtain a continuance or determine its length under the provisions of this article. *People v. Swazo*, 199 Colo. 486, 610 P.2d 1072 (1980); *People v. Fleming*, 867 P.2d 119 (Colo. App. 1993), rev'd on other grounds, 900 P.2d 19 (Colo. 1995).

The trial court's judgment regarding whether a continuance should be granted may be reversed on appeal only if there has been an abuse of discretion. *People v. Fleming*, 867 P.2d 119 (Colo. App. 1993), rev'd on other grounds, 900 P.2d 19 (Colo. 1995).

When dismissal of charges proper. Where a prisoner has substantially complied with the provisions of this article and the prosecution has actual notice of the prisoner's request, it is not

an abuse of discretion for the trial court to dismiss pending charges under the article. The court shall dismiss the charges with the prejudice if the prisoner complies with the act and the cause is not brought to trial within 90 days. *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983).

Failure to hold trial within prescribed time period requires dismissal of charges. This article by its express terms is jurisdictional, hence dismissal is required regardless of whether defendant was prejudiced by the delay. *People v. Naulls*, 937 P.2d 778 (Colo. App. 1996).

Statutory period commences to run upon receipt of request, not upon subsequent hearing. The 90-day statutory period commences to run upon receipt by county judge and district attorney's office of request for speedy trial under provisions of the uniform act, and not on date subsequent preliminary hearing. *People v. Boos*, 199 Colo. 15, 604 P.2d 272 (1979).

Proper sanction for failure to comply with this article is dismissal of the claims with prejudice. *People v. Bean*, 650 P.2d 565 (Colo. 1982).

Imposition of sanction. The prosecutor should have the burden of establishing lack of prejudice in order to avoid a sanction of dismissal for violation of any provision of the uniform act for which dismissal has not been mandated by the legislature. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

The appropriate measure for determining the imposition of a sanction for violations of § 16-14-102 (2) properly begins with an examination of purposes furthered by the UMDDA. *People v. Higinbotham*, 712 P.2d 993 (Colo. 1986).

Filing of detainer not required. The right of a person in the custody of the department of corrections to request final disposition of criminal charges and thereby to obtain a right to trial within 90 days on those charges is not dependent upon the filing of a detainer. *People v. Campbell*, 742 P.2d 302 (Colo. 1987).

Where there was no action on part of defendant when trial was rescheduled to a time outside the applicable statutory time limit, there was no waiver of his rights under the uniform act. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

Where criminal proceeding initiated by filing criminal complaint in county court, a request for disposition of detainer filed in the county court commences the running of the 90-day statutory period provided for in this section. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

Delay not for good cause. Fact that co-defendant who was not subject to UMDDA had trial set for date after 90-day period is not good cause for delaying defendant's trial. *People v. Mueller*, 851 P.2d 211 (Colo. App. 1992).

Disposition within 90 days waived. Failure of defendant's counsel to object to the trial date announced and to request an earlier date along with his statement as to availability on the date announced by the court and his affirmative request for a pretrial date to accommodate his convenience all amounted to consent to the date and waiver of the specified 90 days subsequent to the request for detainer disposition. *Chambers v. District Court*, 180 Colo. 241, 504 P.2d 340 (1972); *People v. Kimble*, 692 P.2d 1142 (Colo. App. 1984), cert. granted, 697 P.2d 716 (Colo.), cert. dismissed, 701 P.2d 17 (Colo. 1985).

Defendant voluntarily waived his objection that his request for final disposition of detainer was not transferred "forthwith" to the trial court when he and his attorney acquiesced freely in a trial date beyond the speedy trial period. *People v. Martin*, 707 P.2d 1005 (Colo. App. 1985).

Defendant's speedy trial right was violated, and there was no waiver of rights under this section by accepting a trial date outside the 180-day speedy trial period. Defendant's acquiescence in the trial date proposed by the court did not meet the express waiver requirements of subsection (2). The court did not advise defendant that his assent to the trial date would constitute a waiver of his speedy trial right, and defendant did not expressly waive his speedy trial right on the record. Further, the UMDDA advisement form attached to defendant's pro se request for speedy disposition did not advise him that agreement to a trial date set beyond the 180-day limitations period would constitute an implied waiver of his rights under the UMDDA. *People v. Carr*, 205 P.3d 471 (Colo. App. 2008).

Waiver of rights by participation in trial setting delays. A defendant effectively waives his rights to final disposition within the 90-day statutory limitation period by his active participation in trial setting delays and in his agreement to the appropriate dates. *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983); *People v. Martin*, 707 P.2d 1005 (Colo. App. 1985).

A defendant may waive his right to a final disposition within the 90-day statutory period by express waiver, or affirmative conduct evidencing such a waiver, such as active participation in trial setting delays, together with agreement to the appropriate dates. *People v. Martinez*, 712 P.2d 1070 (Colo. App. 1985).

Extension of the 90-day time limit does not require the defendant's personal consent. The limit was effectively tolled where the judge granted a continuation for the defendant's benefit because the prosecution was ready to proceed, but the defense counsel was not present. *People v. Fleming*, 900 P.2d 19 (Colo. 1995).

Defendant not entitled to relief because defendant's actions of hiring new counsel and then subsequently firing that counsel and representing himself, both of which required a contin-

uance, tolled the 180-day deadline. *People v. Gess*, 250 P.3d 734 (Colo. App. 2010).

Defendant's speedy trial claim was invalidated by tolling the speedy requirement within 90 days even though trial was not originally set within 90 days. Defendant's motion for a court-appointed expert tolled his speedy trial rights and defendant then expressly waived his speedy trial right at the hearing granting a court-appointed expert. *People v. Garcia*, 17 P.3d 820 (Colo. App. 2000).

Defendant's request for a continuance of the trial date to allow defense counsel more time to prepare tolled the 90-day time period for trial. *People v. Shreck*, 107 P.3d 1048 (Colo. App. 2004).

The 90-day time period was tolled where defendant contributed to the delay by not telling his counsel that he had requested final disposition and the date for completion of the 90-day period. *People v. Fleming*, 900 P.2d 19 (Colo. 1995).

Where a defendant permits a jury trial to proceed to a guilty verdict, there is a waiver of the act's benefits as a matter of law. *People v. Kimble*, 692 P.2d 1142 (Colo. App. 1984), cert. granted, 697 P.2d 716 (Colo.), cert. dismissed, 701 P.2d 17 (Colo. 1985).

Waiver may be of limited scope and duration. Trial court erred in construing such a waiver as broad and perpetual. *People v. Naulls*, 937 P.2d 778 (Colo. App. 1996).

Time extended by motions for defendant's benefit. Where additional time is necessitated by motions made for defendant's benefit, and reasonable continuances are ordered by the trial court to accommodate defendant's motions, the time for bringing defendant to trial under the

uniform act may be extended. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Attorney may request continuance without client's approval. An attorney may stipulate to or request a continuance without obtaining his client's personal approval. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Continuance held to be for good cause. Defense counsel's unanticipated military obligations made adequate trial preparation impossible. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Delay to get preliminary hearing not "good cause". Delay which results from a period of time required by the state in order to get a preliminary hearing is not "good cause" for the granting of a continuance. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

There is no untried "indictment, information, or complaint" where the defendant has been convicted but not sentenced. Thus, the provisions of the UMDDA and the Interstate Agreement on Detainers will not apply to sentencing detainers. *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993).

An outstanding arrest warrant is not an "indictment, information, or criminal complaint" which triggers the application of this section. *People v. McPherson*, 897 P.2d 923 (Colo. App. 1995).

Where trial court's ruling is based on a question of law, the standard of review is de novo, rather than an abuse of discretion standard. Trial court applied this section to undisputed facts and concluded that dismissal was mandatory under the plain language of the statute. *People v. Carr*, 205 P.3d 471 (Colo. App. 2008).

16-14-105. Escape voids request. Escape from custody by any prisoner subsequent to his execution of a request for final disposition of an untried indictment, information, or criminal complaint shall void the request.

Source: L. 69: p. 292, § 8. C.R.S. 1963: § 39-23-4.

16-14-106. Article does not apply. The provisions of this article do not apply to any person determined to be mentally incompetent by a court of competent jurisdiction.

Source: L. 69: p. 292, § 8. C.R.S. 1963: § 39-23-5. L. 75: Entire section amended, p. 926, § 27, effective July 1.

16-14-107. Prisoners to be informed of provisions of article. The superintendent shall arrange for all prisoners under his care and control to be informed in writing of the provisions of this article and for a record thereof to be placed in each prisoner's file.

Source: L. 69: p. 292, § 8. C.R.S. 1963: § 39-23-6. L. 76: Entire section amended, p. 532, § 9, effective April 9.

16-14-108. Construction of article. This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Source: L. 69: p. 292, § 8. C.R.S. 1963: § 39-23-7.

WIRETAPPING AND EAVESDROPPING

ARTICLE 15

Wiretapping and Eavesdropping

Law reviews: For article, “Discovery and Admissibility of Sound Recordings and Their Transcripts”, see 14 Colo. Law. 999 (1985); for article, “Interspousal Wiretapping and Eavesdropping: An Update - Parts I and II”, see 24 Colo. Law. 2343 and 2569 (1995); for article, “Statutory Suppression Under Colorado’s Wiretapping and Eavesdropping Act”, see 30 Colo. Law. 77 (August 2001).

16-15-101.	Definitions.	16-15-103.	Order may direct others to furnish assistance.
16-15-102.	Ex parte order authorizing the interception of wire, oral, or electronic communications.	16-15-104.	Reports to state court administrator and attorney general.

16-15-101. Definitions. As used in this article, unless the context otherwise requires:

(1) “Aggrieved person” means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

(1.5) “Aural transfer” means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(2) “Common carrier” means any person engaged as a common carrier for hire, in intrastate, interstate, or foreign communication by wire or radio, or in intrastate, interstate, or foreign radio transmission of energy.

(3) “Contents”, when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.

(3.3) “Electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce but does not include:

(a) (Deleted by amendment, L. 97, p. 601, § 1, effective August 6, 1997.)

(b) Any wire or oral communication;

(c) Any communication made through a tone-only paging device; or

(d) Any communication from a tracking device.

(3.5) “Electronic communication service” means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(3.7) “Electronic communications system” means any wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of electronic communications and any computer facilities or related electronic equipment for the electronic storage of such communications.

(4) “Electronic, mechanical, or other device” means any device or apparatus which can be used to intercept a wire, oral, or electronic communication, other than:

(a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or furnished by such subscriber or user for connection to the facilities of such service and being used in the ordinary course of its business, or being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal hearing.

(4.5) "Electronic storage" means:

(a) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(b) Any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

(5) "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(6) "Investigative or law enforcement officer" means any officer of the United States or of the state of Colorado or a political subdivision thereof, who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in title 18, C.R.S., and any attorney authorized by law to prosecute or participate in the prosecution of those offenses.

(7) "Judge of competent jurisdiction" means any justice of the supreme court of Colorado and a judge of any district court of the state of Colorado.

(8) "Oral communication" means any oral communication uttered by any person believing that such communication is not subject to interception, under circumstances justifying that belief, but does not include any electronic communication.

(8.5) "Readily accessible to the general public" means, with respect to a radio communication, that such communication is not:

(a) Scrambled or encrypted;

(b) Transmitted using modulation techniques having essential parameters withheld from the public with the intention of preserving the privacy of such communication;

(c) Carried on a subcarrier or other signal subsidiary to a radio transmission;

(d) Transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or

(e) Transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the rules of the federal communications commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

(8.6) "Tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

(8.7) "User" means any person or entity which uses an electronic communication service and is duly authorized by the provider of such service to engage in such use.

(9) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection, including the use of such connection in a switching station, between the point of origin and the point of reception, furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications and includes any electronic storage of such communication.

Source: L. 71: p. 484, § 2. **C.R.S. 1963:** § 39-24-1. **L. 88:** (1), (3), IP(4), (4)(a), (5), (8), and (9) amended and (1.5), (3.3), (3.5), (3.7), (4.5), and (8.5) to (8.7) added, p. 684, § 1, effective May 29. **L. 97:** (3.3) and (9) amended, p. 601, § 1, effective August 6.

ANNOTATION

This section is merely definitional and prescribes nothing. *People v. Morton*, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied, 423 U.S. 1053, 96 S. Ct. 783, 46 L. Ed.2d 642 (1976).

The use of pen registers is not governed by the wiretapping statute. *People v. Wahl*, 716 P.2d 123 (Colo. 1986).

Statements made by juvenile not protected oral communications under this act and fail

the test established in *Katz v. United States* (389 U.S. 347 (1967)) where one who is speaking in the actual presence of a police officer has neither a subjectively nor an objectively reasonable expectation of privacy. *People in Interest of A.W.*, 982 P.2d 842 (Colo. 1999).

However, later statements made by juvenile to parent were protected oral communications under this act where juvenile had a subjectively

and objectively reasonable expectation of privacy after receiving assurances from the police officer that "nothing" was behind a two-way mirror and that the officer would not be listening in. *People in Interest of A.W.*, 982 P.2d 842 (Colo. 1999).

Applied in *In re P.R. v. District Court*, 637 P.2d 346 (Colo. 1981); *People v. Velasquez*, 641 P.2d 943 (Colo. 1982).

16-15-102. Ex parte order authorizing the interception of wire, oral, or electronic communications. (1) (a) An ex parte order authorizing or approving the interception of any wire, oral, or electronic communication may be issued by any judge of competent jurisdiction of the state of Colorado upon application of the attorney general or a district attorney, or his or her designee if the attorney general or district attorney is absent from his or her jurisdiction, showing by affidavit that there is probable cause to believe that evidence will be obtained of the commission of any one of the crimes enumerated in this subsection (1) or that one of said enumerated crimes will be committed:

(I) Murder in the first or second degree as defined in sections 18-3-102 and 18-3-103, C.R.S.;

(II) Kidnapping in the first or second degree as defined in sections 18-3-301 and 18-3-302, C.R.S.;

(III) Gambling, meaning professional gambling, as defined in section 18-10-102 (8), C.R.S., and subject to prosecution under section 18-10-103 (2), C.R.S.;

(IV) Robbery as defined in section 18-4-301, C.R.S., aggravated robbery as defined in section 18-4-302, C.R.S., or burglary in the first or second degree as defined in sections 18-4-202 and 18-4-203, C.R.S.;

(V) Bribery as defined in section 18-8-302, C.R.S., compensation for past official behavior as defined in section 18-8-303, C.R.S., attempt to influence a public servant as defined in section 18-8-306, C.R.S., designation of supplier as defined in section 18-8-307, C.R.S., or misuse of official information as defined in section 18-8-402, C.R.S.;

(VI) Dealing in controlled substances as covered by part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S., as such offenses are subject to prosecution as felonies;

(VII) Crimes dangerous to life, limb, or property, meaning extortion, as defined as menacing by use of a deadly weapon in section 18-3-206, C.R.S., theft by means other than the use of force, threat, or intimidation as defined in section 18-4-401 (5), C.R.S., arson as defined in sections 18-4-102 to 18-4-105, C.R.S., as these offenses are subject to prosecution as felonies, assault in the first or second degree as defined in sections 18-3-202 and 18-3-203, C.R.S.;

(VII.5) Escape, as defined in section 18-8-208, C.R.S., or introducing contraband in the first or second degree, as defined in sections 18-8-203 and 18-8-204, C.R.S.;

(VIII) A criminal conspiracy as defined in section 18-2-201, C.R.S., to commit any of the aforementioned enumerated crimes;

(IX) Limited gaming as defined in article 47.1 of title 12, C.R.S., or in violation of article 20 of title 18, C.R.S.

(b) Anything to the contrary notwithstanding, an ex parte order for wiretapping or eavesdropping may be issued only for a crime specified in this subsection (1) for which a felony penalty is authorized upon conviction.

(c) For the purposes of paragraph (a) of this subsection (1):

(I) The district attorney shall designate the assistant district attorney or the chief deputy district attorney; and

(II) The attorney general shall designate either the chief deputy attorney general or the deputy attorney general of the criminal section of the office of the attorney general.

(2) Each application for an order authorizing or approving the interception of any wire, oral, or electronic communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) A complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including: Details as to the particular offense that has been, is being, or is about to be committed, except as provided in subsection (17) of this section, a particular description of the nature and location of the facilities from which, or the place where, the communication is to be intercepted; a particular description of the type of communication sought to be intercepted; and the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) A complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or to be too dangerous;

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, there shall be required a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

(e) A complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain those results.

(3) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(4) Upon an application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving the interception of any wire, oral, or electronic communication within the territorial jurisdiction of the court in which the judge is sitting and outside that jurisdiction but within the United States in the case of a mobile interception device, if the judge determines on the basis of the facts submitted by the applicant that:

(a) There is probable cause for belief that a person is committing, has committed, or is about to commit a particular offense enumerated in this section;

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through the interception;

(c) Normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous;

(d) Except as provided in subsection (17) of this section, there is probable cause for belief that the facilities from which or the place where the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of an offense or are leased to, listed in the name of, or commonly used by the person alleged to be involved in the commission of the offense.

(5) Each order authorizing or approving wiretapping or eavesdropping shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) Except as otherwise provided in subsection (17) of this section, the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) The period of time during which an interception is authorized, including a statement as to whether or not the interception automatically terminates when the described communication is first obtained.

(6) An order entered under this section may not authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to

achieve the objective of the authorization nor in any event longer than thirty days. Such thirty-day period begins the first day on which the investigative or law enforcement officer begins to conduct an interception under the order or ten days after the order is entered, whichever occurs earlier. An extension of an order may be granted but only upon application for an extension made in accordance with subsection (2) of this section and the court making the findings required by subsection (4) of this section. The period of an extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and each extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception under this section, and must terminate upon attainment of the authorized objective, or in any event in thirty days. No more than three extensions may be granted for any order entered under this section. In the event that the intercepted communication is in a code or foreign language and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception made pursuant to this section may be conducted in whole or in part by government personnel or by an individual operating pursuant to a contract with the government and acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(7) If an order authorizing interception is entered pursuant to this section, the order may require reports to be made to the judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such report shall be made at such times as the judge may require.

(8) (a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this section shall, if possible, be recorded on tape, wire, or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection (8) shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon expiration of the period of the order, or extension thereof, the recording shall be made available to the judge issuing the order and sealed under his directions. Custody of the recording shall be wherever the judge orders. A recording shall not be destroyed except upon an order of the judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of this section. The presence of the seal provided for by this subsection (8), or a satisfactory explanation for the absence thereof, is a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived under this section.

(b) Applications made and orders granted under this section shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. The applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction, and shall not be destroyed except on order of the judge to whom presented, and in any event shall be kept for ten years. Information obtained pursuant to a court order authorizing interception of wire, oral, or electronic communications shall not be used, published, or divulged except in accordance with the provisions of this article.

(c) Any violation of the provisions of this subsection (8) may be punished as contempt of court.

(d) Within a reasonable time, but not later than ninety days after the filing of an application for an order of approval under this section, which application is denied, or after the termination of the period of an order or extensions thereof, the judge to whom the application was presented shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion is in the interest of justice, notice of the following:

(I) The fact of the entry of the order or application;

(II) The date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application; and

(III) The fact that during the period wire, oral, or electronic communications were or were not intercepted. The judge, upon the filing of a motion, may, in his discretion, make available to any such person or his counsel for inspection such portions of the intercepted

communications, applications, and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction, the serving of the matter required by this paragraph (d) may be postponed.

(9) The contents of any intercepted wire, oral, or electronic communication or the evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a state court, unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the court if it finds that it was not possible to furnish the party with the information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving this information.

(10) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the state of Colorado, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, oral, or electronic communication or the evidence derived therefrom on the grounds that: The communication was unlawfully intercepted; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. This motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire, oral, or electronic communication or the evidence derived therefrom shall not be received as evidence. The remedies and sanctions provided for in this section with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this section involving such communications.

(11) In addition to any other right to appeal, the state of Colorado has the right to appeal from an order granting a motion to suppress made under subsection (10) of this section, or the denial of an application for an order of approval, if the person making or authorizing the application certifies to the judge granting the motion or denying an application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(12) Any investigative or law enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire, oral, or electronic communication or the evidence derived therefrom may disclose such contents to another investigative or law enforcement officer to the extent that this disclosure is appropriate in the proper performance of the official duties of the officer making or receiving the disclosure.

(13) Any investigative or law enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire, oral, or electronic communication or the evidence derived therefrom may use those contents to the extent the use is appropriate in the official performance of his official duties.

(14) Any person who has received, by any means authorized by this section, any information concerning a wire, oral, or electronic communication or any evidence derived therefrom, intercepted in accordance with the provisions of this section, may disclose the contents of that communication or derivative evidence while giving testimony in any criminal proceeding in any court of this state or in a grand jury proceeding.

(15) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

(16) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized in this section, intercepts wire, oral, or electronic communications relating to an offense other than one specified in the order of authorization or approval, the contents thereof and the evidence derived therefrom may be disclosed or used as provided in subsections (12) and (13) of this section only if an offense other than one specified in the order is an offense which constitutes a felony under Colorado statutes. The contents thereof and the evidence derived therefrom, as authorized by this section, may be used under subsection (14) of this section only when

authorized or approved by a judge of competent jurisdiction when the judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this section. This application shall be made as soon as practicable.

(17) (a) The requirements of paragraph (b) of subsection (2), paragraph (d) of subsection (4), and paragraph (b) of subsection (5) of this section relating to the specification of the facilities from which, or the place where, the communications are to be intercepted do not apply if:

(I) In the case of an application with respect to the interception of an oral communication:

(A) The application is made by an investigative or law enforcement officer and is approved by the attorney general or the district attorney of the district in which the application is sought;

(B) The application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(C) The judge finds that such specification is not practical; and

(II) In the case of an application with respect to the interception of a wire or electronic communication:

(A) The application is made by an investigative or law enforcement officer and is approved by the attorney general or the district attorney of the district in which the application is sought;

(B) The application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(C) The judge finds that such purpose has been adequately shown.

(b) An interception of a communication under an order with respect to which the requirements of paragraph (b) of subsection (2), paragraph (d) of subsection (4), and paragraph (b) of subsection (5) of this section do not apply pursuant to the provisions of paragraph (a) of this subsection (17) shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order pursuant to subparagraph (II) of paragraph (a) of this subsection (17) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously.

(18) (a) Any other provision of this article notwithstanding, any investigative or law enforcement officer specifically designated by the attorney general or a district attorney may intercept wire, oral, or electronic communications for a period not to exceed twenty-four hours under the following circumstances:

(I) When an emergency situation exists that involves the holding of hostages or kidnapping by the use of physical force, a deadly weapon, or an explosive device, and there is imminent danger of serious bodily injury or death to any person, or where one or more suspects in a felony crime have barricaded themselves in a building and there is a reasonable belief that one or more of the suspects is armed with a deadly weapon or explosive device; and

(II) There are reasonable and sufficient grounds present upon which an order could be entered to authorize such interception.

(b) Any emergency interception shall terminate upon attainment of the authorized objective as set forth in subparagraph (I) of paragraph (a) of this subsection (18) or at the end of the twenty-four-hour period, whichever comes first.

(c) The investigative or law enforcement officer designated pursuant to paragraph (a) of this subsection (18) and the official making such designation shall submit an application for the interception of wire, oral, or electronic communications to a judge of competent jurisdiction within the twenty-four-hour period described in paragraph (a) of this subsection (18). Such application shall be submitted regardless of whether or not the interception was terminated within the twenty-four-hour period. Such application shall comply in all respects with the requirements of this section and sections 16-15-101, 16-15-103, and 16-15-104.

(d) If, after the application described in paragraph (c) of this subsection (18) is made, the application is denied, any interception shall immediately cease. In such case, all recordings shall be sealed by the court as soon as practicable, and any communication intercepted shall be treated as a communication which has been obtained in violation of section 18-9-305, C.R.S., and an inventory shall be served in accordance with this article. Any such communication shall not be admissible in any legal action against any person whose communication was intercepted.

(e) All provisions of this article shall be applicable with respect to the execution of any interception under emergency circumstances.

(f) Repealed.

Source: **L. 71:** p. 486, § 2. **C.R.S. 1963:** § 39-24-2. **L. 72:** pp. 269, 270, §§ 1, 2. **L. 75:** (1)(a)(VII) amended, p. 631, § 3, effective July 1. **L. 81:** (1)(a)(VI) amended, p. 737, § 19, effective July 1. **L. 85:** (1)(a)(III) amended, p. 1360, § 11, effective June 28. **L. 87:** (1)(a)(VII) amended and (1)(a)(VII.5) added, p. 615, § 3, effective May 8. **L. 88:** (2)(b), (2)(e), IP(4), (4)(d), (5)(b), (6), (8)(a), (8)(b), (8)(d)(III), (9), (10), and (12) to (16) amended and (17) added, p. 686, § 2, effective May 29. **L. 91:** IP(1)(a), IP(2), and IP(4) amended and (18) added, p. 433, § 1, effective May 18; (1)(a)(IX) added, p. 1581, § 6, effective June 4. **L. 92:** (1)(a)(IX) amended, p. 2172, § 21, effective June 2. **L. 95:** (18)(f) repealed, p. 463, § 4, effective July 1. **L. 2007:** (18)(a)(I) amended, p. 327, § 1, effective April 2. **L. 2008:** IP(1)(a) and (6) amended and (1)(c) added, p. 47, § 1, effective August 5. **L. 2012:** (1)(a)(VI) amended, (HB 12-1311), ch. 281, p. 1617, § 35, effective July 1.

ANNOTATION

- I. General Consideration.
- II. Application.
- III. Order.
- IV. Use of Contents and Evidence.
 - A. In General.
 - B. Of Other Offenses.
- V. Suppression of Contents and Evidence.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Right of Privacy and Emotional Distress in Colorado", see 43 U. Colo. L. Rev. 147 (1971). For article, "Criminal Procedure", which discusses Tenth Circuit decisions dealing with electronic beepers and state wiretap statutes, see 62 Den. U. L. Rev. 159, 186 (1985). For article, "Discovery and Admissibility of a Sound Recordings and Their Transcripts", see 14 Colo. Law. 999 (1985).

Annotator's note. Since § 16-15-102 is similar to repealed § 40-4-30, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Section held constitutional. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Section is not an unconstitutional invasion of privacy. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

Because the benefits to society from crimes solved or frustrated by the use of wiretapping outweigh the limited invasion. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

Problem of electronic surveillance. The reason for the seriousness of the problem arises not from the fact that particular conversations are

not specifically described and specifically authorized, but rather from the unmanageability generally of electronic surveillance, for the area is peculiarly sensitive due to its effort to probe the thoughts of man who is the object of the search. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

This section allows law enforcement officers to intercept telephone communications after having obtained judicial authorization upon a showing of probable cause. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Court order to be scrutinized under stringent standards. A court order authorizing the wiretapping of telephonic communications must be scrutinized under the same stringent standards as other fourth amendment searches and seizures. *People v. Montoya*, 44 Colo. App. 234, 616 P.2d 156 (1980).

Crime within scope of section. Where the crimes for which the defendant is charged (possession, conspiracy to possess, possession for sale, conspiracy to possess narcotic drugs for sale) have a minimum penalty of from 2 to 10 years in the state penitentiary, he falls within the scope of this section. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Monitoring conversations between husband and wife in visiting room of jail is not wiretapping or eavesdropping because such conversations are not within the statutory definitions of "wire communication" and "oral communication". *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

Consensually overheard conversation not "eavesdropping". By the terms of § 18-9-304

(1)(a), a consensually overheard conversation is not eavesdropping. *People v. Palmer*, 652 P.2d 1092 (Colo. App. 1982).

Wiretap need not be used as last resort. Subsection (2)(c) does not require that wiretapping be used only as a last resort. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Agents to minimize interception of nonrelevant conversations. This section does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct surveillance in such a manner as to "minimize" the interception of such conversations. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Factors considered in determining whether such interceptions minimized. Factors to consider in determining whether the agents have acted reasonably to minimize the interception of nonrelevant conversations include: The nature and scope of the alleged criminal enterprise; the government's reasonable expectations as to the contents of, and parties to, the conversations; the degree of judicial supervision of the wiretap; the length of the conversations; the phase of the investigation; whether the parties used coded language; and the percentage of calls intercepted which are incriminating. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Whether warrantless police eavesdropping violates the fourth amendment depends on whether the defendant had a justified expectation of privacy at the time and place of the communication. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

II. APPLICATION.

Requirements for an ex parte order for a wiretap are to be interpreted in a practical and common sense fashion to effectuate their purpose. *People v. Vazquez*, 768 P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. 1990).

Wiretapping need not be used only as a last resort. The requirements of subsection (4) (c) may be satisfied if the application informs the judge of the difficulties encountered and the lack of success or danger in using conventional investigatory methods. *People v. Vazquez*, 768 P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. 1990).

Application showing probable cause required. An ex parte order for wiretapping or eavesdropping may be issued only upon application stating that there is probable cause to believe that evidence may be obtained. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Affidavits in support of a request for an ex parte wiretap order must establish that there is probable cause to believe that evidence of specific enumerated crimes will be obtained through the substantial intrusion upon the indi-

vidual's privacy. *People v. Montoya*, 44 Colo. App. 234, 616 P.2d 156 (1980).

An interception order may be issued only after a judge of competent jurisdiction has determined that specific grounds exist which justify the use of the intercepting devices. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Supporting affidavit for wiretap order serves same function as affidavit used to establish probable cause for search warrant. *People v. Wahl*, 716 P.2d 123 (Colo. 1986).

Aguilar-Spinelli test applicable under section. The standards of probable cause for issuance of a search warrant based on information given to an affiant police officer by an unidentified informant as set forth in the Aguilar-Spinelli test are applicable under this section. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

Under the Aguilar-Spinelli test, the affidavit must provide sufficient underlying circumstances to enable the magistrate to determine independently whether there is probable cause to believe that illegal activity is being carried on in the place to be searched and must set forth sufficient facts to allow the magistrate to determine independently that the informant is credible or his information reliable. *People v. Montoya*, 44 Colo. App. 234, 616 P.2d 156 (1980).

Probable cause ceases to exist when it is no longer reasonable to presume that the criminal activities are still being carried on in the place to be searched. *People v. Montoya*, 44 Colo. App. 234, 616 P.2d 156 (1980).

Element of time is crucial to determination of existence of probable cause; if information provided the issuing magistrate does not reasonably demonstrate that the suspect is continuously engaged in criminal activity, a warrant based on dated, or "stale", evidence is invalid. *People v. Montoya*, 44 Colo. App. 234, 616 P.2d 156 (1980).

Fact that magistrate was not in his regular office when he authorized search, and made himself readily available to law enforcement officers, did not alter his character as a neutral and detached magistrate. *People v. Montoya*, 44 Colo. App. 234, 616 P.2d 156 (1980).

Authorization sustained where affidavit established probable cause despite its errors. Even though a substantial amount of information in the affidavit is either extraneous or innocuous, and thus could not serve alone as the basis for a determination of probable cause, and included in the affidavit is some information which is allegedly erroneous, if after striking this information probable cause still exists, the wiretap authorization must be sustained. *People v. Montoya*, 44 Colo. App. 234, 616 P.2d 156 (1980).

The constitutional requirement that probable cause be reduced to writing is met re-

ardless of any provision within the wiretap statute allowing the judge to take additional testimony. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Identity of person allegedly committing offense must be included in application or affidavit. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

District attorney need not personally make application for supplemental use. There is no doubt that the district attorney must personally initiate the wiretap, and that he must apply personally for any extension of the duration of the wiretap; however, the provision for supplemental use contains no such requirement. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

District attorney may initiate wiretap by authorizing a subordinate to draft and submit an application to the issuing court. The statute does not require the district attorney to execute the application personally. *People v. O'Hara*, 240 P.3d 283 (Colo. App. 2010).

Application to inform judge of difficulties of other methods. The requirements of this section are satisfied if the application informs the authorizing judge of the difficulties encountered, and the lack of success in using conventional investigatory methods. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

III. ORDER.

The officer is required to obtain a court order before the interception begins. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

This section calls for specific findings and restrictions after careful scrutiny of the application by the judge to whom the application is presented. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

The wiretap statute authorizes the judge to issue an order for interception of communications if he determines from the facts submitted that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

An authorization order will impose strict limitations on the officer who is to execute the authorization. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

It is not a general warrant or roving commission to seize any and all conversations coming into the area covered by the device. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Order authorizing wiretapping must specify the period of time in which an interception is authorized, including a statement as to whether the interception automatically terminates when the described communication is first obtained; however, there is no requirement that

specific findings be set forth detailing why the order does not so automatically terminate. Such an order may not, however, continue longer than necessary to achieve the objective of the authorization and is limited to 30 days, unless extended. *People v. Vazquez*, 768 P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. 1990).

The wiretapping must cease when the objective is attained, and there is an overall 30 day limitation which may be extended for an additional 30 days should the judge make new findings sufficient to uphold an original authorization. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

More latitude given where target is conspiracy. Where the target of the wiretap is a large scale conspiracy, courts must be given more latitude to formulate a sufficiently broad wiretap order. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Such as longer duration. Where there is continuing conduct and one of the objectives of the wiretap is to identify the scope and participants of the conspiracy, the permissible duration of the wiretap is necessarily longer than where the investigation concerns only a single criminal episode. *People v. Gable*, 647 P.2d 246 (Colo. App. 1982).

Order for wiretapping in connection with alleged gambling violation permissible only when the person involved has been previously convicted of professional gambling under § 18-10-103 twice within five years so that a felony is authorized upon conviction as required by subsection (1)(b). *United States v. McNulty*, 729 F.2d 1243 (10th Cir. 1983).

The crime of "dealing in controlled substances" may be defined by its relation to part 3 of article 22 of title 12 and it is sufficient to serve as a basis for a wiretapping order under this section. *People v. Sprowl*, 718 P.2d 524 (Colo. 1986).

Interceptions by personnel of agencies not specifically identified by a wiretap order did not violate the wiretap order so long as such personnel are under the supervision and control of the authorized agency. *People v. Ingram*, 684 P.2d 243 (Colo. 1984).

Wiretap order failing to specify that a pen register would be used is valid nonetheless. *People v. Wahl*, 716 P.2d 123 (Colo. 1986).

IV. USE OF CONTENTS AND EVIDENCE.

A. In General.

Information usable in proper performance of officer's duties. Information obtained as a result of authorized surveillance may be used or disclosed by the officer to the extent appropriate

to the proper performance of his duties. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Recording played on telephone handset before every telephone call placed by a prisoner using that telephone stating that the call would be recorded, and the short jail orientation at which prisoners agreed to read and abide by rules contained in a handbook, which stated that outgoing telephone calls would be recorded, provided notice to the defendant that his calls would be recorded. When a prison inmate is required to permit monitoring of telephone calls as a condition of using prison telephones, the prisoner impliedly consents if he or she has notice of monitoring and still places calls on prison telephones. *People v. Mares*, 263 P.3d 699 (Colo. App. 2011).

B. Of Other Offenses.

This section extends to offenses different from those named within the authorization order; it does not extend to persons other than those named. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Use of information of other offenses permitted. It would be the height of unreasonableness to distinguish between information specifically authorized and that which is unanticipated and which develops in the course of an authorized search, and thus irrational to hold that officers authorized to listen to conversations about one offense, upon learning of another offense, must at once close down the project and not use the information to prevent the other offense since the information is tainted. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

It would be unreasonable and unrealistic to suppress evidence of other crimes, which was obtained through valid interception by wiretap, simply because they are not designated originally in the statute. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

But courts should not hesitate to suppress evidence obtained where the investigation of designated offenses is used as a subterfuge to obtain evidence not otherwise available. Good faith requirements, as well as the statutory requirements of probable cause, are sufficient safeguards of the defendants' rights in this regard. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

Evidence of a nondesignated offense obtained in the course of a lawful wiretap may be later used, if the offense constitutes a felony, and if such use is authorized and approved by a judge of competent jurisdiction. *People v. Milnes*, 186 Colo. 409, 527 P.2d 1163 (1974).

Sexual assault is not included in the list of crimes for which an eavesdropping authorization order is available and no implied exception can be read into the statute. *People in Interest of A.W.*, 982 P.2d 842 (Colo. 1999).

Provisions of this article should not be so narrowly interpreted as to enable offenders against the laws of a state to find permanent asylum in another state. *Glenn v. Baker*, 184 Colo. 211, 519 P.2d 349 (1974).

Time for filing application, as to other offenses. This section requires that application be made to the court as soon as practicable after information as to offenses other than those specified in the authorization are intercepted. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

V. SUPPRESSION OF CONTENTS AND EVIDENCE.

Prerequisites to application of subsection (10). For the exclusionary application of subsection (10) to be operative, it must not only be at the behest of an aggrieved party, but, critically, it must be shown that the communication was unlawfully intercepted. Moreover, in order to make that determination, one must look to the prohibitory statutes on wiretapping and eavesdropping. *People v. Morton*, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied, 423 U.S. 1053, 96 S. Ct. 783, 46 L. Ed.2d 642 (1976).

Subsection (10) does not require the suppression of an aggrieved person's statements simply because they were derived from the illegally intercepted communications, but instead because the party who had illegally intercepted has been the one to "derive" other evidence therefrom. *People in Interest of A.W.*, 982 P.2d 842 (Colo. 1999).

Consensual eavesdropping not an "unlawful interception". Since §§ 18-9-303 and 18-9-304 do not prohibit or make unlawful consensual recorded eavesdropping, where one party to the conversation agrees to the recording, there is no "unlawful interception" within the meaning of subsection (10). Said subsection (10) is, therefore, not applicable, and the evidence should not be suppressed. *People v. Morton*, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied, 423 U.S. 1053, 96 S. Ct. 783, 46 L. Ed.2d 642 (1976).

1991 amendment to subsection (1) did not change holding in *People v. Morton* that consensual eavesdropping is not an unlawful interception that must be suppressed under subsection (10). *People v. Watson*, 53 P.3d 707 (Colo. App. 2001).

Eavesdropping becomes an "unlawful interception" when consent is secured by fraudulent inducement. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

Unlawfully intercepted communications may not be received into evidence for any reason, including for impeachment purposes. *People in Interest of A.W.*, 982 P.2d 842 (Colo. 1999).

Eavesdropping statutes require use of subjective and objective tests to determine

whether a person's conversation qualifies as protected oral communications. *People v. Hart*, 787 P.2d 186 (Colo. App. 1989).

Tape recording of defendant's conversation with accomplice made without his knowledge in the back of police car could properly be considered since, irrespective of defendant's subjective belief that his conversation while in the police vehicle was private, such belief was unreasonable and unjustified. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

Wiretap of crimes excluded from section may be suppressed. A finding that lesser crimes are not intended by congress to be included in the class of crimes for which a wiretap can be authorized does not render the entire state statute invalid, but is merely grounds for suppression with a recognition to restrict application of the statute to crimes such as those with which a defendant is charged. *People v. Martin*, 176 Colo. 322, 490 P.2d 924 (1971).

Right to suppress not impaired by grant of immunity. A grand jury witness has a statutory right to seek the suppression of intercepted communications as well as evidence derived therefrom, and this right is not impaired by the court's grant of transactional immunity since, while such immunity adequately safeguards the witness' privilege against self-incrimination, it does not protect the witness' privacy interest in the contents of the intercepted communications. *In re P.R. v. District Court*, 637 P.2d 346 (Colo. 1981).

Discovery of documents supporting wiretap order cannot be withheld after contempt proceedings are instituted against grand jury witnesses who refuse to testify, claiming questions are based upon information obtained by means of illegal wiretap. Prior to time grand jury witnesses are cited for contempt, adequate protection is afforded witnesses by the requirement

that the court examine all facts before imposing contempt sanction. *Westerberg v. District Court*, 181 Colo. 10, 506 P.2d 746 (1973), cert. denied, 414 U.S. 1162, 94 S. Ct. 925, 39 L. Ed.2d 115 (1974).

Suppression hearing prematurely granted. Where no showing has been made that the court order which permitted electronic surveillance was invalid or was not properly followed, and what witnesses assert is a right to a hearing on a wiretap that might be illegal, and to suppress intercepted contents that might be used in the future in some manner, an order granting the witnesses a suppression hearing is premature and subject to prohibition. *People ex rel. Dunbar v. District Court*, 179 Colo. 321, 500 P.2d 819 (1972).

Supreme court has jurisdiction under subsection (11) over appeal from district court order which granted motion to suppress. *People v. Wahl*, 716 P.2d 123 (Colo. 1986).

Clerical errors do not invalidate a wiretap application, wiretap order, or a letter of inventory notice. *People v. Gallegos*, 251 P.3d 1056 (Colo. 2011).

Describing the results obtained by the wiretap in an affidavit for extension is sufficient; the results do not need to be included in the application for the extension. *People v. Gallegos*, 251 P.3d 1056 (Colo. 2011).

Since progress reports are permissive under this section, the sufficiency of any reports required by the court is left to the discretion of the judge. *People v. Gallegos*, 251 P.3d 1056 (Colo. 2011).

Although the district attorney did not timely provide defense counsel with copies of the application, affidavits, and orders for wiretap, there was no prejudice to defendant since defendant was able to timely file a motion to suppress. *People v. Gallegos*, 251 P.3d 1056 (Colo. 2011).

16-15-103. Order may direct others to furnish assistance. An order authorizing the interception of a wire, oral, or electronic communication shall, upon request of the applicant, direct that a provider of wire or electronic communication service shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service furnishing these facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

Source: L. 72: p. 271, § 3. **C.R.S. 1963:** § 39-24-3. **L. 88:** Entire section amended, p. 690, § 3, effective May 29.

16-15-104. Reports to state court administrator and attorney general. (1) All courts having jurisdiction to issue orders under section 16-15-102 shall submit to the state court administrator reports, as prescribed by the chief justice of the supreme court of Colorado, on the number of applications for orders permitting wiretapping or eavesdropping, whether the applications were granted or denied, the period for which an interception was authorized, and whether any extensions were granted on the original order.

(2) (Deleted by amendment, L. 98, p. 726, § 6, effective May 18, 1998.)

(3) District attorneys shall report annually to the attorney general information as to the number of applications made for orders permitting the interception of wire, oral, or electronic communications; the offense specified in the order or application; the nature of the facilities from which, or the place where, communications were to be intercepted; a general description of the interceptions made under any order or extension, including the nature and frequency of incriminating communications intercepted, the nature and frequency of other communications intercepted, the number of persons whose communications were intercepted, and the nature, amount, and cost of the manpower and other resources used in the interceptions; the number of arrests resulting from interceptions made under such order or extension and the offenses for which arrests were made; the number of motions to suppress made with respect to such interceptions and the number granted or denied; the number of convictions resulting from the interceptions and the offenses for which the convictions were obtained; and a general assessment of the importance of the interceptions. These reports shall be submitted to the attorney general by February 1 of each year and shall include all orders and applications made during the preceding year.

(4) Repealed.

Source: L. 72: p. 271, § 3. C.R.S. 1963: § 39-24-4. L. 88: (3) amended, p. 690, § 4, effective May 29. L. 98: (2) and (4) amended, p. 726, § 6, effective May 18. L. 2001: (4) repealed, p. 1175, § 2, effective August 8.

CRIMINAL ACTIVITY INFORMATION

ARTICLE 15.5

Formal Requests for Criminal Activity Information from Public Utilities

16-15.5-101. Definitions.

16-15.5-102. Formal written request for information relating to specific criminal activity.

16-15.5-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Life-threatening situation" means a circumstance in which a person is causing or has caused or is threatening to cause serious bodily injury to another person or persons, including a situation in which a person has taken another person or persons hostage.

Source: L. 90: Entire article added, p. 937, § 1, effective April 3.

16-15.5-102. Formal written request for information relating to specific criminal activity. (1) Except as otherwise provided in subsection (2) of this section, upon a receipt of a formal written request for information about a particular individual in connection with a life-threatening situation made pursuant to this section by a chief of police, an elected district attorney, the state attorney general, a sheriff, or the director of the Colorado bureau of investigation, an authorized representative of a fixed public utility shall, as soon as possible, provide to the person making such request the following information about the individual named in the formal written request, including and limited to the name or names used, the address or addresses used, and the nonpublished number. Such requests shall be made during regular business hours, whenever practicable.

(2) Notwithstanding the provisions of subsection (1) of this section, if the need for information about a particular individual in connection with a life-threatening situation arises at a time other than regular business hours, a law enforcement officer listed in subsection (1) of this section or, if such officer is unavailable, the next officer in command, may orally request and obtain such information; except that a formal written request shall

be submitted in accordance with subsection (1) of this section by the end of the next working day for the law enforcement agency.

(3) A formal written request for information made pursuant to this section shall be returned to the district court for review in the judicial district within which the formal written request was made. Such return shall be made within seventy-two hours after the issuance of the formal written request for information.

(4) The public utilities and local law enforcement agencies shall establish a procedure for obtaining information based on oral requests. A fixed public utility or authorized representative thereof which responds to a formal written or oral request made pursuant to this section shall not be liable to any person or entity for providing the information requested absent a showing of willful, wanton, or malicious intent.

Source: L. 90: Entire article added, p. 937, § 1, effective April 3.

ARTICLE 15.7

Crime Stopper Organizations

16-15.7-101.	Legislative declaration.		per organizations.
16-15.7-102.	Definitions.	16-15.7-104.	In camera review - confidentiality - records and information - criminal penalty.
16-15.7-103.	Requirements for articles of incorporation of crime stop-		

16-15.7-101. Legislative declaration. The general assembly finds that a significant number of criminal offenders remain at large in this state because law enforcement agencies often lack information concerning criminal activity. In many instances private citizens have information that, if known to law enforcement agencies, would lead to the detection and apprehension of such offenders. Private, nonprofit crime stopper organizations that offer rewards for such information have been successful at encouraging some citizens to come forward; however, even with the offer of a reward, many citizens do not come forward because they fear involvement and shun publicity. In order to remedy this situation and to increase the effectiveness of crime stopper organizations, the general assembly finds and declares that it is appropriate to provide for the anonymity of any person who provides information concerning criminal activity to a crime stopper organization and to provide for the confidentiality of crime stopper organization records.

Source: L. 94: Entire article added, p. 1808, § 1, effective June 1.

- 16-15.7-102. Definitions.** As used in this article, unless the context otherwise requires:
- (1) “Crime stopper organization” means a private, nonprofit organization:
 - (a) Whose primary purposes are to accept donations for the payment of rewards to persons who provide information concerning criminal activity and to forward such information to appropriate law enforcement agencies;
 - (b) Is subject to the provisions of articles 121 to 137 of title 7, C.R.S.;
 - (c) Is held to be tax exempt by the United States internal revenue service; and
 - (d) Has complied with the requirements of section 16-15.7-103.

Source: L. 94: Entire article added, p. 1808, § 1, effective June 1. **L. 97:** (1)(b) amended, p. 763, § 32, effective July 1, 1998.

16-15.7-103. Requirements for articles of incorporation of crime stopper organizations. (1) In addition to any other requirements for articles of incorporation imposed by articles 121 to 137 of title 7, C.R.S., the articles of incorporation for any crime stopper organization that elects to avail itself of the confidentiality provisions of this article shall provide that the organization shall:

- (a) Establish a method to ensure that the identity of any person who provides infor-

mation concerning criminal activity to the organization remains unknown to all persons and entities, including officers and employees of the organization;

(b) Establish a method to ensure that if the identity of any person who provides information becomes known to the crime stopper organization, whether through voluntary disclosure or by any other means, such identity is not further disclosed;

(c) Assist law enforcement agencies in the detection of crime and apprehension of criminal offenders by promptly forwarding information received concerning criminal acts to such agencies;

(d) Foster the detection of crime and encourage citizens to report information about criminal activity; and

(e) Encourage news and other media to promote local crime stopper organizations by informing the public of the functions and benefits of the organization.

Source: L. 94: Entire article added, p. 1809, § 1, effective June 1. L. 97: IP(1) amended, p. 763, § 33, effective July 1, 1998.

16-15.7-104. In camera review - confidentiality - records and information - criminal penalty. (1) (a) A crime stopper organization may not be compelled to produce records concerning a report of criminal activity before a court or other tribunal except on the motion of a criminal defendant to the court in which the offense is being tried that the records or report contain impeachment evidence or evidence that is exculpatory to the defendant in the trial of that offense.

(b) On motion of a defendant pursuant to paragraph (a) of this subsection (1), the court may subpoena the records or report. The court shall conduct an ex parte in camera inspection of materials produced under subpoena to determine whether the materials contain impeachment evidence or evidence that is exculpatory to the defendant.

(c) If the court determines that the materials produced contain impeachment evidence or evidence that is exculpatory to the defendant, the court shall present the evidence to the defendant. In the event the materials contain information which would identify the person who was the source of the evidence, the court shall ensure that such identity is not disclosed, unless the state or federal constitution requires the disclosure of that person's identity. The court shall execute an affidavit accompanying the disclosed materials swearing that, in the opinion of the court, the materials disclosed represent the impeachment or exculpatory evidence the defendant is entitled to receive under this section.

(d) The court shall return to the crime stoppers organization all materials produced under this subsection (1) which are not disclosed to the defendant. The crime stoppers organization shall retain such materials until the conclusion of the criminal trial and the expiration of the time for all direct appeals in the case.

(2) (a) Records and information of a crime stopper organization concerning criminal acts are confidential, and no person shall disclose such records or information. A crime stopper organization shall only be compelled to produce such records or information before a court or other tribunal pursuant to court order for an in camera review. Any such review shall be limited to an inspection of records and information which are relevant to the specific case pending before the court.

(b) Any person who knowingly or intentionally discloses confidential records or information in violation of the provisions of this subsection (2) commits a class 1 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S. Any criminal prosecution brought pursuant to the provisions of this subsection (2) shall be brought within five years after the date the violation occurred.

Source: L. 94: Entire article added, p. 1809, § 1, effective June 1. L. 2002: (2)(b) amended, p. 1498, § 153, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ARTICLE 15.8**Safe2tell Program**

16-15.8-101.	Legislative declaration.	16-15.8-104.	In camera review - confidentiality of materials - criminal penalty.
16-15.8-102.	Definitions.		
16-15.8-103.	Safe2tell - duties - functions.		

16-15.8-101. Legislative declaration. (1) The general assembly hereby finds and declares that:

(a) According to the United States secret service and department of education, in eighty-one percent of dangerous or violent incidents in schools, someone other than the attacker knew the incident was going to happen but did not report or act on that knowledge. Additionally, in incidents of targeted school violence, most attackers engaged in some behavior prior to the incident that caused others concern or indicated a need for help;

(b) The ability to anonymously report information about unsafe, potentially harmful, dangerous, violent, or criminal activities before or after they have occurred is critical in reducing, responding to, and recovering from these types of events in schools;

(c) The safe2tell program empowers students and the community by offering a comprehensive program of education, awareness, and training and a readily accessible tool that allows students and the community to easily provide anonymous information about unsafe, potentially harmful, dangerous, violent, or criminal activities, or the threat of these activities, to appropriate law enforcement and public safety agencies and school officials;

(d) The safe2tell program has a proven record of success in prevention and intervention in cases of threats to people or property, assaults, bullying, child abuse, substance abuse, cutting, suicide, gangs, weapons, internet safety, or other unsafe, potentially harmful, dangerous, violent, or criminal activities; and

(e) The safe2tell program serves as a community partner in the school response framework described in section 22-32-109.1 (4), C.R.S., and the program may engage in information sharing and interoperable communications with other community partners as part of a coordinated response to a school-related incident.

(2) The general assembly therefore finds that it is appropriate and necessary to provide for the anonymity of a person who provides information to the safe2tell program and to provide for the confidentiality of safe2tell materials.

Source: L. 2007: Entire article added, p. 682, § 1, effective May 3. **L. 2012:** Entire section amended, (SB 12-079), ch. 58, p. 210, § 1, effective March 24.

16-15.8-102. Definitions. As used in this article, unless the context otherwise requires:

(1) “In camera review” means an inspection of materials by the court, in chambers, to determine what, if any, materials are discoverable.

(2) “Materials” means any records, reports, claims, writings, documents, or information anonymously reported or information related to the source of the materials.

(3) “Safe2tell”, “safe2tell program”, or “program” means the program described in section 16-15.8-103 that provides students and the community with the means to relay information anonymously concerning unsafe, potentially harmful, dangerous, violent, or criminal activities, or the threat of these activities, to appropriate law enforcement and public safety agencies and school officials.

Source: L. 2007: Entire article added, p. 683, § 1, effective May 3. **L. 2012:** Entire section R & RE, (SB 12-79), ch. 58, p. 211, § 2, effective March 24.

16-15.8-103. Safe2tell - duties - functions. (1) In addition to any other requirements for articles of incorporation imposed by articles 121 to 137 of title 7, C.R.S., the articles of incorporation for the safe2tell program shall require that the safe2tell program:

(a) Establish and maintain methods of anonymous reporting concerning unsafe, potentially harmful, dangerous, violent, or criminal activities, or the threat of such activities;

- (b) Establish methods and procedures to ensure that the identity of the reporting party remains unknown to all persons and entities, including law enforcement officers and employees or other persons operating the program;
- (c) Establish methods and procedures so that information obtained from a reporting party who voluntarily discloses his or her identity and verifies that he or she is willing to be identified may be shared with law enforcement officers, employees or other persons operating the program, and with school officials;
- (d) Establish methods and procedures to ensure that a reporting party’s identity that becomes known through any means other than voluntary disclosure is not further disclosed; and
- (e) Promptly forward information received by the program to the appropriate law enforcement or public safety agency or school officials.

Source: **L. 2007:** Entire article added, p. 683, § 1, effective May 3. **L. 2012:** Entire section amended, (SB 12-079), ch. 58, p. 211, § 3, effective March 24.

- 16-15.8-104. In camera review - confidentiality of materials - criminal penalty.**
- (1) (a) The safe2tell program and persons implementing and operating the program shall not be compelled to produce any materials except on the motion of a criminal defendant to the court in which the offense is being tried, supported by an affidavit establishing that the materials contain impeachment evidence or evidence that is exculpatory to the defendant in the trial of that offense.
 - (b) If the defendant’s motion is granted, the court shall conduct an ex parte in camera review of materials produced under the defendant’s subpoena.
 - (c) If the court determines that the produced materials contain impeachment evidence or evidence that is exculpatory to the defendant, the court shall order the materials to be produced to the defendant pursuant to a protective order that includes, at a minimum, the redaction of the reporting party’s identity and limitations on the use of the materials, as needed, unless contrary to state or federal law. Any materials excised pursuant to a judicial order following the in camera review shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. After the time for appeal has expired, the court shall return the materials to the safe2tell program.
 - (d) (Deleted by amendment, L. 2012.)
 - (2) (a) Materials created or obtained through the implementation or operation of the safe2tell program are confidential, and no person shall disclose the material. The safe2tell program and persons implementing or operating the safe2tell program may be compelled to produce the materials only before a court or other tribunal and only pursuant to court order for an in camera review. Any such review shall be limited to an inspection of materials that are material to the specific case pending before the court. The attorney general acting on behalf of the safe2tell program shall have standing in any action to oppose the disclosure of materials in the custody of the safe2tell program.
 - (b) A person who knowingly discloses materials in violation of the provisions of this subsection (2) commits a class 1 misdemeanor.

Source: **L. 2007:** Entire article added, p. 684, § 1, effective May 3. **L. 2012:** Entire section amended, (SB 12-079), ch. 58, p. 212, § 4, effective March 24.

SENTENCING AND IMPRISONMENT

ARTICLE 16

Criminal Sentencing Act of 1967

16-16-101.	Short title.	16-16-103.	Place of confinement - extension of limits.
16-16-102.	Definitions.		

16-16-101. Short title. This article shall be known and may be cited as the “Criminal Sentencing Act of 1967”.

Source: L. 67: p. 882, § 1. C.R.S. 1963: § 39-22-1.

16-16-102. Definitions. As used in this article, unless the context otherwise requires:

- (1) “Executive director” means the executive director of the department of corrections.
- (2) “Facility” means any residential community treatment center, honor farm, preparole release center, or other correctional facility.
- (3) “Immediate family” means a spouse, child (including stepchild, adopted child, or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person who, though not a natural parent, has acted in the place of a parent), brother, or sister.
- (4) and (5) Repealed.
- (6) “Warden” means the chief correctional officer at a correctional facility.

Source: L. 67: p. 882, § 2. C.R.S. 1963: § 39-22-2. L. 76: (6) amended, p. 532, § 10, effective April 9. L. 77: (1) amended, p. 903, § 7, effective August 1. L. 79: (1), (2), and (6) amended and (4) and (5) repealed, pp. 684, 705, §§ 18, 88, effective July 1. L. 2010: (1) and (6) amended, (SB 10-130), ch. 106, p. 356, § 2, effective April 15.

16-16-103. Place of confinement - extension of limits. (1) The wardens, with the approval of the executive director, shall designate one or more facilities that may be physically separated from the correctional facilities and that may be used for the following purposes:

- (a) Honor farm or camp;
 - (b) Agricultural, industrial, or vocational training or rehabilitation;
 - (c) Preparole center;
 - (d) Medical treatment or research center;
 - (e) Work-release residential center;
 - (f) Any other use or function properly connected with or in aid of the uses and purposes of correctional facilities.
- (2) The executive director, in the exercise of his or her discretion, may extend the limits of confinement of any inmate in the following instances:
- (a) Repealed.
 - (b) To work at paid employment or participate in a program of job training, only if:
 - (I) Representatives of labor organizations in the community in which the inmate will work or obtain employment are advised of such actions;
 - (II) Such paid employment will not result in the significant displacement of employed workers, or such inmates will not be utilized in skills, crafts, or trades in which there is a surplus of available labor in the community, or such inmates will not impair existing contracts for services;
 - (III) The rates of pay, hours, and other conditions of employment will be substantially comparable to those afforded others in the community for the performance of work of a similar nature.

(3) (a) Any inmate who is allowed to participate in such paid employment or in such job training for which a subsistence allowance is paid in connection with the job training shall pay over to the executive director all moneys received from the paid employment or job training; except that the inmate may retain that part of the moneys so received that the executive director deems necessary for expenses connected with the employment or job training. These expenses shall include, but not be limited to, travel expenses, food expenses, clothing, tools, and safety equipment.

(b) The remainder of the moneys shall be disbursed by the executive director for the following purposes, in the order stated:

(I) To the state treasurer for the reasonable cost of the inmate’s confinement as determined by the executive director;

- (II) The support of the inmate's dependents, if any;
- (III) The payment, either in full or ratably, of the inmate's obligations acknowledged by him in writing or which have been reduced to judgment;
- (IV) The balance, if any, to the inmate upon his parole or discharge.
- (c) The state of Colorado shall have a lien upon the wages or subsistence allowance of any such inmate who fails to comply with the provisions of this subsection (3).
- (4) The extension of the limits of confinement by the executive director shall not for any purpose be considered to be parole as provided in part 2 of article 2 or article 22.5 of title 17, C.R.S.

Source: L. 67: p. 882, § 3. C.R.S. 1963: § 39-22-3. L. 76: IP(1), IP(2), (2)(a)(I), (2)(a)(II), (2)(a)(III), (3)(a), IP(3)(b), (3)(b)(I), and (4) amended, p. 532, § 11, effective April 9. L. 77: IP(2) and (3)(a) amended, p. 903, § 8, effective August 1. L. 79: IP(1) and (1)(f) amended, p. 684, § 19, effective July 1; (4) amended, p. 1635, § 25, effective July 19. L. 84: (4) amended, p. 524, § 3, effective July 1. L. 96: (2)(a) repealed, p. 1145, § 2, effective July 1. L. 2000: IP(2) and (3)(a) amended, p. 852, § 60, effective May 24. L. 2010: IP(1), IP(2), (3)(a), IP(3)(b), (3)(b)(I), and (4) amended, (SB 10-130), ch. 106, p. 356, § 3, effective April 15.

ANNOTATION

Applied in *People v. Lucero*, 654 P.2d 835 (Colo. 1982).

ARTICLE 17

Commutation of Sentence

16-17-101.	Governor may commute sentence.	16-17-102.	Application - character certificate.
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16-17-101. Governor may commute sentence. The governor is hereby fully authorized, when he deems it proper and advisable and consistent with the public interests and the rights and interests of the condemned, to commute the sentence in any case by reducing the penalty in a capital case to imprisonment for life or for a term of not less than twenty years at hard labor.

Source: L. 1872: p. 123, § 1. G.L. § 875. G.S. § 999. R.S. 08: § 2043. C.L. § 809. CSA: C. 131, § 117. CRS 53: § 105-6-1. C.R.S. 1963: § 105-6-1. L. 77: Entire section amended, p. 891, § 1, effective July 1.

16-17-102. Application - character certificate. After a conviction, all applications for commutation of sentence or pardon for crimes committed shall be accompanied by a certificate of the respective superintendent of the correctional facility, showing the conduct of an applicant during his or her confinement in the correctional facility, together with such evidences of former good character as the applicant may be able to produce. Before the governor approves such application, it shall be first submitted to the present district attorney of the district in which the applicant was convicted and to the judge who sentenced and the attorney who prosecuted at the trial of the applicant, if available, for such comment as they may deem proper concerning the merits of the application, so as to provide the governor with information upon which to base his or her action. The governor shall make reasonable efforts to locate the judge who sentenced and the attorney who prosecuted at the trial of the applicant and shall afford them a reasonable time, not less than fourteen days, to comment on such applications. The requirements of this section shall be deemed to have been met if the persons to whom the application is submitted for comment do not comment within fourteen days after their receipt of the application or within such other reasonable time in excess of fourteen days as specified by the governor, or if the sentencing judge or

prosecuting attorney cannot be located, are incapacitated, or are otherwise unavailable for comment despite the good-faith efforts of the governor to obtain their comments. Good character previous to conviction, good conduct during confinement in the correctional facility, the statements of the sentencing judge and the district attorneys, if any, and any other material concerning the merits of the application shall be given such weight as to the governor may seem just and proper, in view of the circumstances of each particular case, a due regard being had to the reformation of the accused. The governor shall have sole discretion in evaluating said comments and in soliciting other comments he or she deems appropriate.

Source: **L. 1879:** p. 63, § 1. **G.S. § 1000. R.S. 08:** § 2044. **C.L. § 810. CSA:** C. 131, § 118. **CRS 53:** § 105-6-2. **C.R.S. 1963:** § 105-6-2. **L. 76:** Entire section amended, p. 533, § 12, effective April 9. **L. 77:** Entire section amended, p. 892, § 1, effective June 3. **L. 79:** Entire section amended, p. 676, § 1, effective July 1; entire section amended, p. 684, § 20, effective July 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 859, § 95, effective July 1.

Editor’s note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Purported pardon not issued in compliance with procedures required by this section is invalid. People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980).

Offers of judgment are not revocable by the offeror for the statutory period of 10 days. Centric-Jones Co. v. Hufnagel, 848 P.2d 942 (Colo. 1993).

Trial court erred as a matter of law in holding that the entry of summary judgment

for one of two offerors of an offer of judgment voided the offer of judgment. An offer of judgment is both irrevocable and absolute for the 10-day statutory period. Centric-Jones Co. v. Hufnagel, 848 P.2d 942 (Colo. 1993).

Colorado law does not recognize the existence of “implied pardons”. People v. Wood, 999 P.2d 227 (Colo. App. 2000).

COSTS - CRIMINAL ACTIONS

ARTICLE 18

Costs in Criminal Actions

Cross references: For items includable as costs in criminal actions, see § 18-1.3-701; for items includable as costs in civil actions, see § 13-16-122; for security for costs of apprehension of fugitives, see § 16-19-129; for docket fees and clerks’ costs, see § 13-32-105; for compensation of reporters, see § 13-5-128; for jury fees, see § 13-33-101; for witness fees, see § 13-33-102.

16-18-101.	Costs in criminal cases.		before grand jury.
16-18-102.	Costs taxed against complainant.	16-18-104.	Prosecuting witness before grand jury liable - when.
16-18-103.	When taxed against informant	16-18-105.	Enforcing judgment.

- 16-18-101. Costs in criminal cases.** (1) The costs in criminal cases shall be paid by the state pursuant to section 13-3-104, C.R.S., when the defendant is acquitted or when the defendant is convicted and the court determines he is unable to pay them.
- (2) The costs of preliminary hearings, including any reporters’ transcripts thereof ordered by a defendant, shall be paid pursuant to subsection (1) of this section. Reporters’ transcripts of preliminary hearings which are ordered by the prosecution shall be paid for by the prosecution, unless otherwise ordered by the court.
- (3) The department of corrections, from annual appropriations made by the general assembly, shall reimburse the county or counties in a judicial district for the costs of

prosecuting any crime alleged to have been committed by a person in the custody of the department. The county or counties shall certify these costs to the department, and upon approval of the executive director of the department, the costs shall be paid. The provisions of this subsection (3) shall apply to costs that are not otherwise paid by the state.

Source: L. 1876: p. 53, § 1. G.L. § 349. G.S. § 422. L. 1889: p. 99, § 1. R.S. 08: § 1077. C.L. § 6593. CSA: C. 43, § 23. CRS 53: § 33-2-1. L. 59: p. 342, § 1. C.R.S. 1963: § 33-2-1. L. 71: p. 319, § 1. L. 77: (3) amended, p. 903, § 9, effective August 1. L. 79: (2) amended, p. 601, § 28, effective July 1.

ANNOTATION

Constitutionality. Statutes imposing liability for costs on a convicted defendant have been uniformly held to be constitutional. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Costs are a creature of statute unknown to the common law. At common law there were no costs. *Bd. of County Comm'rs v. Wilson*, 3 Colo. App. 492, 34 P. 265 (1893); *Saunders v. People*, 63 Colo. 241, 165 P. 781 (1917).

Section protects defendant. The provisions of this section are wise and beneficial. They extend ample protection to an indigent defendant. They afford him every facility for making a legitimate defense. *Bd. of County Comm'rs v. Wilson*, 3 Colo. App. 492, 34 P. 265 (1893).

It refers to costs incurred by the prosecution and not those of the defendant. It is only in case of the conviction of the defendant and his inability to pay the costs, or of his acquittal, that costs are made a charge against the state; so that there is no difficulty in supposing that the costs referred to are the costs incurred by the prosecution, and not those incurred by the defendant. *Bd. of County Comm'rs v. Wilson*, 3 Colo. App. 492, 34 P. 265 (1893); *Saunders v. People*, 63 Colo. 241, 165 P. 781 (1917).

Costs in criminal cases must be taxed according to law and not as per agreement between court and convict, or between the prosecuting officer and the convict. *Murphy v. People*, 3 Colo. 147 (1876).

The costs in a criminal case must be taxed according to statutes and not according to any plea agreement. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

There is no limit to the amount of costs which may be incurred by the prosecution in

a criminal case. This is left to the discretion of the prosecutor and the court. *Parker v. People*, 7 Colo. App. 56, 42 P. 172 (1895).

The general rule as to payment of costs may be avoided if the trial judge, in his discretion, determines that the defendant is unable to pay the costs. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Differs from determination of indigency. Whether a presumably innocent defendant is declared indigent for the purposes of appointing counsel before he is brought to trial involves different considerations than the question of whether a convicted defendant may be charged with the costs expended by the state to secure his conviction. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

The sixth amendment of the constitution compels appointing counsel for indigent defendants but does not speak to whether convicted defendants of limited resources may be charged with the costs of their trial. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

The expenses of obtaining the testimony of witnesses for an indigent defendant must be paid by the state. *People v. McCabe*, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Arrest part of preliminary hearing. The arrest of one charged with crime under a capias issued by a justice, is part of the preliminary hearing before the magistrate. *Bd. of County Comm'rs v. Camp*, 48 Colo. 61, 108 P. 972 (1910).

Applied in *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002).

16-18-102. Costs taxed against complainant. If any informer or complainant under a penal statute of this state, to whom the penalty or any part thereof, if recovered, is given, dismisses his suit or prosecution, or fails in the same, or willfully absents himself from trial or examination, he shall be adjudged to pay all costs accruing on such suit or prosecution, unless he is an officer whose duty it is to make and file the information or complaint; but in all cases of examination into any criminal charge before a county judge, where the party accused is discharged, and it appears to the judge before whom such examination was made that there was no reasonable ground for the complaint, or that it was maliciously entered, and in all cases where the complaining witness willfully absents himself from or fails to appear at such examination or trial, the county judge shall give judgment against the

complainant for all costs of the examination or trial and shall issue execution thereon. Appeal may be had in all such cases, as provided by law for the taking of appeals from judgments rendered in county courts.

Source: G.L. § 347. G.S. § 421. L. 1893: p. 93, § 1. R.S. 08: § 1078. C.L. § 6594. CSA: C. 43, § 24. CRS 53: § 33-2-2. C.R.S. 1963: § 33-2-2. L. 64: p. 220, § 45.

16-18-103. When taxed against informant before grand jury. If any person complains to any grand jury of injury done to his person, or to any person of his household, or to his property, done by another, and upon hearing evidence of the charge it appears to the grand jury that the same is untrue, and that it was maliciously entered, it is the duty of the grand jury to return the facts into court, and the court shall thereupon tax the costs incurred in the investigation of the charge and enter judgment against the person who made the complaint for the amount thereof. In proceedings under this section, the action of the grand jury shall be determined by twelve members thereof.

Source: L. 1872: p. 96, § 1. G.L. § 344. G.S. § 418. R.S. 08: § 1079. C.L. § 6595. CSA: C. 43, § 25. CRS 53: § 33-2-3. C.R.S. 1963: § 33-2-3.

16-18-104. Prosecuting witness before grand jury liable - when. If any person complains to any grand jury of injury done to his person, or to any person of his household, or to his property, and after indictment found does not appear in the court in which the indictment is pending to give evidence in that behalf against the party charged in the indictment, and the party charged is acquitted, or if proceedings under said indictment are discontinued for want of testimony, the court in which the indictment is pending shall give judgment against the person who preferred the complaint for the costs arising in that case. Upon the trial of the party charged in any such indictment, if he is acquitted and the jury finds that the proceeding was maliciously commenced, the court shall give judgment against the prosecuting witness for the costs arising in the case. Whenever any person complains, the grand jury shall cause the name of the person so complaining to be endorsed upon the indictment, with the words "prosecuting witness" added, and this shall be evidence that the complaint was made by the person whose name is thus endorsed.

Source: L. 1872: p. 96, § 2. G.L. § 345. G.S. § 419. R.S. 08: § 1080. C.L. § 6596. CSA: C. 43, § 26. CRS 53: § 33-2-4. C.R.S. 1963: § 33-2-4.

ANNOTATION

Prosecuting witness under jurisdiction of court for judgment for costs. Where an indictment was filed with the name of a witness listed as the prosecuting witness, and the jury returned a verdict of not guilty as to defendant, and by their verdict declared that the prosecution was maliciously begun, it was the duty of the court to

enter a judgment against the prosecuting witness for costs, and such witness was so far a party to the prosecution as to give the court jurisdiction to render such judgment against her for costs. *Leppel v. District Court*, 33 Colo. 24, 78 P. 682 (1904).

16-18-105. Enforcing judgment. Judgment rendered under the provisions of sections 16-18-103 and 16-18-104 may be enforced in the same manner as in other criminal cases.

Source: L. 1872: p. 97, § 3. G.L. § 346. G.S. § 420. R.S. 08: § 1081. C.L. § 6597. CSA: C. 43, § 27. CRS 53: § 33-2-5. C.R.S. 1963: § 33-2-5.

ARTICLE 18.5

Restitution in Criminal Actions

Law reviews: For article, "Restitution in Criminal Cases", see 30 Colo. Law. 125 (October 2001).

16-18.5-101.	Legislative declaration. (Repealed)	16-18.5-106.5.	Lottery winnings offset - restitution.
16-18.5-102.	Definitions. (Repealed)	16-18.5-106.7.	Unclaimed property offset.
16-18.5-103.	Assessment of restitution - corrective orders. (Repealed)	16-18.5-106.8.	State income tax refund offsets - restitution - definitions.
16-18.5-104.	Initial collections investigation - payment schedule.	16-18.5-107.	Collection of restitution by the victim.
16-18.5-105.	Monitoring - default - penalties.	16-18.5-108.	Dishonored check fee.
16-18.5-106.	Restitution for persons sentenced to the department of corrections.	16-18.5-109.	Declined or unclaimed restitution.
		16-18.5-110.	Order of crediting payments.

16-18.5-101. Legislative declaration. (Repealed)

Source: L. 2000: Entire article added, p. 1030, § 1, effective September 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-601.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-18.5-102. Definitions. (Repealed)

Source: L. 2000: Entire article added, p. 1031, § 1, effective September 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-602.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-18.5-103. Assessment of restitution - corrective orders. (Repealed)

Source: L. 2000: Entire article added, p. 1032, § 1, effective September 1. L. 2002: (7) added, p. 422, § 4, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: House Bill 02-1258 enacted subsection (7). This section as amended by House Bill 02-1258 was subsequently harmonized with House Bill 02-1046 and relocated to section 18-1.3-603.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

16-18.5-104. Initial collections investigation - payment schedule. (1) Orders for restitution shall be due and payable at the time that the order of conviction is entered. Unless the defendant is sentenced to the custody of the executive director of the department of corrections, if at the time that the court enters an order for restitution pursuant to section 18-1.3-603, C.R.S., the defendant alleges that he or she cannot pay the full amount of restitution, the court shall direct that the defendant report immediately to the collections investigator.

(2) The time payment fee established in section 16-11-101.6 shall be assessed, and the associated provisions of section 16-11-101.6 shall apply to cases in which restitution is not paid in full on the date that it is imposed. The fee shall be collected from the defendant after the defendant has satisfied all orders for restitution. All payments for the time payment fee shall be credited to the judicial collection enhancement fund created in section 16-11-101.6

(2). In addition, reasonable costs incurred and collected by the state for restitution shall be credited to the fund.

(3) (a) Upon referral of a defendant pursuant to subsection (2) of this section, the collections investigator shall conduct an investigation into the financial ability of the defendant to pay the restitution ordered by the court. Such investigation may consist of but is not limited to:

(I) Submission of written financial affidavits or disclosures of the defendant's personal, household, and business income, assets, and liabilities;

(II) Submission to an oral examination of the defendant's financial circumstances;

(III) Submission of books, papers, documents, or other tangible things related to the defendant's financial circumstances including but not limited to:

(A) Payroll stubs;

(B) Financial institution account statements;

(C) Stock certificates;

(D) Deeds, titles, or other evidence of ownership;

(E) State and federal tax records; and

(F) Insurance policies and statements;

(IV) Research and verification of all oral and written statements made by the defendant.

(b) In the case of a juvenile defendant, the collections investigator may conduct the investigation into the juvenile's parents' or legal guardian's financial circumstances as well as the juvenile's.

(c) For purposes of conducting the investigation required by this subsection (3), the collections investigator shall have access to data maintained by other state agencies including but not limited to wage data, employment data, and income tax data. The judicial department and any other departments are authorized to enter into agreements for the sharing of such data.

(d) Notwithstanding the provisions of article 72 of title 24, C.R.S., documents and information obtained by the collections investigators pursuant to this subsection (3) shall not be public records, but shall be open to public inspection only upon an order of the court based on a finding of good cause. Documents and information obtained by the collection investigators may be made available to the victim and to any private collection agency or third party with whom the judicial department may contract for the collection of past due restitution. In addition, if any warrant is issued for the arrest of any defendant due to nonpayment of restitution, information concerning the defendant's address and place of employment may be shared with a criminal justice agency.

(4) (a) (I) Following the investigation described in subsection (3) of this section, the collections investigator shall establish a payment schedule and direct that the defendant:

(A) Pay the full amount ordered immediately;

(B) Pay the full amount ordered as a single payment on a specified date; or

(C) Pay the full amount ordered in specified partial amounts on specified dates.

(II) The collections investigator may ask the court to enter the payment schedule as an order of court.

(b) In addition to the payments required by paragraph (a) of this subsection (4), the collections investigator may direct that:

(I) If the defendant is unemployed, the defendant seek gainful employment and report to the investigator on such efforts by a specified date;

(II) The defendant shall not incur additional debt or financial obligation without the approval of the collections investigator, which approval shall not be unreasonably withheld; or

(III) The defendant promptly report to the collections investigator any changes in income, assets, or other financial circumstances.

(5) Following the investigation required by subsection (3) of this section, the collections investigator may also:

(a) (I) Record a transcript of the order for restitution in the real estate records in the office of the clerk and recorder of any county in which the defendant holds an interest in real property. From the time of the recording of the transcript, there shall be a lien that is

an encumbrance in favor of the state or the victim, or an assignee of the state or the victim, and shall encumber any interest of the defendant in real property in such county.

(II) (A) The lien created by this paragraph (a), shall remain in effect until all amounts of restitution, including interest, costs, time payment fees, and late fees are paid or for a period of twenty years after the recording of the transcript. So long as there is an amount still owing, the collections investigator or the victim or the assignee of the state or the victim may record a new transcript of the order of restitution. Any transcript of the order for restitution recorded pursuant to this subparagraph (II) prior to the expiration of the twenty-year period shall relate back to the date of the recording of the original transcript of the order for restitution and shall be valid for a period of twenty years after the recording of the subsequent transcript. More than one subsequent transcript shall be permitted.

(B) Within twenty-one days after the payment of all such amounts of restitution, the collections investigator or the victim, or the assignee of the state or the victim, shall record a certificate of satisfaction of judgment issued by the clerk of the court with each clerk and recorder where a transcript was recorded. The satisfaction of judgment shall be conclusive evidence that the lien was extinguished.

(III) The collections investigator and the victim shall be exempt from the payment of recording fees charged by the clerk and recorder for the recording of the transcripts and satisfactions of judgment.

(b) (I) File a transcript of the order for restitution with the secretary of state. From the time of the filing of the transcript, there shall be a lien that is an encumbrance in favor of the state or the victim, or an assignee of the state or the victim, and shall encumber any interest of the defendant in any personal property.

(II) The lien created by this paragraph (b), shall remain in effect without the necessity of renewal for twelve years or until all amounts of restitution, including interest, costs, time payment fees, and late fees are paid. Within twenty-one days after the payment of all such amounts of restitution, the collections investigator or the victim, or the assignee of the state or the victim, shall file a satisfaction of judgment with the secretary of state. The satisfaction of judgment shall be conclusive evidence that the lien was extinguished.

(III) The collections investigator and the victim shall be exempt from the payment of filing fees charged by the secretary of state.

(c) (I) File a transcript of the order for restitution with the authorized agent as defined in section 42-6-102 (1), C.R.S. From the time of the filing of the transcript, there shall be a lien that is an encumbrance in favor of the state or the victim, or an assignee of the state or the victim, and shall encumber any interest of the defendant in a motor vehicle. In order for such lien to be effective as a valid lien against a motor vehicle, the state or the victim, or the assignee of the state or the victim, shall have such lien filed for public record and noted on the owner's certificate of title in the manner provided in sections 42-6-121 and 42-6-129, C.R.S.

(II) The lien created by this paragraph (c), shall remain in effect for the same period of time as any other lien on motor vehicles as specified in section 42-6-127, C.R.S., or until all amounts of restitution, including interest, costs, time payment fees, and late fees are paid, whichever occurs first. A lien created pursuant to this paragraph (c) may be renewed pursuant to section 42-6-127, C.R.S. Within twenty-one days after the payment of all such amounts of restitution, the collections investigator or the victim or the assignee of the state or the victim shall release the lien pursuant to the procedures specified in section 42-6-125, C.R.S. When a lien created by this paragraph (c) is released, the authorized agent and the executive director of the department of revenue shall proceed as provided in section 42-6-126, C.R.S.

(III) The collections investigator and the victim shall not be exempt from the payment of filing fees charged by the authorized agent for the filing of either the transcript of order or the release of lien. However, the state or the victim, or the assignee of the state or the victim, may add the amount of the filing fees to the lien amount and collect the amount from the defendant.

Source: L. 2000: Entire article added, p. 1034, § 1, effective September 1. L. 2002: (1) amended, p. 1499, § 154, effective October 1. L. 2003: (5)(b) amended, p. 1673, § 9,

effective July 1. **L. 2011:** (2) amended, (HB 11-1076), ch. 178, p. 679, § 2, effective July 1. **L. 2012:** (5)(a)(II)(B), (5)(b)(II), and (5)(c)(II) amended, (SB 12-175), ch. 208, p. 860, § 96, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (5)(a)(II)(B), (5)(b)(II), and (5)(c)(II) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

16-18.5-105. Monitoring - default - penalties. (1) The collections investigator shall be responsible for monitoring the payments of restitution by any defendant referred to the investigator pursuant to section 16-18.5-104. Based upon changes in the defendant's financial circumstances, the collections investigator may modify the payment schedule established pursuant to section 16-18.5-104 (4). If a payment schedule has been made an order of the court pursuant to section 16-18.5-104 (4) (a) (II), prior to enforcing a new schedule, the collections investigator shall request and obtain a modification of the order.

(2) In addition to any other costs that may accrue, for each payment of restitution that a defendant fails to make within seven days after the date that the payment is due pursuant to any payment schedule established pursuant to this article, the late penalty fee established in section 16-11-101.6 shall be assessed, and the associated provisions of section 16-11-101.6 may apply. The late fees shall be collected from the defendant after the defendant has satisfied all orders for restitution. All payments for late fees shall be credited to the judicial collection enhancement fund created in section 16-11-101.6 (2).

(3) Whenever a defendant fails to make a payment of restitution within seven days after the date that the payment is due pursuant to a payment schedule established pursuant to this article, in addition to any other remedy, the collections investigator may:

(a) Conduct an additional financial investigation of the defendant as described in section 16-18.5-104 (3);

(b) Issue an attachment of earnings requiring that a certain portion of a defendant's earnings, not to exceed fifty percent, be withheld and applied to any unpaid restitution, if such an attachment does not adversely impact the defendant's ability to comply with other orders of the court. An attachment of earnings under this paragraph (b) may be modified to a lesser or greater amount based upon changes in a defendant's circumstances as long as the amount withheld does not exceed fifty percent and may be suspended or cancelled at the court's discretion. An attachment of earnings issued pursuant to this paragraph (b) shall be enforceable in the same manner as a garnishment in a civil action. For purposes of this section, "earnings" shall have the same meaning as set forth for any type of garnishment in section 13-54.5-101, C.R.S., and shall include profits.

(c) Request that the clerk of the court issue a writ of execution, writ of attachment, or other civil process to collect upon a judgment pursuant to article 52 of title 13, C.R.S.;

(d) Request that the court issue a notice to show cause requiring the defendant to appear before the court and show cause why the required payment or payments were not made. Upon a finding of the defendant's failure to pay, unless the defendant establishes that he or she was unable to make the payments, the court may:

(I) Revoke probation and impose any other sentence permitted by law;

(II) Order that the defendant be confined to jail with a recommendation that the defendant participate in a work release program;

(III) Extend the period of probation; or

(IV) Find the defendant in contempt of court and impose any authorized penalties for such action.

(e) (I) Employ any method available to collect state receivables, including the assignment of the defendant's accounts to a third party that has an agreement with the judicial department under this paragraph (e).

(II) The judicial department may enter into agreements with third parties for collection-related services. Any fees or costs of the third parties shall be added to the amount of restitution owed by the defendant, but such fees and costs shall not exceed twenty-five percent of the amount collected.

Source: L. 2000: Entire article added, p. 1037, § 1, effective September 1. **L. 2011:** (2) amended, (HB 11-1076), ch. 178, p. 679, § 3, effective July 1. **L. 2012:** (3)(b) amended, (HB 12-1310), ch. 268, p. 1395, § 10, effective June 7; (2) and IP(3) amended, (SB 12-175), ch. 208, p. 860, § 97, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) and the introductory portion to subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Subsection (3)(d) requires findings of fact concerning defendant's ability to pay restitution. Where a collections investigator asked the court to issue a notice to show cause, and the court did not make findings regarding whether the defendant had missed or had been late mak-

ing one or more payments and, if so, whether the defendant was able to make the payment or payments, the extension of defendant's probation violated subsection (3)(d)(III). *People v. Reyes*, 207 P.3d 872 (Colo. App. 2008).

16-18.5-106. Restitution for persons sentenced to the department of corrections.

(1) Whenever a person is sentenced to the department of corrections, the department of corrections is authorized to conduct an investigation into the financial circumstances of the defendant, as described in section 16-18.5-104 (3), for purposes of determining the defendant's ability to pay court ordered costs, surcharges, restitution, time payment fees, late fees, and other fines, fees, or surcharges pursuant to section 16-18.5-110.

(2) During any period of time that a defendant is a state inmate, as defined in section 17-1-102 (8), C.R.S., the executive director of the department of corrections, or his or her designee, may fix the time and manner of payment for court ordered costs, surcharges, restitution, time payment fees, late fees, and any other fines, fees, or surcharges pursuant to section 16-18.5-110 resulting from a criminal case or for child support, and may direct that a portion of the deposits into such inmate's bank account be applied to any outstanding balance existing before, on, or after September 1, 2000. At a minimum, the executive director shall order that twenty percent of all deposits into an inmate's bank account, including deposits for inmate pay shall be deducted and paid toward any outstanding order from a criminal case or for child support. If an inmate owes money on more than one order from a criminal case or for child support, the executive director may equitably apportion payments among the outstanding obligations.

(3) Whenever a defendant is released from a correctional facility, the defendant shall be obligated to make payments for restitution as required by section 17-2-201 (5) (c) (I), C.R.S.

(4) The department of corrections may enter into a memorandum of understanding with the judicial department or contract with a private collection agency for the collection of court ordered costs, surcharges, restitution, time payment fees, late fees, and any other fines, fees, or surcharges pursuant to section 16-18.5-110 from defendants sentenced to the department of corrections or released on parole.

Source: L. 2000: Entire article added, p. 1039, § 1, effective September 1. **L. 2002:** (1), (2), and (4) amended, p. 67, § 1, effective March 22; (2) amended, p. 1016, § 20, effective June 1.

Editor's note: Amendments to subsection (2) by Senate Bill 02-159 and Senate Bill 02-140 were harmonized.

ANNOTATION

The effective date and applicability clause of the original bill states that the restitution act

applies to all convictions entered on or after September 1, 2000, but applies to convictions

entered before that date only if sums assessed at the time of sentencing remain unpaid. *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002).

16-18.5-106.5. Lottery winnings offset - restitution. (1) (a) The judicial department shall, on no less than a monthly basis, certify to the department of revenue information regarding any defendant who has been ordered to pay restitution pursuant to section 18-1.3-603 or 19-2-918, C.R.S.

(b) The information described in paragraph (a) of this subsection (1) shall include the social security number of the person who is obligated to pay restitution and the amount of restitution due and owing. The department of revenue may request additional identifying information, as needed, from the judicial department in order to obtain an accurate data match pursuant to subsection (2) of this section.

(2) (a) Prior to the payment of lottery winnings required by rule and regulation of the Colorado lottery commission to be paid only at the lottery offices, the department of revenue shall check the social security number of each winner with those certified by the judicial department pursuant to subsection (1) of this section. If the name and associated social security number of a lottery winner appear among those certified, the department of revenue shall obtain the current address of the winner, shall suspend the payment of the winnings, and shall notify the judicial department. The notification shall include the name, home address, and social security number of the winner. The judicial department shall forward the notification to the court in which the lottery winner's restitution obligation is pending.

(b) (I) After receipt of the notification, the court shall notify the person that is obligated to pay restitution, in writing, that the state intends to offset the person's restitution obligation against his or her winnings from the state lottery. Such notification shall include information concerning the obligated person's right to object to the offset and to request an administrative review pursuant to the rules and regulations of the state court administrator.

(II) The sole issues to be determined at the administrative review described in subparagraph (I) of this paragraph (b) shall be:

(A) Whether the person is required to pay restitution pursuant to an order entered by a court of this state; and

(B) The amount of restitution outstanding.

(3) (a) Except as otherwise provided in subsection (5) of this section, upon notification by the department of revenue of amounts deposited with the state treasurer pursuant to section 24-35-212.5, C.R.S., and upon the transfer of the amounts by the state treasurer to the court in which the restitution obligation is pending, the court shall disburse the amounts in accordance with this subsection (3).

(b) The clerk of the court shall apply the amounts toward the outstanding restitution balance owed in the criminal or juvenile case. The clerk shall distribute the remainder, if any, to the person against whom the restitution order was entered. The court shall notify the crime victim or victims of actions taken under this paragraph (b).

(4) The state court administrator shall promulgate rules and regulations, subject to the approval of the supreme court, establishing procedures to implement this section including but not limited to the process by which a lottery winner may object to an offset against restitution in accordance with paragraph (b) of subsection (2) of this section.

(5) If a lottery winner owes restitution in a criminal or juvenile case and also owes a child support debt or arrearages as described in section 26-13-118 (1), C.R.S., the lottery winnings offset described in sections 24-35-212 (5) and 26-13-118, C.R.S., shall take priority and be applied first. Any remaining lottery winnings shall be disbursed and distributed in accordance with this section.

(6) The home addresses and social security numbers of persons subject to the state lottery winnings offset described in this section that are provided to the judicial department by the department of revenue shall be sent to the respective court.

Source: **L. 2003:** Entire section added, p. 656, § 1, effective August 6; (3)(a) and (5) amended, p. 1275, § 71, effective August 6. **L. 2004:** (1)(a), (3)(b), and (5) amended, p. 1257, § 2, effective August 4.

16-18.5-106.7. Unclaimed property offset. (1) The judicial department may enter into a memorandum of understanding with the state treasurer, acting as the administrator of unclaimed property under the “Unclaimed Property Act”, article 13 of title 38, C.R.S., for the purpose of offsetting against a claim for unclaimed property the unpaid amount of restitution the person making the claim has been ordered to pay pursuant to section 18-1.3-603 or 19-2-918, C.R.S. When an offset is to be made, the judicial department or the court in which the person’s restitution obligation is pending shall notify the person in writing that the state intends to offset the amount of the person’s unpaid restitution obligation against his or her claim for unclaimed property.

(2) The state court administrator may adopt rules establishing the process by which an unclaimed property claimant may object to an offset and request an administrative review. The sole issues to be determined at the administrative review shall be whether the person is required to pay restitution pursuant to an order entered by a court of this state and the amount of the outstanding restitution.

(3) For purposes of this section, “claim for unclaimed property” means a cash claim filed in accordance with section 38-13-117, C.R.S.

Source: L. 2005: Entire section added, p. 698, § 2, effective August 8.

16-18.5-106.8. State income tax refund offsets - restitution - definitions. (1) In any case in which a defendant has an unsatisfied restitution obligation ordered pursuant to section 18-1.3-603 or 19-2-918, C.R.S., the judicial department is authorized to transmit data concerning the obligation to the department of revenue for the purpose of conducting a data match and offsetting the restitution obligation against a state income tax refund pursuant to section 39-21-108 (3), C.R.S. For any restitution obligation identified by the judicial department for offset, the state court administrator shall:

(a) On at least an annual basis, certify to the department of revenue the social security number of the defendant who is obligated to pay the restitution obligation and the amount of the outstanding restitution obligation. The department of revenue may request additional identifying information from the judicial department that is necessary to obtain an accurate data match.

(b) Upon notification by the department of revenue of a data match, notify the appropriate court that a match has occurred and that an offset is pending and provide to the court the identifying information received from the department concerning the defendant whose state income tax refund is subject to the offset;

(c) Provide or require the appropriate court to provide written notice to the defendant that the state intends to offset the defendant’s restitution obligation against his or her state income tax refund and that the defendant has the right to object to the offset and request an administrative review; and

(d) Upon receipt of funds for offset from the department of revenue, transmit the funds to the appropriate court.

(2) The clerk of court shall apply funds received pursuant to this section to the defendant’s outstanding restitution obligation. If the moneys received exceed the defendant’s current restitution obligation, the excess may be applied to other financial obligations the defendant owes the court or the judicial department. If no other financial obligations are owed, the clerk of court shall refund any excess to the defendant.

(3) The state court administrator may adopt rules establishing the process by which a defendant may object to an offset and request an administrative review. The sole issues to be determined at the administrative review shall be whether the person is required to pay the restitution and the amount of the outstanding restitution.

(4) The department of revenue is authorized to receive data from the judicial department and execute offsets of state income tax refunds in accordance with this section and section 39-21-108 (3), C.R.S.

(5) As used in this section, “defendant” means any person, including an adult or juvenile, who has been ordered to pay restitution pursuant to section 18-1.3-603 or 19-2-918, C.R.S.

Source: L. 2004: Entire section added, p. 1258, § 3, effective August 4.

16-18.5-107. Collection of restitution by the victim. (1) Any victim in whose name a restitution order has been entered shall have a right to pursue collection of the amount of restitution owed to such person in such person's own name. Any victim who wishes to collect restitution pursuant to the provisions of this section shall first deliver to the clerk of the court or, if the defendant was sentenced to the department of corrections, to the executive director of the department of corrections a notice of intent to pursue collection. Upon receipt of notice of intent to pursue collection, the court, the collections investigator, and the department of corrections shall cease all attempts to collect the restitution due to the person or persons named in the notice, except that the collections investigator may still assist the victim in the victim's effort. The filing of a victim's intent to pursue collection and a victim's subsequent collection efforts do not alter a court's order that restitution is a condition of the defendant's probation, and such probation may still be revoked by the court upon a finding of failure to pay restitution.

(2) Any victim who has filed a notice of intent to pursue collection may apply to the sentencing court for issuance of any of the following that, if provided, shall be provided without cost:

(a) One or more certified copies of the transcript of the order for restitution;

(b) An order that a portion of the defendant's earnings be withheld pursuant to section 16-18.5-105 (3) (b);

(c) A writ of execution, writ of attachment, or other civil process to collect upon a judgment pursuant to article 52 of title 13, C.R.S.

(3) If the victim chooses to record a copy of the transcript with a clerk and recorder or with the secretary of state, the victim may do so without charge.

(4) A victim may withdraw his or her intent to pursue collection by filing a notice of such withdrawal with the person to whom the notice of intent was served pursuant to subsection (1) of this section. Such notice shall state the amount, if any, of restitution collected by the victim. Upon receipt of a notice of withdrawal, the collections investigator or the department of corrections shall pursue collection of the restitution pursuant to this article.

(5) The judicial department shall develop informational brochures for victims explaining the process of restitution and the victim's rights and remedies.

Source: L. 2000: Entire article added, p. 1039, § 1, effective September 1. L. 2003: (3) amended, p. 1674, § 10, effective July 1.

16-18.5-108. Dishonored check fee. Whenever a payment of restitution that was presented in the form of a check or similar sight draft for the payment of money is subsequently dishonored by the financial institution for any reason upon presentment within thirty days after issue, the agency supervising the collection of such payment may assess a twenty dollar penalty against the defendant. The penalty provided in this section shall be assessed in addition to any other penalties or interest authorized by law.

Source: L. 2000: Entire article added, p. 1040, § 1, effective September 1.

16-18.5-109. Declined or unclaimed restitution. (1) If at the time that an order for restitution is entered no victim can be reasonably located or the victim declines to accept restitution, the defendant shall still pay restitution but such restitution shall be made to the state and distributed as provided for in subsection (3) of this section.

(2) Notwithstanding the provisions of sections 13-32-108 and 13-32-112, C.R.S., all restitution paid to the clerk of any court or into the registry of any court that has been unclaimed for a period of two years or more after the final determination of any case in which said restitution was collected or money deposited shall be distributed as provided for in subsection (3) of this section.

(3) The amounts of restitution remaining undistributed pursuant to subsections (1) and (2) of this section shall be paid to the victims and witnesses assistance and law enforcement fund created pursuant to section 24-4.2-103, C.R.S., and to the crime victim compensation

fund created pursuant to section 24-4.1-117, C.R.S., in the judicial district in which the crime occurred. The chair of the victims and witnesses assistance and law enforcement board, in consultation with the board, and the chair of the crime victim compensation board, in consultation with the board, in each judicial district shall designate on or before each December 1, starting December 1, 2000, how moneys received pursuant to this section shall be divided between the two funds during the next calendar year for that judicial district. If the chairs are unable to agree on a distribution, the crime victim services advisory board created in section 24-4.1-117.3 (1), C.R.S., shall designate how the moneys shall be divided between the funds for that judicial district. If no designation is made, the payments shall be made to the victims and witnesses assistance and law enforcement fund.

Source: **L. 2000:** Entire article added, p. 1041, § 1, effective September 1. **L. 2009:** (3) amended, (SB 09-047), ch. 129, p. 555, § 2, effective July 1.

16-18.5-110. Order of crediting payments. (1) Payments received shall be credited in the following order:

- (a) Costs for crime victim compensation fund, pursuant to section 24-4.1-119, C.R.S.;
- (b) Surcharges for victims and witnesses assistance and law enforcement fund, pursuant to section 24-4.2-104, C.R.S.;
- (c) Restitution to victims in the following order:
 - (I) A victim, as defined in section 18-1.3-602 (4) (a) (I), C.R.S.;
 - (II) A victim, as defined in section 18-1.3-602 (4) (a) (II), C.R.S.;
 - (III) A victim, as defined in section 18-1.3-602 (4) (a) (III), C.R.S.;
- (c.5) Surcharges related to the address confidentiality program pursuant to section 24-30-2114, C.R.S.;
- (d) Time payment fee;
- (e) Late fees; and
- (f) Any other fines, fees, or surcharges.

Source: **L. 2000:** Entire article added, p. 1041, § 1, effective September 1. **L. 2003:** (1)(c) amended, p. 1050, § 3, effective September 1. **L. 2007:** (1)(c.5) added, p. 1699, § 2, effective July 1. **L. 2008:** (1)(a) amended, p. 1884, § 24, effective August 5. **L. 2011:** (1)(c.5) amended, (HB 11-1080), ch. 256, p. 1123, § 5, effective June 2.

Cross references: For the legislative declaration stating the purpose of and the provision directing legislative staff agencies to conduct a post-enactment review pursuant to § 2-2-1201 scheduled in 2009, see sections 4 and 6 of chapter 385, Session Laws of Colorado 2007. To obtain a copy of the review, once completed, view Colorado Legislative Council’s web site.

ANNOTATION

Applied in *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002).

FUGITIVES AND EXTRADITION

ARTICLE 19

Fugitives and Extradition

Cross references: For interstate compacts affecting the subject matter of this article, see article 60 of title 24; for habeas corpus proceedings, see article 45 of title 13.

16-19-101.	Short title.	16-19-105.	Governor may investigate case.
16-19-102.	Definitions.	16-19-106.	Extradition of persons imprisoned or awaiting trial.
16-19-103.	Fugitives from justice.		
16-19-104.	Form of demand.		

16-19-107.	Extradition of persons not present where crime committed.	16-19-120.	Persons under prosecution when demanded.
16-19-108.	Issue of governor's warrant.	16-19-121.	When guilt inquired into.
16-19-109.	Manner and place of execution.	16-19-122.	Governor may recall warrant.
16-19-110.	Authority of arresting officer.	16-19-123.	Fugitives from this state.
16-19-111.	Rights of accused - habeas corpus.	16-19-124.	Application for requisition.
16-19-112.	Penalty for noncompliance.	16-19-125.	Immunity from civil process.
16-19-113.	Confinement in jail.	16-19-126.	Written waiver of extradition.
16-19-114.	Arrest prior to requisition.	16-19-126.5.	Prior waiver of extradition.
16-19-115.	Arrest without warrant.	16-19-127.	Nonwaiver by this state.
16-19-116.	Commitment to await requisition - bail.	16-19-128.	Prosecution of other charges.
16-19-117.	Bail pending extradition.	16-19-129.	Security for costs - default - fees.
16-19-118.	Extension of time.	16-19-130.	Rewards - how audited - paid.
16-19-119.	Forfeiture of bail.	16-19-131.	Escape - reward.
16-19-119.5.	Custody pending arrival of agent of the demanding state.	16-19-132.	Interpretation.
		16-19-133.	Concealment of fugitives - penalty. (Repealed)
		16-19-134.	Securing the attendance of a defendant who is outside the United States.

16-19-101. Short title. This article shall be known and may be cited as the "Uniform Criminal Extradition Act".

Source: L. 53: p. 323, § 29. CSA: C. 72, § 74. CRS 53: § 60-1-29. C.R.S. 1963: § 60-1-32.

ANNOTATION

Purpose. The interstate agreement on detainers and the extradition act are both intended to serve the purpose of forcing a recalcitrant defendant who is no longer within the state where charges are pending to stand trial. *Moen v. Wilson*, 189 Colo. 85, 536 P.2d 1129 (1975).

Transfer of custody not a waiver of jurisdiction. This article contemplates that the mere transfer of custody to another jurisdiction will not be deemed a presumptive or implied waiver of jurisdiction by the demanding state. *Schoengarth v. Bray*, 200 Colo. 288, 615 P.2d 655 (1980).

Interstate agreement on detainers is inapplicable to a defendant whose custody is sought by traditional extradition procedures. *People v. Quackenbush*, 687 P.2d 448 (Colo. 1984).

Parolee was not entitled to insist upon utilization of Extradition Act rather than the Parole Supervision Act to effectuate his return to paroling state merely because he was initially advised of his rights under the Extradition Act. *People v. Velarde*, 739 P.2d 845 (Colo. 1987).

Applied in *Guy v. Nelson*, 630 P.2d 610 (Colo. 1981).

16-19-102. Definitions. As used in this article, unless the context otherwise requires:

- (1) "Executive authority" includes the governor and any person performing the function of governor in a state other than this state.

- (2) "Governor" includes any person performing the functions of governor by authority of the law of this state.

- (3) "State", referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States.

Source: L. 53: p. 314, § 1. CSA: C. 72, § 46. CRS 53: § 60-1-1. C.R.S. 1963: § 60-1-1.

ANNOTATION

Delegation of governor's authority. Because this section defines "governor" to include persons authorized to perform the functions of governor, the governor may delegate his authority to review and sign extradition documents. *Macurdy v. Leach*, 662 P.2d 166 (Colo. 1983).

Delegation of governor's executive authority not forbidden. Neither the state nor federal law (18 U.S.C. § 3182 (1976)) forbids delegation of the governor's executive authority to employees in his office and assistant attorneys general. *Whittington v. Bray*, 200 Colo. 17, 612 P.2d 72 (1980).

And exercise of powers delegated by governor is "executive authority". The governor of Colorado is the chief executive officer of

Colorado, and, when he properly delegates power, the exercise of that power is action of the "executive authority". *Whittington v. Bray*, 623 F.2d 681 (10th Cir. 1980).

It is not proper for judiciary to tell governor how to delegate his authority in extradition matters. *Whittington v. Bray*, 200 Colo. 17, 612 P.2d 72 (1980).

Authentication of executive authority required. The only authentication required by § 16-19-104 is an authentication by the executive authority of the demanding state. *Clark v. Leach*, 200 Colo. 151, 612 P.2d 1130 (1980).

Applied in *Jaques v. Bray*, 645 P.2d 22 (Colo. 1982); *Hershberger v. Black*, 645 P.2d 279 (1982).

16-19-103. Fugitives from justice. Subject to the provisions of this article, the provisions of the constitution of the United States controlling, and any act of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

Source: L. 53: p. 314, § 2. CSA: C. 72, § 47. CRS 53: § 60-1-2. C.R.S. 1963: § 60-1-2.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 35 *Dicta* 26 (1958).

Purpose of extradition. The United States constitutional provision regarding extradition from one state to another was adopted to promote justice, to aid the states in enforcing their laws, and not to shield malefactors. *Tinsley v. Woods*, 135 Colo. 590, 313 P.2d 1006 (1957); *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957).

The public purpose to be effected by extradition is to prevent the successful escape of all persons accused of crime, whether convicted or unconvicted, and to secure their return to the state from which they fled for the purpose of punishment. It is invoked to aid the administration of criminal justice and to more certainly insure the punishment of the guilty. *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957); *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

The several states adopted the provisions of this uniform act so that one who commits a crime in one state cannot go to a sister state to avoid prosecution, or cannot send agents or accomplices from one state into another with impunity while he remains out of the state where the crime is perpetrated. *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

Extradition serves the interest of comity between states. *Bryan v. Conn*, 187 Colo. 275, 530 P.2d 1274 (1975).

And, therefore, extradition proceeding should not be utilized as a vehicle to challenge acts undertaken by a sister state to enforce their criminal laws. *Bryan v. Conn*, 187 Colo. 275, 530 P.2d 1274 (1975).

Transfer of custody not a waiver of jurisdiction. This article contemplates that the mere transfer of custody to another jurisdiction will not be deemed a presumptive or implied waiver of jurisdiction by the demanding state. *Schoengarth v. Bray*, 200 Colo. 288, 615 P.2d 655 (1980).

Waiver of state's right to extradite. A finding of a waiver of a state's right to extradite requires affirmative evidence of a state's intent to waive jurisdiction over the fugitive and will not be presumed from a silent record. *Schoengarth v. Bray*, 200 Colo. 288, 615 P.2d 655 (1980).

Construction of section. Statutes providing for the arrest and extradition of fugitives are in derogation of constitutional guarantees of immunity from arrest and must be strictly construed. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957).

The extradition statutes should not be so narrowly construed as to enable offenders against

the laws of a state to find permanent asylum in another state. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

The clause "any person charged with a crime" includes a person whose judgment of conviction remains unsatisfied. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

No probable cause necessary where person convicted and sentenced. No showing of probable cause is necessary for the extradition of a person who has been convicted and sentenced. *Morgan v. Miller*, 197 Colo. 341, 593 P.2d 357 (1979).

The phrase "fled from justice" has generally been interpreted to cover individuals who are merely absent from the state when they are sought to answer for a crime, irrespective of their manner of leaving the state. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

Reason for leaving jurisdiction of demanding state immaterial. For extradition purposes, it is immaterial why the person demanded left the jurisdiction of the demanding state: he is a fugitive within the meaning of this section if he was present in the demanding state at the time of the commission of the offense charged and thereafter departed for whatever reason. *Danielson v. Miller*, 196 Colo. 537, 587 P.2d 788 (1978).

Where demanding state voluntarily released fugitive to another state. Under this section, a person can be classified as a fugitive from justice where the demanding state voluntarily released him to another state to serve out his unexpired sentence there. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

The United States constitution guarantees no right of asylum to a person who has committed a crime in one state or territory of the United States and fled to another jurisdiction. *Cutting v. Geer*, 135 Colo. 503, 313 P.2d 314 (1957).

Extradition to or from territories has been upheld under the federal statute, even though the United States constitution is silent as to extradition to or from territories. *Cutting v. Geer*, 135 Colo. 503, 313 P.2d 314 (1957).

The governor of Colorado has no inherent powers of arrest and surrender and cannot proceed as a volunteer but is limited to acting pursuant to a demand or a request from the executive of a sister state, and then only in strict conformity with law. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957); *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

This section makes it the duty of the governor to cause the arrest and surrender of any person who is charged with a felony in the demanding state and who has fled therefrom and taken asylum in Colorado. *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958).

It is the duty of the governor to issue his warrant for the arrest and delivery to the exec-

utive of another state any person charged with a crime in that state who has fled from justice and is found in this state. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962).

Demanding state has right to extradition of fugitive. When demanding the return of a fugitive, the demanding state does not seek a favor, but appears as a sovereign state demanding rights granted to it by the constitution and laws of the United States. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957); *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958).

Constitutional rights to limitations on the use of evidence on the issue of guilt or innocence are not at issue in the rendition proceeding. What is in issue is the constitutional right of the demanding state to have a defendant promptly returned to that state on a showing of probable cause. *North v. Koch*, 169 Colo. 508, 457 P.2d 915 (1969).

Demanding state is entitled to obtain custody of the petitioner through extradition proceedings after extradition statute was complied with and proof established that the appellant is a fugitive from justice. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

A sister state may proceed in extradition in either of two ways: (1) Make a demand upon any state for return of a fugitive under the constitution and laws of the United States and this section; or (2) make demand upon the governor of Colorado for surrender under § 16-19-107 for any person in this state charged in another state with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957); *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958); *Layher v. Van Cleave*, 171 Colo. 465, 468 P.2d 32 (1970).

Habeas corpus proceeding is not filed as part of an extradition proceeding but is filed as an independent civil action. *People v. Gomez*, 192 Colo. 313, 558 P.2d 439 (1976).

Form complied with § 16-19-104. Demand for extradition complied with § 16-19-104 although the requisition documents contained both a demand for extradition, pursuant to this section, and a request for extradition predicated on § 16-19-106, which controls executive agreements, since the executive agreement, which accompanied the requisition documents, served only to ensure that the demanding state would return and surrender defendant to the Colorado authorities upon the completion of the trial in the demanding state. *Buffalo v. Tanksley*, 189 Colo. 45, 536 P.2d 827 (1975).

Prima facie showing of identity is made when the name of the person is identical to that appearing in the requisition documents. *Light v. Cronin*, 621 P.2d 309 (Colo. 1980).

Where there is a discrepancy in the name in the extradition documents and the name claimed by the prisoner, a prima facie showing of identity is made where testimony, photographs, and fingerprints identify the fugitive being sought. *Secrest v. Simonet*, 708 P.2d 803 (Colo. 1985).

Governor's grant of extradition prima facie evidence that constitutional and statutory requirements have been met. *Howe v. Cronin*, 197 Colo. 17, 589 P.2d 930 (1979).

Presumption of defendant's presence in demanding state at time of crime. The issuance of a governor's warrant by the governor of the asylum state creates a presumption that the person sought to be extradited was in the demanding state at the time the crime was committed. The person whose extradition is sought must

show by clear and convincing evidence that he was not in the demanding state at the time the crime was committed. *Light v. Cronin*, 621 P.2d 309 (Colo. 1980); *Briddle v. Caldwell*, 628 P.2d 613 (Colo. 1981).

Where any statutory ground exists to substantiate extradition documents on their face, the courts of the asylum state may not block the extradition process. *Howe v. Cronin*, 197 Colo. 17, 589 P.2d 930 (1979).

Applied in *Wilkerson v. Vogt*, 167 Colo. 109, 445 P.2d 715 (1968); *People v. Calloway*, 40 Colo. App. 543, 577 P.2d 1109 (1978); *Steinman v. Caldwell*, 628 P.2d 110 (Colo. 1981); *People v. Campbell*, 633 P.2d 509 (Colo. App. 1981); *Parker v. Glazner*, 645 P.2d 1319 (Colo. 1982); *Morris v. Nelson*, 659 P.2d 1386 (Colo. 1983).

16-19-104. Form of demand. No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 16-19-107, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon, or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation, or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of the indictment, information, affidavit, or judgment of conviction or sentence must be authenticated by the executive authority making the demand.

Source: L. 53: p. 315, § 3. CSA: C. 72, § 48. CRS 53: § 60-1-3. L. 57: p. 379, § 1. C.R.S. 1963: § 60-1-3.

ANNOTATION

Purpose of extradition law. The extradition law is designed to prevent the successful escape of all persons accused of crime, whether convicted or not, and to secure their return to the state from which they fled for their due punishment. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

The purpose of extradition proceedings is to prevent an accused person from being wrongfully rendered to the demanding state for trial. *Lovato v. Johnson*, 617 P.2d 1203 (Colo. 1980).

Construction. The extradition statutes should not be so narrowly construed as to enable offenders against the laws of a state to find permanent asylum in another state. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

Demanding state may terminate proceedings. Nothing in the law of extradition prevents a demanding state from making a unilateral decision to terminate extradition proceedings. *Massey v. Wilson*, 199 Colo. 121, 605 P.2d 469 (1980).

Demanding state has no duty to ensure that a pre-extradition hearing is held in the asylum state. *Smith v. Lamm*, 629 F. Supp. 1184 (D. Colo. 1986).

It is for the general assembly to say under what circumstances this state will grant asylum. *Petition of Harwell*, 180 Colo. 144, 503 P.2d 618 (1972).

It is within the province of the general assembly to require that the demanding state must meet standards which are akin to probable cause. *Bryan v. Conn*, 187 Colo. 275, 530 P.2d 1274 (1975).

The procedural safeguards in this article are adequate. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

The form of demand and the requisites for extradition are defined by this section. *Woolsey v. Nelson*, 178 Colo. 144, 496 P.2d 306 (1972).

All documents read together. In determining whether extradition documents sufficiently

charge an accused with a crime in the demanding state, or that he was convicted of a crime and sentenced therefor, from which he escaped, or that the accused has broken the terms of his bail, probation, or parole, all of the requisition documents must be read and considered together. *Martello v. Baker*, 189 Colo. 195, 539 P.2d 1280 (1975).

In evaluating the sufficiency of requisition papers, all of the documents must be read and considered together. *Patrick v. Watson*, 195 Colo. 156, 576 P.2d 1014 (1978).

Extradition requisition may refer to, annex, and authenticate accompanying papers and, if together they meet statutory requirements, that is sufficient compliance with the requirements of this section. *Hall v. Cronin*, 196 Colo. 333, 585 P.2d 286 (1978).

Statutory grounds required in demand for execution stated in alternative. It is fundamental that the statutory grounds in this section, which are required to be set forth in the form of demand for execution, are stated in the alternative. If any one ground is adequately set forth as required by this section, then the demand is sufficient in form to authorize the execution of the personal demand. *Norrod v. Bower*, 187 Colo. 421, 532 P.2d 330 (1975).

Demand for extradition complied with this section although the requisition documents contained both a demand for extradition, pursuant to § 16-19-103, and a request for extradition predicated on § 16-19-106, which controls executive agreements, since the executive agreement, which accompanied the requisition documents, served only to ensure that the demanding state would return and surrender defendant to the Colorado authorities upon the completion of the trial in the demanding state. *Buffalo v. Tanksley*, 189 Colo. 45, 536 P.2d 827 (1975).

The statutory requirement for supporting documents in a foreign state's form of demand is stated in the alternative. *Johnson v. Kiefer*, 624 P.2d 894 (Colo. 1981).

Any one basis for extradition sufficient to meet statutory test. If any one basis for extradition is adequately set forth as required by this statute, the form of the demand meets the statutory test. *Johnson v. Kiefer*, 624 P.2d 894 (Colo. 1981); *Butcher v. Caldwell*, 677 P.2d 342 (Colo. 1984).

Allegation of presence in demanding state in governor's warrant creates presumption. The requirement that the person sought to be extradited be shown to be in the state when the crime was committed is satisfied by an allegation to that effect in a governor's warrant, which creates a presumption that the accused was in the demanding state at the time the offense was committed. *Graham v. Vanderhoof*, 185 Colo. 334, 524 P.2d 611 (1974); *Johnson v. Cronin*, 690 P.2d 1277 (Colo. 1984).

Court's habeas corpus review limited.

Once the governor has granted extradition, a court considering habeas corpus relief is limited to deciding whether: (1) The extradition documents on their face are in order; (2) the petitioner has been charged with a crime in the demanding state; (3) the petitioner is the person named in the request for extradition; and (4) the petitioner is a fugitive. *Gerard v. Ossola*, 649 P.2d 1110 (Colo. 1982); *Rodriguez v. Sandoval*, 680 P.2d 1278 (Colo. 1984).

Lawful demand required prior to extradition. The governor of Colorado must have a lawful demand or request before surrendering one who has committed a crime in another state. *Massey v. Wilson*, 199 Colo. 121, 605 P.2d 469 (1980).

Requisition for extradition presents questions of law and fact. Upon receipt of a requisition for interstate rendition, the governor of the asylum state has two questions to pass upon: (1) Is the person demanded substantially charged with a crime against the laws of the demanding state by indictment or affidavit before a magistrate?; and (2) is the person a fugitive from the justice of the demanding state? The first of these questions is one of law, while the second is one of fact. *Buhler v. People*, 151 Colo. 345, 377 P.2d 748 (1963); *Capra v. Ballarby*, 158 Colo. 91, 405 P.2d 205 (1965).

The question as to whether a defendant is a fugitive from justice is one of fact. *Harding v. People*, 161 Colo. 571, 423 P.2d 847 (1967).

It must allege presence in demanding state. The requirement of alleging presence in the demanding state is clearly imposed upon the requisition of the governor of the demanding state rather than upon the warrant of the governor of the asylum state. *Harding v. People*, 161 Colo. 571, 423 P.2d 847 (1967); *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

And the accused must be substantially charged with a crime in the demanding state to be subject to extradition. This means that the charge standing against him must legally constitute a crime. *Buhler v. People*, 151 Colo. 345, 377 P.2d 748 (1963).

This section of the uniform act requires that the indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state. *Capra v. Ballarby*, 158 Colo. 91, 405 P.2d 205 (1965).

The requirement that the indictment, information, or affidavit made before the magistrate substantially charges the person demanded with having committed a crime under the law of that state is met where the crime is charged under the law of the demanding state, not under law of the asylum state. *People v. Jackson*, 180 Colo. 135, 502 P.2d 1106 (1972).

The law of extradition in Colorado requires that the defendant be charged with a crime under

the laws of the demanding state. *White v. Leach*, 188 Colo. 62, 532 P.2d 740 (1975).

This is determined by asylum state. It is not only the right, but the duty of the proper authorities of the asylum state, executive and judicial, to determine whether the accused is charged with a crime in the demanding state. *Buhler v. People*, 151 Colo. 345, 377 P.2d 748 (1963).

The sufficiency of the method of charging the crime in an extradition proceeding may be a matter for determination by the demanding state. *Mote v. Koch*, 173 Colo. 82, 476 P.2d 255 (1970).

A criminal complaint or indictment from a state requesting extradition is presumed to charge a crime. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966).

But one wholly failing to state offense does not support extradition. If the indictment or other charge of crime on which the requisition is founded wholly fails to state an offense created by the statute of the demanding state, it describes no crime thereunder and extradition should be refused. *Buhler v. People*, 151 Colo. 345, 377 P.2d 748 (1963).

Charging document must be framed substantially in statutory language. To comply with the statutory requirement that an accused be substantially charged with an offense if he is to be extradited, the charging document must be framed substantially in the statutory language. *White v. Leach*, 188 Colo. 62, 532 P.2d 740 (1975); *Cates v. Sullivan*, 696 P.2d 322 (Colo. 1985).

Burden not on asylum state to determine if defendant correctly charged. The law of extradition does not impose the burden on the courts of the asylum state to determine whether the defendant has been correctly charged with committing a particular offense. *White v. Leach*, 188 Colo. 62, 532 P.2d 740 (1975); *Pickinpaugh v. Lamm*, 189 Colo. 143, 538 P.2d 113 (1975); *Cates v. Sullivan*, 696 P.2d 322 (Colo. 1985).

Any question relating to the sufficiency of the information or the technical accuracy of the charge is left to the courts of the demanding state to resolve. *White v. Leach*, 188 Colo. 62, 532 P.2d 740 (1975).

In an extradition proceeding and in its habeas corpus review, questions relating to the sufficiency of an information or the technical accuracy of a charge are left to the courts of the demanding state to resolve. *Lovato v. Johnson*, 617 P.2d 1203 (Colo. 1980).

Credibility of affiant may be attacked only in demanding state. At a hearing on a writ of habeas corpus, the state need not prove the credibility of the person who made the affidavit upon which extradition is based; an attack on the credibility of the affiant is possible only in the courts of the demanding state. *People v. Schneckloth*, 660 P.2d 1293 (Colo. 1983).

The asylum state need only determine whether accused is charged with an extraditable offense. *White v. Leach*, 188 Colo. 62, 532 P.2d 740 (1975).

A person who seeks to invalidate an extradition has a burden of overcoming the presumption, by clear and convincing evidence, that the documents submitted by the demanding state substantially charge him with a crime. *Nevard v. Conn*, 187 Colo. 168, 529 P.2d 305 (1974).

Extradition ordered if minimal requirements met. If in the course of a hearing which challenges extradition proceedings, Colorado courts are satisfied that certain minimal requirements are met, extradition should be ordered. *Bryan v. Conn*, 187 Colo. 275, 530 P.2d 1274 (1975).

As long as the extradition demand and accompanying documents exhibit substantial compliance with the statutory requirements, extradition should be ordered. *Griffith v. Nelson*, 647 P.2d 228 (Colo. 1982); *Cates v. Sullivan*, 696 P.2d 322 (Colo. 1985).

The general rule is that the offense must be so described that the accused may know how to answer the charge, the court what judgment to pronounce, and conviction or acquittal thereon may be pleaded in bar to any subsequent prosecution. *Capra v. Ballarby*, 158 Colo. 91, 405 P.2d 205 (1965).

If it may be fairly determined what the charges are for which the extradition of the accused is being sought, then the requisition documents satisfy the statutory requirements. *Martello v. Baker*, 189 Colo. 195, 539 P.2d 1280 (1975).

Adequate statement as to parole violation. Demand reciting that the petitioner "is charged with the crime of parole violation having been convicted of the crime of possession of narcotics", and certifying that the petitioner has fled from Michigan and may have taken refuge in Colorado, was held adequate statement. *Wynsma v. Leach*, 189 Colo. 59, 536 P.2d 817 (1975).

The words "jumped bail" in a demand for extradition are substantially equivalent to a statement that a person has "broken the terms of his bail". *Protz v. Watson*, 194 Colo. 223, 571 P.2d 719 (1977).

The demanding state is not required to enumerate the grounds for probation revocation, only that the fugitive has violated the terms of his probation. *Bernardo v. Cronin*, 191 Colo. 36, 550 P.2d 349 (1976).

Indictment need not allege elements of crime. Upon the trial of the issue of guilt, it would doubtless be necessary for the prosecution to prove an essential element of the crime. It is not necessary that the indictment should contain any such allegation. The indictment did "substantially charge" the petitioner with the

crime of sodomy; being a crime known to the common law, further statutory definition of the word sodomy was unnecessary. *Beliajus v. Phillips*, 170 Colo. 212, 460 P.2d 233 (1969).

Or prove criminal intent. The question of criminal intent is relevant only to the sufficiency of the demand for extradition. It is not an element to be proved in the responding state. Instead, it is a jurisdictional fact which must appear from the face of the supporting documents. Where the basis for extradition is that defendant has been charged in California in the manner provided in this section with committing an act in this state, or in a third state, intentionally resulting in a crime in California, the trial court was under no duty to admit the evidence offered to prove that defendant was financially unable to make the support payments to negate the intent to commit a crime. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

The asylum state has no authority to pass on the technical sufficiency of an indictment in an interstate rendition proceeding. If the subject of extradition desires to attack the technical insufficiency of an indictment, he must do so in the demanding state. *Capra v. Ballarby*, 158 Colo. 91, 405 P.2d 205 (1965); *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

Courts of the asylum state are without authority to pass upon the technical sufficiency of the indictment, which is left to the courts of the demanding state. *Dressel v. Bianco*, 168 Colo. 517, 452 P.2d 756 (1969).

A court of an asylum state is without power to review the determination of probable cause by the demanding state. *Gerard v. Ossola*, 649 P.2d 1110 (Colo. 1982).

The sufficiency of the evidence to support the charge is an issue to be resolved by the demanding state. *Crosby v. Griswold*, 650 P.2d 568 (Colo. 1982).

Matters of technical pleading will not be considered in an extradition hearing. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

It is fundamental that the technical sufficiency of the indictment is for the court of the demanding state to determine and not for the court of the asylum state. *Samples v. Cronin*, 189 Colo. 40, 536 P.2d 306 (1975).

Likewise, asylum state not concerned with criminal procedure. Whether demanding state required preliminary examination before felony charge could be filed is a concern of the demanding state, not the asylum state. *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

Nor on constitutional claims. However meritorious a defendant's constitutional claims may be, when the issue centers on extradition in a habeas corpus proceeding, the question must be resolved by the courts of the demanding state and not by the courts of Colorado. *Buffalo v. Tanksley*, 189 Colo. 45, 536 P.2d 827 (1975).

Nor as to parole violation. Whether a person convicted of a crime has in fact violated his parole is of no concern in the courts of the asylum state. *Tinsley v. Woods*, 135 Colo. 590, 313 P.2d 1006 (1957).

The relinquishing state will not look beyond the statement of the governor of the demanding state that the person sought has violated the terms of his parole. An inquiry into that subject is reserved for the demanding state upon the individual's return. *Wynsma v. Leach*, 189 Colo. 59, 536 P.2d 817 (1975).

Or whether terms of probation violated. Whether the petitioner has, in fact, violated the terms of his probation is a matter for determination in the demanding, not the asylum, state. *Bernardo v. Cronin*, 191 Colo. 36, 550 P.2d 349 (1976).

The issue of whether the demanding state properly revoked a fugitive's probation is a matter for determination in the demanding, not the asylum, state. *Patrick v. Watson*, 195 Colo. 156, 576 P.2d 1014 (1978).

Hearing not required to show probable cause exists that defendant violated probation. Due process does not require that all extradition proceedings include a hearing to determine that probable cause exists to show that a defendant has violated the terms of his probation. *Bryan v. Conn*, 187 Colo. 275, 530 P.2d 1274 (1975).

Due process of law does not require the courts of this state to extend an extradition proceeding beyond an examination of the sufficiency of the extradition documents into an exploration of whether there was probable cause to believe that the appellant had violated the terms of his probation. *Byers v. Leach*, 187 Colo. 312, 530 P.2d 1276 (1975).

Demanding state has no duty to ensure that a pre-extradition hearing is held in the asylum state. *Smith v. Lamm*, 629 F. Supp. 1184 (D. Colo. 1986).

The requirement for ordering extradition is satisfied if the trial court finds either that probable cause exists or that the demanding state has made a finding of probable cause. *Lopez v. Cronin*, 193 Colo. 486, 568 P.2d 43 (1977).

If the finding of probable cause was supported by evidence in the record, the constitutional and statutory requirements would be met. The requirement is also met if probable cause is in fact established by the extradition papers. *Lopez v. Cronin*, 193 Colo. 486, 568 P.2d 43 (1977).

Effect of waiver of right to showing of probable cause in demanding state. Wyoming may extradite a defendant without an independent showing in Colorado of probable cause to hold him for trial in Wyoming, when he has already validly waived his right to such a showing in Wyoming. *Smith v. Miller*, 194 Colo. 218, 571 P.2d 1084 (1977).

Extradition documents were sufficient to establish probable cause to believe that the appellant had committed a crime in Minnesota. *Simon v. Miller*, 194 Colo. 27, 568 P.2d 1167 (1977).

Where extradition is based on an information, there must be an accompanying affidavit which sets forth facts and circumstances which establish "something approaching probable cause". *Graham v. Vanderhoof*, 185 Colo. 334, 524 P.2d 611 (1974); *Smith v. Miller*, 194 Colo. 218, 571 P.2d 1084 (1977).

Affidavit, accompanying extradition request, which incorporated police reports setting out facts of the investigation established sufficient cause. *Graham v. Vanderhoof*, 185 Colo. 334, 524 P.2d 611 (1974).

Right to hearing does not turn on who demands transfer. A prisoner's right to a hearing should not turn on whether custody and transfer are sought by the demanding state under the extradition act or by the receiving state under the interstate compact. *Moen v. Wilson*, 189 Colo. 85, 536 P.2d 1129 (1975).

Who may be extradited. Where the requisition papers show that the person has been charged and convicted in the demanding state, and that he has not completed his sentence, that person can be extradited to the demanding state under this article. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

In light of § 16-19-103 and the act's purposes, this section does not limit the extradition of an individual convicted of a crime to instances where he has "escaped from confinement or has broken the terms of his bail, probation, or parole". Such language was only meant to be illustrative, but not exhaustive, of the occasions when a convicted person can be considered to have fled from the justice of another state. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

A person remains charged with crime while the judgment of conviction remains unsatisfied; hence, where a charge of crime has resulted in a conviction, the record of such conviction is sufficient evidence in extradition proceedings. *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957); *Tinsley v. Woods*, 135 Colo. 590, 313 P.2d 1006 (1957).

A typewritten demand such as the judgment of conviction satisfies the language of the law. It alone is sufficient; hence, whose signature was on the order of commitment showing the sentence is unimportant, as long as all papers were authenticated by the governor who is the only one required by law to do so. *Burnette v. McClearn*, 162 Colo. 503, 427 P.2d 331 (1967).

When extradition is for an offense that has resulted in conviction, all that is required is record of conviction and a statement by the governor that the accused has violated his pa-

role. *Wynsma v. Leach*, 189 Colo. 59, 536 P.2d 817 (1975).

Parolee subject to extradition. A crime that has resulted in conviction remains a charge under § 2, cl. (2) of art. IV, U.S. Const., which mandates the relinquishment of any person "charged" with a crime who has fled from justice and is in another state, so long as the sentence resulting from conviction is unsatisfied. Consequently, a parolee is subject to extradition as a fugitive because, as a convict with an unexpired sentence, he remains criminally "charged". His extradition is for his original offense. *Wynsma v. Leach*, 189 Colo. 59, 536 P.2d 817 (1975).

Parolee properly in asylum state extraditable for another offense. The fact that defendant was legally in the asylum state under probation does not prevent him from being a fugitive from the demanding state with respect to another offense. *Mote v. Koch*, 173 Colo. 82, 476 P.2d 255 (1970).

Or for parole violation. A convicted individual may be extradited as a fugitive when he, prior to the revocation of parole, seeks asylum in the state from which he is sought to be extradited. The paroled prisoner is declared to be a fugitive from justice on the ground that he is a convict whose time has not expired and who, therefore, is charged with crime. *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957).

Probable cause finding by a neutral judicial officer in demanding state forecloses court in asylum state from reconsidering issue and when governor of asylum state grants extradition, prima facie evidence exists that all constitutional and statutory requirements have been met and the burden shifts to the petitioner to prove the extradition request is improper. *Johnson v. Cronin*, 690 P.2d 1277 (Colo. 1984).

A determination of probable cause by a neutral magistrate of the demanding state is binding upon the courts of any asylum state, which are without power to review that determination. *Allen v. Leach*, 626 P.2d 1141 (Colo. 1981); *Richardson v. Sullivan*, 700 P.2d 534 (Colo. 1985).

Affidavits failing to set forth facts establishing probable cause not insufficient. Affidavits supporting an extradition demand are not insufficient because they fail to set forth sufficient facts to establish probable cause, because a determination of probable cause by a neutral judicial officer of the demanding state is binding upon the courts of the asylum state. *Moore v. Miller*, 198 Colo. 24, 596 P.2d 64 (1979).

Presence of warrant in requisition documents establishes probable cause. When a state's law requires a judge to find probable cause before issuing a warrant, the presence of the warrant in the requisition documents establishes probable cause for the purposes of this section. *Keefer v. Leach*, 198 Colo. 101, 597 P.2d 203 (1979); *Parker v. Glazner*, 645 P.2d

1319 (Colo. 1982); *Vigil v Martinez*, 661 P.2d 1164 (Colo. 1983).

Minutes of earlier proceeding during which defendant was found guilty qualifies as copy of judgment of conviction or of a sentence. *Miller v. Cronin*, 197 Colo. 391, 593 P.2d 706 (1979).

Certified copies of minute orders qualify as a copy of a judgment of conviction or sentence. *Blackwell v. Johnson*, 647 P.2d 237 (Colo. 1982); *Butcher v. Caldwell*, 677 P.2d 342 (Colo. 1984).

Record of conviction and probation violation sufficient to support extradition. Where the defendant violated the terms of his probation, all that is required is a record of the conviction and a statement by the governor of the requisition state that the person sought has violated the terms of his probation. *Blackburn v. Johnson*, 647 P.2d 238 (Colo. 1982).

And for parole violators record of conviction and parole violation is sufficient. *Rodriguez v. Sandoval*, 680 P.2d 1278 (Colo. 1984).

Where extradition based on substantive offense rather than probation violation. Where extradition is based not upon violation of the terms of probation, but upon the substantive criminal offense for which the defendant has not yet completed his sentence, all that is required is a record of the conviction and a statement by the governor of the requisition state that the person sought has violated the terms of his probation. *Morgan v. Miller*, 197 Colo. 341, 593 P.2d 357 (1979).

Where indictment states two possible grounds for extradition but only one is basis for extradition. Where the indictment states two possible grounds for extradition, a charge of aggravated robbery and a burglary conviction, but the governor's requisition indicates that the charge of aggravated robbery is the actual basis for extradition, the statute requires only an accompanying indictment together with any warrants issued pursuant thereto and the allegation that petitioner was in the demanding state when the crime occurred and afterwards fled, and failure to include an authenticated copy of the prior conviction does not render the indictment ineffective. *Anderson v. Cronin*, 198 Colo. 103, 596 P.2d 760 (1979).

No distinction between properly verified complaint and unverified information with affidavit. There is no meaningful distinction between a properly verified complaint which incorporates attached factual matter by reference and an unverified information with supporting affidavit. *Coca v. Sheriff of City & County of Denver*, 184 Colo. 11, 517 P.2d 843 (1974).

Thus, the sufficiency of affidavits preliminary to the original criminal complaint or indictment is immaterial. *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957).

Where person sought to be extradited is charged with crime by grand jury indictment, an authenticated copy of which accompanies extradition papers, affidavit showing probable cause is not required. *People v. Jackson*, 180 Colo. 135, 502 P.2d 1106 (1972).

A grand jury indictment is a finding of probable cause by the grand jury so extradition papers based upon an indictment need not have an additional showing of probable cause. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

When extradition is founded upon a criminal indictment, supporting affidavits are unnecessary and may be regarded as immaterial surplusage when considering the sufficiency of the form of demand required. *McCoy v. Cronin*, 187 Colo. 364, 531 P.2d 379 (1975).

But affidavit alone must show probable cause for arrest. An affidavit used to charge a crime for the purpose of obtaining an arrest warrant must set forth facts sufficient to justify a finding of the existence of probable cause. It should report or summarize enough evidence to justify the issuance of an arrest warrant in the accusing state. *People v. McFall*, 175 Colo. 151, 486 P.2d 6 (1971).

The affidavit in support of the extradition documents must also contain sufficient information to justify a fourth amendment finding of probable cause that the accused committed the crime with which he is charged. *Allen v. Cronin*, 189 Colo. 540, 543 P.2d 707 (1975); *Renton v. Cronin*, 196 Colo. 109, 582 P.2d 677 (1978).

The affidavit which accompanies the arrest warrant and the criminal complaint from the demanding state must set forth some of the underlying circumstances surrounding the crime charged, as well as an adequate identification of the source, or sources, of the information set forth in the affidavit. *Allen v. Cronin*, 189 Colo. 540, 543 P.2d 707 (1975).

Probable cause established that defendant committed crime of escape. Where the complaint and affidavit was based upon the personal information and knowledge of the chief records officer of the Kentucky state reformatory, stating under oath that appellant had been confined in the Kentucky state reformatory under a sentence of 10 years for armed robbery, pursuant to a judgment of conviction from the Jefferson circuit court of Louisville, Kentucky; that affiant had been the chief records officer of the reformatory for 16 years and was in charge of the official custody and control records of the appellant at the reformatory; and that he knew, from these records and his own personal knowledge, that appellant did escape from the reformatory, leaving while on a hospital trip to Louisville, Kentucky, the complaint and affidavit is sufficient to establish probable cause that appellant had committed the substantive crime of escape under the Kentucky statute. *Norrod v. Bower*, 187 Colo. 421, 532 P.2d 330 (1975).

Whether the affidavits establishing probable cause were executed before or after the charging document is immaterial, provided that the extradition documents, viewed in their entirety, establish probable cause that the person to be extradited committed the offense. *Wood v. Leach*, 189 Colo. 361, 540 P.2d 1084 (1975); *See Hill v. Miller*, 195 Colo. 370, 578 P.2d 655 (1978); *Moore v. Miller*, 198 Colo. 24, 596 P.2d 64 (1979); *Dietz v. Leach*, 199 Colo. 293, 607 P.2d 993 (1980).

Prima facie showing of identity. Where the name of the person in custody is identical to that appearing in the extradition documents, there is a prima facie showing of identity and the burden is on the petitioner to disprove the presumed identity. *Samples v. Cronin*, 189 Colo. 40, 536 P.2d 306 (1975); *Guy v. Nelson*, 630 P.2d 610 (Colo. 1981).

Identity of name with the extradition documents is sufficient to establish a prima facie showing of identity; and, unless overcome by the appellant's evidence showing lack of identity, the prima facie showing is sufficient to establish identity. *Cates v. Cronin*, 194 Colo. 89, 570 P.2d 524 (1977).

Once the prosecution has established a prima facie showing of identity, the person charged as a fugitive must show that he is not the person sought by the demanding state. *Beam v. McKinster*, 652 P.2d 618 (Colo. 1982).

Once a prima facie case for extradition has been established, the burden devolves upon the accused to prove by clear and convincing evidence either that he is not a fugitive from the demanding state or that he is not substantially charged with a crime in that state. *Lucero v. Martin*, 660 P.2d 902 (Colo. 1983); *Richardson v. Sullivan*, 700 P.2d 534 (Colo. 1985); *Council v. MacFarlane*, 709 P.2d 947 (Colo. 1985).

However, the use of a "a/k/a" as a means of identifying a fugitive in a complaint, standing alone, is not sufficient to establish a prima facie showing of identity. *Cates v. Sullivan*, 696 P.2d 322 (Colo. 1985).

But the use of "a/k/a" documentation coupled with a description and photograph of the fugitive is sufficient to establish a prima facie showing of identity. *Cates v. Sullivan*, 696 P.2d 322 (Colo. 1985).

Clear and convincing evidence must be shown by accused that he is not the person sought in order to rebut the prima facie showing of identity. *Guy v. Nelson*, 630 P.2d 610 (Colo. 1981).

Where petitioner failed to introduce evidence that he was not the person described in the requisition documents and the cross-examination of the respondents' witnesses did not create such evidence, the petitioner failed to establish that he was not the person described in the documents. *Council v. MacFarlane*, 709 P.2d 947 (Colo. 1985).

Statutory citation not required to be included within indictment. *Samples v. Cronin*, 189 Colo. 40, 536 P.2d 306 (1975).

An information not required with indictment. The trial court was in error to discharge a fugitive for lack of an information for no such information is required. It is sufficient that a certified copy of the indictment, charging the passing of a worthless check, and other papers relating thereto, including a requisition, were forwarded from the governor of Tennessee and that the governor of Colorado issued a warrant for petitioner's arrest on the basis of such papers. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

The statement required by the extradition statute may be contained in the documents appended to the form of demand since the requisitioning governor certifies the accuracy of these documents. *Wynsma v. Leach*, 189 Colo. 59, 536 P.2d 817 (1975).

Statements as to escape and copy of judgment are sufficient. In cases where persons are sought as escapees from state prison, all that is required for extradition is either a copy of the judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement. *Burnette v. McClearn*, 162 Colo. 503, 427 P.2d 331 (1967); *Holmes v. People*, 169 Colo. 371, 456 P.2d 731 (1969).

Where a demand is for a person whose judgment of conviction remains unsatisfied, the demand shall be accompanied by a copy of the judgment of conviction or of the sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or broken the terms of his bail, probation, or parole. *Byers v. Leach*, 187 Colo. 312, 530 P.2d 1276 (1975).

Affidavit of sheriff in extraditing jurisdiction held sufficient. *Weathers v. Sullivan*, 184 Colo. 39, 518 P.2d 842 (1974).

Fact that signature of South Carolina solicitor on indictment was made by his deputy did not preclude extradition of fugitive to South Carolina where procedure of having deputy sign solicitor's name to an indictment was proper and routine in South Carolina. *Nevard v. Conn*, 187 Colo. 168, 529 P.2d 305 (1974).

Authentication of demanding governor is sufficient. In the absence of a showing that any of the documents authenticated by a governor are spurious the certificate of the governor is sufficient. *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957); *Tinsley v. Woods*, 135 Colo. 590, 313 P.2d 1006 (1957).

The question of authenticity is one for the determination of the governor of the demanding state alone, and his certification of that fact is all that is required. *Burnette v. McClearn*, 162

Colo. 503, 427 P.2d 331 (1967); Byers v. Leach, 187 Colo. 312, 530 P.2d 1276 (1975).

Where governor of demanding state personally certifies to authenticity of extradition papers according to laws of demanding state, requirements of section in regard to authentication are met. *People v. Jackson*, 180 Colo. 135, 502 P.2d 1106 (1972).

Where the requisition signed by the governor of Arizona clearly reflected that the indictment was authenticated, and in the absence of any showing by the accused that the authenticated documents are spurious, the requisition must be considered to be adequate and sufficient to support an extradition order. *Rush v. Baker*, 188 Colo. 136, 533 P.2d 36 (1975).

Certification of extradition documents is not defective because there is no authorization included to show that the chief deputy clerk could sign for the clerk of the court when the demanding state's governor's authentication covers all the documents including the affidavits of probable cause and the arrest warrant. Absent some showing that the documents are spurious, the governor's general authentication establishes their validity. *Keefer v. Leach*, 198 Colo. 101, 597 P.2d 203 (1979).

The only authentication required by § 16-19-104 is an authentication by the executive authority of the demanding state. *Clark v. Leach*, 200 Colo. 151, 612 P.2d 1130 (1980); *Butcher v. Caldwell*, 677 P.2d 342 (Colo. 1984).

Governor's authentication covers all documents. A governor's general authentication, included in the requisition documents, covers all documents included in the requisition request. *Blackwell v. Johnson*, 647 P.2d 237 (Colo. 1982).

Requisition document signed by one other than governor. A requisition document, signed by one other than the governor of the demanding state, is valid so long as the capacity of the signator to act on behalf of the governor is duly authenticated. *Hershberger v. Black*, 645 P.2d 278 (Colo. 1982).

Petitioner's burden to overcome presumption that extradition papers properly signed. The burden of proof is on the petitioner to overcome the presumption that the person signing the extradition papers had the authority to do so. *Hershberger v. Black*, 645 P.2d 278 (Colo. 1982).

The copies necessary to accompany the demand need not be verified, certified, nor photocopied. *Burnette v. McClearn*, 162 Colo. 503, 427 P.2d 331 (1967); *Byers v. Leach*, 187 Colo. 312, 530 P.2d 1276 (1975).

Indictments need not specifically attest that their certification was authorized. The copy of the indictments accompanying the request for extradition need not specifically attest that the officer of the court who certified the copies of

the indictments was authorized to do so. *Furman v. Miller*, 198 Colo. 282, 598 P.2d 1042 (1979).

Charging documents accompanying demand for extradition must be verified by executive authority. The requirements of this statute are clear as to which of the documents accompanying the demand for extradition must be authenticated by the executive authority making the demand. They are, "the copy of indictment, information, affidavit, judgment of conviction or sentence". In other words, it is the charging document. *People v. Lent*, 187 Colo. 248, 529 P.2d 1317 (1975).

Minor discrepancies or inconsistencies in the requisition documents do not render them invalid or prevent extradition. *Martello v. Baker*, 189 Colo. 195, 539 P.2d 1280 (1975); *Griffith v. Nelson*, 647 P.2d 228 (Colo. 1982).

A minor discrepancy in the charge set forth in the requisition documents does not prevent extradition. *Bryan v. Conn*, 187 Colo. 275, 530 P.2d 1274 (1975); *Schumm v. Nelson*, 659 P.2d 1389 (Colo. 1983).

As long as the requisition documents substantially comply with these statutory requirements, extradition should be ordered notwithstanding minor discrepancies or inconsistencies in the documents. *Lucero v. Martin*, 660 P.2d 902 (Colo. 1983); *Cates v. Sullivan*, 696 P.2d 322 (Colo. 1985).

Immaterial clerical inconsistencies do not affect the validity of the governor's warrant. *Morris v. Nelson*, 659 P.2d 1386 (Colo. 1983).

Although a charging document must be phrased substantially in accordance with the statutory language, minor discrepancies will not prevent extradition if the substantive statutory standards are met. *Furman v. Miller*, 198 Colo. 282, 598 P.2d 1042 (1979).

Where the documents substantially charge the defendant with having committed a crime under the laws of another state, clerical errors do not render the extradition documents invalid or prevent extradition. *Wilson v. Johnson*, 645 P.2d 21 (Colo. 1982).

Where the only difference between an authenticated copy and the original indictment relates to the manner in which those signatures are described on the copy, such difference does not impair the genuineness of the signatures on the original indictment nor the authenticity of the copy, and this authenticated copy satisfied the requirements of this section. *Griffith v. Nelson*, 647 P.2d 228 (Colo. 1982).

Demanding state is not required to allege every element of crime for which extradition is sought and charging documents are sufficient if framed substantially in the language contained in the statute. *Johnson v. Cronin*, 690 P.2d 1277 (Colo. 1984).

Technical discrepancy in middle name insufficient to defeat extradition. Under summary proceedings, sole reliance on a technical

discrepancy in a middle name, when appellant does not allege or represent that he is not the fugitive, will not suffice to defeat extradition. *Beverly v. Davis*, 648 P.2d 621 (Colo. 1982); *Beam v. McKinster*, 652 P.2d 618 (Colo. 1982).

Where there is a discrepancy between the middle initial contained in the extradition documents and the governor's warrant and the initial claimed by the accused as being correct, a prima facie case of identity may be established by an appropriate affidavit and photograph. *Miller v. Debekker*, 668 P.2d 927 (Colo. 1983).

Discrepancy as to height insufficient to defeat extradition. A discrepancy between an extradition document from a demanding state and a governor's warrant issued pursuant thereto in this state, as to the height of the person in custody, is not clear and convincing evidence that the detainee is not the person named in the extradition document. *Tackett v. Leach*, 661 P.2d 1160 (Colo. 1983).

Evidence of fugitive's own admissions relating to alleged offenses sufficient to overcome technical discrepancy in extradition documents and to establish identity for persons of extradition. *Edmonds v. Andrews*, 696 P.2d 325 (Colo. 1985).

Clerical defects did not require reversal. Clerical defects in extradition papers, such as the failure of the governor of North Dakota to insert in one the day and month on which he signed it, and in another, the day cannot be the basis for a reversal. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966).

Extradition complaint was not defective because it incorporated by reference "6 pages", and there were attached two duplicate sets of investigative reports, each set containing six pages. *Coca v. Sheriff of City & County of Denver*, 184 Colo. 11, 517 P.2d 843 (1974).

Once a valid governor's warrant has been issued and served, questions relating to the illegality or irregularity of the arrest or initial detention become moot. *Reese v. Warden & Keeper of County Jail*, 193 Colo. 7, 561 P.2d 339 (1977); *Renton v. Cronin*, 196 Colo. 109, 582 P.2d 677 (1978); *Whittington v. Bray*, 200 Colo. 17, 612 P.2d 72 (1980); *Gerard v. Ossola*, 649 P.2d 1110 (Colo. 1982).

Once the governor's warrant is served, issues concerning the petitioner's previous detention are moot. *Schumm v. Nelson*, 659 P.2d 1389 (Colo. 1983).

Defects in the original Colorado arrest documents become moot once the petitioner is served with the governor's warrant. *Morris v. Nelson*, 659 P.2d 1386 (Colo. 1983).

Subsequent extradition not barred by defective prior proceeding. Prior grant of writ of habeas corpus in extradition proceedings on ground that rendition papers allege that petitioner is fugitive when it is admitted that he is not a fugitive does not bar, under doctrine of res judicata, a subsequent attempt at extradition where facts and issues are different from those raised by the first petition. *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

First hearing not res judicata. Where the only issue determined by a trial court on a first habeas corpus proceeding was that the petitioner was then unlawfully detained because the requesting state had not provided all the necessary documents required for extradition, the underlying basis or validity of the extradition demand was not adjudicated in the first habeas corpus proceeding and is not res judicata to second. *Tucker v. Shoemaker*, 190 Colo. 267, 546 P.2d 951 (1976).

Judicial review under extradition act but not under detainer act. The extradition act and the uniform detainer compact, when applied to prisoners who are similarly situated, grant limited judicial review to contest transfer when the extradition act is used, but not under the provisions of the agreement on detainers. *Moen v. Wilson*, 189 Colo. 85, 536 P.2d 1129 (1975).

Compliance with section established. *Woolsey v. Nelson*, 178 Colo. 144, 496 P.2d 306 (1972); *Reese v. Warden & Keeper of County Jail*, 193 Colo. 7, 561 P.2d 339 (1977).

Statute as basis for jurisdiction. See *Lomax v. Cronin*, 194 Colo. 523, 575 P.2d 1285 (1978); *Sollinger v. McNeel*, 656 P.2d 701 (Colo. 1983).

Applied in Threadgill v. Capra, 161 Colo. 453, 423 P.2d 318 (1967); *Bartz v. Capra*, 161 Colo. 503, 423 P.2d 25 (1967); *Davis v. People*, 172 Colo. 486, 474 P.2d 206 (1970); *Buckmon v. Cronin*, 183 Colo. 205, 515 P.2d 1245 (1973); *Teters v. Watson*, 190 Colo. 355, 547 P.2d 1277 (1976); *People v. Pitcher*, 192 Colo. 195, 557 P.2d 395 (1976); *Dulac v. Miller*, 195 Colo. 275, 577 P.2d 761 (1978); *Jackson v. Cronin*, 199 Colo. 428, 610 P.2d 103 (1980); *Schoengarth v. Bray*, 200 Colo. 288, 615 P.2d 655 (1980); *Briddle v. Caldwell*, 628 P.2d 613 (Colo. 1981); *Martin v. Johnson*, 708 P.2d 121 (Colo. 1985); *Johnson v. Sullivan*, 708 P.2d 123 (Colo. 1985).

16-19-105. Governor may investigate case. When a demand is made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

Source: L. 53: p. 315, § 4. CSA: C. 72, § 49. CRS 53: § 60-1-4. C.R.S. 1963: § 60-1-4.

ANNOTATION

Courts of asylum state may not consider certain allegations. The courts of the asylum state in a habeas corpus proceeding under this article may not properly consider allegations that the fugitive's life would be endangered by return to the demanding state. The accused, in respect to this matter, must pursue his remedies in the demanding state or with the executive of the asylum state. *Lomax v. Cronin*, 194 Colo. 523, 575 P.2d 1285 (1978).

It is improper for judiciary to tell governor how to delegate his authority in extradition matters. It is no less improper for the judiciary to tell the governor, once he has delegated his authority, how the delegated authority should be exercised. *Steinman v. Caldwell*, 628 P.2d 110 (Colo. 1981).

16-19-106. Extradition of persons imprisoned or awaiting trial. (1) When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of the other state for the extradition of that person before the conclusion of such proceedings or his term of sentence in the other state, upon condition that such person be returned to the other state at the expense of this state as soon as the prosecution in this state is terminated.

(2) The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section 16-19-124 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

Source: L. 53: p. 315, § 5. CSA: C. 72, § 50. CRS 53: § 60-1-5. C.R.S. 1963: § 60-1-5.

ANNOTATION

Section deals with problem of extraditing prisoners already in custody. This section was specifically designed to deal with the problem of extraditing and returning those prisoners who are already in the custody of the authorities of another state by reason of imprisonment or awaiting trial. *Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346, cert. denied, 419 U.S. 880, 95 S. Ct. 145, 42 L. Ed.2d 120 (1974).

This section is both a grant and limitation of executive authority. *Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346, cert. denied, 419 U.S. 880, 95 S. Ct. 145, 42 L. Ed.2d 120 (1974).

And sets forth the course of conduct which the Colorado governor must follow. *Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346, cert. denied, 419 U.S. 880, 95 S. Ct. 145, 42 L. Ed.2d 120 (1974).

Subsection (1) affirmative duty on executive and provides standard to state of origin. The clause in subsection (1) requiring that return be made "as soon as the prosecution in this state is terminated" is an affirmative duty that the general assembly has imposed in the executive, is clearly intended to provide a standard to the state of origin, informing that state as to the proper time for demand, and gives the governor

of Colorado a standard for determining when a demand for return is both timely and proper. *Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346, cert. denied, 419 U.S. 880, 95 S. Ct. 145, 42 L. Ed.2d 120 (1974).

This grant of authority is addressed to governor's discretion. But once having exercised that discretion, the powers and duties of the governor are controlled by the terms of this section. *Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346, cert. denied, 419 U.S. 880, 95 S. Ct. 145, 42 L. Ed.2d 120 (1974).

Executive authority limited to make surrender at later date. Where an executive agreement based on this statute has been made, the failure to return a person according to the terms of the statute limits the authority of Colorado executive to make surrender at a later date. *Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346, cert. denied, 419 U.S. 880, 95 S. Ct. 145, 42 L. Ed.2d 120 (1974).

Governor was without authority to make return. Where extradition request was filed more than eight years after petitioner's appellate proceedings in Colorado had terminated, Colorado governor, who had entered into an executive agreement with requesting state, was with-

out authority under this section to make the requested return. *Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346, cert. denied, 419 U.S. 880, 95 S. Ct. 145, 42 L. Ed.2d 120 (1974).

Demand in alternative adequate. Demand for extradition complied with § 16-19-104 although the requisition documents contained both a demand for extradition, pursuant to § 16-19-103, and a request for extradition predicated on this section, which controls executive agreements, since the executive agreement, which accompanied the requisition documents, served only to ensure that the demanding state would

return and surrender defendant to the Colorado authorities upon the completion of the trial in the demanding state. *Buffalo v. Tanksley*, 189 Colo. 45, 536 P.2d 827 (1975).

"Flagging device" on file permitted. Another state may request that Colorado authorities notify it 60 days prior to the petitioner's release so that his consecutive sentence could be served there. The request for notification is no more than a "flagging device", which allows the requesting state to take whatever action it deems appropriate. *Moore v. Ricketts*, 654 P.2d 837 (Colo. 1982).

16-19-107. Extradition of persons not present where crime committed. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 16-19-104 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this article not otherwise inconsistent shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime and has not fled therefrom.

Source: L. 53: p. 316, § 6. CSA: C. 72, § 51. CRS 53: § 60-1-6. C.R.S. 1963: § 60-1-6.

ANNOTATION

Constitutionality. Some 44 states have adopted the procedure of this section as part of the uniform act and in no state has it been held unconstitutional for denial of equal protection or due process. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

This section providing for extradition of nonfugitives must be strictly construed and strictly complied with in proceedings thereunder. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957).

It confers discretion upon governor. Upon receipt of a request under this section for the surrender of a person charged with an act resulting in a crime in the demanding state, the governor of Colorado in the exercise of his discretion may cause his arrest and surrender and finds his authority and protection under this section, and not under the constitution or laws of the United States or § 16-19-103 relating to fugitives. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957); *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958); *Layher v. Van Cleave*, 171 Colo. 465, 468 P.2d 32 (1970).

The rendition of a nonfugitive is permissible as a matter of executive discretion. *Allen v. Leach*, 626 P.2d 1141 (Colo. 1981).

State not constitutionally required to deliver nonfugitive. Where it was stipulated that appellant was a "fugitive" and that his extradition was sought under this section, the state of Colorado was not constitutionally required to deliver him to the state requesting him. *Allen v. Leach*, 626 P.2d 1141 (Colo. 1981).

Which is exercisable pursuant to demand.

The governor of Colorado has no inherent powers of arrest and surrender and cannot proceed as a volunteer but is limited to acting pursuant to a demand or a request from the executive of a sister state, and then only in strict conformity with law. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957).

The governor's discretion is not a completely arbitrary one, but can be exercised only upon a lawful demand or request from the executive authority of another state to surrender only those persons in this state who have been charged by the demanding state with committing an act in this state or a third state which intentionally results in a crime in the demanding state. The governor cannot proceed as a volunteer, but must act in strict conformity with the law. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

And warrant for fugitive ineffective where request concerns nonfugitive. A warrant issued for the arrest of defendant as a fugitive from the justice of a sister state, where the facts disclosed that he was charged with violation of the reciprocal nonsupport act and had never been in that sister state except to pass through, was unlawful and void and he cannot be extradited as a fugitive. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957).

Where demand is made for the arrest and delivery pursuant to the constitution and laws of the United States under § 16-19-103 pertaining to fugitives, and arrest and surrender are made

pursuant to the laws of the state of Colorado under this section, the warrant issued is not in accordance with the requisition; consequently, it is wholly ineffectual for any purpose. *Layher v. Van Cleave*, 171 Colo. 465, 468 P.2d 32 (1970).

But subsequent extradition not barred by defective prior proceeding. Prior grant of writ of habeas corpus in extradition proceedings on ground that rendition papers allege that petitioner is fugitive when it is admitted that he is not a fugitive does not bar, under doctrine of res judicata, a subsequent attempt at extradition where facts and issues are different from those raised by the first petition. *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

Extradition available to enforce support obligations. Since the enactment of the "Uniform Reciprocal Enforcement of Support Act" in Colorado there are now two distinct courses

of action which a demanding state may take with respect to one who does not carry out his obligations of support to his family: (1) Extradition on a criminal charge of nonsupport; and (2) the initiation of civil proceedings under the uniform act. Either or both courses of action may be pursued, and the election lies wholly with the demanding state and the obligee. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

Affidavits accompanying request for extradition sufficient to show probable cause. *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

Applied in *Howe v. Cronin*, 197 Colo. 17, 589 P.2d 930 (1979); *Morris v. Nelson*, 659 P.2d 1386 (Colo. 1983); *Lucero v. Martin*, 660 P.2d 902 (Colo. 1983).

16-19-108. Issue of governor's warrant. If the governor decides that the demand should be complied with, the governor shall sign a warrant of arrest, which shall be sealed with the state seal and be directed to any peace officer or other person whom the governor may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance. Any electronically or electromagnetically transmitted facsimile of a governor's warrant shall be treated as an original document.

Source: L. 53: p. 316, § 7. CSA: C. 72, § 52. CRS 53: § 60-1-7. C.R.S. 1963: § 60-1-7. L. 93: Entire section amended, p. 518, § 8, effective July 1.

ANNOTATION

Law reviews. For article, "Report of the Denver Bar Association's Committee on the Administration of Criminal Justice in Colorado", see 2 Den. B. Ass'n Rec. 2 (Feb. 1925).

Governor may direct execution of arrest warrant. This section provides that if the governor determines that the demand be complied with he shall sign a warrant of arrest, which shall be sealed with the state seal, and direct some person selected by the chief executive to execute the same. *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958).

But he cannot proceed without demand. The governor of Colorado has no inherent powers of arrest and surrender. His rights and duties are clearly defined; he cannot proceed as a volunteer but is limited to acting pursuant to a demand or a request from a sister state and then only in strict conformity with law. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957); *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

Governor may delegate his authority to review and sign extradition documents. *Macurdy v. Leach*, 662 P.2d 166 (Colo. 1983).

It is improper for judiciary to tell governor how to delegate his authority in extradition matters. It is no less improper for the judiciary to tell the governor, once he has delegated his authority, how the delegated authority should be

exercised. *Steinman v. Caldwell*, 628 P.2d 110 (Colo. 1981).

Presumption that lieutenant governor properly signed warrant. It is defendant's burden of proof to overcome the presumption that the lieutenant governor was acting pursuant to her authority and was properly exercising the incidents of her office when she signed the governor's warrant. *Jaques v. Bray*, 645 P.2d 22 (Colo. 1982).

The warrant of the governor of the asylum state merely implements the proceedings which are based on the requisition from the demanding state. *Self v. People*, 133 Colo. 524, 297 P.2d 887 (1956).

It must substantially recite the facts necessary to the validity of its issuance. *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958).

It need not include a statement that the defendant was present in the demanding state at the time of commission of the alleged crime. *Harding v. People*, 161 Colo. 571, 423 P.2d 847 (1967).

Or set out statutory authority for action. The arrest warrant in extradition proceedings of a fugitive from justice need not clearly define and set out the enabling statutes of the asylum state under which the executive authority of the state purports to act. *Olson v. People*, 138 Colo. 310, 332 P.2d 486 (1958).

And defective warrant may be cured by accompanying papers. If the rendition warrant is defective but is accompanied by allied papers, either on the return to the writ of habeas corpus or introduced on the trial, which when taken together with the warrant show that the executive of the asylum state did in fact have before him the necessary jurisdictional matters, namely the documents required for the issuance of the warrant, then the prisoner is not illegally restrained. *Self v. People*, 133 Colo. 524, 297 P.2d 887 (1956).

Governor's warrant is prima facie evidence of jurisdiction. The findings of the governor as to the status of a prisoner as a fugitive from justice establishes prima facie that the accused is a fugitive from justice and subject to prosecution in the demanding state. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962).

A governor's extradition warrant is prima facie evidence that all legal requirements have been complied with. *Capra v. Ballarby*, 158 Colo. 91, 405 P.2d 205 (1965); *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

In Colorado, as in most jurisdictions, a warrant issued by a governor is prima facie evidence both that a petitioner is substantially charged with a crime and that he is a fugitive from justice. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966); *Ede v. Bray*, 178 Colo. 99, 495 P.2d 1139 (1972).

Execution of a governor's warrant establishes prima facie evidence that the person who is sought to be extradited is substantially charged with a crime. *Nevard v. Conn*, 187 Colo. 168, 529 P.2d 305 (1974).

The issuance of the governor's warrant establishes prima facie that the accused is substantially charged with the commission of a crime in the demanding state, and the burden is upon him to show otherwise. *McCoy v. Cronin*, 187 Colo. 364, 531 P.2d 379 (1975).

The warrant of the governor of the asylum state is prima facie evidence of three things only: (1) That the defendant is substantially charged with a crime in the demanding state; (2) that he is a fugitive from the justice of that state; and (3) that a demand has been made for his delivery to the state wherein he is charged with a crime. *Harding v. People*, 161 Colo. 571, 423 P.2d 847 (1967).

It is sufficient that the governor's warrant of the asylum state recite that defendant is a fugitive from justice in the demanding state to create a presumption that the accused was present in the demanding state at the time of the crime. *Harding v. People*, 161 Colo. 571, 423 P.2d 847 (1967); *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971); *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

The warrant of arrest is prima facie evidence of the recitals therein. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

The governor's warrant of the asylum state is prima facie evidence that the accused was substantially charged with a crime under the laws of the demanding state, and that accused fled from justice after committing a felony in the demanding state. *Mote v. Koch*, 173 Colo. 82, 476 P.2d 255 (1970).

And of authority to arrest and deliver defendant. Where the Colorado warrant recites that defendant is a fugitive from justice and that he stands charged with a crime, and it is accompanied by a certified copy of the indictment, it is prima facie sufficient authority for the arrest of the defendant and delivery of him to the agents duly appointed to return him to the demanding state. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

Thus, process of arrest in first instance becomes moot and academic, when replaced by governor's warrant. *McClern v. Jones*, 162 Colo. 354, 426 P.2d 192 (1967); *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

The governor's warrant for defendant's arrest for extradition having issued and having been filed, the issue as to whether he was lawfully arrested by an unverified information in the first instance is not just academic but moot. *Velazquez v. People*, 154 Colo. 284, 389 P.2d 849 (1964).

Once the governor's warrant is filed in the district court, irregularity in connection with prior proceedings becomes moot. *Dressel v. Bianco*, 168 Colo. 517, 452 P.2d 756 (1969).

Alleged illegality of the process of arrest involved in an initial arrest in the asylum state becomes moot upon the issuance of a governor's warrant. *Dilworth v. Leach*, 183 Colo. 206, 515 P.2d 1130 (1973).

Once the governor's warrant has been issued, the question of the validity of the initial arrest becomes moot and may not be raised in habeas corpus proceedings which test the validity of the detention under the governor's warrant. *McCoy v. Cronin*, 187 Colo. 364, 531 P.2d 379 (1975).

After a valid governor's warrant is issued and served, illegalities and irregularities which relate to the initial arrest of the fugitive become moot. *White v. Leach*, 188 Colo. 62, 532 P.2d 740 (1975).

It is unnecessary to execute the governor's warrant by rearresting when accused has already been arrested and is free on bond. *McClern v. Jones*, 162 Colo. 354, 426 P.2d 192 (1967); *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

But warrant for fugitive ineffective where request concerns nonfugitive. A warrant charging petitioner as a fugitive from the justice of a sister state for failure to support his minor children is not supported by a showing that petitioner's wife left him and removed to the sister state with their children, and that petitioner has never been in that state except to pass through, and

hence he cannot be extradited as a fugitive. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957).

Where demand is made for arrest and delivery pursuant to the constitution and laws of the United States under this section and arrest and surrender are made pursuant to the laws of the state of Colorado, under § 16-19-107 pertaining to extradition of persons not present where crime committed, the warrant issued is not in accordance with the requisition; consequently, it is wholly ineffectual for any purpose. *Layher v. Van Cleave*, 171 Colo. 465, 468 P.2d 32 (1970).

Where person claims he is not the fugitive sought, prima facie identity may be established through testimony, photographs, and fingerprints identifying the person is the fugitive being sought. *Secrest v. Simonet*, 708 P.2d 803 (Colo. 1985).

Misspelling petitioner's name in document supporting governor's warrant immaterial. Where two names are spelled differently but sound alike in their pronunciation, they are regarded as the same under the doctrine of idem sonans, and misspelling of petitioner's name in documents supporting governor's warrant was immaterial. *Dilworth v. Leach*, 183 Colo. 206, 515 P.2d 1130 (1973).

Identity between name in extradition documents and name in governor's warrant establishes a prima facie case that the person charged as a fugitive is indeed the fugitive sought by the demanding state. *Richardson v. Cronin*, 621 P.2d

949 (Colo. 1980); *Council v. MacFarlane*, 709 P.2d 947 (Colo. 1985).

Presumption of named person's presence in demanding state at time of offense. The issuance of a governor's warrant for a person whose name is identical to that of the person charged in the fugitive information establishes a presumption that he was in the demanding state at the time of the offense. *Richardson v. Cronin*, 621 P.2d 949 (Colo. 1980).

Inclusion of two surnames in Texas governor's warrant served dual function of adequately identifying the person sought and of authorizing peace officers in Colorado to arrest that person as a fugitive, and was consistent with the governor's statutory extradition authority. *Richardson v. Cronin*, 621 P.2d 949 (Colo. 1980).

Governor's warrant need not be technically correct in every respect, so that the misspelling of the county in which the crime occurred is irrelevant to the sufficiency of the warrant. *Rodriguez v. Sandoval*, 680 P.2d 1278 (Colo. 1984).

Seal. No statutory requirement that state seal be affixed on each extradition document. *Secrest v. Simonet*, 708 P.2d 803 (Colo. 1985).

Issuance of governor's warrant held sufficient. *Byers v. Leach*, 187 Colo. 312, 530 P.2d 1276 (1975).

Applied in *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972); *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979); *Massey v. People*, 656 P.2d 658 (Colo. 1982).

16-19-109. Manner and place of execution. The warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant and to deliver the accused, subject to the provisions of this article, to the duly authorized agent of the demanding state.

Source: L. 53: p. 316, § 8. CSA: C. 72, § 53. CRS 53: § 60-1-8. C.R.S. 1963: § 60-1-8.

ANNOTATION

Documents authorizing transport and delivery cure defective warrant. The warrant of the governor of Colorado accompanied by a document authorizing the agent to transport defendant, and another document ordering his delivery into the custody of agent, amply compensate for the clerical error in failing to fill in the two blank spaces in the initial warrant. *Harding v. People*, 161 Colo. 571, 423 P.2d 847 (1967).

Identity between name in extradition documents and name in governor's warrant establishes a prima facie case that the person charged as a fugitive is indeed the fugitive sought by the demanding state. *Richardson v. Cronin*, 621 P.2d 949 (Colo. 1980); *Council v. MacFarlane*, 709 P.2d 947 (Colo. 1985).

Applied in *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

16-19-110. Authority of arresting officer. Every peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

Source: L. 53: p. 316, § 9. CSA: C. 72, § 54. CRS 53: § 60-1-9. C.R.S. 1963: § 60-1-9.

Cross references: For general authority of peace officer in making arrests, see part 1 of article 3 of this title.

16-19-111. Rights of accused - habeas corpus. No person arrested upon such a warrant shall be delivered over to the agent whom the executive authority demanding him has appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged and that he has the right to demand and procure legal counsel. If the prisoner or his counsel states that he or they desire to test the legality of his arrest, the judge of the court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody and to the agent of the demanding state. Review beyond the court of record shall be only in the supreme court by petition for certiorari, pursuant to such rules as that court may promulgate.

Source: L. 53: p. 316, § 10. CSA: C. 72, § 55. CRS 53: § 60-1-10. C.R.S. 1963: § 60-1-10. L. 86: Entire section amended, p. 735, § 6, effective July 1.

Cross references: For procedural requirements in habeas corpus, see C.R.C.P. 106; for jurisdiction of the supreme court on writs of certiorari, see C.A.R. 49 to 56.

ANNOTATION

The duty to extradite must be viewed in light of this section. *Buffalo v. Tanksley*, 189 Colo. 45, 536 P.2d 827 (1975).

Applicable to all prisoners. Under the extradition act, each prisoner is entitled to petition the district court for a writ of habeas corpus and to obtain a hearing in which extradition can be contested. *Moen v. Wilson*, 189 Colo. 85, 536 P.2d 1129 (1975).

Extradition proceedings are summary in nature and the accused is not entitled to all of the procedural safeguards of a criminal trial. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

An extradition hearing is not designed or intended to accomplish a determination of guilt or innocence, and is only summary in nature. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

Habeas corpus proceedings are civil rather than criminal in nature, concerned only with the prisoner's right to liberty, notwithstanding the particular act for which he is detained, and is separate from the legal proceedings under which the detention is sought to be justified. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

Habeas corpus is an independent civil proceeding separate and apart from the case in which the criminal charge which initiates the extradition proceedings is filed. *People v. Lent*, 187 Colo. 248, 529 P.2d 1317 (1975).

But criminal safeguards attach regardless of formal designation of a proceeding if the

proceeding substantively involves incarceration or other criminal sanctions. *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972).

Despite a common-law and constitutional tradition which treat habeas corpus as a civil matter and as a matter to which criminal due process safeguards do not attach, the supreme court is of the opinion that this tradition does not comport with recent developments in the constitutional law. The administration of criminal procedural safeguards must look beyond form to substance. *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972).

Section provides right to counsel. The language of this section establishes a right to the presence of legal counsel, and due process requirements prohibit the denial of this right to indigents when it has been made available to those able to afford counsel. *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972).

Indigent's right to counsel on appeal. Where a person is indigent, the right to appointed counsel and a free transcript for appellate review extends to an appeal of the denial of a writ of habeas corpus in extradition proceedings. *Denbow v. District Court*, 652 P.2d 1065 (Colo. 1982).

It requires advising by judge and counsel. The statute expressly requires that a person arrested on a governor's warrant shall be brought before a judge to be advised of the demand made for his surrender and of the crime of which he is charged, and that he has a right to procure

legal counsel to test the legality of his arrest. *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968).

It is clear and its requirements are not merely directory but mandatory. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962).

The only proper respondent in a habeas corpus proceeding is the person who allegedly is detaining the petitioner unlawfully, and neither the governor nor the people of the state of Colorado is such a person. *People v. Lent*, 187 Colo. 248, 529 P.2d 1317 (1975).

Habeas corpus is the only judicial review available to an accused in extradition proceedings. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

Under this section a party held in custody under a warrant of extradition may test the validity thereof by a writ of habeas corpus. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962); *Gagan v. Gately*, 673 F. Supp. 1029 (D. Colo. 1987).

In the absence of such writ a trial court has no jurisdiction and no issue before it to resolve. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962).

This section contemplates a hearing on the legality of the prisoner's detention, if he requests one, and such a hearing can be had only when a writ of habeas corpus has been duly applied for by the prisoner and issued by the court. *Osborne v. Van Cleave*, 166 Colo. 398, 443 P.2d 988 (1968).

Inquiry in habeas corpus proceeding severely restricted. In the interests of comity and speedy resolution of extradition matters, the inquiry by the courts of Colorado, the asylum state, in a habeas corpus proceeding, is severely restricted, and the accused is left to pursue his remedies in the courts of the demanding state. *Rush v. Baker*, 188 Colo. 136, 533 P.2d 36 (1975).

Scope of inquiry limited. The scope of inquiry in a habeas corpus proceeding in the context of a request for extradition under this article is narrowly limited to the issues of: (1) The technical sufficiency of the extradition papers; (2) identification of the accused; (3) whether the accused is charged with a crime; and (4) whether the accused is a fugitive from justice. *Lomax v. Cronin*, 194 Colo. 523, 575 P.2d 1285 (1978); *Steinman v. Caldwell*, 628 P.2d 110 (Colo. 1981); *Gagan v. Gately*, 673 F. Supp. 1029 (D. Colo. 1987).

At habeas corpus proceedings to consider the validity of an extradition warrant, the only questions which may be presented to the court by the habeas corpus petition are whether the prisoner is lawfully detained and whether the requirements of extradition have been met. *Massey v. Wilson*, 199 Colo. 121, 605 P.2d 469 (1980); *Simmons v. Leach*, 626 P.2d 164 (Colo. 1981).

When asylum state's court to make determination of probable cause. The fourth amendment interests of a person against whom extradition is sought are protected upon a habeas corpus review where the courts of the asylum state examine the extradition documents to determine whether probable cause has been found by a neutral court in the demanding state. If no determination of probable cause by the courts of the demanding state appears in the extradition documents, the courts in the asylum state are required to make an independent determination from the extradition documents as to whether probable cause exists. *Lutrell v. Williams*, 660 P.2d 499 (Colo. 1983).

Courts in asylum state have no duty to inquire into substantive law and pleading practices of the demanding state. *Simmons v. Leach*, 626 P.2d 164 (Colo. 1981).

Court may not nullify extradition on own motion. A trial court may not disregard the provisions of this section and of its own motion nullify an extradition warrant without the filing of a petition for a writ of habeas corpus by the accused showing substantial grounds why the extradition should not be enforced. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962).

The accused has the right to proffer evidence in aid of his discharge. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962).

But not to try questions of guilt or innocence. The guilt or innocence of the alleged fugitive may not be considered by the court of the asylum state in habeas corpus proceedings. *Dressel v. Bianco*, 168 Colo. 517, 452 P.2d 756 (1969).

Since an extradition proceeding is designed only to convey the petitioner to the proper jurisdiction for trial, his guilt or innocence and any issue as to his sanity as it relates to his guilt or innocence or ability to stand trial are not issues at the extradition hearing, but rather at the trial in the demanding state. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

Although questions concerning the petitioner's sanity as it affects his ability to stand trial are properly addressed to courts in the demanding state, the petitioner's competency may also be the subject of inquiry by the asylum state if it affects the petitioner's ability to understand and assist counsel in handling the issues involved in the habeas corpus proceeding itself. *Gagan v. Gately*, 673 F. Supp. 1029 (D. Colo. 1987).

Such as date of crime. In an extradition hearing, the time of the commission of the crime is material; however, the precise date alleged does not necessarily have to be proved and where, for the purpose of extradition, trial court ruled that any date in a certain month was sufficient to advise accused of the charge against him, it was held that under the evidence and special circumstances of the case, trial court's

ruling was correct. *Osborne v. Van Cleave*, 173 Colo. 26, 475 P.2d 625 (1970).

Or alibi. Habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused. *Osborne v. Van Cleave*, 173 Colo. 26, 475 P.2d 625 (1970); *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

Or validity of arrest or detention. The fugitive cannot, in opposition to proper extradition proceedings, urge the fact that his original arrest or detention was illegal, once proceedings have been instituted, it is too late to claim that the preliminary detention in the asylum state was illegal. *Travis v. People*, 135 Colo. 141, 308 P.2d 996 (1957).

The fact that the defendant was originally arrested in Colorado on a charge different than the one upheld by requisition is immaterial and moot. Extradition proceedings on the charge of passing a worthless check were properly instituted and the validity of his initial arrest is not in issue in the proceeding to determine whether the discharge of the person was valid. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

The illegality of an initial arrest cannot be challenged in an extradition proceeding growing out of that arrest. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

Where accused petitioned for writ of habeas corpus after issuance of governor's warrant for accused's extradition to another state, any issue arising out of any alleged wrongful detention preceding the service of the governor's warrant was moot. *Crumrine v. Erickson*, 186 Colo. 139, 526 P.2d 148 (1974).

Once the governor's warrant has been issued, the question of the validity of the initial arrest becomes moot and may not be raised in habeas corpus proceedings which test the validity of the detention under the governor's warrant. *McCoy v. Cronin*, 187 Colo. 364, 531 P.2d 379 (1975).

After a valid governor's warrant has been issued and served, any illegalities and irregularities which relate to the initial arrest of the fugitive become moot. *Simmons v. Leach*, 626 P.2d 164 (Colo. 1981).

Or violations of parole. In habeas corpus proceedings involving extradition the courts cannot consider the question of whether or not the petitioner has violated his parole. *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957).

Or the constitutionality of statute charging crime in demanding state. Accused could not avoid extradition to another state on argument that statute charging him with crime in other state was unconstitutional. Rather, the principle of comity required the accused to test the statute's constitutionality in the courts of that state. *Denton v. Cronin*, 187 Colo. 247, 529 P.2d 644 (1974).

Or death penalty. Where accused proposes that Colorado ought not give aid and assistance

to Oklahoma in enforcing its death penalty which he alleges is unconstitutional, this position presents no issue justiciable in the Colorado courts in an extradition proceeding. *Pickinpaugh v. Lamm*, 189 Colo. 143, 538 P.2d 113 (1975).

Defendant's claim that his federal constitutional rights were violated in the asylum state does not require habeas corpus relief, nor does it deprive the Colorado courts of jurisdiction over the defendant. *Yellen v. Nelson*, 680 P.2d 234 (Colo. 1984).

Alleged denial of speedy trial and due process by demanding state. Issues of whether petitioner has been denied his constitutional rights to a speedy trial and due process by demanding state's delay in proceeding with extradition are not justiciable in a habeas corpus action brought in Colorado grounded upon a demand for extradition. *Simmons v. Leach*, 626 P.2d 164 (Colo. 1981).

When prisoner released for state's failure to comply with constitutional requirements, he remains subject to extradition proceedings. When the prisoner is released because the demanding state or the asylum state has failed to comply with statutory or constitutional requirements, the prisoner remains a fugitive from the demanding state and subject to that state's constitutional right to demand his return. *Massey v. Wilson*, 199 Colo. 121, 605 P.2d 469 (1980).

Effect of writ on prosecution of underlying charge. Where New Mexico properly granted a writ of habeas corpus on the grounds of technical insufficiency of the extradition documents, Colorado is not estopped from prosecuting the defendant on the merits of the underlying charges. *People v. Coyle*, 654 P.2d 815 (Colo. 1982).

Courts of asylum state may not consider certain allegations. The courts of the asylum state in a habeas corpus proceeding under this article may not properly consider allegations that the fugitive's life would be endangered by return to the demanding state. The accused, in respect to this matter, must pursue his remedies in the demanding state or with the executive of the asylum state. *Lomax v. Cronin*, 194 Colo. 523, 575 P.2d 1285 (1978).

Identification testimony at extradition hearing is not tested by same standards applied at trial on the merits. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

Sanity a question only if accused unable to assist counsel. The only conceivable situation in which a court in the asylum state might be required to consider sanity would be one in which the petitioner is so incompetent as to be totally unable to assist his counsel in a habeas corpus proceeding in connection with a pending extradition. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

"Total inability to assist counsel" test disavowed in favor of "sufficient present ability to

consult with attorney" test. *Pruett v. Barry*, 696 P.2d 789 (Colo. 1985).

Issue is right of demanding state to defendant's return. Constitutional rights to limitations on the use of evidence on the issue of guilt or innocence are not at issue in the rendition proceeding. What is in issue is the constitutional right of the demanding state to have the defendant promptly returned to that state on a showing of probable cause. *North v. Koch*, 169 Colo. 508, 457 P.2d 915 (1969).

This involves narrow determination of compliance with statute. Habeas corpus, in the instance of interstate extradition, involves a narrow determination of whether there has been compliance with the statutory elements of whether the petitioner: (1) Was present in the demanding state at the time charged in the governor's warrant and the extradition proceedings; (2) was substantially charged with a crime; and (3) is a fugitive from justice. *Petition of Harwell*, 180 Colo. 144, 503 P.2d 618 (1972).

The scope of inquiry in habeas corpus proceedings is narrowly limited to the technical sufficiency of the papers and: (1) The identification of the accused; (2) whether the accused has been charged with a crime; and (3) whether the accused is a fugitive from justice. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

A habeas corpus proceeding has limited scope and is intended to resolve the issue of whether the person in custody is lawfully detained. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

Evidence required to overcome presumption of validity. An accused who seeks to invalidate an extradition must overcome the presumption of validity afforded by the governor's warrant by clear and convincing evidence. *Lomax v. Cronin*, 194 Colo. 523, 575 P.2d 1285 (1978).

The warrant of arrest is prima facie evidence of the recitals therein in a habeas corpus proceeding. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

The warrant of the governor as to the status of the accused as a fugitive from justice of the demanding state is prima facie proof of such status which must be overcome to justify a discharge from custody. *Krutka v. Bryer*, 150 Colo. 293, 372 P.2d 83 (1962).

It places the burden upon the accused to show either that he is not a fugitive from justice or that he was not substantially charged with a crime in the demanding state. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

A petitioner who believes that the demanding state's requisition papers do not support the warrant of the governor of the asylum state has the responsibility of going forward with the matter and controvert the warrant by introducing the requisition papers into evidence. *Mote v. Koch*, 173 Colo. 82, 476 P.2d 255 (1970).

The burden is to show by clear and convincing evidence that defendant was absent at the time of the crime charged from Texas. *Dressel v. Bianco*, 168 Colo. 517, 452 P.2d 756 (1969).

The courts will not discharge a defendant arrested under a governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state. *Osborne v. Van Cleave*, 173 Colo. 26, 475 P.2d 625 (1970); *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

The burden is upon the accused to come forward with clear and convincing proof that he was not in the demanding state at the time of the crime charged or that he was not the fugitive from justice named in the extradition papers, in order to overcome the presumption which attaches to the governor's warrant that the accused was in the demanding state at the time of the crime. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

Absence from the demanding state is a defense which may be raised and proven by a petitioner in order to defeat extradition. *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

A habeas corpus petitioner charged as an out-of-state fugitive, not the sheriff-respondent, has the burden of going forward with clear and convincing evidence to prove that he was not in the demanding state at the time of the crime or that he is not the individual named in the extradition papers. *Ede v. Bray*, 178 Colo. 99, 495 P.2d 1139 (1972).

The burden is on the accused to show by clear and satisfactory evidence that he was not present if he is to overcome the presumption created by the warrant which governor of Colorado issues that the accused is in the demanding state at the time the offense was committed. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

Or that he had not left the state. To demonstrate that he was not a fugitive from justice, the defendant would have to show either that he was not present in the state demanding extradition at the time that the crime allegedly was committed, or that he had not left the state. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966).

The presumption raised by a governor's warrant in an asylum state in a habeas corpus proceeding may be overcome either by a petitioner showing that he was not within the demanding state at the time the crime was committed or that he has not since left the state. *Harding v. People*, 161 Colo. 571, 423 P.2d 847 (1967); *Luker v. Koch*, 176 Colo. 75, 489 P.2d 191 (1971).

Burden shifted to petitioner to disprove identity. Where the petitioner's name in the requisition of governor of New Mexico was identical to the name appearing in the Colorado governor's warrant, this created a prima facie showing of identity and shifted the burden to

petitioner to disprove the identity. *Dilworth v. Leach*, 183 Colo. 206, 515 P.2d 1130 (1973).

The introduction of the governor's warrant and the supporting requisition documents created a prima facie showing of identity and shifted the burden to appellant to show that the state did not properly identify him as the person sought by the requisitioning state. *Dominguez v. Bray*, 188 Colo. 72, 532 P.2d 950 (1975).

Photo competent evidence of identity. Where an authenticated prison photo of the petitioner accompanied the extradition documents from New Mexico, the photo was competent evidence of identity. *Dilworth v. Leach*, 183 Colo. 206, 515 P.2d 1130 (1973).

State allowed time to cure defective affidavit. In a habeas corpus proceeding a state should be permitted a reasonable time to cure a defective extradition affidavit, but if the affidavit is not cured within 15 days the writ of habeas corpus becomes absolute, and the accused is entitled to release from custody. *People v. McFall*, 175 Colo. 151, 486 P.2d 6 (1971).

It is within the trial court's discretion to allow a reasonable time for correction of defective extradition documents instead of causing the entire process to be repeated. *Williams v. Leach*, 194 Colo. 374, 572 P.2d 481 (1977).

Failure of sheriff to make formal return to writ not prejudicial. While the better and approved practice is for a sheriff to make a formal return to a writ of habeas corpus in an extradition matter, where all extradition documents were before the trial court and the validity of the

detention was determined without objection that such formal return had not been filed, and the substantial rights of the petitioner were not adversely affected thereby, he cannot be heard to complain for the first time in the supreme court that no formal return was made. *Bright v. Foster*, 150 Colo. 559, 374 P.2d 865 (1962).

Nor was failure of district attorney to answer interrogatories. Where a district attorney failed to answer all interrogatories served upon him by a habeas corpus petitioner questioning extradition proceedings, which interrogatories involved matters entirely foreign to the rather limited issues involved in an extradition proceeding, any error arising out of such failure on the part of the district attorney could not have been prejudicial. *Mote v. Koch*, 173 Colo. 82, 476 P.2d 255 (1970).

Denial of petition for writ of habeas corpus held correct. *People v. Jackson*, 180 Colo. 134, 502 P.2d 1106 (1972); *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

Denial of petition for habeas corpus held error. *Moog v. Williams*, 195 Colo. 237, 577 P.2d 6 (1978).

Appellate review procedures for habeas corpus petitions contesting transfers of temporary custody under article IV of the Interstate Agreement on Detainers, § 24-60-501, shall be by petition for certiorari and not an appeal of right. *Semendinger v. Brittain*, 770 P.2d 1270 (Colo. 1989).

Applied in *Dorador v. Cronin*, 199 Colo. 85, 605 P.2d 53 (1980); *Beals v. Wilson*, 631 P.2d 1181 (Colo. App. 1981).

16-19-112. Penalty for noncompliance. Any person who delivers to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to section 16-19-111, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

Source: L. 53: p. 317, § 11. CSA: C. 72, § 56. CRS 53: § 60-1-11. C.R.S. 1963: § 60-1-11.

16-19-113. Confinement in jail. The officer or person executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner has been delivered, when necessary, may confine the prisoner in the jail in any county or city through which he may pass. The keeper of the jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such person being chargeable with the expense of keeping. The officer or agent of a demanding state to whom a prisoner has been delivered following extradition proceedings in another state, or to whom a prisoner has been delivered after waiving extradition in such other state, and who is passing through this state with the prisoner for the purpose of immediately returning the prisoner to the demanding state, when necessary, may confine the prisoner in the jail of any county or city through which he may pass. The keeper of the jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; but the officer or agent shall produce and show to the keeper of the jail satisfactory written evidence

of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of the demanding state. The prisoner shall not be entitled to demand a new requisition while in this state.

Source: L. 53: p. 317, § 12. CSA: C. 72, § 57. CRS 53: § 60-1-12. C.R.S. 1963: § 60-1-12.

16-19-114. Arrest prior to requisition. When any person within this state is charged on the oath of any credible person before any judge of this state with the commission of any crime in any other state and, except in cases arising under section 16-19-107, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation, or parole, or whenever complaint has been made before any judge in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in the other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 16-19-107, has fled from justice or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation, or parole, and is believed to be in this state, the judge shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge or court which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

Source: L. 53: p. 317, § 13. CSA: C. 72, § 58. CRS 53: § 60-1-13. L. 57: p. 379, § 2. C.R.S. 1963: § 60-1-13.

ANNOTATION

Extradition proceedings need not be instituted by formal requisition from the executive authority of the demanding state and warrant from the executive authority of the asylum state, but such a requisition and warrant must issue at some point in the proceedings. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

And issuance of governor's warrant renders question of prior arrest moot. The governor's warrant for defendant's arrest for extradition having issued and having been filed, the issue as to whether he was lawfully arrested by an unverified information in the first instance is not just academic but moot. *Velasquez v. People*, 154 Colo. 284, 389 P.2d 849 (1964); *McClearn v. Jones*, 162 Colo. 354, 426 P.2d 192 (1967); *Dilworth v. Leach*, 183 Colo. 206, 515 P.2d 1130 (1973).

The indictment or criminal complaint is controlling when determining whether a crime has been charged. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966).

It is sufficient if the language used fully states an offense denounced by the statutes; even a mistake in stating the number of a statute is immaterial. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966).

Charge of desertion and nonsupport sufficient to support extradition. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966).

Complaint and affidavit established probable cause crime of escape committed. Where the complaint and affidavit was based upon the personal information and knowledge of the chief records officer of the Kentucky state reformatory, stating under oath that appellant had been confined in the Kentucky state reformatory under a sentence of 10 years for armed robbery, pursuant to a judgment of conviction from the Jefferson circuit court of Louisville, Kentucky; that affiant had been the chief records officer of the reformatory for 16 years and was in charge of the official custody and control records of the appellant at the reformatory; and that he knew, from these records and his own personal knowledge, that appellant did escape from the reformatory, leaving while on a hospital trip to Louisville, Kentucky, the complaint and affidavit is sufficient to establish probable cause that appellant had committed the substantive crime of escape under the Kentucky statute. *Norrod v. Bower*, 187 Colo. 421, 532 P.2d 330 (1975).

Right to certified copy of complaint waived. Although a photostatic copy of the complaint and affidavit upon which the warrant issued was served, rather than a certified copy as required by this section, the defendant made no objection to this during the proceedings in the trial court when it could have been corrected. He

cannot now raise that issue on appeal and must be deemed to have waived his right to receive a certified copy when he proceeded to trial on the merits. *Fox v. People*, 161 Colo. 163, 420 P.2d 412 (1966).

Testimony of prosecution witness was admissible. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

Applied in *Lucero v. Martin*, 660 P.2d 902 (Colo. 1983); *People v. Schneckloth*, 660 P.2d 1293 (Colo. 1983); *Roy v. Simonet*, 696 P.2d 822 (Colo. 1985); *Moore v. Simonet*, 696 P.2d 823 (Colo. 1985); *Evans v. Simonet*, 699 P.2d 1337 (Colo. 1985).

16-19-115. Arrest without warrant. The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. When so arrested the accused must be taken before a judge with all practicable speed, and complaint must be made against him under oath setting forth the ground for arrest as in section 16-19-114; and thereafter his answer shall be heard as if he had been arrested on a warrant.

Source: L. 53: p. 318, § 14. CSA: C. 72, § 59. CRS 53: § 60-1-14. C.R.S. 1963: § 60-1-14.

ANNOTATION

Statute as basis for jurisdiction. See *Crumrine v. Erickson*, 186 Colo. 139, 526 P.2d 148 (1974).

Outstanding arrest warrant from another jurisdiction constituted sufficient probable cause for warrantless arrest even though arrest

warrant contained "no extradition" provision. *People v. Thompson*, 793 P.2d 1173 (Colo. 1990).

Applied in *Evans v. Simonet*, 699 P.2d 1337 (Colo. 1985).

16-19-116. Commitment to await requisition - bail. If from the examination before the judge it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under section 16-19-107, that he or she has fled from justice, the judge shall, by a warrant reciting the accusation, commit him or her to the county jail for such a time not exceeding thirty-five days and as specified in the warrant as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused gives bail as provided in section 16-19-117, or until he or she is legally discharged.

Source: L. 53: p. 318, § 15. CSA: C. 72, § 60. CRS 53: § 60-1-15. C.R.S. 1963: § 60-1-15. L. 2012: Entire section amended, (SB 12-175), ch. 208, p. 861, § 98, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Requisition and warrant must issue. Although extradition proceedings need not necessarily be instituted by formal requisition from the executive authority of the demanding state and warrant from the executive authority of the asylum state, such a requisition and warrant must issue at some point in the proceedings. *Capra v. Miller*, 161 Colo. 448, 422 P.2d 636 (1967).

Once valid governor's warrant is issued, illegalities and irregularities relating to detention of fugitive are moot. *Whittington v. Bray*, 200 Colo. 17, 612 P.2d 72 (1980); *Casler v. Nelson*, 661 P.2d 1166 (Colo. 1983).

This section, together with § 16-19-118, imposes an outside limit of ninety days during which a person may be committed to the county jail while awaiting the execution of the gover-

nor's warrant issued in accordance with the requisition of the executive authority of the demanding state. *Garcia v. Cooper*, 711 P.2d 1255 (Colo. 1986).

Second extradition proceeding not precluded by expiration of ninety days. *Garcia v. Cooper*, 711 P.2d 1255 (Colo. 1986).

Extension of time was within court's discretion. Where the governor's warrant was issued on the same day the district attorney applied for and was granted the extension of time, and the defendant had shown no prejudice, the extension of time was clearly within the court's discretion. *Norrod v. Bower*, 187 Colo. 421, 532 P.2d 330 (1975).

Although appellant was held in jail thirty-nine days before continuance was requested, the court did have the authority to grant a continuance under § 16-19-118 and the extension

granted was within the court's discretion, where the appellant was not prejudiced by the detention. *Whittington v. Bray*, 200 Colo. 17, 612 P.2d 72 (1980); *Alliey v. Lamm*, 711 P.2d 1258 (Colo. 1986).

Res judicata may not be invoked to bar a second extradition proceeding. An initial discharge and dismissal of an extradition proceeding does not constitute an adjudication on the merits that the defendant was not wanted by the state of Florida for violating the terms of his probation. *Garcia v. Cooper*, 711 P.2d 1255 (Colo. 1986); *Morris v. McGoff*, 728 P.2d 720 (Colo. 1986).

Applied in *Gerard v. Ossola*, 649 P.2d 1110 (Colo. 1982); *Schumm v. Nelson*, 659 P.2d 1389 (Colo. 1983); *Dawson v. Nelson*, 661 P.2d 683 (Colo. 1983).

16-19-117. Bail pending extradition. (1) Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state or territory or country in which it is alleged to have been committed, or having been convicted of a crime in the demanding state, the fugitive is alleged to have escaped from custody or confinement in the demanding state or to have violated the terms of his or her bail, probation, parole, or sentence, or the fugitive has executed a written waiver of extradition pursuant to section 16-19-126, the judge of any district court within the state of Colorado may admit any person arrested, held, or detained for extradition or interstate rendition to another state or territory of the United States or to any foreign country, to bail by bond or undertaking, with such sufficient sureties and in such sum as such judge deems proper, conditioned upon the appearance of such person before the court at a time specified in the bond or undertaking and for such person's surrender upon the warrant of the governor of this state for such person's extradition or interstate rendition to another state or territory of the United States or to any foreign country. When any such person has been served with a governor's warrant, such person shall no longer be eligible to be admitted to bail.

(2) Before granting the bond provided for in subsection (1) of this section, the judge of the district court within the state of Colorado to whom such application for bail is made shall cause reasonable notice to be served upon the district attorney of the judicial district within which an application is made and also upon the person or authority holding or detaining the person.

Source: L. 53: p. 319, § 16. CSA: C. 72, § 61. CRS 53: § 60-1-16. C.R.S. 1963: § 60-1-16. L. 93: (1) amended, p. 1729, § 9, effective July 1. L. 2005: (1) amended, p. 620, § 1, effective May 27.

ANNOTATION

This section exclusively governs questions of bail for defendants awaiting extradition prior to service of a governor's warrant. *Fullerton v. County Court*, 124 P.3d 866 (Colo. App. 2005).

Bond conditioned upon surrender under governor's warrant. When a person has been arrested prior to requisition for a crime in another state and thereafter is admitted to bail, such bond shall be conditioned upon his appearance at the time specified for his surrender upon the warrant of the governor of this state for his

extradition or interstate rendition to another state. *McClearn v. Jones*, 162 Colo. 354, 426 P.2d 192 (1967).

Prior to service of a governor's warrant, a trial court is authorized to require bond for a defendant pending extradition in any type necessary, including a "cash only" bond, to secure the defendant's appearance. *Fullerton v. County Court*, 124 P.3d 866 (Colo. App. 2005).

Unnecessary to rearrest upon filing of governor's warrant. The clear meaning and pur-

port of this section is that when a person has been arrested prior to requisition in accordance with § 16-19-114 and is thereafter admitted to bail, the bond being returnable on a specified date, it is unnecessary to rearrest such person upon the issuance and filing in court of the governor's warrant. Appearance on the day specified constitutes surrender upon the governor's warrant. *McClearn v. Jones*, 162 Colo. 354, 426 P.2d 192 (1967).

No right to bail exists after governor's warrant has been served and pending decision on a habeas corpus petition in the trial court because, where the fugitive is being held for another state, he should be readily available to be turned over to those who arrive to return him. A special obligation to deliver a fugitive is owed to a sister state — an obligation which makes bail inappropriate after the stage when issuance of the governor's warrant is reached. *Johnson v. District Court*, 199 Colo. 458, 610 P.2d 1064 (1980).

Legislative intent to deny bail after service of warrant. The lack of an absolute right to bail after service of the governor's warrant does not mean that the court has lost its inherent power to grant bail after that time, but simply reflects a determination that the legislative intent to deny bail after service of the governor's warrant is a

reasonable and appropriate limitation on that power absent the most extraordinary circumstances. *Johnson v. District Court*, 199 Colo. 458, 610 P.2d 1064 (1980).

Facts insufficient to permit bail after service of warrant. That, at the time of his arrest, the defendant was employed as a welder, and could return to that work if bail were granted, that the defendant was a union and church member, and that his petition for bail was supported by many members of his church are facts which fall far short of establishing the extraordinary circumstances which must be shown to permit bail to be granted after service of a governor's warrant. *Johnson v. District Court*, 199 Colo. 458, 610 P.2d 1064 (1980).

The process involved in the arrest in the first instance becomes moot and academic, when replaced and supplanted by the governor's warrant. *McClearn v. Jones*, 162 Colo. 354, 426 P.2d 192 (1967).

Extension of time was within court's discretion. Where the governor's warrant was issued on the same day the district attorney applied for and was granted the extension of time, and the defendant had shown no prejudice, the extension of time was clearly within the court's discretion. *Norrod v. Bower*, 187 Colo. 421, 532 P.2d 330 (1975).

16-19-118. Extension of time. If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge of a district court shall either recommit him or her for a further period not to exceed sixty days or again take bail for his or her appearance and surrender, as provided in section 16-19-117, but within a period not to exceed sixty days after the date of the new bond.

Source: L. 53: p. 319, § 17. **CSA:** C. 72, § 62. **CRS 53:** § 60-1-17. **C.R.S. 1963:** § 60-1-17. **L. 2004:** Entire section amended, p. 353, § 1, effective July 1.

ANNOTATION

The only requirement for the continuance authorized by this section is that more time is needed for the issuance and execution of the governor's warrant. *Alliey v. Lamm*, 711 P.2d 1258 (Colo. 1986).

90-day statutory limit begins to run on the date the person first appears in court and is advised of the extradition proceedings. *Alliey v. Lamm*, 711 P.2d 1258 (Colo. 1986).

This section, together with § 16-19-116, imposes an outside limit of 90 days during which a person may be committed to the county jail while awaiting the execution of the governor's warrant issued in accordance with the requisition of the executive authority of the demanding state. *Garcia v. Cooper*, 711 P.2d 1255 (Colo. 1986).

Although appellant was held in jail thirty-nine days before continuance was requested, the court did have the authority to grant a continuance under § 16-19-118 and the extension

granted was within the court's discretion, where the appellant was not prejudiced by the detention. *Whittington v. Bray*, 200 Colo. 17, 612 P.2d 72 (1980); *Alliey v. Lamm*, 711 P.2d 1258 (Colo. 1986).

Second extradition proceeding not precluded by expiration of ninety days. *Garcia v. Cooper*, 711 P.2d 1255 (Colo. 1986).

Res judicata may not be invoked to bar a second extradition proceeding. An initial discharge and dismissal of an extradition proceeding does not constitute an adjudication on the merits that the defendant was not wanted by the state of Florida for violating the terms of his probation. *Garcia v. Cooper*, 711 P.2d 1255 (Colo. 1986).

Procedure of continuing bond without recommitment satisfied section. When defendant was already on bond, it would be a useless thing to recommit the defendant, then require a new bond, and then release him under the new bond

for the extended or continued period of time. Defendant has shown no prejudice by the procedure followed in extending the time for hearing of the extradition proceeding, and continuing bond and permitting him to remain at large, which substantially complied with this section.

Dressel v. Bianco, 168 Colo. 517, 452 P.2d 756 (1969).

Applied in *Gerard v. Ossola*, 649 P.2d 1110 (Colo. 1982); *Schumm v. Nelson*, 659 P.2d 1389 (Colo. 1983).

16-19-119. Forfeiture of bail. If the person so held is admitted to bail as provided for in section 16-19-117 and fails to appear and surrender himself according to the conditions of his bond, the judge of the district court, by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he is within this state. Recovery may be had on such bond in the name of the people of the state of Colorado as in the case of other bonds or undertakings given by a defendant in criminal proceedings.

Source: L. 53: p. 319, § 18. CSA: C. 72, § 63. CRS 53: § 60-1-18. C.R.S. 1963: § 60-1-18.

16-19-119.5. Custody pending arrival of agent of the demanding state. Upon ordering the delivery of a fugitive forthwith to the agent of a demanding state, a judge shall allow the agent of the demanding state a period of not less than fifteen days and not more than thirty days from the date of the order within which to complete transportation arrangements, travel to this state, and appear to take custody of the fugitive. During this period, pending the arrival of the agent of the demanding state, the fugitive shall remain in custody in this state without bail and shall not be discharged.

Source: L. 2006: Entire section added, p. 340, § 1, effective July 1.

16-19-120. Persons under prosecution when demanded. If a criminal prosecution has been instituted against a person under the laws of this state and is still pending, the governor, in his discretion, subject to such criminal prosecution, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

Source: L. 53: p. 319, § 19. CSA: C. 72, § 64. CRS 53: § 60-1-19. C.R.S. 1963: § 60-1-19.

ANNOTATION

Applied in *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

16-19-121. When guilt inquired into. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceedings after the demand for extradition accompanied by a charge of crime in legal form has been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

Source: L. 53: p. 320, § 20. CSA: C. 72, § 65. CRS 53: § 60-1-20. C.R.S. 1963: § 60-1-20.

ANNOTATION

The guilt or innocence of the alleged fugitive may not be considered in extradition matters. *Self v. People*, 133 Colo. 524, 297 P.2d 887 (1956).

Guilt or innocence of the crime charged has no bearing on the issue of extradition but will be determined on the trial of the case once he is returned to the demanding state. *Fox v. People*,

161 Colo. 163, 420 P.2d 412 (1966); *Osborne v. Van Cleave*, 173 Colo. 26, 475 P.2d 625 (1970).

When the court in Kansas forfeited the petitioner's bond, he became a fugitive within the meaning of the extradition laws. Whether it was wrongfully revoked is an issue between the petitioner and the state of Kansas, over which the courts of Colorado have no jurisdiction. *Davis v. People*, 172 Colo. 486, 474 P.2d 206 (1970).

Extradition is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt or innocence. *Eathorne v. Nelson*, 180 Colo. 288, 505 P.2d 1 (1973).

Colorado courts cannot determine the accused's guilt or innocence under the laws of the demanding state in resolving the extradition issue. *Rush v. Baker*, 188 Colo. 136, 533 P.2d 36 (1975).

Neither are constitutional rights justiciable. Petitioner's allegations concerning a viola-

tion of his constitutional rights present no issue justiciable in the Colorado courts. His remedy for violation of such rights in Mississippi lies in the post conviction procedures provided by Mississippi in its state courts, and in the appropriate federal courts. *Holmes v. People*, 169 Colo. 371, 456 P.2d 731 (1969).

And criminal procedure is not applicable. Being a summary proceeding of a civil nature, not involving the guilt or innocence of the accused, there is no compelling reason to apply the strict rules of criminal procedure in determining factual issues that may arise at extradition hearings on a petition of habeas corpus. *North v. Koch*, 169 Colo. 508, 457 P.2d 915 (1969).

Statute as basis for jurisdiction. See *Crumrine v. Erickson*, 186 Colo. 139, 526 P.2d 148 (1974).

Applied in *Wilkerson v. Vogt*, 167 Colo. 109, 445 P.2d 715 (1968).

16-19-122. Governor may recall warrant. The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

Source: L. 53: p. 320, § 21. CSA: C. 72, § 66. CRS 53: § 60-1-21. C.R.S. 1963: § 60-1-21.

ANNOTATION

Courts of asylum state may not consider certain allegations. The courts of the asylum state in a habeas corpus proceeding under this article may not properly consider allegations that the fugitive's life would be endangered by return to the demanding state. The accused, in respect to this matter, must pursue his remedies in the demanding state or with the executive of the asylum state. *Lomax v. Cronin*, 194 Colo. 523, 575 P.2d 1285 (1978).

Demanding state may reinstate extradition demand after having withdrawn it. *Massey v. Wilson*, 199 Colo. 121, 605 P.2d 469 (1980).

Jurisdiction retained where warrant recalled because complaint amended. Where the

governor of the asylum state recalled his warrant of arrest and issued another warrant because the complaints against the defendants was amended, Colorado court clearly retained jurisdiction over the defendants during this procedure. *Allen v. Leach*, 626 P.2d 1141 (Colo. 1981).

Governor may reactivate warrant. When considered in conjunction with § 16-19-120, the authority granted to the governor by this section, includes the authority to temporarily withhold and conditionally reactivate a previously issued warrant. *Jacobson v. Sullivan*, 703 P.2d 1293 (Colo. 1985).

16-19-123. Fugitives from this state. When the governor of this state demands a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation, or parole in this state from the executive authority of any other state or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

Source: L. 53: p. 320, § 22. CSA: C. 72, § 67. CRS 53: § 60-1-22. L. 57: p. 380, § 3. C.R.S. 1963: § 60-1-22.

ANNOTATION

Duty as agent distinguished from official status. Although the agent selected by the governor to receive an alleged fugitive from justice from another state may be a sheriff or his deputy, his duties, as such agent, are wholly apart from, and have nothing to do with, his official status.

Fidelity & Deposit Co. v. Hershey, 93 Colo. 215, 25 P.2d 178 (1933).

Interstate agreement on detainers is inapplicable to a defendant whose custody is sought by traditional extradition procedures. *People v. Quackenbush*, 687 P.2d 448 (Colo. 1984).

16-19-124. Application for requisition. (1) When the return to this state of a person charged with crime in this state is required, the district attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place, and circumstances of its commission, and the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that, in the opinion of the said district attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

(2) When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation, or parole, the prosecuting attorney of the county in which the offense was committed, the state board of parole, or the superintendent of the institution or sheriff of the county from which escape was made shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation, or parole, and the state in which he is believed to be, including the location of the person therein at the time application is made.

(3) The application shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, state board of parole, superintendent, or sheriff may also attach such further affidavits and other documents in duplicate as he deems proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

Source: L. 53: p. 320, § 23. CSA: C. 72, § 68. CRS 53: § 60-1-23. L. 57: p. 380, § 4. C.R.S. 1963: § 60-1-23. L. 76: (2) and (3) amended, p. 533, § 13, effective April 9.

16-19-125. Immunity from civil process. A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

Source: L. 53: p. 321, § 24. CSA: C. 72, § 69. CRS 53: § 60-1-24. C.R.S. 1963: § 60-1-24.

ANNOTATION

Applied in *Poss v. District Court*, 158 Colo. 474, 408 P.2d 69 (1965).

16-19-126. Written waiver of extradition. (1) Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement or broken the terms of his or her bail, probation, or parole may waive the issuance and service of the warrant provided for in sections 16-19-108 and 16-19-109 and all other procedure incidental to extradition proceedings by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he or she consents to return to the demanding state and acknowledging that he or she shall not be admitted to bail; but, before the waiver is executed or subscribed by such person, it is the duty of the judge to inform such person of his or her rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 16-19-111.

(2) If and when a consent has been duly executed, it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having the person in custody to deliver such person forthwith to the duly accredited agent or agents of the demanding state and shall deliver or cause to be delivered to that agent or those agents a copy of the consent. Nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights, or duties of the officers of the demanding state or of this state.

(3) A fugitive shall not be permitted to withdraw a waiver of extradition unless the fugitive makes a showing of good cause for the withdrawal of the waiver of extradition. The fugitive shall provide the court, governor, and district attorney with the request to withdraw the waiver of extradition stating the reasons for withdrawing the waiver. If the court grants the withdrawal, it shall provide the governor with an order permitting the withdrawal of the waiver of extradition. A judge shall commit a fugitive who is permitted to withdraw his or her waiver of extradition to the county jail without bond for a specified period of time, of not less than thirty days and not more than ninety days, as will enable the arrest of the accused to be made under warrant of the governor or on a requisition of the executive authority of the state having jurisdiction of the offense.

Source: L. 53: p. 321, § 24-A. CSA: C. 72, § 70. CRS 53: § 60-1-25. L. 57: p. 381, § 5. C.R.S. 1963: § 60-1-25. L. 2005: (1) amended and (3) added, p. 620, § 2, effective May 27.

ANNOTATION

State waives right to extradition only upon clear manifestation of intent. A state waives its right to extradition of an accused only when there has been a clear manifestation of an intent to do so. When the charge is first-degree murder, the requirement for a clear manifestation means that the intent to waive the right must be expressly stated. Massey v. Wilson, 199 Colo. 121, 605 P.2d 469 (1980).

A prisoner must personally execute a waiver of extradition before a formal request for final disposition to Interstate Agreement on Detainer Act can be triggered. Gardner v. Gambatz, 719 P.2d 329 (Colo. App. 1985).

Applied in People v. Wimer, 43 Colo. App. 237, 604 P.2d 1183 (1979).

16-19-126.5. Prior waiver of extradition. (1) Notwithstanding any other provision of law, a law enforcement agency in the state of Colorado holding a person who is alleged to have broken the terms of such person's probation, parole, bail, or any other conditional release in the demanding state shall immediately deliver the person to the duly authorized agent of the demanding state without the requirement of a demand by the executive authority of the demanding state, and without the requirement of a governor's warrant issued by the governor of the state of Colorado, if such person has signed a prior waiver of extradition as a condition of such person's current probation, parole, bail, or other conditional release in the demanding state.

(2) The law enforcement agency shall immediately deliver any person pursuant to subsection (1) of this section upon the receipt of the following documents, which shall be

accepted as conclusive proof of the contents of such documents and of the validity of the waiver set forth therein:

(a) A certified copy of the prior waiver of extradition signed by the person being held by the law enforcement agency, or an electronically or electromagnetically transmitted facsimile thereof;

(b) A certified copy of an order or warrant from the demanding state directing the return of the person for violating the conditions of such person's probation, parole, bail, or other conditional release, or an electronically or electromagnetically transmitted facsimile thereof; and

(c) A photograph, fingerprints, or other evidence which identifies the person held by the law enforcement agency as the person who signed the waiver of extradition and who is named in the order or warrant, or an electronically or electromagnetically transmitted facsimile thereof.

(3) Nothing in this section shall be deemed to limit the right, power, or privilege of the state of Colorado to hold, try, and punish any person demanded by another state for any crime committed in the state of Colorado before delivering such person to the demanding state.

Source: L. 93: Entire section added, p. 1729, § 10, effective July 1.

16-19-127. Nonwaiver by this state. Nothing contained in this article shall be deemed to constitute a waiver by this state of its right, power, or privilege to try such demanded person for any crime committed within this state, or of its right, power, or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence, or punishment for any crime committed within this state, nor shall any proceedings had under this article which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges, or jurisdiction in any way whatsoever.

Source: L. 53: p. 322, § 24-B. CSA: C. 72, § 71. CRS 53: § 60-1-26. C.R.S. 1963: § 60-1-26.

ANNOTATION

A waiver of jurisdiction should be found only in circumstances where the waiver is manifestly intended. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

No transfer of prisoners between states pursuant to statute shall be regarded as

waiver of its jurisdiction. *Gottfried v. Cronin*, 192 Colo. 25, 555 P.2d 969 (1976).

Applied in *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

16-19-128. Prosecution of other charges. After a person has been brought back to this state by, or after waiver of, extradition proceedings, he may be tried in this state for other crimes which he may be charged with committing here as well as that specified in the requisition for his extradition.

Source: L. 53: p. 322, § 25. CSA: C. 72, § 72. CRS 53: § 60-1-27. C.R.S. 1963: § 60-1-27.

16-19-129. Security for costs - default - fees. (1) In all cases where complaint is made against any fugitive from justice, the judge or justice in his discretion may require from complainant good and sufficient security for the payment of all costs which may accrue from the arrest and detention of such fugitive, which security shall be by bond to the clerk of the district court, conditioned for the payment of costs, which bond, together with a statement of the costs which have accrued on the examination, shall be returned to the office of the clerk of the district court. Upon the determination of the proceedings against the fugitive within that county, the clerk shall issue a fee bill as in other cases, to be served on the persons named in the bond, or any of them, which fee bill shall be served and

returned by the sheriff, for which he shall be allowed the same fees as are given him for serving notices. If the fees are not paid on or before the first day of the next district court to be held in and for that county, nor any cause then shown why they should not be paid, the clerk may issue an execution for the same against those parties on whom the fee bill has been served and when the fees are collected shall pay over the same to the persons respectively entitled thereto. The clerk shall be entitled to one dollar for his trouble in each case, besides the usual taxed fees which are allowed in other cases for like services. Nothing contained in this section shall prevent the clerk from instituting suits on said bonds in the ordinary mode of judicial proceedings, if he deems it proper. The costs which may accrue from the arrest and detention of such fugitive, as described in this section, shall include any reasonable and necessary costs incurred by the district attorney which are directly the result of the prosecution of such fugitive from justice. When such costs are recovered by the clerk, such costs shall be remitted to the office of the district attorney which incurred such costs.

(2) For purposes of this section, reasonable costs incurred by the district attorney include but are not limited to those in section 18-1.3-701, C.R.S., as well as attorney fees and support staff costs.

Source: L. 53: p. 323, § 30. CSA: C. 72, § 75. CRS 53: § 60-2-1. C.R.S. 1963: § 60-1-28. L. 91: Entire section amended, p. 430, § 8, effective May 24. L. 2002: (2) amended, p. 1499, § 155, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

16-19-130. Rewards - how audited - paid. When the governor is satisfied that the crime of murder or arson or kidnapping has been committed within the state, and that the person charged therewith has not been arrested or has escaped therefrom, he may in his discretion offer a reward not exceeding one thousand dollars for the arrest and delivery to the proper authorities of the person so charged, which reward, upon the certificate of the governor that the same has been earned, shall be audited and paid by the state out of any funds appropriated for that purpose.

Source: L. 53: p. 323, § 31. CSA: C. 72, § 76. CRS 53: § 60-2-2. C.R.S. 1963: § 60-1-29.

16-19-131. Escape - reward. If any person charged with or convicted of a felony breaks prison or escapes or flees from justice or absconds and secretes himself, it shall be lawful for the governor, if he judges it necessary, to offer any reward not exceeding two hundred dollars for apprehending and delivering such person into custody of the sheriff or other officer as he may direct. Upon the person or persons so apprehending and delivering any such person and producing the sheriff's or justice's receipt for the body to the governor, it shall be lawful for the governor to certify the amount of the claim to the controller, who shall issue his warrant on the treasury for the same.

Source: L. 53: p. 323, § 32. CSA: C. 72, § 77. C.R.S. 1963: § 60-1-30. L. 72: p. 560, § 23.

Cross references: For definitions of "escape", see § 18-8-208.

16-19-132. Interpretation. The provisions of this article shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which enact it.

Source: L. 53: p. 322, § 26. CSA: C. 72, § 73. CRS 53: § 60-1-28. C.R.S. 1963: § 60-1-31.

ANNOTATION

Statutes strictly construed. Statutes providing for the arrest and extradition of fugitives, being in derogation of constitutional guaranties of immunity from arrest, must be strictly construed. *Matthews v. People*, 136 Colo. 102, 314 P.2d 906 (1957).

Under Colorado law the extradition statutes must be strictly construed as they are in derogation of the common law. *Davis v. People*, 172 Colo. 486, 474 P.2d 206 (1970).

But not interpreted to allow asylum to offenders. Extradition provisions should not be so

narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state. *Travis v. People*, 135 Colo. 141, 308 P.2d 997 (1957); *Tinsley v. Woods*, 135 Colo. 590, 313 P.2d 1006 (1957); *Capra v. Ballarby*, 158 Colo. 91, 405 P.2d 205 (1965); *Dressel v. Bianco*, 168 Colo. 517, 452 P.2d 756 (1969); *Boyd v. Van Cleave*, 180 Colo. 403, 505 P.2d 1305 (1973).

16-19-133. Concealment of fugitives - penalty. (Repealed)

Source: **L. 63:** p. 497, § 1. **C.R.S. 1963:** § 60-1-34. **L. 77:** (2) amended, p. 878, § 44, effective July 1, 1979. **L. 85:** (2) amended, p. 709, § 1, effective March 30. **L. 86:** Entire section repealed, p. 772, § 15, effective July 1.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

16-19-134. Securing the attendance of a defendant who is outside the United States. (1) When a criminal action for an offense committed in this state is pending in a criminal court of this state against a defendant who is in a foreign country with which the United States has an extradition treaty, and when the accusatory instrument charges an offense that is declared in the treaty to be an extraditable offense, and when the district attorney of the judicial district in which the offense was allegedly committed desires the international extradition of the defendant, the district attorney shall apply to the governor, requesting the governor to apply to the president of the United States, to institute extradition proceedings for the return of the defendant to this country and state for the purpose of prosecution of the action. The district attorney's application shall comply with the rules, regulations, and guidelines established by the governor for such applications and shall be accompanied by all of the accusatory instruments, affidavits, and other documents required by the governor's rules, regulations, and guidelines.

(2) Upon receipt of the district attorney's application, the governor, if satisfied that the defendant is in the foreign country in question, that the offense charged is an extraditable offense pursuant to the treaty in question, and that there are no factors or impediments which in law may preclude such an extradition, may in his or her discretion submit an application, addressed to the secretary of state of the United States, requesting that the president of the United States institute extradition proceedings for the return of the defendant from the foreign country. The governor's application shall comply with the rules, regulations, and guidelines established by the secretary of state of the United States for such applications and shall be accompanied by all of the accusatory instruments, affidavits, and other documents required by such rules, regulations, and guidelines.

(3) Nothing in this section shall preclude prosecution in another country of a fugitive from justice charged with committing a crime in Colorado, if the other country offers domestic prosecution of such fugitives as an alternative to extradition. This includes, but is not limited to, prosecution in Mexico pursuant to the Mexican federal penal code.

(4) The provisions of this section also apply equally to extradition or attempted extradition of a person who is a fugitive following the entry of a judgment of conviction against him or her in a criminal court of this state.

Source: **L. 2004:** Entire section added, p. 353, § 3, effective July 1. **L. 2006:** (1) amended, p. 342, § 7, effective July 1.

ARTICLE 20

Extradition of Persons of Unsound Mind

16-20-101.	Short title.	16-20-104.	Executive authority - proce-
16-20-102.	Definitions.		dure.
16-20-103.	Persons subject to extradition.	16-20-105.	Limitation. (Repealed)

16-20-101. Short title. This article shall be known and may be cited as the “Colorado Extradition of Persons of Unsound Mind Act”.

Source: L. 75: Entire article added, p. 639, § 2, effective June 29.

16-20-102. Definitions. As used in this article, unless the context otherwise requires:

- (1) “Executive authority” means the executive authority of any state; and, when used in connection with a request to return any person, pursuant to the provisions of this article, to or from the District of Columbia, “executive authority” includes a justice of the supreme court of the District of Columbia and any other authority.
- (2) “Flight” or “fled” means any voluntary or involuntary departure from the jurisdiction of the court where proceedings for determination as a person of unsound mind have been instituted and are still pending with the effect of avoiding, impeding, or delaying the action of the court in which such proceedings have been instituted or are pending or any such departure from the state where the person demanded then was, if he was then under detention by law as a person of unsound mind and subject to detention.
- (3) “Person of unsound mind” includes the terms “insane person”, “mentally ill person”, “person with a mental illness”, “mentally incompetent person”, and “lunatic”.

Source: L. 75: Entire article added, p. 639, § 2, effective June 29. **L. 2006:** (3) amended, p. 1397, § 43, effective August 7.

- 16-20-103. Persons subject to extradition.** (1) A person alleged to be of unsound mind found in this state who has fled from another state shall be extradited from this state on demand of the executive authority of the state from which he fled if, at the time of his flight:
- (a) He was under detention by law in a hospital, asylum, or other institution for the insane as a person of unsound mind;
 - (b) He had been determined by a legal proceeding to be of unsound mind prior to his flight, the finding being unreversed and in full force and effect and the control of his person having been acquired by a court of competent jurisdiction of the state from which he fled; or
 - (c) He was subject to detention in such state, being then his legal domicile (personal process having been made), based on legal proceedings to have him declared of unsound mind.

Source: L. 75: Entire article added, p. 639, § 2, effective June 29.

16-20-104. Executive authority - procedure. (1) When the executive authority of any state demands of the executive authority of this state any fugitive pursuant to this article and produces a copy of commitment, decree, or other process and proceedings certified as authentic by the executive authority of the state from which the person so charged has fled, with an affidavit made before a proper officer showing the person to be such fugitive, it is the duty of the executive authority of this state to cause immediate notice of the apprehension to be given to the executive authority making such demand or to the agent of such executive authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he appears. If no such agent appears within thirty days from

the time of the apprehension, the fugitive may be discharged. Any agent so appointed who receives the fugitive into his custody shall transmit him to the state from which he has fled.

(2) All costs and expenses incurred in apprehending, securing, maintaining, and transmitting such fugitive to the state making such demand shall be paid by such state.

(3) The executive authority of this state has the power, on the application of any person interested, to demand the return of any fugitive from this state in accordance with this article.

Source: L. 75: Entire article added, p. 639, § 2, effective June 29.

16-20-105. Limitation. (Repealed)

Source: L. 75: Entire article added, p. 640, § 2, effective June 29. L. 2004: Entire section repealed, p. 353, § 2, effective July 1.

OFFENDERS - REGISTRATION

ARTICLE 20.5

**Integrated Criminal Justice
Information System**

16-20.5-101.	Short title.		nal justice information sys-
16-20.5-101.5.	Legislative declaration.		tem. (Repealed)
16-20.5-102.	Definitions.	16-20.5-106.	Approval - funding. (Re-
16-20.5-103.	Colorado integrated criminal justice information system program - executive board.	16-20.5-107.	pealed)
16-20.5-104.	Repeal of article. (Repealed)	16-20.5-108.	Future modifications and pur-
16-20.5-105.	Task force plan for imple-		chases.
	mentation - integrated crimi-		Local criminal justice agen-
			cies pilot program. (Re-
			pealed)

16-20.5-101. Short title. This article and article 21 of this title shall be known and may be cited as the “Criminal Justice Information System Act”.

Source: L. 95: Entire article added, p. 598, § 1, effective May 22.

16-20.5-101.5. Legislative declaration. (1) The general assembly hereby finds and determines that, since 1974, there have been proposals for an automated criminal justice information system that shares and tracks data concerning offenders among the various criminal justice agencies. Because each of the criminal justice agencies in the state has developed independent information systems to address each agency’s own management and planning needs, the status of criminal justice information in the state has been fragmented.

(2) The general assembly hereby declares that this article is enacted for the purpose of developing, operating, supporting, maintaining, and enhancing, in a cost-effective manner, a seamless, integrated criminal justice information system that maximizes standardization of data and communications technology among law enforcement agencies, district attorneys, the courts, and state-funded corrections for adult and youth offenders and other agencies as approved by the general assembly or by the executive board pursuant to this article. Such a system will improve:

(a) Public safety by making more timely, accurate, and complete information concerning offenders available statewide to all criminal justice agencies and to individual decision-makers in the criminal justice system, including but not limited to police officers, prosecutors, judges, probation officers, and corrections officers;

(b) Decision-making by increasing the availability of statistical measures for evaluating public policy;

(c) Productivity of existing staff by continually working toward eliminating redundant

data collection and input efforts among the agencies and by reducing or eliminating paper-based processing;

(d) Access to timely, accurate, and complete information by both staff from all criminal justice agencies and the public when permitted by article 72 of title 24, C.R.S.

(3) Because information about offenders collected by local law enforcement agencies may be the most current, the general assembly directs criminal justice agencies, where practical, to cooperate with and to encourage local law enforcement agencies to participate in the Colorado integrated criminal justice information system program developed under this article.

(4) The general assembly hereby finds that the Colorado integrated criminal justice information system program has been successfully implemented and that the sharing of criminal justice information is being enhanced as a result. The general assembly further finds that there is a need to provide ongoing maintenance, support, and leadership for the continued operation and enhancement of the Colorado integrated criminal justice information system program.

(5) The general assembly hereby finds and declares that the operation of the integrated criminal justice information system established by this article is critical to the accurate, complete, and timely performance of criminal background checks and to the effective communications between and among law enforcement, the state judicial department, and executive agencies and political subdivisions of the state. The general assembly further finds and declares that it is in the best interests of the citizens of the state and for the enhancement of public safety that the collaborative effort surrounding the integrated criminal justice information system be maintained, supported, and enhanced.

Source: **L. 96:** Entire section added, p. 1030, § 1, effective May 23. **L. 98:** Entire section amended, p. 941, § 1, effective May 27. **L. 2001:** (5) added, p. 613, § 2, effective May 30. **L. 2005:** IP(2), (2)(a), (2)(c), (4), and (5) amended, p. 84, § 1, effective March 25.

16-20.5-102. Definitions. As used in this article, unless the context otherwise requires:

(1) “Action” means the district attorneys’ case management system.

(2) “CCIC” means the Colorado crime information center.

(3) “Chief information officer” means the chief information officer who reports to the executive board and who is selected pursuant to section 16-20.5-103 and who is responsible for coordinating the implementation of a strategic plan for and operating, supporting, maintaining, and enhancing the integrated criminal justice information system.

(4) “CICJIS” means the automated system of the Colorado integrated criminal justice information system program that integrates agency systems.

(5) Repealed.

(6) “Criminal justice agency” means any of the following: The department of public safety, department of corrections, department of human services, judicial department, Colorado district attorneys council, and other approved agencies.

(7) “DCIS” means the department of corrections information system.

(8) “ICON” or “eclipse” means the integrated Colorado online network that is the judicial department’s case management system.

(9) “Integrated criminal justice information system” or “system” means an automated information system capable of tracking the complete life cycle of a criminal case throughout its various stages involving different criminal justice agencies through potentially separate and individual systems and without unnecessary duplication of data collection, data storage, or data entry.

(10) “TRAILS” means the case management system of the division of youth corrections of the department of human services.

Source: **L. 95:** Entire article added, p. 598, § 1, effective May 22. **L. 96:** (2) amended and (2.3) and (2.5) added, p. 1031, § 2, effective May 23. **L. 98:** (2) amended, p. 942, § 2, effective May 27. **L. 99:** (2.3) amended, p. 872, § 3, effective July 1. **L. 2005:** Entire section amended, p. 85, § 2, effective March 25. **L. 2007:** (5) repealed, p. 918, § 22, effective May 17.

16-20.5-103. Colorado integrated criminal justice information system program - executive board. (1) There is hereby established the Colorado integrated criminal justice information system program, referred to in this article as the “program”. The program shall be a joint effort of the criminal justice agencies and other approved agencies. The program shall be implemented, maintained, supported, and enhanced by the criminal justice information program executive board, which is hereby created and referred to in this article as the “executive board”. Membership of the executive board shall be comprised initially of the executive directors of the department of public safety, department of corrections, department of human services, and Colorado district attorneys council and the state court administrator. The executive board shall unanimously designate a chief information officer. Upon unanimous agreement, the executive board may approve the addition of either voting or nonvoting members.

(2) The executive board shall be responsible and accountable for the program. The program shall include mechanisms to enable the criminal justice agencies to share data stored in each agency’s information system. Initially, the program shall maximize the use of existing data bases and platforms through the use of a virtual data base created by a network linking existing data bases and platforms among the various departments. The program shall also develop plans for new interoperable system platforms when the existing platforms become obsolete.

Source: L. 95: Entire article added, p. 599, § 1, effective May 22. L. 96: Entire section R&RE, p. 1031, § 3, effective May 23. L. 2005: Entire section amended, p. 86, § 3, effective March 25.

16-20.5-104. Repeal of article. (Repealed)

Source: L. 95: Entire article added, p. 600, § 1, effective May 22. L. 96: Entire section repealed, p. 1032, § 4, effective May 23.

16-20.5-105. Task force plan for implementation - integrated criminal justice information system. (Repealed)

Source: L. 96: Entire section added, p. 1032, § 5, effective May 23. L. 98: Entire section repealed, p. 942, § 3, effective May 27.

16-20.5-106. Approval - funding. (Repealed)

Source: L. 96: Entire section added, p. 1033, § 5, effective May 23. L. 98: Entire section repealed, p. 943, § 4, effective May 27.

16-20.5-107. Future modifications and purchases. (1) The executive board shall develop and maintain a process to determine if and how changes to existing criminal justice applications impact the integrated network. Changes to criminal justice applications, databases, platforms, or business processes that have an impact on the integrated network must be coordinated through and approved by the executive board.

(2) Any state-funded expenditures by a criminal justice agency for computer platforms, databases, or applications in support of criminal justice applications shall be reviewed and approved by the executive board. The executive board shall make recommendations concerning such purchases to all appropriate budgetary approval agencies.

Source: L. 96: Entire section added, p. 1033, § 5, effective May 23. L. 2005: Entire section amended, p. 86, § 4, effective March 25.

16-20.5-108. Local criminal justice agencies pilot program. (Repealed)

Source: **L. 96:** Entire section added, p. 1034, § 5, effective May 23. **L. 98:** Entire section repealed, p. 944, § 5, effective May 27.

ARTICLE 21**Offender-based Tracking System**

16-21-101.	Legislative declaration.		court.
16-21-102.	"Offender" defined.	16-21-104.5.	Electronic signatures - validity.
16-21-103.	Information on offenders required - duties of law enforcement agencies - court.	16-21-105.	Applicability of article to municipal courts - local law enforcement.
16-21-104.	Fingerprinting - ordered by		

16-21-101. Legislative declaration. The general assembly hereby finds and declares that the creation of an offender-based tracking system is necessary in order to improve the consistency of data shared by the different elements of the criminal justice system and to allow for the tracking of offenders through the criminal justice system. The general assembly further finds and declares that the offender-based tracking system should be operated through the Colorado integrated criminal justice information system program.

Source: **L. 87:** Entire article added, p. 647, § 1, effective July 1. **L. 2005:** Entire section amended, p. 87, § 5, effective March 25.

16-21-102. "Offender" defined. Except as otherwise provided in section 16-21-103, for the purposes of this article, "offender" means any person charged as an adult with a felony, a class 1 misdemeanor, or a misdemeanor pursuant to section 42-4-1301, C.R.S., or a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), C.R.S.

Source: **L. 87:** Entire article added, p. 647, § 1, effective July 1. **L. 94:** Entire section amended, p. 2039, § 19, effective July 1; entire section amended, p. 2551, § 39, effective January 1, 1995.

Editor's note: Amendments to this section in House Bill 94-1253 and Senate Bill 94-1 were harmonized.

16-21-103. Information on offenders required - duties of law enforcement agencies - court. (1) (a) For purposes of this section, unless the context otherwise requires:

(I) "Act of domestic violence" has the same meaning as set forth in section 18-6-800.3 (1), C.R.S.

(II) "Arrest number" means a number that shall be assigned by the arresting agency to an arrest of the arrestee.

(III) "Bureau" means the Colorado bureau of investigation.

(III.3) "CICJIS" means the Colorado integrated criminal justice information system program, as defined in section 16-20.5-102.

(III.5) "Electronic signature" means information transferred from one agency to another through CICJIS, including but not limited to warrants, mittimus, judgments, and plea agreements.

(III.7) "ICON" means the integrated Colorado online network, as defined in section 16-20.5-102.

(IV) "Sexual offense" means crimes described in article 3 of title 18, C.R.S., and crimes described in articles 6 and 7 of title 18, C.R.S.

(V) "State identification number" means the number assigned to an offender by the bureau based on fingerprint identification.

(b) The requirements of this section are intended to complement the rules of criminal procedure and shall not be interpreted to conflict with or supersede any such rules.

(2) (a) A law enforcement agency that requests the filing of any criminal case shall submit to the district attorney the arresting agency's name, the offender's full name and date of birth, the charge or charges being requested, the investigating agency's case number, and the date of arrest and the arrest number. In addition, the law enforcement agency shall submit to the district attorney any relevant information about the offender's affiliation or association with gangs or gang activities.

(b) In addition to the information described in paragraph (a) of this subsection (2), a law enforcement agency shall comply with the following procedures:

(I) When requesting the filing of any felony, misdemeanor, or petty offense, criminal charge, or a violation of a municipal ordinance, the factual basis of which includes an act of domestic violence or a sexual offense, the law enforcement agency shall submit to the prosecuting attorney the information set forth in this subsection (2).

(II) If a law enforcement agency directly issues a complaint, summons, or summons and complaint for the charges described in subparagraph (I) of this paragraph (b), the agency shall identify on the face of such document whether the factual basis for the charge or charges includes an act of domestic violence or a sexual offense.

(3) A district attorney who files any criminal case with the court or who reports to the bureau a final disposition occurring in the district attorney's office shall submit the arresting agency's name, the offender's full name and date of birth, the investigating agency's case number, the date of arrest and the arrest number, and any other information that a law enforcement agency is required to submit in accordance with subsection (2) of this section.

(4) (a) Upon the issuance of a warrant of arrest, the court shall notify the sheriff of the county in which the court is located of the issuance of such warrant. When the court withdraws, cancels, quashes, or otherwise renders a warrant of arrest invalid, the court shall immediately notify the bureau of such action in a manner that is consistent with procedures established jointly by the state court administrator and the director of the bureau.

(b) When the court creates a new criminal case in ICON, the court shall electronically notify the bureau of such action and shall provide the bureau with the arresting agency's name, the arrest date, and the arrest number provided to the court in accordance with subsection (3) of this section. Thereafter, the bureau shall electronically notify the court of the state identification number, if any, assigned to the offender.

(c) The court shall report the final disposition concerning an offender to the bureau in a form that is electronically consistent with applicable law. The report shall be made within seventy-two hours after the final disposition; except that the time period shall not include Saturdays, Sundays, or legal holidays. The report shall include the information provided to the court in accordance with subsection (3) of this section, the disposition of each charge, and the court case number, and, with respect to any charge, the factual basis of which includes an act of domestic violence or a sexual offense, the court and the bureau shall comply with the following procedures:

(I) The court shall advise the bureau to reflect the change of the status of domestic violence or sexual offense if the defendant is found not guilty of the alleged crime or if the case is dismissed.

(II) The court shall specify that there is a change in the status of the charge originally submitted to the bureau in accordance with paragraph (b) of this subsection (4), based upon the court's findings.

(III) The bureau shall reflect the change of status but shall not delete or eliminate information concerning the original charge.

(5) (a) The bureau shall maintain the information it receives pursuant to this article and shall make such information immediately available electronically to the department of corrections and to any other criminal justice agency upon request.

(b) Upon receipt of the fingerprints required pursuant to this article, the bureau shall perform a complete search of the bureau's files to identify any prior criminal record that the offender may have. Upon the association of a unique state identification number with any such offender, the bureau shall report such number electronically to CICJIS, the submitting agency, and the district attorney with jurisdiction over the offense. Upon nonassociation, the

bureau shall create a new state identification number and electronically report the number to CICJIS and the submitting agency. Upon receipt of the number, CICJIS shall electronically report the number to the court and the district attorney with jurisdiction over the offense.

(6) The information received by the bureau pursuant to this article shall be made available to any sentencing court, probation office, or other pretrial services agency preparing a report on domestic violence or sexual offense cases.

Source: **L. 87:** Entire article added, p. 647, § 1, effective July 1. **L. 89:** (1) and (2) amended, p. 874, § 6, effective June 5. **L. 92:** Entire section amended, p. 256, § 2, effective June 3. **L. 94:** (1) and (3) amended and (6) added, p. 2039, § 20, effective July 1. **L. 95:** (3) and (6) amended, p. 600, § 2, effective May 22; entire section R&RE, p. 945, § 2, effective July 1. **L. 2005:** (1)(a)(III.3), (1)(a)(III.5), and (1)(a)(III.7) added and (4)(b), (5)(a), (5)(b), and (6) amended, p. 87, §§ 6, 7, effective March 25.

Editor's note: Subsections (3) and (6) were amended in House Bill 95-1101. Those amendments were superseded by the repeal and reenactment of the section in Senate Bill 95-153.

Cross references: For the legislative declaration contained in the 1995 act amending this section, see section 1 of chapter 198, Session Laws of Colorado 1995.

16-21-104. Fingerprinting - ordered by court. (1) If the offender has not been fingerprinted and photographed for the charges pending before the court, the court at the first appearance of the offender after the filing of charges shall order the offender to report to the investigating agency within fourteen days for fingerprinting and photographing. The investigating agency shall endorse upon a copy of the order the completion of the fingerprinting and photographing and return the same to the court. At least one set of fingerprints and one set of photographs ordered pursuant to this section shall be forwarded by the investigating agency to the Colorado bureau of investigation in a form and manner prescribed by such bureau.

(2) Any fingerprints required by this section to be forwarded shall be forwarded within twenty-four hours after completion; except that such time period shall not include Saturdays, Sundays, and legal holidays.

Source: **L. 87:** Entire article added, p. 648, § 1, effective July 1. **L. 91:** (1) amended, p. 442, § 10, effective May 29. **L. 92:** Entire section amended, p. 257, § 3, effective June 3. **L. 2012:** (1) amended, (SB 12-175), ch. 208, p. 861, § 99, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

16-21-104.5. Electronic signatures - validity. The information contained in an electronic signature, as defined in section 16-21-103 (1) (a) (III.5), sent between agencies using CICJIS, as defined in section 16-20.5-102, shall be presumed to be valid on its face without signed hard copy.

Source: **L. 2005:** Entire section added p. 88, § 8, effective March 25.

16-21-105. Applicability of article to municipal courts - local law enforcement. (1) The provisions of this article concerning the duty of a law enforcement agency to identify on the face of a complaint, summons, or summons and complaint whether the factual basis of the charge or charges being filed include an act of domestic violence shall apply to local law enforcement agencies.

(2) The provisions of this article concerning the duty of a court to notify the bureau concerning actions involving crimes in which the charge or charges include an act of domestic violence shall apply to municipal courts.

Source: **L. 94:** Entire section added, p. 2040, § 21, effective July 1. **L. 95:** (2) amended, p. 600, § 3, effective May 22.

ARTICLE 22

Colorado Sex Offender Registration Act

16-22-101.	Short title.	16-22-108.	Registration - procedure - frequency - place - change of address - fee.
16-22-102.	Definitions.	16-22-109.	Registration forms - local law enforcement agencies - duties.
16-22-103.	Sex offender registration - required - applicability - exception.	16-22-110.	Colorado sex offender registry - creation - maintenance - release of information.
16-22-104.	Initial registration - effective date.	16-22-111.	Internet posting of sex offenders - procedure.
16-22-105.	Notice - requirements - residence - presumption.	16-22-112.	Release of information - law enforcement agencies.
16-22-106.	Duties - probation department - community corrections administrator - court personnel - jail personnel - notice.	16-22-113.	Petition for removal from registry.
16-22-107.	Duties - department of corrections - department of human services - confirmation of registration - notice - address verification.	16-22-114.	Immunity.
		16-22-115.	CBI assistance in apprehending sex offenders who fail to register.

16-22-101. Short title. This article shall be known and may be cited as the “Colorado Sex Offender Registration Act”.

Source: **L. 2002:** Entire article added, p. 1157, § 1, effective July 1.

ANNOTATION

Law reviews. For article, “Constitutional Challenges to Sex Offender Registration and Community Notification Laws”, see 30 Colo. Law. 51 (February 2001).

16-22-102. Definitions. As used in this article, unless the context otherwise requires:

(1) “Birthday” means a person’s birthday as reflected on the notice provided to the person pursuant to section 16-22-106 or 16-22-107 or the person’s actual date of birth if the notice does not reflect the person’s birthday.

(2) “CBI” means the Colorado bureau of investigation established pursuant to part 4 of article 33.5 of title 24, C.R.S.

(3) “Convicted” or “conviction” means having received a verdict of guilty by a judge or jury, having pleaded guilty or nolo contendere, having received a disposition as a juvenile, having been adjudicated a juvenile delinquent, or having received a deferred judgment and sentence or a deferred adjudication.

(3.5) “Employed at an institution of postsecondary education” means a person:

(a) Is employed by or is an independent contractor with an institution of postsecondary education or is employed by or is an independent contractor with an entity that contracts with an institution of postsecondary education; and

(b) Spends any period of time in furtherance of the employment or independent contractor relationship on the campus of the postsecondary institution or at a site that is owned or leased by the postsecondary institution.

(4) “Immediate family” means a person’s spouse, parent, grandparent, sibling, or child.

(4.3) (a) “Lacks a fixed residence” means that a person does not have a living situation that meets the definition of “residence” pursuant to subsection (5.7) of this section. “Lacks a fixed residence” may include, but need not be limited to, outdoor sleeping locations or any public or private locations not designed as traditional living accommodations. “Lacks a

fixed residence” may also include temporary public or private housing or temporary shelter facilities, residential treatment facilities, or any other residential program or facility if the person remains at the location for less than fourteen days.

(b) “Lacks a fixed residence” also includes a person who is registered in any jurisdiction if the person:

(I) Ceases to reside at an address in that jurisdiction; and

(II) Fails to register:

(A) A change of address in the same jurisdiction; or

(B) In a new jurisdiction pursuant to section 16-22-108 (4); or

(C) Pursuant to section 16-22-108 (3).

(4.5) “Local law enforcement agency” means the law enforcement agency, including but not limited to a campus police agency, that has jurisdiction over a certain geographic area.

(5) “Register” and “registration” include initial registration pursuant to section 16-22-104, and registration, confirmation of registration, and reregistration, as required in section 16-22-108.

(5.5) “Registrant” means a person who is required to register in accordance with this article.

(5.7) “Residence” means a place or dwelling that is used, intended to be used, or usually used for habitation by a person who is required to register pursuant to section 16-22-103. “Residence” may include, but need not be limited to, a temporary shelter or institution, if the person resides at the temporary shelter or institution for fourteen consecutive days or longer, if the owner of the shelter or institution consents to the person utilizing the shelter or institution as his or her registered address as required by section 16-22-106 (4) or 16-22-107 (4) (a), and if the residence of the person at the shelter or institution can be verified as required by section 16-22-109 (3.5). A person may establish multiple residences by residing in more than one place or dwelling.

(5.8) “Resides” includes residence and lacks a fixed residence.

(6) “Sex offender registry” means the Colorado sex offender registry created and maintained by the CBI pursuant to section 16-22-110.

(7) “Sexually violent predator” means a person who is found to be a sexually violent predator pursuant to section 18-3-414.5, C.R.S.

(8) “Temporary resident” means a person who is a resident of another state but in Colorado temporarily because the person is:

(a) Employed in this state on a full-time or part-time basis, with or without compensation, for more than fourteen consecutive business days or for an aggregate period of more than thirty days in any calendar year; or

(b) Enrolled in any type of educational institution in this state on a full-time or part-time basis; or

(c) Present in Colorado for more than fourteen consecutive business days or for an aggregate period of more than thirty days in a calendar year for any purpose, including but not limited to vacation, travel, or retirement.

(9) “Unlawful sexual behavior” means any of the following offenses or criminal attempt, conspiracy, or solicitation to commit any of the following offenses:

(a) (I) Sexual assault, in violation of section 18-3-402, C.R.S.; or

(II) Sexual assault in the first degree, in violation of section 18-3-402, C.R.S., as it existed prior to July 1, 2000;

(b) Sexual assault in the second degree, in violation of section 18-3-403, C.R.S., as it existed prior to July 1, 2000;

(c) (I) Unlawful sexual contact, in violation of section 18-3-404, C.R.S.; or

(II) Sexual assault in the third degree, in violation of section 18-3-404, C.R.S., as it existed prior to July 1, 2000;

(d) Sexual assault on a child, in violation of section 18-3-405, C.R.S.;

(e) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3, C.R.S.;

(f) Sexual assault on a client by a psychotherapist, in violation of section 18-3-405.5, C.R.S.;

- (g) Enticement of a child, in violation of section 18-3-305, C.R.S.;
- (h) Incest, in violation of section 18-6-301, C.R.S.;
- (i) Aggravated incest, in violation of section 18-6-302, C.R.S.;
- (j) Trafficking in children, in violation of section 18-3-502, C.R.S.;
- (k) Sexual exploitation of children, in violation of section 18-6-403, C.R.S.;
- (l) Procurement of a child for sexual exploitation, in violation of section 18-6-404, C.R.S.;
- (m) Indecent exposure, in violation of section 18-7-302, C.R.S.;
- (n) Soliciting for child prostitution, in violation of section 18-7-402, C.R.S.;
- (o) Pandering of a child, in violation of section 18-7-403, C.R.S.;
- (p) Procurement of a child, in violation of section 18-7-403.5, C.R.S.;
- (q) Keeping a place of child prostitution, in violation of section 18-7-404, C.R.S.;
- (r) Pimping of a child, in violation of section 18-7-405, C.R.S.;
- (s) Inducement of child prostitution, in violation of section 18-7-405.5, C.R.S.;
- (t) Patronizing a prostituted child, in violation of section 18-7-406, C.R.S.;
- (u) Engaging in sexual conduct in a correctional institution, in violation of section 18-7-701, C.R.S.;
- (v) Wholesale promotion of obscenity to a minor, in violation of section 18-7-102 (1.5), C.R.S.;
- (w) Promotion of obscenity to a minor, in violation of section 18-7-102 (2.5), C.R.S.;
- (x) Class 4 felony internet luring of a child, in violation of section 18-3-306 (3), C.R.S.;
- (y) Internet sexual exploitation of a child, in violation of section 18-3-405.4, C.R.S.;
- (z) Public indecency, committed in violation of section 18-7-301 (2) (b), C.R.S., if a second offense is committed within five years of the previous offense or a third or subsequent offense is committed;
 - (aa) Invasion of privacy for sexual gratification, in violation of section 18-3-405.6, C.R.S.; or
 - (bb) Second degree kidnapping, if committed in violation of section 18-3-302 (3) (a), C.R.S.

Source: **L. 2002:** Entire article added, p. 1157, § 1, effective July 1. **L. 2004:** (9)(v) and (9)(w) added, p. 800, § 1, effective May 21; (3.5), (4.5), (5.5), and (5.7) added and (8) amended, p. 1107, § 1, effective May 27. **L. 2006:** (5.7) amended, p. 1006, § 3, effective July 1; (9)(x) and (9)(y) added, p. 2054, § 2, effective July 1. **L. 2010:** (9)(j) amended, (SB 10-140), ch. 156, p. 537, § 6, effective April 21; (9)(u) amended, (HB 10-1277), ch. 262, p. 1190, § 2, effective July 1; (9)(x) and (9)(y) amended and (9)(z) added, (HB 10-1334), ch. 359, p. 1708, § 3, effective August 11; (9)(x) and (9)(y) amended and (9)(aa) added, (SB 10-128), ch. 415, p. 2047, § 8, effective July 1, 2012. **L. 2011:** (9)(bb) added, (HB 11-1278), ch. 224, p. 960, § 3, effective May 27. **L. 2012:** (4.3) and (5.8) added and (5.7) amended, (HB 12-1346), ch. 220, p. 940, § 1, effective July 1.

Editor's note: Subsections (9)(x) and (9)(y), as amended by House Bill 10-1334 and Senate Bill 10-128, are identical; except that subsections (9)(x) and (9)(y), as amended by Senate Bill 10-128, are effective July 1, 2012.

ANNOTATION

Annotator's note. Since § 16-22-102 is similar to § 18-3-412.5 as it existed prior to its 2002 repeal and reenactment, a relevant case construing that provision has been included in the annotations to this section.

In reference to the term "convicted" in subsection (3), the phrase "having received a deferred judgment and sentence" does not mean the same as "completing the terms of a deferred sentencing agreement". Defendant must register as a sex offender pursuant to § 16-

22-103 (1)(a) despite completion of a deferred sentencing agreement. *Dubois v. Abrahamson*, 214 P.3d 586 (Colo. App. 2009).

The trial court properly ordered the defendant to register as a sex offender pursuant to this section even though defendant plead guilty to an offense not specifically listed in the definition of "unlawful sexual behavior" in subsection (1)(b). Although defendant plead guilty to contributing to the delinquency of a minor, she had engaged in soliciting for child

prostitution, pandering of a child, procurement of a child for sexual exploitation, and inducement of child prostitution. Thus, the factual basis for the plea involved unlawful sexual behavior, and defendant was appropriately required to register as a sex offender. *People v. Meidinger*, 987 P.2d 937 (Colo. App. 1999).

To establish a residence under subsection (5.7) requires a physical presence or occupancy

at a location. An offender under the Colorado Sex Offender Registration Act is required to give notice of where he or she intends to reside upon release from custody, but is not required to register at an address solely based upon that intent. *People v. Griffin*, __ P.3d __ (Colo. App. 2011).

16-22-103. Sex offender registration - required - applicability - exception. (1) Effective July 1, 1998, the following persons shall be required to register pursuant to the provisions of section 16-22-108 and shall be subject to the requirements and other provisions specified in this article:

(a) Any person who was convicted on or after July 1, 1991, in the state of Colorado, of an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S., enticement of a child, as described in section 18-3-305, C.R.S., or internet luring of a child, as described in section 18-3-306, C.R.S.;

(b) Any person who was convicted on or after July 1, 1991, in another state or jurisdiction, including but not limited to a military, tribal, territorial, or federal jurisdiction, of an offense that, if committed in Colorado, would constitute an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S., enticement of a child, as described in section 18-3-305, C.R.S., or internet luring of a child, as described in section 18-3-306, C.R.S.; and

(c) Any person who was released on or after July 1, 1991, from the custody of the department of corrections of this state or any other state, having served a sentence for an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S., enticement of a child, as described in section 18-3-305, C.R.S., or internet luring of a child, as described in section 18-3-306, C.R.S.

(2) (a) On and after July 1, 1994, any person who is convicted in the state of Colorado of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior, or any person who is released from the custody of the department of corrections having completed serving a sentence for unlawful sexual behavior or for another offense, the underlying factual basis of which involved unlawful sexual behavior, shall be required to register in the manner prescribed in section 16-22-104, section 16-22-106 or 16-22-107, whichever is applicable, and section 16-22-108.

(b) A person shall be deemed to have been convicted of unlawful sexual behavior if he or she is convicted of one or more of the offenses specified in section 16-22-102 (9), or of attempt, solicitation, or conspiracy to commit one or more of the offenses specified in said section.

(c) (I) For convictions entered on or after July 1, 2002, a person shall be deemed to be convicted of an offense, the underlying factual basis of which involves unlawful sexual behavior, if:

(A) The person is convicted of an offense that requires proof of unlawful sexual behavior as an element of the offense; or

(B) The person is convicted of an offense and is eligible for and receives an enhanced sentence based on a circumstance that requires proof of unlawful sexual behavior; or

(C) The person was originally charged with unlawful sexual behavior or with an offense that meets the description in sub-subparagraph (A) or (B) of this subparagraph (I), the person pleads guilty to an offense that does not constitute unlawful sexual behavior, and, as part of the plea agreement, the person admits, after advisement as provided in subparagraph (III) of this paragraph (c), that the underlying factual basis of the offense to which he or she is pleading guilty involves unlawful sexual behavior; or

(D) The person was charged with and convicted of an offense that does not constitute unlawful sexual behavior and the person admits on the record, after advisement as provided in subparagraph (III) of this paragraph (c), that the underlying factual basis of the offense involved unlawful sexual behavior.

(II) If a person is originally charged with unlawful sexual behavior or with an offense that meets the description in sub-subparagraph (A) or (B) of subparagraph (I) of this

paragraph (c), the court may accept a plea agreement to an offense that does not constitute unlawful sexual behavior only if:

(A) The district attorney stipulates that the underlying factual basis of the offense to which the person is pleading guilty does not involve unlawful sexual behavior; or

(B) The person admits, after advisement as provided in subparagraph (III) of this paragraph (c), that the underlying factual basis of the offense to which he or she is pleading guilty involves unlawful sexual behavior.

(III) The advisement provided for purposes of this paragraph (c), in addition to meeting the requirements of the Colorado rules of criminal procedure, shall advise the person that admitting that the underlying factual basis of the offense to which the person is pleading or of which the person is convicted involves unlawful sexual behavior will have the collateral result of making the person subject to the requirements of this article. Notwithstanding any provision of this paragraph (c) to the contrary, failure to advise a person pursuant to the provisions of this subparagraph (III) shall not constitute a defense to the offense of failure to register as a sex offender if there is evidence that the defendant had actual notice of the duty to register.

(IV) In any case in which a person is deemed to have been convicted of an offense, the underlying factual basis of which involves unlawful sexual behavior, as provided in this paragraph (c), the judgment of conviction shall specify that the person is convicted of such an offense and specify the particular crime of unlawful sexual behavior involved.

(V) The provisions of this paragraph (c) shall apply to juveniles for purposes of determining whether a juvenile is convicted of an offense, the underlying factual basis of which involves unlawful sexual behavior.

(d) (I) Notwithstanding any other provision of this section, any stipulation by a district attorney and any finding by the court with regard to whether the offense of which the person is convicted includes an underlying factual basis involving unlawful sexual behavior, as defined in section 16-22-102, shall be binding on the department of corrections for purposes of classification. On or after July 1, 2008, if the department of corrections receives a mittimus that does not indicate the necessary findings as required by section 16-22-103 (2) (c) (II), the department shall notify the court and request that the court enter the necessary findings pursuant to section 16-22-103 (2) (c) (II).

(II) The department of corrections shall have the authority to make a determination that a person is a sex offender, as defined in section 16-11.7-102 (2) (a), for the purposes of classification and treatment if:

(A) The person has one or more prior convictions for a sex offense as defined in section 16-11.7-102 (3);

(B) The person has a prior offense for which a determination has been made by the court that the underlying factual basis involved a sex offense as defined in section 16-11.7-102 (3); or

(C) The person has been classified as a sex offender in accordance with procedures established by the department of corrections.

(III) The procedures established by the department of corrections to classify a person as a sex offender shall require that:

(A) The classification proceeding be conducted by a licensed attorney who shall serve as an administrative hearing officer;

(B) The offender's attorney be permitted to attend, represent, and assist the offender at the classification proceeding; and

(C) The offender be entitled to written notice of the reason for the proceeding, disclosure of the evidence to be presented against him or her, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, unless the administrative hearing officer finds good cause for not allowing confrontation, and written findings and conclusions indicating the evidence and reasons relied upon for the classification as a sex offender.

(IV) Notwithstanding any statutory provisions to the contrary, the department of corrections shall ensure that all procedures and policies comply with the federal "Prison Rape Elimination Act of 2003", Pub.L. 108-79, as amended.

(3) In addition to the persons specified in subsections (1) and (2) of this section, any person convicted of an offense in any other state or jurisdiction, including but not limited to a military or federal jurisdiction, for which the person, as a result of the conviction, is, was, has been, or would be required to register if he or she resided in the state or jurisdiction of conviction, or for which such person would be required to register if convicted in Colorado, shall be required to register in the manner specified in section 16-22-108, so long as such person is a temporary or permanent resident of Colorado. Such person may petition the court for an order that discontinues the requirement for registration in this state at the times specified in section 16-22-113 for offense classifications that are comparable to the classification of the offense for which the person was convicted in the other state or jurisdiction.

(4) The provisions of this article shall apply to any person who receives a disposition or is adjudicated a juvenile delinquent based on the commission of any act that may constitute unlawful sexual behavior or who receives a deferred adjudication based on commission of any act that may constitute unlawful sexual behavior; except that, with respect to section 16-22-113 (1) (a) to (1) (e), a person may petition the court for an order to discontinue the duty to register as provided in those paragraphs, but only if the person has not subsequently received a disposition for, been adjudicated a juvenile delinquent for, or been otherwise convicted of any offense involving unlawful sexual behavior. In addition, the duty to provide notice to a person of the duty to register, as set forth in sections 16-22-105 to 16-22-107, shall apply to juvenile parole and probation officers and appropriate personnel of the division of youth corrections in the department of human services.

(5) (a) Notwithstanding any provision of this article to the contrary, if, pursuant to a motion filed by a person described in this subsection (5) or on its own motion, a court determines that the registration requirement specified in this section would be unfairly punitive and that exempting the person from the registration requirement would not pose a significant risk to the community, the court, upon consideration of the totality of the circumstances, may exempt the person from the registration requirements imposed pursuant to this section if:

(I) The person was younger than eighteen years of age at the time of the commission of the offense; and

(II) The person has not been previously charged with unlawful sexual behavior; and

(III) The offense, as charged in the first petition filed with the court, is a first offense of either misdemeanor unlawful sexual contact, as described in section 18-3-404, C.R.S., or indecent exposure, as described in section 18-7-302, C.R.S.; and

(IV) The person has received a sex offender evaluation that conforms with the standards developed pursuant to section 16-11.7-103 (4) (i), from an evaluator who meets the standards established by the sex offender management board, and the evaluator recommends exempting the person from the registration requirements based upon the best interests of that person and the community; and

(V) The court makes written findings of fact specifying the grounds for granting such exemption.

(b) Any defendant who files a motion pursuant to this subsection (5) or the court, if considering its own motion, shall provide notice of the motion to the prosecuting district attorney. In addition, the court shall provide notice of the motion to the victim of the offense. Prior to deciding the motion, the court shall conduct a hearing on the motion at which both the district attorney and the victim shall have opportunity to be heard.

(6) Any person who is required to register pursuant to this section and fails to do so or otherwise fails to comply with the provisions of this article may be subject to prosecution for the offense of failure to register as a sex offender, as described in section 18-3-412.5, C.R.S. Failure of any governmental entity or any employee of any governmental entity to comply with any requirement of this article shall not constitute a defense to the offense of failure to register as a sex offender if there is evidence that the defendant had actual notice of the duty to register.

Source: L. 2002: Entire article added, p. 1159, § 1, effective July 1. L. 2004: (1)(b), (1)(c), (3), and (5)(a) amended, p. 1108, § 2, effective May 27. L. 2007: (1) amended, p.

1687, § 3, effective July 1. **L. 2008:** (3) amended, p. 849, § 1, effective May 14; (2)(d) amended, p. 1754, § 1, effective July 1. **L. 2011:** (1)(b) amended, (HB 11-1278), ch. 224, p. 960, § 4, effective May 27; (5)(a)(IV) amended, (HB 11-1138), ch. 236, p. 1027, § 9, effective May 27.

ANNOTATION

Annotator's note. Since § 16-22-103 is similar to § 18-3-412.5 as it existed prior to its 2002 repeal and reenactment, relevant cases construing that provision have been included in the annotations to this section.

Prior to the 2004 amendment, subsection (1)(c) referred to the department of corrections in Colorado not that of any other state. *Fendley v. People*, 107 P.3d 1122 (Colo. App. 2004).

Use of present tense in subsection (3) refers to any person currently required to register in the state of conviction of the sexual offense and not to a person who “was” or “has been” required to register. *Fendley v. People*, 107 P.3d 1122 (Colo. App. 2004).

Although application of subsection (1) relates back to convicted sexual offenders released on or after July 1, 1991, it does not violate the prohibition against ex post facto laws, because the statute does not disadvantage the offender. The registration requirement is intended to assist law enforcement officials in investigating future sex crimes and to protect the public safety. As such, it is remedial, not punitive, and does not unconstitutionally enhance the offender's punishment. *Jamison v. People*, 988 P.2d 177 (Colo. App. 1999); *People v. Sowell*, ___ P.3d ___ (Colo. App. 2011).

The 2008 amendments to subsection (2)(d)(I) were substantive and cannot be applied retroactively. A retroactive application would modify vested rights and liabilities. *Vondra v. Colo. Dept. of Corr.*, 226 P.3d 1165 (Colo. App. 2009).

Procedural due process does not entitle a sex offender to a hearing on the sex offender's dangerousness before requiring the sex offender to register. Due process does not guarantee the right to a hearing to establish a fact that is not material under the statute. Dangerousness is not material under the registration statute, the duty to register is triggered by a conviction of a sex offense. The statute even states the crime for which the registrant was convicted may not reflect the current level of dangerousness. *People ex rel. C.B.B.*, 75 P.3d 1148 (Colo. App. 2003).

This section does not violate the offender's right to equal protection even though this section does not apply to persons who may have been convicted the same date as the offender, but were eligible for release prior to 1991. The offender is not similarly situated to persons released prior to 1991 because the offender was not eligible for release as of said

date. *Jamison v. People*, 988 P.2d 177 (Colo. App. 1999).

The duty to register as a sex offender is not a direct consequence of the entry of a guilty plea and therefore need not be included in the advisement. The statutory duty to register as a sex offender in Colorado is only a collateral consequence of a defendant's guilty plea. Failure to advise defendant of the duty to register as a sex offender does not invalidate his guilty plea. *People v. Montaine*, 7 P.3d 1065 (Colo. App. 1999).

The requirement that a juvenile register as a sex offender pursuant to this section does not give rise to a constitutional right to a jury trial in a juvenile adjudication because the statutory duty to register as a sex offender is not a criminal punishment. *People ex rel. J.T.*, 13 P.3d 321 (Colo. App. 2000).

A person convicted of violating 18 U.S.C. § 2252 (a)(2) has engaged in conduct that, if committed in Colorado, would constitute sexual exploitation of a child in violation of § 18-6-403 (3)(b.5) and is, therefore, subject to the registration requirement of subsection (1)(b) of this section. *Fabiano v. Armstrong*, 141 P.3d 907 (Colo. App. 2006).

Based upon defendant's civil commitment in another state for a sex offense, defendant is required to register as a sex offender in this state. Defendant is a person “required to register in the state of conviction” and a person who would be “required to register if convicted in this state”. The civil commitment proceedings in the other state were equivalent of a deferred judgment and sentencing in this state, thus satisfying the “convicted” requirement of the statute. The other state's commitment procedures included sufficient due process protections. The crime that was the subject of the civil commitment would essentially have been sexual assault on a child in this state. *Mayo v. People*, 181 P.3d 1207 (Colo. App. 2008).

Defendant must register as a sex offender pursuant to subsection (1)(a) despite completion of a deferred sentencing agreement based on the plain language of the definition of “convicted”, as defined in § 16-22-102 (3) and as used in subsection (1)(a) of this section. *Dubois v. Abrahamson*, 214 P.3d 586 (Colo. App. 2009).

Sufficient competent evidence for department of corrections' hearing panel to determine defendant to be a sex offender. The panel relied on police reports and the victim's statements to determine that defendant had subjected

a victim to unwanted sexual contact through threats, intimidation, and physical force. Vondra

v. Colo. Dept. of Corr., 226 P.3d 1165 (Colo. App. 2009).

16-22-104. Initial registration - effective date. (1) (a) (I) Beginning January 1, 2005, for any person required to register pursuant to section 16-22-103, the court, within the later of twenty-four hours or the next business day after sentencing the person, shall electronically file with the CBI the initial registration of the person, providing the information required by the CBI.

(II) Beginning May 27, 2004, the court shall specify on the judgment of conviction the person's duty to register as required in section 16-22-108, including but not limited to the duty to confirm registration if the person is sentenced on or after January 1, 2005, and the person's duty to reregister.

(b) Any person who is sentenced prior to January 1, 2005, and who is required to register pursuant to section 16-22-103 shall initially register in the manner provided and within the times specified in section 16-22-108 (1) (a) for registration.

(c) The state court administrator is hereby authorized to receive and expend any public or private gifts, grants, or donations that may be available to offset the costs incurred in implementing the provisions of this subsection (1).

(2) Repealed.

Source: L. 2002: Entire article added, p. 1163, § 1, effective July 1. L. 2003: (1)(a) amended, p. 759, § 1, effective March 25. L. 2004: Entire section amended, p. 1109, § 3, effective May 27.

Editor's note: Subsection (2)(c) provided for the repeal of subsection (2), effective July 1, 2005. (See L. 2004, p. 1109.)

16-22-105. Notice - requirements - residence - presumption. (1) Any person who is required to register pursuant to section 16-22-103 shall receive notice of the duty to register as provided in section 16-22-106 or 16-22-107, whichever is applicable. Such notice shall inform the person of the duty to register, in the manner provided in section 16-22-108, with the local law enforcement agency of each jurisdiction in which the person resides. The notice shall inform the person that he or she has a duty to register with local law enforcement agencies in any state or other jurisdiction to which the person may move and that the CBI shall notify the agency responsible for registration in the new state as provided in section 16-22-108 (4). The notice shall also inform the person that, at the time the person registers, he or she must provide his or her date of birth, a current photograph, and a complete set of fingerprints.

(2) Failure of any person to sign the notice of duty to register, as required in sections 16-22-106 and 16-22-107, shall not constitute a defense to the offense of failure to register as a sex offender if there is evidence that the person had actual notice of the duty to register.

(3) For purposes of this article, any person who is required to register pursuant to section 16-22-103 shall register in all jurisdictions in which he or she establishes a residence. A person establishes a residence through an intent to make any place or dwelling his or her residence. The prosecution may prove intent to establish residence by reference to hotel or motel receipts or a lease of real property, ownership of real property, proof the person accepted responsibility for utility bills, proof the person established a mailing address, or any other action demonstrating such intent. Notwithstanding the existence of any other evidence of intent, occupying or inhabiting any dwelling for more than fourteen days in any thirty-day period shall constitute the establishment of residence.

Source: L. 2002: Entire article added, p. 1163, § 1, effective July 1. L. 2004: (3) amended, p. 1110, § 4, effective May 27.

ANNOTATION

Annotator's note. Since § 16-22-105 is similar to § 18-3-412.5 as it existed prior to its 2002 repeal and reenactment, a relevant case construing that provision has been included in the annotations to this section.

The duty to register as a sex offender is not a direct consequence of the entry of a guilty plea and therefore need not be included in the advisement. The statutory duty to register as a sex offender in Colorado is only a collateral consequence of a defendant's guilty plea. Failure to advise defendant of the duty to register as

a sex offender does not invalidate his guilty plea. *People v. Montaine*, 7 P.3d 1065 (Colo. App. 1999).

To establish a residence under subsection (3) requires a physical presence or occupancy at a location. An offender under the Colorado Sex Offender Registration Act is required to give notice of where he or she intends to reside upon release from custody, but is not required to register at an address solely based upon that intent. *People v. Griffin*, __ P.3d __ (Colo. App. 2011).

16-22-106. Duties - probation department - community corrections administrator - court personnel - jail personnel - notice. (1) (a) If a person who is required to register pursuant to section 16-22-103 is sentenced to probation, the probation department, as soon as possible following sentencing, shall provide notice, as described in section 16-22-105, to the person of his or her duty to register in accordance with the provisions of this article with the local law enforcement agency of each jurisdiction in which the person resides, and the notice shall include the requirements for a person who registers as "lacks a fixed residence". The person shall be required to sign the notice as confirmation of receipt and to provide the person's date of birth and the address or addresses at which the person resides or a statement that the person lacks a fixed residence. Beginning on May 27, 2004, the court shall specify on the judgment of conviction the duty to register as required in section 16-22-108, including but not limited to the duty to confirm registration if sentenced on or after January 1, 2005, and to reregister.

(b) The probation department shall electronically notify the CBI of the date on which the person's probation is terminated, and the probation department shall notify the CBI if the person absconds or dies prior to the probation termination date. The CBI shall electronically notify the local law enforcement agency of each jurisdiction in which the person resides of the occurrence of any of the events specified in this paragraph (b).

(2) (a) If a person who is required to register pursuant to section 16-22-103 receives a direct sentence to community corrections, the administrator for the community corrections program, or his or her designee, as soon as possible following sentencing, shall provide notice, as described in section 16-22-105, to the person of the duty to register in accordance with the provisions of this article with the local law enforcement agency of each jurisdiction in which the person resides. The person shall be required to sign the notice as confirmation of receipt and to provide the person's date of birth and the address or addresses at which the person resides. The court shall specify on the judgment of conviction the duty to register as required in section 16-22-108, including but not limited to the duty to confirm registration, if sentenced on or after January 1, 2005, and to reregister.

(b) The administrator of the community corrections program, or his or her designee, shall electronically notify the CBI of the date on which the sentence to community corrections is terminated, and the administrator of the community corrections program shall notify the CBI if the person escapes or dies prior to the sentence termination date. The CBI shall electronically notify the local law enforcement agency of each jurisdiction in which the person resides of the occurrence of any of the events specified in this paragraph (b).

(3) (a) (I) If a person who is required to register pursuant to section 16-22-103 is held for more than five business days in a county jail pending court disposition for any offense, the sheriff of the county in which the county jail is located, or his or her designee, shall transmit to the local law enforcement agency of the jurisdiction in which the person was last registered and to the CBI confirmation of the person's registration. The confirmation shall be transmitted on a standardized form provided by the CBI and shall include the address or addresses at which the person will reside while in custody of the county jail, the person's date of birth, a current photograph of the person, and the person's fingerprints.

(II) If a person who is required to register pursuant to section 16-22-103 is sentenced to a county jail for any offense, the sheriff of the county in which the county jail is located, or his or her designee, as soon as possible following sentencing, shall transmit to the local law enforcement agency of the jurisdiction in which the person was last registered and to the CBI confirmation of the person's registration. The confirmation shall be transmitted on a standardized form provided by the CBI and shall include the address or addresses at which the person will reside while in custody of the county jail, the person's date of birth, a current photograph of the person, and the person's fingerprints.

(III) The provisions of this paragraph (a) shall apply to persons sentenced on or after January 1, 2005.

(b) At least five days prior to the discharge of the person from custody, the sheriff, or his or her designee, shall provide notice, as described in section 16-22-105, to the person of the duty to register in accordance with the provisions of this article with the local law enforcement agency of each jurisdiction in which the person resides. The person shall be required to sign the notice as confirmation of receipt and to provide the person's date of birth and the address at which the person intends to reside upon discharge.

(c) Within five days, but not fewer than two days, prior to the discharge of the person from custody, the sheriff, or his or her designee, shall notify the CBI and the local law enforcement agency of the jurisdiction in which the person intends to reside of the date of the person's discharge. Such notice, at a minimum, shall include the address at which the person plans to reside upon discharge, provided by the person pursuant to paragraph (b) of this subsection (3), and the person's date of birth, fingerprints, and current photograph.

(3.5) With regard to a person who is required to register within a state, military, or federal jurisdiction other than Colorado, the chief local law enforcement officer, or his or her designee, of the Colorado jurisdiction in which the person resides shall provide notice, as described in section 16-22-105, to the person as soon as possible after discovering the person's presence in the jurisdiction, of the duty to register in accordance with the provisions of this article with the local law enforcement agency of each Colorado jurisdiction in which the person resides. The person shall be required to sign the notice as confirmation of receipt and to provide the person's date of birth and the address or addresses at which the person resides.

(4) For any person who is required to register pursuant to section 16-22-103, who is not committed to the department of human services, and who is not sentenced to probation, community corrections, county jail, or the department of corrections, the judge or magistrate who has jurisdiction over the person shall, at sentencing, provide notice, as described in section 16-22-105, to the person of the duty to register in accordance with the provisions of this article with the local law enforcement agency of each jurisdiction in which the person resides, and the notice shall include the requirements for a person who registers as "lacks a fixed residence". The person shall be required to sign the notice as confirmation of receipt and to provide the person's date of birth and the address or addresses at which the person resides or a statement that the person lacks a fixed residence.

Source: **L. 2002:** Entire article added, p. 1164, § 1, effective July 1. **L. 2003:** (3)(a)(II) amended, p. 759, § 2, effective March 25. **L. 2004:** (1), (2), and (3)(a)(II) amended and (3.5) added, pp. 1110, 1111, §§ 5, 6, effective May 27. **L. 2008:** (3)(c) amended, p. 1885, § 25, effective August 5. **L. 2011:** (3)(a) amended, (HB 11-1278), ch. 224, p. 960, § 5, effective May 27. **L. 2012:** (1)(a) and (4) amended, (HB 12-1346), ch. 220, p. 941, § 2, effective July 1.

16-22-107. Duties - department of corrections - department of human services - confirmation of registration - notice - address verification. (1) (a) If a person who is required to register pursuant to section 16-22-103 is sentenced to the department of corrections, the department of corrections shall transmit to the CBI confirmation of the person's registration on a standardized form provided by the CBI, including the person's date of birth and the person's fingerprints. The department of corrections shall also transmit a photograph of the person if requested by the CBI.

(b) The provisions of this subsection (1) shall apply to persons sentenced on or after January 1, 2005.

(2) At least ten business days prior to the release or discharge of any person who has been sentenced to the department of corrections and is required to register pursuant to section 16-22-103, the department of corrections shall provide notice, as described in section 16-22-105, to the person of the duty to register in accordance with the provisions of this article with the local law enforcement agency of each jurisdiction in which the person resides, and the notice shall include the requirements for a person who registers as "lacks a fixed residence". The person shall be required to sign the notice as confirmation of receipt and to provide the person's date of birth and the address at which the person intends to reside upon release or discharge or a statement that the person lacks a fixed residence.

(3) Within five days, but not fewer than two days, prior to the release or discharge of any person who has been sentenced to the department of corrections and is required to register pursuant to section 16-22-103, the department shall notify the CBI and the local law enforcement agency of the jurisdiction in which the person intends to reside of the date of the person's release or discharge. Such notice shall include the address at which the person intends to reside upon release or discharge, provided by the person pursuant to subsection (2) of this section, and the person's date of birth and the person's current photograph if requested by the CBI. In addition, such notice may include additional information concerning the person, including but not limited to any information obtained in conducting the assessment to determine whether the person may be subject to community notification pursuant to section 16-13-903.

(4) (a) Prior to the release or discharge of any person who has been sentenced to the department of corrections and is required to register pursuant to section 16-22-103, department of corrections personnel, if the person is being released on parole, or the local law enforcement agency of the jurisdiction in which the person intends to reside, if the person is being discharged, shall verify that:

(I) The address provided by the person pursuant to subsection (2) of this section is a residence;

(II) The occupants or owners of the residence know of the person's history of unlawful sexual behavior;

(III) The occupants or owners of the residence have agreed to allow the person to reside at the address; and

(IV) If the person is being released on parole, the address complies with any conditions imposed by the parole board.

(b) If, in attempting to verify the address provided by the person, department of corrections personnel or local law enforcement officers determine that any of the information specified in paragraph (a) of this subsection (4) is not true, the person shall be deemed to have provided false information to department personnel concerning the address at which the person intends to reside upon release.

(4.5) With regard to a person who has been sentenced to the department of corrections, is released on parole, and is required to register pursuant to section 16-22-103, the department shall electronically notify the CBI of the date on which the person's parole is terminated, and the department shall notify the CBI if the person absconds or dies prior to the parole termination date. The CBI shall electronically notify the local law enforcement agency of each jurisdiction in which the person resides of the occurrence of any of the events specified in this subsection (4.5).

(5) In the case of a juvenile who is required to register pursuant to section 16-22-103 and is committed to the department of human services, said department shall have and carry out the duties specified in this section for the department of corrections with regard to said juvenile.

Source: **L. 2002:** Entire article added, p. 1165, § 1, effective July 1. **L. 2003:** (1)(b) amended, p. 759, § 3, effective March 25. **L. 2004:** (1), (2), and (3) amended and (4.5) added, p. 1111, § 7, effective May 27. **L. 2012:** (2) amended, (HB 12-1346), ch. 220, p. 942, § 3, effective July 1.

16-22-108. Registration - procedure - frequency - place - change of address - fee.

(1) (a) (I) Each person who is required to register pursuant to section 16-22-103 shall register with the local law enforcement agency in each jurisdiction in which the person resides. A local law enforcement agency shall accept the registration of a person who lacks a fixed residence; except that the law enforcement agency is not required to accept the person's registration if it includes a residence or location that would violate state law or local ordinance. If the residence or location with which the person attempts to register constitutes such a violation, the law enforcement agency shall so advise the person and give the person an opportunity to secure an alternate location within five days.

(II) Each person who is required to register pursuant to section 16-22-103 shall initially register or, if sentenced on or after January 1, 2005, confirm his or her initial registration within five business days after release from incarceration for commission of the offense requiring registration or within five business days after receiving notice of the duty to register, if the person was not incarcerated. The person shall register with the local law enforcement agency during business hours by completing a standardized registration form provided to the person by the local law enforcement agency and paying the registration fee imposed by the local law enforcement agency as provided in subsection (7) of this section. The CBI shall provide standardized registration forms to the local law enforcement agencies pursuant to section 16-22-109.

(b) Except as otherwise provided in paragraph (d) of this subsection (1), each person who is required to register pursuant to section 16-22-103 shall reregister within five business days before or after the person's first birthday following initial registration and annually within five business days before or after the person's birthday thereafter. Such person shall reregister pursuant to this paragraph (b) with the local law enforcement agency of each jurisdiction in which the person resides within five business days before or after his or her birthday, in the manner provided in paragraph (a) of this subsection (1).

(c) Each person who is required to register pursuant to section 16-22-103 and who establishes an additional residence shall, within five business days after establishing an additional residence in any city, town, county, or city and county within Colorado, register with the local law enforcement agency of the jurisdiction in which he or she establishes the additional residence. The person shall register in said jurisdiction in the manner provided in paragraph (a) of this subsection (1) and shall reregister as provided in paragraph (b) of this subsection (1) or paragraph (d) of this subsection (1), whichever is applicable, in said jurisdiction so long as the person resides in said jurisdiction. For purposes of this paragraph (c), "additional residence" shall include, when the person's residence is a trailer or motor home, an address at which the person's trailer or motor home is lawfully located.

(d) (I) Any person who is a sexually violent predator and any person who is convicted as an adult of any of the offenses specified in subparagraph (II) of this paragraph (d) has a duty to register for the remainder of his or her natural life; except that, if the person receives a deferred judgment and sentence for one of the offenses specified in subparagraph (II) of this paragraph (d), the person may petition the court for discontinuation of the duty to register as provided in section 16-22-113 (1) (d). In addition to registering as required in paragraph (a) of this subsection (1), the person shall reregister within five business days before or after the date that is three months after the date on which the person was released from incarceration for commission of the offense requiring registration or, if the person was not incarcerated, after the date on which he or she received notice of the duty to register. The person shall register within five business days before or after that date every three months thereafter until the person's birthday. The person shall reregister within five business days before or after his or her next birthday and shall reregister within five business days before or after that date every three months thereafter. The person shall reregister pursuant to this paragraph (d) with the local law enforcement agency of each jurisdiction in which the person resides or in any jurisdiction if the person lacks a fixed residence on the reregistration date, in the manner provided in paragraph (a) of this subsection (1).

(I.5) (A) A person convicted of an offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, who, as a result of the conviction, is required to register quarterly as a sex offender in the state or jurisdiction of conviction is required to

register as provided in subparagraph (I) of this paragraph (d) so long as the person is a temporary or permanent resident of Colorado.

(B) A person convicted of an offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, which conviction would require the person to register as provided in subparagraph (I) of this paragraph (d) if the conviction occurred in Colorado, is required to register as provided in said subparagraph (I) so long as the person is a temporary or permanent resident of Colorado.

(II) The provisions of this paragraph (d) shall apply to persons convicted of one or more of the following offenses:

(A) Felony sexual assault, in violation of section 18-3-402, C.R.S., or sexual assault in the first degree, in violation of section 18-3-402, C.R.S., as it existed prior to July 1, 2000, or felony sexual assault in the second degree, in violation of section 18-3-403, C.R.S., as it existed prior to July 1, 2000; or

(B) Sexual assault on a child in violation of section 18-3-405, C.R.S.; or

(C) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3, C.R.S.; or

(D) Sexual assault on a client by a psychotherapist, in violation of section 18-3-405.5, C.R.S.; or

(E) Incest, in violation of section 18-6-301, C.R.S.; or

(F) Aggravated incest, in violation of section 18-6-302, C.R.S.

(e) Notwithstanding the time period for registration specified in paragraph (a) of this subsection (1), any person who is discharged from the department of corrections of this state or another state without supervision shall register in the manner provided in paragraph (a) of this subsection (1) no later than the next business day following discharge.

(2) Persons who reside within the corporate limits of any city, town, or city and county shall register at the office of the chief law enforcement officer of such city, town, or city and county; except that, if there is no chief law enforcement officer of the city, town, or city and county in which a person resides, the person shall register at the office of the county sheriff of the county in which the person resides. Persons who reside outside of the corporate limits of any city, town, or city and county shall register at the office of the county sheriff of the county where such person resides.

(2.5) (a) Any person who is required to register pursuant to section 16-22-103 and who has been convicted of a child sex crime shall be required to register all e-mail addresses, instant-messaging identities, or chat room identities prior to using the address or identity. The entity that accepts the registration of a person required to register all e-mail addresses shall make a reasonable effort to verify all e-mail addresses provided by the person.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (2.5), a person shall not be required to register an employment e-mail address if:

(I) The person's employer provided the e-mail address for use primarily in the course of the person's employment;

(II) The e-mail address identifies the employer by name, initials, or other commonly recognized identifier; and

(III) The person required to register is not an owner or operator of the employing entity that provided the e-mail address.

(c) For purposes of this section, "child sex crime" means sexual assault on a child, as described in section 18-3-405, C.R.S.; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3, C.R.S.; unlawful sexual contact, as described in section 18-3-404 (1.5), C.R.S.; enticement of a child, as described in section 18-3-305, C.R.S.; aggravated incest, as described in section 18-6-302 (1) (b), C.R.S.; trafficking in children, as described in section 18-3-502, C.R.S.; sexual exploitation of children, as described in section 18-6-403, C.R.S.; procurement of a child for sexual exploitation, as described in section 18-6-404, C.R.S.; soliciting for child prostitution, as described in section 18-7-402, C.R.S.; pandering of a child, as described in section 18-7-403, C.R.S.; procurement of a child, as described in section 18-7-403.5, C.R.S.; keeping a place of child prostitution, as described in section 18-7-404, C.R.S.; pimping of a child, as described in section 18-7-405, C.R.S.; inducement of child prostitution, as described in section 18-7-405.5, C.R.S.; patronizing a prostituted child, as described in section 18-7-406, C.R.S.; internet luring of

a child, as described in section 18-3-306, C.R.S.; internet sexual exploitation of a child, as described in section 18-3-405.4, C.R.S.; wholesale promotion of obscenity to a minor, as described in section 18-7-102 (1.5), C.R.S.; promotion of obscenity to a minor, as described in section 18-7-102 (2.5), C.R.S.; sexual assault, as described in section 18-3-402 (1) (d) and (1) (e), C.R.S.; sexual assault in the second degree as it existed prior to July 1, 2000, as described in section 18-3-403 (1) (e) and (1) (e.5), C.R.S.; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this paragraph (c).

(d) The entity that accepts the registration of a person required to register all e-mail addresses, instant-messaging identities, or chat room identities pursuant to paragraph (a) of this subsection (2.5) shall require the person to sign a statement that the e-mail addresses, instant-messaging identities, or chat room identities provided on the registration form are e-mail addresses, instant-messaging identities, or chat room identities that the person has the authority to use. The statement shall also state that providing false information related to the person's e-mail addresses, instant-messaging identities, or chat room identities may constitute a misdemeanor or felony criminal offense. This signed statement constitutes a reasonable effort to verify all e-mail addresses provided by the person as required by paragraph (a) of this subsection (2.5), but does not preclude additional verification efforts.

(3) Any person who is required to register pursuant to section 16-22-103 shall be required to register within five business days before or after each time the person:

(a) Changes such person's address, regardless of whether such person has moved to a new address within the jurisdiction of the law enforcement agency with which such person previously registered:

(a.5) Changes the address at which a vehicle, trailer, or motor home is located, if the vehicle, trailer, or motor home is the person's place of residence, regardless of whether the new address is within the jurisdiction of the law enforcement agency with which such person previously registered;

(b) Legally changes such person's name;

(c) Establishes an additional residence in another jurisdiction or an additional residence in the same jurisdiction;

(d) Becomes employed or changes employment or employment location, if employed at an institution of postsecondary education;

(e) Becomes enrolled or changes enrollment in an institution of postsecondary education, or changes the location of enrollment;

(f) Becomes a volunteer or changes the volunteer work location, if volunteering at an institution of postsecondary education;

(g) Changes his or her e-mail address, instant-messaging identity, or chat room identity, if the person is required to register that information pursuant to subsection (2.5) of this section. The person shall register the e-mail address, instant-messaging identity, or chat room identity prior to using it.

(h) Ceases to lack a fixed residence and establishes a residence; or

(i) Ceases to reside at an address and lacks a fixed residence.

(4) (a) (I) Any time a person who is required to register pursuant to section 16-22-103 ceases to reside at an address, the person shall register with the local law enforcement agency for his or her new address and include the address at which the person will no longer reside and all addresses at which the person will reside. The person shall file the new registration form within five business days after ceasing to reside at an address. The local law enforcement agency that receives the new registration form shall inform the previous jurisdiction of the cancellation of that registration and shall electronically notify the CBI of the registration cancellation.

(II) Any time a person who is required to register pursuant to section 16-22-103 ceases to reside at an address and moves to another state, the person shall notify the local law enforcement agency of the jurisdiction in which said address is located by completing a written registration cancellation form, available from the local law enforcement agency. At a minimum, the registration cancellation form shall indicate the address at which the person will no longer reside and all addresses at which the person will reside. The person shall file the registration cancellation form within five business days after ceasing to reside at an address. A local law enforcement agency that receives a registration cancellation form shall

electronically notify the CBI of the registration cancellation. If the person moves to another state, the CBI shall promptly notify the agency responsible for registration in the other state.

(b) If a person fails to submit the new registration form or registration cancellation form as required in paragraph (a) of this subsection (4) and the address at which the person is no longer residing is a group facility, officials at such facility may provide information concerning the person's cessation of residency to the local law enforcement agency of the jurisdiction in which the address is located. If the person is a juvenile or developmentally disabled and fails to submit the registration cancellation form as required in paragraph (a) of this subsection (4) and the address at which the person is no longer residing is the residence of his or her parent or legal guardian, the person's parent or legal guardian may provide information concerning the person's cessation of residency to the local law enforcement agency of the jurisdiction in which the address is located. Any law enforcement agency that receives such information shall reflect in its records that the person no longer resides at said group facility or the parent's or legal guardian's residence and shall transmit such information to the CBI. Provision of information by a group facility or a person's parent or legal guardian pursuant to this paragraph (b) shall not constitute a defense to a charge of failure to register as a sex offender.

(5) During the initial registration process for a temporary resident, the local law enforcement agency with which the temporary resident is registering shall provide the temporary resident with the registration information specified in section 16-22-105. A temporary resident who is required to register pursuant to the provisions of section 16-22-103 shall, within five business days after arrival in Colorado, register with the local law enforcement agency of each jurisdiction in which the temporary resident resides.

(6) Any person required to register pursuant to section 16-22-103, at the time the person registers with any local law enforcement agency in this state, and thereafter when annually reregistering on the person's birthday or the first business day following the birthday as required in paragraph (b) of subsection (1) of this section, shall sit for a current photograph or image of himself or herself and shall supply a set of fingerprints to verify the person's identity. The person shall bear the cost of the photograph or image and fingerprints.

(7) (a) A local law enforcement agency may establish a registration fee to be paid by persons registering and reregistering annually or quarterly with the local law enforcement agency pursuant to the provisions of this section. The amount of the fee shall reflect the actual direct costs incurred by the local law enforcement agency in implementing the provisions of this article but shall not exceed seventy-five dollars for the initial registration with the local law enforcement agency and twenty-five dollars for any subsequent annual or quarterly registration.

(b) The local law enforcement agency may waive the fee for an indigent person. For all other persons, the local law enforcement agency may pursue payment of the fee through a civil collection process or any other lawful means if the person is unable to pay at the time of registration. A local law enforcement agency shall accept a timely registration in all circumstances even if the person is unable to pay the fee at the time of registration.

(c) A local law enforcement agency may not charge a fee to a person who provides an update to his or her information pursuant to subsection (3) of this section.

Source: **L. 2002:** Entire article added, p. 1167, § 1, effective July 1; (3) amended, p. 1201, § 3, effective July 1. **L. 2004:** (1)(a), (1)(b), (1)(d)(I), (1)(d)(II)(A), (1)(e), (3)(d), (5), and (6) amended and (1)(d)(I.5) and (7) added, pp. 1112, 1114, §§ 8, 9, effective May 27. **L. 2007:** (1)(c) amended and (3)(a.5) added, p. 211, §§ 2, 3, effective March 26; (2.5) and (3)(g) added and (3)(e) and (3)(f) amended, pp. 1680, 1681, §§ 1, 2, effective July 1. **L. 2010:** (2.5)(c) amended, (SB 10-140), ch. 156, p. 537, § 7, effective April 21. **L. 2011:** (1)(b), IP(3), (3)(a.5), (4), and (7) amended, (HB 11-1278), ch. 224, p. 961, § 6, effective May 27. **L. 2012:** (1)(a), (1)(d)(I), IP(3), and (3)(f) amended and (3)(h) and (3)(i) added, (HB12-1346), ch. 220, p. 942, § 4, effective July 1.

ANNOTATION

Defendant charged under former version of registration statute is properly registered if he or she registers either on his or her birth-day or the first business day thereafter. Court may not infer the intent of the general assembly

by review of a subsequent amendment to the statute, and plain meaning of prior statute allowed for registration on either day. *People v. Duncan*, 109 P.3d 1044 (Colo. App. 2004) (decided under former § 18-3-412.5 (3)(a)(I)).

16-22-109. Registration forms - local law enforcement agencies - duties. (1) The director of the CBI shall prescribe standardized forms to be used to comply with this article, and the CBI shall provide copies of the standardized forms to the courts, probation departments, community corrections programs, the department of corrections, the department of human services, and local law enforcement agencies. The standardized forms may be provided in electronic form. The standardized forms shall be used to register persons pursuant to this article and to enable persons to cancel registration, as necessary. The standardized forms shall provide that the persons required to register pursuant to section 16-22-103 disclose such information as is required on the standardized forms. The information required on the standardized forms shall include, but need not be limited to:

(a) The name, date of birth, address, and place of employment of the person required to register, and, if the place of employment is at an institution of postsecondary education, all addresses and locations of the institution of postsecondary education at which the person may be physically located;

(a.3) If the person's place of residence is a trailer or motor home, the address at which the trailer or motor home is lawfully located and the vehicle identification number, license tag number, registration number, and description, including color scheme, of the trailer or motor home;

(a.5) If the person is volunteering at an institution of postsecondary education, all addresses and locations of the institution of postsecondary education at which the person may be physically located;

(a.7) If the person enrolls or is enrolled in an institution of a postsecondary education, all addresses and locations of the institution of postsecondary education at which the person attends classes or otherwise participates in required activities;

(a.9) If a person lacks a fixed residence, any public or private locations where the person may be found or habitually sleeps, which information may include, but need not be limited to, cross-streets, intersections, directions to or identifiable landmarks of the locations, or any other information necessary to accurately identify the locations;

(b) All names used at any time by the person required to register, including both aliases and legal names;

(c) For any person who is a temporary resident of the state, the person's address in his or her state of permanent residence and the person's place of employment in this state or the educational institution in which he or she is enrolled in this state and, if the temporary resident of the state is enrolled in, employed by, or volunteers at an institution of postsecondary education, all addresses and locations of the institution of postsecondary education at which the temporary resident attends classes or otherwise participates in required activities or works or performs volunteer activities;

(d) The name, address, and location of any institution of postsecondary education where the person required to register is enrolled;

(e) The name, address, and location of any institution of postsecondary education where the person required to register volunteers;

(f) The vehicle identification number, license tag number, registration number, and description, including color scheme, of any motor vehicle owned or leased by the person;

(g) All e-mail addresses, instant-messaging identities, and chat room identities to be used by the person if the person is required to register that information pursuant to section 16-22-108 (2.5).

(2) The standardized forms prepared by the CBI pursuant to this section, including electronic versions of said forms, shall be admissible in court without exclusion on hearsay

or other evidentiary grounds and shall be self-authenticating as a public record pursuant to the Colorado rules of evidence.

(3) Upon receipt of any completed registration form pursuant to this article, the local law enforcement agency shall retain a copy of such form and shall report the registration to the CBI in the manner and on the standardized form prescribed by the director of the CBI. The local law enforcement agency shall, within three business days after the date on which a person is required to register, report to the CBI such registration and, if it is the registrant's first registration with the local law enforcement agency, transmit the registrant's fingerprints to the CBI. The local law enforcement agency shall transfer additional sets of fingerprints only when requesting CBI to conduct a comparison. The local law enforcement agency shall transmit a photograph of a registrant only upon request of the CBI.

(3.5) (a) The local law enforcement agency with which a person registers pursuant to this article shall, as soon as possible following the registrant's first registration with the local law enforcement agency and at least annually thereafter, verify the residential address reported by the registrant on the standardized form; except that, if the registrant is a sexually violent predator, the local law enforcement agency shall verify the registrant's residential address quarterly.

(b) If a person registers as "lacks a fixed residence", verification of the location or locations reported by the person shall be accomplished by the self-verification enhanced reporting process as described in paragraph (c) of this subsection (3.5). A local law enforcement agency shall not be required to verify the physical location of a person who is required to comply with the self-verification enhanced reporting process.

(c) (I) In addition to any other requirements pursuant to this article, a person who is subject to annual registration and who lacks a fixed residence shall, at least every three months, report to the local law enforcement agency in whose jurisdiction or jurisdictions the person is registered for the self-verification enhancement reporting of the location or locations where the person remains without a fixed residence. The self-verification process shall be accomplished consistent with any time schedule established by the local jurisdiction, which may include a time schedule that is within five business days before or after the person's birthday. The person shall be required to verify his or her location or locations and verify any and all information required to be reported pursuant to this section.

(II) In addition to any other requirements pursuant to this article, a person who is subject to quarterly registration or registration every three months and who lacks a fixed residence shall, at least every month, report to each local law enforcement agency in whose jurisdiction the person is registered for the self-verification enhanced reporting of the location or locations where the person remains without a fixed residence. The self-verification process shall be accomplished consistent with any time schedule established by the local jurisdiction, which may include a time schedule that is within five business days before or after the person's birthday. The person shall be required to verify his or her location or locations and verify any and all information required to be reported pursuant to section 16-22-109.

(III) A person required to register pursuant to this article who lacks a fixed residence and who fails to comply with the provisions of subparagraphs (I) and (II) of this paragraph (c) is subject to prosecution for the crime of failure to verify location as defined in section 18-3-412.6, C.R.S.

(d) Beginning on July 1, 2012, and ending January 1, 2015, the Colorado bureau of investigation and each local law enforcement agency, subject to available resources, shall report every six months to the department of public safety the number of persons who registered without a fixed residence. The department may require additional information to be reported. By March 31, 2015, the department shall assess the effectiveness of the registration for offenders who lack a fixed residence.

(4) The forms completed by persons required to register pursuant to this article shall be confidential and shall not be open to inspection by the public or any person other than law enforcement personnel, except as provided in sections 16-22-110 (6), 16-22-111, and 16-22-112 and section 25-1-124.5, C.R.S.

(5) Notwithstanding any provision of this article to the contrary, a requirement for electronic notification or electronic transmission of information specified in this article shall

be effective on and after January 1, 2005. Prior to said date, or if an agency does not have access to electronic means of transmitting information, the notification and information requirements shall be met by providing the required notification or information by a standard means of transmittal.

Source: **L. 2002:** Entire article added, p. 1170, § 1, effective July 1; (1) amended, p. 1201, § 4, effective July 1. **L. 2003:** (5) RC&RE, p. 760, § 4, effective March 25. **L. 2004:** (1)(a), (1)(a.5), and (3) amended, (3.5) added, and (5) RC&RE, p. 1115, §§ 10, 11, effective May 27. **L. 2006:** (1)(a.3) added, p. 1005, § 2, effective July 1. **L. 2007:** IP(1) and (1)(a.3) amended and (1)(f) added, p. 210, § 1, effective March 26; IP(1) amended and (1)(g) added, p. 1682, § 3, effective July 1. **L. 2012:** (1)(a.9) added and (3.5) amended, (HB 12-1346), ch. 220, p. 943, § 5, effective July 1.

Editor's note: (1) Subsection (5)(b) provided for the repeal of subsection (5), effective January 1, 2003. (See L. 2002, p. 1170.)

(2) Subsection (5)(b) provided for the repeal of subsection (5), effective January 1, 2004. (See L. 2003, p. 760.)

16-22-110. Colorado sex offender registry - creation - maintenance - release of information. (1) The director of the Colorado bureau of investigation shall establish a statewide central registry of persons required to register pursuant to section 16-8-115 or 16-8-118 or as a condition of parole or pursuant to this article, to be known as the Colorado sex offender registry. The CBI shall create and maintain the sex offender registry as provided in this section. In addition, the CBI shall be the official custodian of all registration forms completed pursuant to this article and other documents associated with sex offender registration created pursuant to this article.

(2) The sex offender registry shall provide, at a minimum, the following information to all criminal justice agencies with regard to registered persons:

- (a) Identification of a person's registration status;
- (b) A person's date of birth;
- (c) Descriptions of the offenses of unlawful sexual behavior of which a person has been convicted;
- (d) Identification of persons who are identified as sexually violent predators;
- (e) Notification to local law enforcement agencies when a person who is required to register pursuant to section 16-22-103 fails to register, when a person is required to reregister as provided in section 16-22-108, or when a person reregisters with another jurisdiction in accordance with the provisions of section 16-22-108;
- (f) Specification of modus operandi information concerning any person who is required to register pursuant to section 16-22-103.

(3) (a) In addition to the sex offender registry, the CBI shall maintain one or more interactive data base systems to provide, at a minimum, cross validation of a registrant's known names and known addresses with information maintained by the department of revenue concerning driver's licenses and identification cards issued under article 2 of title 42, C.R.S. Discrepancies between the known names or known addresses listed in the sex offender registry and information maintained by the department of revenue shall be reported through the Colorado crime information center to each local law enforcement agency that has jurisdiction over the location of the person's last-known residences.

(b) The Colorado integrated criminal justice information system established pursuant to article 20.5 of this title shall be used to facilitate the exchange of information among agencies as required in this subsection (3) whenever practicable.

(3.5) The Colorado bureau of investigation shall develop an interactive database within the sex offender registry to provide, at a minimum, the following information to all criminal justice agencies in whose jurisdictions an institution of postsecondary education is located:

- (a) Identification of all persons required to register pursuant to section 16-22-103 who volunteer or are employed or enrolled at an institution of postsecondary education and the institution at which each such person volunteers, is employed, or is enrolled;

(b) Identification of all persons who are sexually violent predators who volunteer or are employed or enrolled at an institution of postsecondary education and the institution at which each such person volunteers, is employed, or is enrolled.

(4) Upon development of the interactive databases pursuant to subsection (3) of this section, personnel in the judicial department, the department of corrections, and the department of human services shall be responsible for entering and maintaining in the databases the information specified in subsection (2) of this section for persons in those departments' legal or physical custody. Each local law enforcement agency shall be responsible for entering and maintaining in the databases the information for persons registered with the agency who are not in the physical or legal custody of the judicial department, the department of corrections, or the department of human services.

(5) The CBI, upon receipt of fingerprints and conviction data concerning a person convicted of unlawful sexual behavior, shall transmit promptly such fingerprints and conviction data to the federal bureau of investigation.

(6) (a) The general assembly hereby recognizes the need to balance the expectations of persons convicted of offenses involving unlawful sexual behavior and the public's need to adequately protect themselves and their children from these persons, as expressed in section 16-22-112 (1). The general assembly declares, however, that, in making information concerning persons convicted of offenses involving unlawful sexual behavior available to the public, it is not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

(b) Pursuant to a request for a criminal history check under the provisions of part 3 of article 72 of title 24, C.R.S., the CBI may inform the requesting party as to whether the person who is the subject of the criminal history check is on the sex offender registry.

(c) 'A person may request from the CBI a list of persons on the sex offender registry.

(d) (Deleted by amendment, L. 2005, p. 611, § 1, effective May 27, 2005.)

(e) Any person requesting information pursuant to paragraph (c) of this subsection (6) shall show proper identification.

(f) Information released pursuant to this subsection (6), at a minimum, shall include the name, address or addresses, and aliases of the registrant; the registrant's date of birth; a photograph of the registrant, if requested and readily available; and the conviction resulting in the registrant being required to register pursuant to this article. Information concerning victims shall not be released pursuant to this section.

(7) The CBI may assess reasonable fees for the search, retrieval, and copying of information requested pursuant to subsection (6) of this section. The amount of such fees shall reflect the actual costs, including but not limited to personnel and equipment, incurred in operating and maintaining the sex offender registry. Any such fees received shall be credited to the sex offender registry fund, which fund is hereby created in the state treasury. The moneys in the sex offender registry fund shall be subject to annual appropriation by the general assembly for the costs, including but not limited to personnel and equipment, incurred in operating and maintaining the sex offender registry. The sex offender registry fund shall consist of the moneys credited thereto pursuant to this subsection (7) and subsection (9) of this section and any additional moneys that may be appropriated thereto by the general assembly. All interest derived from the deposit and investment of moneys in the sex offender registry fund shall be credited to the fund. At the end of any fiscal year, all unexpended and unencumbered moneys in the sex offender registry fund shall remain therein and shall not be credited or transferred to the general fund or any other fund.

(8) Any information released pursuant to this section shall include in writing the following statement:

The Colorado sex offender registry includes only those persons who have been required by law to register and who are in compliance with the sex offender registration laws. Persons should not rely solely on the sex offender registry as a safeguard against perpetrators of sexual assault in their communities. The crime for which a person is convicted may not accurately reflect the level of risk.

(9) The CBI shall seek and is hereby authorized to receive and expend any public or private gifts, grants, or donations that may be available to implement the provisions of this article pertaining to establishment and maintenance of the sex offender registry, including but not limited to provisions pertaining to the initial registration of persons pursuant to section 16-22-104 and the transmittal of information between and among local law enforcement agencies, community corrections programs, the judicial department, the department of corrections, the department of human services, and the CBI. Any moneys received pursuant to this subsection (9), except federal moneys that are custodial funds, shall be transmitted to the state treasurer for deposit in the sex offender registry fund created in subsection (7) of this section.

Source: **L. 2002:** Entire article added, p. 1171, § 1, effective July 1; (1) amended, p. 500, § 5, effective July 1; (3.5) added, p. 1202, § 5, effective July 1. **L. 2004:** (2)(c), (3)(a), (6)(d), (6)(f), (7), and (9) amended, p. 1116, § 12, effective May 27. **L. 2005:** (6) amended, p. 611, § 1, effective May 27.

16-22-111. Internet posting of sex offenders - procedure. (1) The CBI shall post a link on the state of Colorado homepage on the internet to a list containing the names, addresses, and physical descriptions of certain persons and descriptions of the offenses committed by said persons. A person's physical description shall include, but need not be limited to, the person's sex, height, and weight, any identifying characteristics of the person, and a digitized photograph or image of the person. The list shall specifically exclude any reference to any victims of the offenses. The list shall include the following persons:

- (a) Any person who is a sexually violent predator;
- (b) Any person sentenced as or found to be a sexually violent predator under the laws of another state or jurisdiction;
- (c) Any person who is required to register pursuant to section 16-22-103 and who has been convicted as an adult of two or more of the following offenses:
 - (I) A felony offense involving unlawful sexual behavior; or
 - (II) A crime of violence as defined in section 18-1.3-406, C.R.S.; and
- (d) Any person who is required to register pursuant to section 16-22-103 because the person was convicted of a felony as an adult and who fails to register as required by section 16-22-108.

(1.5) In addition to the posting required by subsection (1) of this section, the CBI may post a link on the state of Colorado homepage on the internet to a list, including but not limited to the names, addresses, and physical descriptions of any person required to register pursuant to section 16-22-103, as a result of a conviction for a felony. A person's physical description shall include, but need not be limited to, the person's sex, height, weight, and any other identifying characteristics of the person. The list shall specifically exclude any reference to any victims of the offenses.

(2) (a) For purposes of paragraph (d) of subsection (1) of this section, a person's failure to register shall be determined by the CBI. Whenever the CBI's records show that a person has failed to register as required by this article, the CBI shall forward to each law enforcement agency with which the person is required to register notice of the person's failure to register by the required date. Each law enforcement agency, within three business days after receiving the notice, shall submit to the CBI written confirmation of the person's failure to register. Upon receipt of the written confirmation from the law enforcement agency, the CBI shall post the information concerning the person on the internet as required in this section.

(b) If a local law enforcement agency files criminal charges against a person for failure to register as a sex offender, as described in section 18-3-412.5, C.R.S., the local law enforcement agency shall notify the CBI. On receipt of the notification, the CBI shall post the information concerning the person on the internet, as specified in subsection (1) of this section.

(3) The internet posting required by this section shall be in addition to any other release of information authorized pursuant to this article or pursuant to part 9 of article 13 of this title, or any other provision of law.

Source: **L. 2002:** Entire article added, p. 1174, § 1, effective July 1; (1)(c)(II) amended, p. 1567, § 394, effective October 1. **L. 2004:** (1)(b) and (2) amended, p. 1117, § 13, effective May 27. **L. 2005:** (1.5) added, p. 615, § 3, effective May 27.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(c)(II), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Posting of defendant's personal information on the internet does not constitute additional punishment. People v. Stead, 66 P.3d 117 (Colo. App. 2002) (decided under § 18-3-412.5).

16-22-112. Release of information - law enforcement agencies. (1) The general assembly finds that persons convicted of offenses involving unlawful sexual behavior have a reduced expectation of privacy because of the public's interest in public safety. The general assembly further finds that the public must have access to information concerning persons convicted of offenses involving unlawful sexual behavior that is collected pursuant to this article to allow them to adequately protect themselves and their children from these persons. The general assembly declares, however, that, in making this information available to the public, as provided in this section and section 16-22-110 (6), it is not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

(2) (a) A local law enforcement agency shall release information regarding any person registered with the local law enforcement agency pursuant to this article to any person residing within the local law enforcement agency's jurisdiction. In addition, the local law enforcement agency may post the information specified in paragraph (b) of this subsection (2) on the law enforcement agency's web site.

(b) A local law enforcement agency may post on its web site sex offender registration information of a person from its registration list only if the person is:

(I) An adult convicted of a felony requiring the adult to register pursuant to section 16-22-103;

(II) An adult convicted of a second or subsequent offense of any of the following misdemeanors:

(A) Sexual assault as described in section 18-3-402 (1) (e), C.R.S.;

(B) Unlawful sexual contact as described in section 18-3-404, C.R.S.;

(C) Sexual assault on a client as described in section 18-3-405.5 (2), C.R.S.;

(D) Sexual exploitation of a child by possession of sexually exploitive material as described in section 18-6-403, C.R.S.;

(E) Indecent exposure as described in section 18-7-302, C.R.S.; or

(F) Sexual conduct in a correctional institution as described in section 18-7-701, C.R.S.;

(III) A juvenile with a second or subsequent adjudication involving unlawful sexual behavior or for a crime of violence as defined in section 18-1.3-406, C.R.S.; or

(IV) A juvenile who is required to register pursuant to section 16-22-103 because he or she was adjudicated for an offense that would have been a felony if committed by an adult and has failed to register as required by section 16-22-103.

(3) (a) (Deleted by amendment, L. 2005, p. 612, § 2, effective May 27, 2005.)

(b) At its discretion, a local law enforcement agency may release information regarding any person registered with the local law enforcement agency pursuant to this article to any person who does not reside within the local law enforcement agency's jurisdiction or may post the information specified in paragraph (b) of subsection (2) of this section on the law enforcement agency's web site. If a local law enforcement agency does not elect to release information regarding any person registered with the local law enforcement agency to a person not residing within the local law enforcement agency's jurisdiction, the local law enforcement agency may submit a request from the person to the CBI.

(c) (Deleted by amendment, L. 2005, p. 612, § 2, effective May 27, 2005.)

(d) Upon receipt of a request for information from a law enforcement agency pursuant to this subsection (3), the CBI shall mail the requested information to the person making the request.

(e) (Deleted by amendment, L. 2007, p. 648, § 1, effective April 26, 2007.)

(3.5) To assist members of the public in protecting themselves from persons who commit offenses involving unlawful sexual behavior, a local law enforcement agency that chooses to post sex offender registration information on its web site shall either post educational information concerning protection from sex offenders on its web site or provide a link to the educational information included on the CBI web site maintained pursuant to section 16-22-111. A local law enforcement agency that posts the educational information shall work with the sex offender management board created pursuant to section 16-11.7-103 and sexual assault victims' advocacy groups in preparing the educational information.

(4) Information released pursuant to this section, at a minimum, shall include the name, address or addresses, and aliases of the registrant; the registrant's date of birth; a photograph of the registrant, if requested and readily available; and a history of the convictions of unlawful sexual behavior resulting in the registrant being required to register pursuant to this article. Information concerning victims shall not be released pursuant to this section.

(5) Any information released pursuant to this section shall include in writing the following statement:

The Colorado sex offender registry includes only those persons who have been required by law to register and who are in compliance with the sex offender registration laws. Persons should not rely solely on the sex offender registry as a safeguard against perpetrators of sexual assault in their communities. The crime for which a person is convicted may not accurately reflect the level of risk.

Source: **L. 2002:** Entire article added, p. 1174, § 1, effective July 1. **L. 2004:** (4) amended, p. 1118, § 14, effective May 27. **L. 2005:** Entire section amended, p. 612, § 2, effective May 27. **L. 2006:** (2)(b)(III) and (3)(e)(III) amended, p. 421, § 2, effective April 13; (2)(b)(II)(D) amended, p. 2043, § 2, effective July 1. **L. 2007:** (3)(b) and (3)(e) amended and (3.5) added, p. 648, § 1, effective April 26. **L. 2010:** (2)(b)(II)(F) amended, (HB 10-1277), ch. 262, p. 1190, § 3, effective July 1.

16-22-113. Petition for removal from registry. (1) Except as otherwise provided in subsection (3) of this section, any person required to register pursuant to section 16-22-103 or whose information is required to be posted on the internet pursuant to section 16-22-111 may file a petition with the court that issued the order of judgment for the conviction that requires the person to register for an order to discontinue the requirement for such registration or internet posting, or both, as follows:

(a) Except as otherwise provided in paragraphs (d), (e), and (f) of this subsection (1), if the offense that required such person to register constituted or would constitute a class 1, 2, or 3 felony, after a period of twenty years from the date of such person's discharge from the department of corrections, if such person was sentenced to incarceration, or discharge from the department of human services, if such person was committed, or final release from the jurisdiction of the court for such offense, if such person has not subsequently been convicted of unlawful sexual behavior or of any other offense, the underlying factual basis of which involved unlawful sexual behavior;

(b) Except as otherwise provided in paragraphs (d), (e), and (f) of this subsection (1), if the offense that required such person to register constituted or would constitute a class 4, 5, or 6 felony or the class 1 misdemeanor of unlawful sexual contact, as described in section 18-3-404, C.R.S., or sexual assault in the third degree as described in section 18-3-404, C.R.S., as it existed prior to July 1, 2000, after a period of ten years from the date of such person's discharge from the department of corrections, if such person was sentenced to incarceration, or discharge from the department of human services, if such person was committed, or final release from the jurisdiction of the court for such offense, if such person

has not subsequently been convicted of unlawful sexual behavior or of any other offense, the underlying factual basis of which involved unlawful sexual behavior;

(c) Except as otherwise provided in paragraphs (d), (e), and (f) of this subsection (1), if the offense that required such person to register constituted or would constitute a misdemeanor other than the class 1 misdemeanor of unlawful sexual contact, as described in section 18-3-404, C.R.S., or sexual assault in the third degree as described in section 18-3-404, C.R.S., as it existed prior to July 1, 2000, after a period of five years from the date of such person's final release from the jurisdiction of the court for such offense, if such person has not subsequently been convicted of unlawful sexual behavior or of any other offense, the underlying factual basis of which involved unlawful sexual behavior;

(d) If the person was required to register due to being placed on a deferred judgment and sentence or a deferred adjudication for an offense involving unlawful sexual behavior, after the successful completion of the deferred judgment and sentence or deferred adjudication and dismissal of the case, if the person prior to such time has not been subsequently convicted of unlawful sexual behavior or of any other offense, the underlying factual basis of which involved unlawful sexual behavior and the court did not issue an order either continuing the duty to register or discontinuing the duty to register pursuant to paragraph (a) of subsection (1.3) of this section;

(e) If the person was younger than eighteen years of age at the time of disposition or adjudication, after the successful completion of and discharge from the sentence, if the person prior to such time has not been subsequently convicted of unlawful sexual behavior or of any other offense, the underlying factual basis of which involved unlawful sexual behavior and the court did not issue an order either continuing the duty to register or discontinuing the duty to register pursuant to paragraph (b) of subsection (1.3) of this section. Any person petitioning pursuant to this paragraph (e) may also petition for an order removing his or her name from the sex offender registry. In determining whether to grant the order, the court shall consider whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior. The court shall base its determination on recommendations from the person's probation or community parole officer, the person's treatment provider, and the prosecuting attorney for the jurisdiction in which the person was tried and on the recommendations included in the person's presentence investigation report. In addition, the court shall consider any written or oral testimony submitted by the victim of the offense for which the petitioner was required to register. Notwithstanding the provisions of this subsection (1), a juvenile who files a petition pursuant to this section may file the petition with the court to which venue is transferred pursuant to section 19-2-105, C.R.S., if any.

(f) If the information about the person was required to be posted on the internet pursuant to section 16-22-111 (1) (d) only for failure to register, if the person has fully complied with all registration requirements for a period of not less than one year and if the person, prior to such time, has not been subsequently convicted of unlawful sexual behavior or of any other offense, the underlying factual basis of which involved unlawful sexual behavior; except that the provisions of this paragraph (f) shall apply only to a petition to discontinue the requirement for internet posting.

(1.3) (a) If a person is eligible to petition to discontinue his or her duty to register pursuant to paragraph (d) of subsection (1) of this section, the court, at least sixty-three days before dismissing the case, shall notify each of the parties described in paragraph (a) of subsection (2) of this section, the person, and the victim of the offense for which the person was required to register, if the victim has requested notice and has provided current contact information, that the court will consider whether to order that the person may discontinue his or her duty to register when the court dismisses the case as a result of the person's successful completion of the deferred judgment and sentence or deferred adjudication. The court shall set the matter for hearing if any of the parties described in paragraph (a) of subsection (2) of this section or the victim of the offense objects or if the person requests a hearing. If the court enters an order discontinuing the person's duty to register, the person shall send a copy of the order to each local law enforcement agency with which the person is registered and to the CBI. If the victim of the offense has requested notice, the court shall

notify the victim of its decision either to continue or discontinue the person's duty to register.

(b) (I) If a juvenile is eligible to petition to discontinue his or her duty to register pursuant to paragraph (e) of subsection (1) of this section, the court, at least sixty-three days before discharging the juvenile's sentence, shall notify each of the parties described in paragraph (a) of subsection (2) of this section, the juvenile, and the victim of the offense for which the juvenile was required to register, if the victim has requested notice and has provided current contact information, that the court shall consider whether to order that the juvenile may discontinue his or her duty to register when the court discharges the juvenile's sentence. The court shall set the matter for hearing if any of the parties described in paragraph (a) of subsection (2) of this section or the victim of the offense objects, or if the juvenile requests a hearing, and shall consider the criteria in paragraph (e) of subsection (1) of this section in determining whether to continue or discontinue the duty to register. If the court enters an order discontinuing the juvenile's duty to register, the department of human services shall send a copy of the order to each local law enforcement agency with which the juvenile is registered, the juvenile parole board, and to the CBI. If the victim of the offense has requested notice, the court shall notify the victim of its decision either to continue or discontinue the juvenile's duty to register.

(II) If a juvenile is eligible to petition to discontinue his or her registration pursuant to paragraph (e) of subsection (1) of this section and is under the custody of the department of human services and yet to be released on parole by the juvenile parole board, the department of human services may petition the court to set a hearing pursuant to paragraph (e) of subsection (1) of this section at least sixty-three days before the juvenile is scheduled to appear before the juvenile parole board.

(III) If a juvenile is eligible to petition to discontinue his or her registration pursuant to paragraph (e) of subsection (1) of this section and is under the custody of the department of human services and yet to be released on parole by the juvenile parole board, the department of human services, prior to setting the matter for hearing, shall modify the juvenile's parole plan or parole hearing to acknowledge the court order or petition unless it is already incorporated in the parole plan.

(1.5) If the conviction that requires a person to register pursuant to the provisions of section 16-22-103 was not obtained from a Colorado court, the person seeking to discontinue registration or internet posting or both may file a civil case with the district court of the judicial district in which the person resides and seek a civil order to discontinue the requirement to register or internet posting or both under the circumstances specified in subsection (1) of this section.

(2) (a) Prior to filing a petition pursuant to this section, the petitioner shall notify each of the following parties by certified mail of the petitioner's intent to file a request pursuant to this section:

(I) Each local law enforcement agency with which the petitioner is required to register;

(II) The prosecuting attorney for the jurisdiction in which each such local law enforcement agency is located; and

(III) The prosecuting attorney who obtained the conviction for which the petitioner is required to register.

(b) When filing the petition, the petitioner shall attach to the petition copies of the return receipts received from each party notified pursuant to paragraph (a) of this subsection (2).

(c) Upon the filing of the petition, the court shall set a date for a hearing and shall notify the victim of the offense for which the petitioner was required to register, if the victim of the offense has requested notice and has provided current contact information. If the court enters an order discontinuing the petitioner's duty to register, the petitioner shall send a copy of the order to each local law enforcement agency with which the petitioner is registered and the CBI. If the victim of the offense has requested notice, the court shall notify the victim of the offense of its decision either to continue or discontinue the petitioner's duty to register.

(d) On receipt of a copy of an order discontinuing a petitioner's duty to register:

(I) The CBI shall remove the petitioner's sex offender registration information from the sex offender registry; and

(II) If the local law enforcement agency maintains a local registry of sex offenders who are registered with the local law enforcement agency, the local law enforcement agency shall remove the petitioner's sex offender registration information from the local sex offender registry.

(3) The following persons shall not be eligible for relief pursuant to this section, but shall be subject for the remainder of their natural lives to the registration requirements specified in this article or to the comparable requirements of any other jurisdictions in which they may reside:

(a) Any person who is a sexually violent predator;

(b) Any person who is convicted as an adult of:

(I) Sexual assault, in violation of section 18-3-402, C.R.S., or sexual assault in the first degree, in violation of section 18-3-402, C.R.S., as it existed prior to July 1, 2000, or sexual assault in the second degree, in violation of section 18-3-403, C.R.S., as it existed prior to July 1, 2000; or

(II) Sexual assault on a child, in violation of section 18-3-405, C.R.S.; or

(III) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3, C.R.S.; or

(IV) Sexual assault on a client by a psychotherapist, in violation of section 18-3-405.5, C.R.S.; or

(V) Incest, in violation of section 18-6-301, C.R.S.; or

(VI) Aggravated incest, in violation of section 18-6-302, C.R.S.;

(c) Any adult who has more than one conviction or adjudication for unlawful sexual behavior in this state or any other jurisdiction.

Source: **L. 2002:** Entire article added, p. 1176, § 1, effective July 1. **L. 2004:** IP(1) and (2)(c) amended and (1.5) and (2)(d) added, p. 1118, §§ 15, 16, effective May 27. **L. 2008:** (1)(e) amended, p. 654, § 2, effective April 25; (1)(e) amended, p. 1755, § 2, effective July 1. **L. 2011:** IP(1), (1)(d), (1)(e), and IP(2)(d) amended and (1.3) added, (HB 11-1278), ch. 224, p. 962, § 7, effective May 27. **L. 2012:** (1.3)(a), (1.3)(b)(I), and (1.3)(b)(II) amended, (SB 12-175), ch. 208, p. 861, § 100, effective July 1.

Editor's note: (1) Amendments to subsection (1)(e) by Senate Bill 08-172 and House Bill 08-1382 were harmonized.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1.3)(a), (1.3)(b)(I), and (1.3)(b)(II) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Individual who successfully completes a deferred judgment and sentence for sexual assault on a child is eligible to petition the court for removal from the sex offender registry. *People v. Perry*, 252 P.3d 45 (Colo. App. 2010).

Conviction on more than one charge of unlawful sexual behavior, whether adjudicated

in the same case or in separate cases, renders defendant ineligible for relief from status as a sex offender and for removal from sex offender registry. Statute contains no explicit limiting language that would require "multiple convictions" to be the result of more than one proceeding. *People v. Atencio*, 219 P.3d 1080 (Colo. App. 2009).

16-22-114. Immunity. State agencies and their employees and local law enforcement agencies and their employees are immune from civil or criminal liability for the good faith implementation of this article.

Source: **L. 2002:** Entire article added, p. 1178, § 1, effective July 1.

16-22-115. CBI assistance in apprehending sex offenders who fail to register. In an effort to ensure that a sexual offender who fails to respond to address-verification attempts

or who otherwise absconds from registration is located in a timely manner, the Colorado bureau of investigation shall share information with local law enforcement agencies. The Colorado bureau of investigation shall use analytical resources to assist local law enforcement agencies to determine the potential whereabouts of sex offenders who fail to respond to address-verification attempts or who otherwise abscond from registration. The Colorado bureau of investigation shall review and analyze all available information concerning a sex offender who fails to respond to address-verification attempts or otherwise absconds from registration and provide the information to local law enforcement agencies in order to assist in locating and apprehending the sex offender.

Source: L. 2006: Entire section added, p. 1005, § 1, effective July 1.

ARTICLE 23

**DNA Crime Prevention and Exoneration
of the Innocent Act**

16-23-101.	Short title.		rested for or charged with felonies.
16-23-102.	Legislative declaration.		
16-23-103.	Collection of biological samples from persons ar-	16-23-104.	Collection and testing.
		16-23-105.	Expungement.

16-23-101. Short title. This article shall be known and may be cited as “Katie’s Law”.

Source: L. 2009: Entire article added, (SB 09-241), ch. 295, p. 1573 § 1, effective September 30, 2010.

16-23-102. Legislative declaration. (1) The general assembly hereby finds and declares that:

- (a) The collection and use of DNA by law enforcement agencies is a valuable tool in preventing crime;
- (b) The analysis of DNA has been used numerous times in the exoneration of innocent individuals charged with or convicted of crimes; and
- (c) The implementation of this article will result in preventing a significant number of violent crimes in Colorado and in solving a number of unsolved crimes in Colorado.

Source: L. 2009: Entire article added, (SB 09-241), ch. 295, p. 1573, § 1, effective September 30, 2010.

16-23-103. Collection of biological samples from persons arrested for or charged with felonies. (1) The following persons shall submit to collection of a biological substance sample for testing to determine the genetic markers thereof, unless the person has previously provided a biological substance sample for such testing pursuant to a statute of this state and the Colorado bureau of investigation has that sample:

- (a) Every adult arrested on or after September 30, 2010, for a felony offense or for the investigation of a felony offense. The arresting law enforcement agency shall collect the biological substance sample from the arrested person as part of the booking process.
- (b) (I) Every adult who is charged with a felony by an indictment, information, or felony complaint filed on or after September 30, 2010, and who is not arrested in connection with the felony charge on or after September 30, 2010, whether because the person’s arrest occurred before that date, because the person’s appearance is procured by summons rather than arrest, or for other reasons.
- (II) In cases where a booking process occurs on or after September 30, 2010, the law enforcement agency conducting the booking process shall collect the biological substance sample from the charged adult as part of the booking process.
- (III) In all other cases, upon the adult’s first appearance in court following the filing of charges, the court shall require the adult to submit to collection of a biological substance

sample by the investigating agency responsible for fingerprinting pursuant to section 16-21-104, and that agency shall collect the sample.

(2) (a) At the person's first appearance in court following the filing of charges, the court shall advise the person that the biological substance sample collected pursuant to this section shall be destroyed and the results of the testing of the sample shall be expunged from the federal combined DNA index system and any state index system pursuant to the circumstances described in section 16-23-105.

(b) When an action occurs that qualifies an adult for expungement pursuant to section 16-23-105 (1), the court or district attorney shall advise the adult that the adult may make a request to the Colorado bureau of investigation to have the biological substance sample collected pursuant to this section destroyed and results of the testing of the sample expunged from the federal combined DNA index system and any state index system pursuant to the process described in section 16-23-105.

(3) If collection of a biological substance sample is impractical at the time specified in subsection (1) of this section, an appropriate agency may collect a sample at any other time during the adult's detention or during the pendency of charges.

(4) An agency collecting a biological substance sample pursuant to this section shall make reasonable efforts to determine if the Colorado bureau of investigation already holds a biological substance sample from the adult. If, but only if, the agency determines that the Colorado bureau of investigation already holds a sample from the adult, then the agency need not collect a sample.

(5) A law enforcement agency may use reasonable force to collect biological substance samples in accordance with this article using medically recognized procedures.

(6) Each law enforcement agency that collects a biological substance sample shall submit the sample to the Colorado bureau of investigation for testing.

Source: L. 2009: Entire article added, (SB 09-241), ch. 295, p. 1574, § 1, effective September 30, 2010.

16-23-104. Collection and testing. (1) The Colorado bureau of investigation shall provide all specimen vials, mailing tubes, labels, and other materials and instructions necessary for the collection of biological substance samples required pursuant to this article.

(2) The Colorado bureau of investigation shall chemically test the biological substance samples collected pursuant to this article. The Colorado bureau of investigation shall file and maintain the testing results in the state index system after receiving confirmation from the arresting or charging agency that the adult was charged with a felony. If the Colorado bureau of investigation does not receive confirmation of a felony charge within a year after receiving the sample for testing, the Colorado bureau of investigation shall destroy the biological sample and any results from the testing of the sample. The Colorado bureau of investigation shall furnish the results to a law enforcement agency upon request. The Colorado bureau of investigation shall store and preserve all biological substance samples obtained pursuant to this article.

Source: L. 2009: Entire article added, (SB 09-241), ch. 295, p. 1575, § 1, effective September 30, 2010.

16-23-105. Expungement. (1) Except as provided in subsection (7) of this section, a person whose biological substance sample is collected pursuant to section 16-23-103 qualifies for expungement if:

(a) In the case of a sample collected based upon the filing of a charge or based upon a final court order, each felony charge stemming from the charges has, by final court order, been dismissed, resulted in an acquittal, or resulted in a conviction for an offense other than a felony offense;

(b) In the case of a sample collected based upon an arrest:

(I) A felony charge was not filed within ninety days after the arrest; or

(II) Each felony charge stemming from the arrest has, by final court order, been dismissed, resulted in an acquittal, or resulted in a conviction for an offense other than a felony offense.

(2) A person who qualifies for expungement under subsection (1) of this section may submit a written request for expungement to the Colorado bureau of investigation. The request shall include the items listed in this subsection (2) and may include any additional information that may assist the bureau in locating the records of arrest or charges or the biological substance sample or testing results. The following information shall be included in the submitted request:

- (a) The person's name, date of birth, and mailing address;
- (b) The name of the agency that collected the biological substance sample;
- (c) The date of arrest or other date when the sample was taken;
- (d) Whether any charges were filed stemming from the arrest for which a biological substance sample was collected, the identity of the court, and the case number of each case in which charges were filed; and
- (e) A declaration that, to the best of the person's knowledge, he or she qualifies for expungement.

(3) Upon receipt of a request satisfying the requirements of subsection (2) of this section, the Colorado bureau of investigation shall promptly submit a written inquiry to the district attorney in the jurisdiction in which the person's biological substance sample was collected concerning the outcome of the arrest or charges.

(4) Within ninety days after receiving the request submitted pursuant to subsection (2) of this section, the Colorado bureau of investigation shall destroy the biological substance sample collected pursuant to section 16-23-103 and expunge the results of the testing of the sample from the federal combined DNA index system and any state index system, unless the bureau receives written notification from the applicable district attorney that the person does not qualify for expungement and the reasons that the person does not qualify.

(5) Within thirty days after receiving a notice from a district attorney pursuant to subsection (4) of this section, or at the end of the ninety-day period identified in subsection (4) of this section, whichever is earlier, the Colorado bureau of investigation shall send notification by first class mail to the person arrested or charged, either stating that the bureau has destroyed the biological substance sample and expunged the results of the testing of the sample or stating why the bureau has not destroyed the sample and expunged the test results.

(6) A data bank or database match shall not be admitted as evidence against a person in a criminal prosecution and shall not be used as a basis to identify a person if the match is:

(a) Derived from a biological substance sample that is required to be destroyed or expunged pursuant to this section; and

(b) Obtained after the required date of destruction or expungement.

(7) This section shall not apply if the person has been arrested for, charged with, or convicted of some other offense on the basis of which a biological substance sample was or could have been collected under state statute.

(8) For purposes of this section, a court order shall not be deemed final if time remains for an appeal or application for discretionary review with respect to the order.

Source: L. 2009: Entire article added, (SB 09-241), ch. 295, p. 1575 § 1, effective September 30, 2010. L. 2011: (1)(a) amended, (HB 11-1051), ch. 17, p. 45, § 1, effective March 11.

TITLE 17
CORRECTIONS

TITLE 17

CORRECTIONS

Editor's note: This title was numbered as articles 17 and 18 of chapter 39, C.R.S. 1963. The substantive provisions of this title were repealed and reenacted in 1977, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this title prior to 1977, consult Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

DEPARTMENT OF CORRECTIONS

Organization

Art. 1. Department of Corrections, 17-1-101 to 17-1-207.

Parole and Probation

Art. 2. Correctional Services, 17-2-100.2 to 17-2-405.

Care and Custody - Reimbursement

Art. 10. Cost of Care Reimbursement, 17-10-101 to 17-10-106.

CORRECTIONAL FACILITIES AND PROGRAMS

Facilities

Art. 18. Correctional Facilities - Statutory Appropriations, 17-18-101 to 17-18-107.

Art. 19. Correctional Facilities - Visitors and Employees, 17-19-101 and 17-19-102.

Art. 20. Correctional Facilities, 17-20-101 to 17-20-128.

Art. 21. Women's Correctional Institution (Repealed).

Art. 22. Reformatory (Repealed).

Art. 22.5. Inmate and Parole Time Computation, 17-22.5-101 to 17-22.5-407.

Art. 23. Inmates with Mental Illness or a Developmental Disability - Transfer, 17-23-101 to 17-23-103.

Art. 24. Correctional Industries, 17-24-101 to 17-24-126.

Art. 25. Minimum Security Facilities, 17-25-101 to 17-25-103.

Art. 26. Jails, 17-26-101 to 17-26-208.

Art. 26.5. Multijurisdictional Jails, 17-26.5-101 and 17-26.5-102.

Programs

Art. 27. Community Corrections Programs, 17-27-101 to 17-27-108.

Art. 27.1. Nongovernmental Facilities - Notice Requirements, 17-27.1-101.

Art. 27.5. Intensive Supervision Programs, 17-27.5-101 to 17-27.5-106.

Art. 27.7. Regimented Inmate Discipline and Treatment Program, 17-27.7-101 to 17-27.7-105.

Art. 27.8. Home Detention Programs, 17-27.8-101 to 17-27.8-106.

Art. 27.9. Specialized Restitution and Community Service Programs, 17-27.9-101 to 17-27.9-106.

Art. 28. Restitution to Victims of Crime, 17-28-101 and 17-28-102.

Art. 29. Physical Labor by Inmates, 17-29-101 to 17-29-105.

Art. 30. Interdepartmental Cooperation Concerning Offenders (Repealed).

- Art. 30.5. Interdepartmental Agreements to Consolidate Parole and Probation Offices (Repealed).
- Art. 31. Volunteerism in the Juvenile and Adult Criminal Justice System, 17-31-101 to 17-31-104.
- Art. 32. Correctional Education Program, 17-32-101 to 17-32-107.
- Art. 33. Reentry Program, 17-33-101.

DIAGNOSTIC PROGRAMS

- Art. 40. Colorado Diagnostic Program, 17-40-101 to 17-40-107.
- Art. 41. Colorado Prerelease Program (Repealed).

MISCELLANEOUS PROVISIONS

- Art. 42. Miscellaneous Provisions, 17-42-101 and 17-42-102.

DEPARTMENT OF CORRECTIONS

Organization

ARTICLE 1

Department of Corrections

Editor's note: For historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

PART 1

CORRECTIONS ADMINISTRATION

- | | | | |
|-------------|--|-------------|--|
| | | 17-1-104.8. | Legislative review of facilities program plans for correctional facilities. |
| | | 17-1-104.9. | Custody levels for state inmates at private prisons - correctional emergency - definition. |
| 17-1-101. | Executive director - creation - division heads - medical personnel. | 17-1-105. | Powers of executive director. |
| 17-1-102. | Definitions. | 17-1-105.1. | Accreditation of private contract prisons. |
| 17-1-103. | Duties of the executive director. | 17-1-105.5. | Contract rates. |
| 17-1-103.5. | Literacy corrections program - legislative declaration - repeal. (Repealed) | 17-1-106. | Transfer of functions. (Repealed) |
| 17-1-103.7. | Duties of executive director - emergency response time - legislative declaration. (Repealed) | 17-1-107. | Department may accept gifts, donations, and grants. |
| | | 17-1-107.5. | State criminal alien assistance program cash fund - creation. |
| 17-1-103.8. | Duties of executive director - inspector general - investigators - duties. | 17-1-108. | Transfer of inmates. |
| | | 17-1-109. | Duties and functions of the warden. |
| 17-1-104. | Facilities managed, supervised, and controlled. (Repealed) | 17-1-109.5. | Correctional facility employees - rules. |
| 17-1-104.3. | Correctional facilities - locations - security level. | 17-1-110. | Joint review committee on corrections. (Repealed) |
| 17-1-104.4. | Future correctional facility needs. (Repealed) | 17-1-111. | Certain provisions of the administrative procedure act not to apply. |
| 17-1-104.5. | Incarceration of inmates from other states - private contract prison facilities. | 17-1-112. | Expenses - reimbursement by department. |
| 17-1-104.6. | Planning and review requirements - legislative intent. | 17-1-112.5. | Annual audit by state auditor. (Repealed) |
| 17-1-104.7. | Management plan for housing of juveniles - report. (Repealed) | 17-1-113. | Medical visits - charge to inmates - legislative declaration. |
| | | 17-1-113.1. | Administration or monitoring |

	of medications to persons in correctional facilities.		section 2-2-703 - HB 00-1158. (Repealed)
17-1-113.3.	Telemedicine - study - report - repeal. (Repealed)	17-1-128.	Appropriation to comply with section 2-2-703 - HB 00-1111. (Repealed)
17-1-113.5.	Inmates held in correctional facilities - medical benefits application assistance - county of residence.	17-1-129.	Appropriation to comply with section 2-2-703 - HB 00-1214. (Repealed)
17-1-113.7.	Prohibition against the use of restraints on pregnant inmates in the custody of correctional facilities and private contract prisons.	17-1-130.	Appropriation to comply with section 2-2-703 - HB 00-1201. (Repealed)
17-1-113.9.	Use of administrative segregation for state inmates - reporting.	17-1-131.	Appropriation to comply with section 2-2-703 - HB 00-1317. (Repealed)
17-1-114.	Pool of funds - continuance of community supervision.	17-1-132.	Appropriation to comply with section 2-2-703 - HB 00-1107. (Repealed)
17-1-115.	Investigators employed by the department - notification to local law enforcement agencies. (Repealed)	17-1-133.	Appropriation to comply with section 2-2-703 - HB 01-1205. (Repealed)
17-1-115.5.	Prison sexual assault prevention program.	17-1-134.	Appropriation to comply with section 2-2-703 - SB 01-046. (Repealed)
17-1-116.	Corrections expansion reserve fund.	17-1-135.	Appropriation to comply with section 2-2-703 - HB 01-1204. (Repealed)
17-1-117.	Appropriation to comply with section 2-2-703 - HB 94-1052. (Repealed)	17-1-136.	Appropriation to comply with section 2-2-703 - SB 01-210. (Repealed)
17-1-118.	Appropriation to comply with section 2-2-703 - HB 96-1361. (Repealed)	17-1-137.	Appropriation to comply with section 2-2-703 - HB 01-1242. (Repealed)
17-1-119.	Lethal perimeter security systems for correctional facilities - governmental immunity - limitations.	17-1-138.	Appropriation to comply with section 2-2-703 - HB 01-1344. (Repealed)
17-1-119.5.	Compilation of data related to inmates with children attending school.	17-1-139.	Appropriation to comply with section 2-2-703 - HB 02-1301. (Repealed)
17-1-120.	Appropriation to comply with section 2-2-703 - HB 97-1077 and HB 97-1060. (Repealed)	17-1-140.	Appropriation to comply with section 2-2-703 - HB 02-1283. (Repealed)
17-1-121.	Appropriation to comply with section 2-2-703 - HB 97-1186. (Repealed)	17-1-141.	Appropriation to comply with section 2-2-703 - HB 02-1396. (Repealed)
17-1-122.	Appropriation to comply with section 2-2-703 - HB 98-1160. (Repealed)	17-1-142.	Appropriation to comply with section 2-2-703 - SB 02-050. (Repealed)
17-1-123.	Appropriation to comply with section 2-2-703 - HB 98-1156. (Repealed)	17-1-143.	Appropriation to comply with section 2-2-703 - HB 02-1038. (Repealed)
17-1-124.	Appropriation to comply with section 2-2-703 - SB 98-021. (Repealed)	17-1-144.	Appropriation to comply with section 2-2-703 - HB 02S-1006. (Repealed)
17-1-125.	Appropriation to comply with section 2-2-703 - HB 99-1068. (Repealed)	17-1-145.	Appropriation to comply with section 2-2-703 - HB 02S-1006. (Repealed)
17-1-126.	Appropriation to comply with section 2-2-703 - HB 00-1247. (Repealed)	17-1-146.	Appropriation to comply with section 2-2-703 - HB 03-1004 - repeal. (Repealed)
17-1-127.	Appropriation to comply with	17-1-147.	Appropriation to comply with section 2-2-703 - HB 03-1138 - repeal. (Repealed)
		17-1-148.	Appropriation to comply with

	section 2-2-703 - HB 03-1213 - repeal. (Repealed)	17-1-161.	Appropriation to comply with section 2-2-703 - SB 06S-005 - repeal. (Repealed)
17-1-149.	Appropriation to comply with section 2-2-703 - HB 03-1317 - repeal. (Repealed)	17-1-162.	Appropriation to comply with section 2-2-703 - SB 06S-007 - repeal. (Repealed)
17-1-150.	Appropriation to comply with section 2-2-703 - HB 04-1016 - repeal. (Repealed)	17-1-163.	Appropriation to comply with section 2-2-703 - HB 07-1040 - repeal. (Repealed)
17-1-151.	Appropriation to comply with section 2-2-703 - HB 04-1003 - repeal. (Repealed)	17-1-164.	Appropriation to comply with section 2-2-703 - SB 07-096 - repeal. (Repealed)
17-1-152.	Appropriation to comply with section 2-2-703 - HB 04-1021 - repeal. (Repealed)	17-1-165.	Appropriation to comply with section 2-2-703 - HB 07-1326 - repeal. (Repealed)
17-1-153.	Appropriation to comply with section 2-2-703 - SB 06-207 - repeal. (Repealed)		
17-1-154.	Appropriation to comply with section 2-2-703 - HB 06-1151 - repeal. (Repealed)		PART 2
17-1-155.	Appropriation to comply with section 2-2-703 - HB 06-1011 - repeal. (Repealed)		CORRECTIONS PRIVATIZATION - REQUESTS FOR PROPOSALS PROCESS
17-1-156.	Appropriation to comply with section 2-2-703 - HB 06-1145 - repeal. (Repealed)	17-1-201.	Duties of department.
17-1-157.	Appropriation to comply with section 2-2-703 - HB 06-1326 - repeal. (Repealed)	17-1-202.	Requests for competitive proposals and contract requirements.
17-1-158.	Appropriation to comply with section 2-2-703 - SB 06-206 - repeal. (Repealed)	17-1-202.5.	Private prison planning process.
17-1-159.	Appropriation to comply with section 2-2-703 - HB 06-1092 - repeal. (Repealed)	17-1-203.	Powers and duties not delegable to contractor.
17-1-160.	Appropriation to comply with section 2-2-703 - SB 06S-004 - repeal. (Repealed)	17-1-204.	Background checks.
		17-1-205.	Contract termination - control of a correctional facility by the department.
		17-1-206.	Inmates in custody of the department.
		17-1-206.5.	Parole release and revocation facility - community return-to-custody facility.
		17-1-207.	Applicability of part.

PART 1

CORRECTIONS ADMINISTRATION

17-1-101. Executive director - creation - division heads - medical personnel.

(1) The governor, with the consent of the senate, shall appoint an executive director of the department of corrections, who shall serve at the pleasure of the governor. The reappointment of an executive director after initial election of a governor shall be subject to the provisions of section 24-20-109, C.R.S.

(2) There is hereby created, within the department of corrections, the division of correctional industries, the division of adult parole, and such other divisions and programs as are deemed necessary by the executive director for the safe and efficient operation of the department. The executive director shall organize such divisions and programs in an appropriate manner. Subject to the provisions of section 13 of article XII of the state constitution, the executive director shall appoint the heads of such divisions, and the heads of such divisions shall appoint such personnel as are necessary to carry out the functions of the divisions.

(3) (a) Medical personnel employed at any of the institutions subject to the control of the executive director, the medical director of which is licensed to practice medicine in this state, shall be exempt from the provisions of the "Colorado Medical Practice Act", article 36 of title 12, C.R.S., with respect to service rendered to bona fide patients or inmates at said

institutions, if such personnel are licensed to practice medicine in any other state of the United States or any province of Canada, have satisfactorily completed an internship of not less than one year in the United States, Canada, or Puerto Rico in a hospital approved for that purpose by the American medical association, have satisfactorily completed three years of postgraduate residency training, or its equivalent, in their particular specialty in a hospital approved for that purpose by the American medical association, and can read, write, speak, and understand the English language. Proof of said requirements shall be submitted to and approved or disapproved by the executive director.

(b) All such personnel as cannot satisfy all of the requirements set forth in paragraph (a) of this subsection (3) shall be exempt from the "Colorado Medical Practice Act", article 36 of title 12, C.R.S., with respect to services rendered to bona fide patients or inmates at said institutions, if such personnel are of good moral character, are graduates of an approved medical college as defined in section 12-36-102.5, C.R.S., have completed an approved internship of at least one year as defined in section 12-36-102.5, C.R.S., and, within nine months after first being employed, pass the examinations approved by the Colorado medical board under the provisions of the "Colorado Medical Practice Act" and the national board of medical examiners, the national board of examiners for osteopathic physicians and surgeons, or the federation of state medical boards, or their successor organizations, on subjects relating to the basic sciences, are able to read, write, speak, and understand the English language, and, in the case of personnel who are not citizens of the United States, become citizens within the minimum period of time within which the particular individual can become a citizen according to the laws of the United States and the regulations of the immigration and naturalization service of the United States, or any successor agency, or within such additional time as may be granted by said boards.

(c) Medical personnel granted exemption under paragraphs (a) and (b) of this subsection (3) may not practice medicine except as described in this subsection (3) without first complying with all of the provisions of said "Colorado Medical Practice Act".

Source: **L. 77:** Entire title R&RE, p. 903, § 10, effective August 1. **L. 78:** (3) added, p. 354, § 1, effective April 27. **L. 79:** (3) amended, p. 522, § 26, effective July 1. **L. 86:** (1) amended, p. 884, § 2, effective May 23. **L. 2000:** (2) amended, p. 829, § 1, effective May 24. **L. 2010:** (3)(b) amended, (HB 10-1260), ch. 403, p. 1986, § 73, effective July 1. **L. 2011:** (3)(b) amended, (HB 11-1303), ch. 264, p. 1155, § 27, effective August 10.

17-1-102. Definitions. As used in this title, unless the context otherwise requires:

- (1) and (1.3) (Deleted by amendment, L. 93, p. 404, § 1, effective April 19, 1993.)
- (1.7) "Correctional facility" means any facility under the supervision of the department in which persons are or may be lawfully held in custody as a result of conviction of a crime.
- (2) "Department" means the department of corrections.
- (3) (Deleted by amendment, L. 94, p. 602, § 2, effective July 1, 1994.)
- (4) "Executive director" means the executive director of the department of corrections.
- (5) and (6) (Deleted by amendment, L. 2000, p. 829, § 2, effective May 24, 2000.)
- (6.5) "Inmate" means any person who is sentenced to a term of imprisonment for a violation of the laws of this state, any other state, or the United States.
- (7) "Local jail" means a jail or an adult detention center of a county or city and county.
- (7.3) "Private contract prison" means any private prison facility operated by a county, city and county, or private corporation located in this state; except that "private contract prison" does not include any local jail, multijurisdictional jail, or community corrections center.
- (7.5) (a) "Special needs offender" means a person in the custody of the department:
 - (I) Who is sixty years of age or older and has been diagnosed by a licensed health care provider who is employed by or under contract with the department as suffering from a chronic infirmity, illness, condition, disease, or mental illness and the department or the state board of parole determines that the person is incapacitated to the extent that he or she is not likely to pose a risk to public safety; or
 - (II) Who, as determined by a licensed health care provider who is employed by or under contract with the department, suffers from a chronic, permanent, terminal, or irreversible

physical or mental illness, condition, disease, or mental illness that requires costly care or treatment and who is determined by the department or the state board of parole to be incapacitated to the extent that he or she is not likely to pose a risk to public safety.

(III) (Deleted by amendment, L. 2011, (SB 11-241), ch. 200, p. 831, § 1, effective May 23, 2011.)

(b) Notwithstanding the provisions of paragraph (a) of this subsection (7.5), "special needs offender" does not include a person who:

(I) Was convicted of a class 1 felony, unless the offense was committed before July 1, 1990, and the offender has served at least twenty years in a department of corrections facility for the offense; or

(II) Was convicted of a class 2 felony crime of violence as described in section 18-1.3-406, C.R.S., and the offender has served fewer than ten years in a department of corrections facility for the offense.

(III) (Deleted by amendment, L. 2011, (SB 11-241), ch. 200, p. 831, § 1, effective May 23, 2011.)

(8) "State inmate" means any person who is sentenced by the state to a term of imprisonment in a correctional facility or who is sentenced to a term of imprisonment pursuant to section 16-11-308.5, C.R.S.

(9) "Warden" means the administrative head of a correctional facility.

Source: **L. 77:** Entire title R&RE, p. 904, § 10, effective August 1. **L. 79:** Entire section R&RE, p. 685, § 21, effective July 1. **L. 91:** (1) amended and (1.3), (1.7), and (5) to (8) added, p. 336, § 1, effective May 24. **L. 93:** (1), (1.3), and (7) amended, p. 404, § 1, effective April 19. **L. 94:** (3) amended and (9) added, p. 602, § 2, effective July 1. **L. 2000:** (5), (6), (8), and (9) amended and (6.5) and (7.3) added, p. 829, § 2, effective May 24; (7.5) added, p. 1495, § 1, effective July 1, 2001. **L. 2002:** (7.5)(b)(II) and (7.5)(b)(III) amended, p. 1499, § 156, effective October 1. **L. 2003:** (7.5)(a) amended, p. 1910, § 1, effective August 6. **L. 2006:** (7.5)(a)(I) amended, p. 1398, § 44, effective August 7. **L. 2011:** (7.5) amended, (SB 11-241), ch. 200, p. 831, § 1, effective May 23.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (7.5)(b)(II) and (7.5)(b)(III), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-1-103. Duties of the executive director. (1) The duties of the executive director shall be:

(a) To manage, supervise, and control the correctional institutions operated and supported by the state; to monitor and supervise the activities of private contract prisons; to manage and supervise the divisions, agencies, boards, and commissions that are or may be transferred to or established within the department by law or by the executive director pursuant to section 17-1-101 (2); to provide work and self-improvement opportunities; and to establish an environment that promotes habilitation for successful reentry into society;

(a.5) To develop policies and procedures governing the operation of the department;

(b) To supervise the business, fiscal, budget, personnel, and financial operations of the department and the institutions and activities under his or her control;

(c) In consultation with the division directors and the wardens, to develop a systematic building program providing for the projected, long-range needs of the institutions under his or her control;

(d) To efficiently manage the lands associated with or owned by the department;

(e) To the extent practical, to utilize the staff and services of other state agencies and departments, within their respective statutory functions, to carry out the purposes of this title;

(f) To the extent practical, to develop within the correctional institutions industries that develop work skills for inmates and that also will serve the purpose of supplying necessary products for state institutions and other public purposes as provided by law;

(g) Repealed.

(h) (Deleted by amendment, L. 2000, p. 830, § 3, effective May 24, 2000.)

(i) Repealed.

- (j) (Deleted by amendment, L. 2000, p. 830, § 3, effective May 24, 2000.)
- (k) To carry out the duties prescribed in article 11.5 of title 16, C.R.S.;
- (l) To carry out the duties prescribed in article 11.7 of title 16, C.R.S.;
- (m) To provide information to the director of research of the legislative council concerning population projections, research data, and the projected long-range needs of the institutions under the control of the executive director and any other related data requested by the director;
- (n) To contract with the department of human services to house in a facility operated by the department of human services any juvenile under the age of fourteen years who is sentenced as an adult to the department of corrections and to provide services for the juvenile, as provided in section 19-2-518 (1) (e), C.R.S.;
- (o) To appoint an inspector general and investigators as provided in section 17-1-103.8;
- (p) Notwithstanding the provisions of the "Colorado Open Records Act", part 2 of article 72 of title 24, C.R.S., and part 3 of said article 72, to adopt such policies and guidelines as may be necessary concerning the release of records to inmates.
- (2) The executive director shall have such other duties and functions as are prescribed for heads of principal departments in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S.
- (3) (a) (I) The executive director shall, upon the recommendation of the department's chief medical officer, appoint a panel of medical consultants.
- (II) The executive director shall, upon the recommendation of the department's chief medical officer, determine the membership of the panel based on the medical and surgical needs of the department.
- (III) The executive director shall determine the qualifications for appointment to the panel of medical consultants; except that all members of the panel shall be licensed by the Colorado medical board pursuant to article 36 of title 12, C.R.S., or the state board of dental examiners pursuant to article 35 of title 12, C.R.S.
- (b) Members of the panel of medical consultants shall be compensated at a rate which shall be approved by the executive director. Compensation shall be paid from available funds of the department.
- (c) The panel members shall act as medical consultants to the department with respect to persons receiving services from any correctional facility as defined in section 17-1-102 (1.7).
- (d) A member of the panel of medical consultants, for all activities performed within the course and scope of said member's responsibilities to the department, shall be entitled to all of the protections of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., as if the panel member were a "public employee" as defined in section 24-10-103 (4), C.R.S. This provision shall not be construed to afford independent contractors hired as panel members any of the protections of the state personnel system, article 50 of title 24, C.R.S.
- (e) For purposes of this subsection (3), "panel of medical consultants" means a panel of medical physicians, dentists, or oral surgeons whose duty is to deliver medical services or services related to oral surgery.
- (4) For an inmate who was convicted as an adult of a class 1 felony following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., the executive director shall ensure that the inmate has the opportunity to participate in treatment, programs, and services that is equal to the opportunities granted to other inmates who will be eligible for parole or discharge.

Source: L. 77: Entire title R&RE, p. 904, § 10, effective August 1. L. 83: (1)(g) and (1)(h) amended, p. 832, § 30, effective July 1. L. 88: (1)(a) amended, p. 696, § 1, effective July 1. L. 89, 1st Ex. Sess.: (1)(i) added, p. 77, § 3, effective July 1. L. 90: (1)(j) added, p. 941, § 5, effective June 7; (1)(a) amended, p. 976, § 2, effective July 1. L. 91: (1)(k) added, p. 441, § 4, effective May 29. L. 92: (1)(l) added, p. 461, § 4, effective June 2. L. 94: (2) added, p. 563, § 3, effective April 6; (3) added, p. 772, § 1, effective April 20; (1)(m) added, p. 1097, § 8, effective May 9; (1)(i) repealed, p. 1362, § 5, effective July 1.

L. 95: (3)(a) and (3)(e) amended, p. 879, § 16, effective May 24. **L. 96:** (1)(n) added, p. 1683, § 10, effective January 1, 1997. **L. 98:** (1)(g) amended, p. 726, § 7, effective May 18. **L. 99:** (1)(o) added, p. 424, § 2, effective April 30. **L. 2000:** (1)(a) to (1)(d), (1)(f), (1)(g), (1)(h), (1)(j), and (3)(e) amended and (1)(a.5) and (1)(p) added, p. 830, § 3, effective May 24. **L. 2001:** (1)(g) repealed, p. 1176, § 3, effective August 8. **L. 2006:** (4) added, p. 1055, § 8, effective May 25. **L. 2009:** (1)(p) amended, (SB 09-292), ch. 369, p. 1948, § 31, effective August 5. **L. 2010:** (3)(a)(III) amended, (HB 10-1260), ch. 403, p. 1986, § 74, effective July 1.

Cross references: (1) For additional authority for the executive director to enter into multi-jurisdictional jail agreements, see section 6 of chapter 120, Session Laws of Colorado 1990.

(2) For the legislative declaration contained in the 2006 act enacting subsection (4), see section 1 of chapter 228, Session Laws of Colorado 2006.

ANNOTATION

The department of corrections has the discretion to use a code of penal discipline conviction of a sexual nature to reclassify an

inmate on the sexual violence scale. *Reeves v. Colo. Dept. of Corr.*, 155 P.3d 648 (Colo. App. 2007).

17-1-103.5. Literacy corrections program - legislative declaration - repeal. (Repealed)

Source: **L. 88:** Entire section added, p. 696, § 2, effective July 1.

Editor's note: Subsection (5) provided for the repeal of this section, effective July 1, 1991. (See **L. 88**, p. 696.)

Cross references: For current provisions concerning the correctional education program, see article 32 of this title.

17-1-103.7. Duties of executive director - emergency response time - legislative declaration. (Repealed)

Source: **L. 89:** Entire section added, p. 870, § 1, effective June 10. **L. 94:** Entire section amended, p. 602, § 3, effective July 1. **L. 2000:** Entire section repealed, p. 831, § 4, effective May 24.

17-1-103.8. Duties of executive director - inspector general - investigators - duties.

(1) The executive director, pursuant to section 13 of article XII of the state constitution, shall appoint a person to the position of inspector general. The person appointed to the position shall report to the executive director and shall have the powers of a peace officer, as described in sections 16-2.5-101 and 16-2.5-134, C.R.S.

(1.5) The executive director, in consultation with the inspector general, shall appoint investigators who shall operate under the inspector general's direct authority. Investigators appointed pursuant to this section shall have the powers of a peace officer, as described in sections 16-2.5-101 and 16-2.5-134, C.R.S.

(2) The inspector general and the investigators under his or her direction shall have the following duties:

(a) To investigate, detect, and prevent any crimes, criminal enterprises, or conspiracies originating within the department and any crimes, criminal enterprises, or conspiracies originating outside correctional facilities if the crimes, criminal enterprises, or conspiracies are related to the safety and security of correctional facilities, public or private. Evidence obtained by the inspector general or an investigator of any crimes so investigated shall be:

(I) Reported to the applicable local law enforcement agency; or

(II) With the consent of the district attorney, reported directly to the district attorney, attorney general, or United States attorney having jurisdiction over the issue; or

(III) In the case of a city and county, reported immediately to the local law enforcement agency, and the agency may complete the investigation and report the findings to the district attorney having jurisdiction over the city and county.

(b) To investigate, detect, and prevent any violations of administrative regulations or state policy and procedure and any waste or mismanagement of departmental resources and corruption that may occur within the department and any other violation that may be committed by department staff where the violation could affect the performance of staff duties or tend to erode public confidence in the performance of the department;

(c) and (d) (Deleted by amendment, L. 2008, p. 464, § 1, effective April 14, 2008.)

(e) To conduct preemployment investigations and integrity interviews of all persons who apply for employment with the department, including employment as contractors and subcontractors. The preemployment investigations and integrity interviews shall ensure that department employees meet the minimum standards set forth by state personnel rules, executive orders, and department policies.

(3) (Deleted by amendment, L. 2008, p. 464, § 1, effective April 14, 2008.)

(4) For purposes of this section, "correctional facilities" includes but is not limited to any facility with which the department has contracted to house offenders who are in the legal custody of the department.

(5) (Deleted by amendment, L. 2008, p. 464, § 1, effective April 14, 2008.)

Source: L. 99: Entire section added, p. 422, § 1, effective April 30. L. 2003: (1) and (5)(a) amended, p. 1625, § 49, effective August 6. L. 2008: Entire section amended, p. 464, § 1, effective April 14.

17-1-104. Facilities managed, supervised, and controlled. (Repealed)

Source: L. 77: Entire title R&RE, p. 905, § 10, effective August 1. L. 79: Entire section R&RE, p. 685, § 22, effective July 1. L. 2000: Entire section repealed, p. 831, § 5, effective May 24.

17-1-104.3. Correctional facilities - locations - security level. (1) (a) Each facility operated by or under contract with the department shall have a designated security level. Designation of security levels shall be as follows:

(I) Level I facilities shall have designated boundaries, but need not have perimeter fencing. Inmates classified as minimum may be incarcerated in level I facilities, but generally inmates of higher classifications shall not be incarcerated in level I facilities.

(II) Level II facilities shall have designated boundaries with a single or double perimeter fencing. The perimeter of level II facilities shall be patrolled periodically. Inmates classified as minimum restrictive and minimum may be incarcerated in level II facilities, but generally inmates of higher classifications shall not be incarcerated in level II facilities.

(III) Level III facilities generally shall have towers, a wall or double perimeter fencing with razor wire, and detection devices. The perimeter of level III facilities shall be continuously patrolled. Appropriately designated close classified inmates, medium classified inmates, and inmates of lower classification levels may be incarcerated in level III facilities, but generally inmates of higher classifications shall not be incarcerated in level III facilities.

(IV) Level IV facilities shall generally have towers, a wall or double perimeter fencing with razor wire, and detection devices. The perimeter of level IV facilities shall be continuously patrolled. Close classified inmates and inmates of lower classification levels may be incarcerated in level IV facilities, but generally inmates of higher classifications shall not be incarcerated in level IV facilities on a long-term basis.

(V) Level V facilities comprise the highest security level and are capable of incarcerating all classification levels. The facilities shall have double perimeter fencing with razor wire and detection devices or equivalent security architecture. These facilities generally shall use towers or stun-lethal fencing as well as controlled sally ports. The perimeter of level V facilities shall be continuously patrolled.

(b) The correctional facilities operated by the department, the location of such facilities, and the designated security level of such facilities shall be as follows:

Correctional facility	Location	Security level
Colorado state penitentiary	Fremont county	Level V
Centennial correctional facility	Fremont county	Level V
Limon correctional facility	Lincoln county	Level IV
Arkansas Valley correctional facility	Crowley county	Level III
Buena Vista correctional complex	Chaffee county	Level III
Colorado Territorial correctional facility	Fremont county	Level III
Fremont correctional facility	Fremont county	Level III
Arrowhead correctional center	Fremont county	Level II
Four Mile correctional center	Fremont county	Level II
Skyline correctional center	Fremont county	Level I
Colorado correctional center	Jefferson county	Level I
Delta correctional center	Delta county	Level I
Rifle correctional center	Garfield county	Level I
Colorado correctional alternative program	Chaffee county	Level I
Colorado women's correctional facility	Fremont county	Level IV
Denver reception and diagnostic center of Denver	City and county	Level V
La Vista correctional facility	Pueblo county	Level III
San Carlos correctional facility	Pueblo county	Level V
Sterling correctional facility	Logan county	Level V
Trinidad correctional facility	Las Animas county	Level II
Denver women's correctional facility of Denver	City and county	Level V
Youthful offender system	Pueblo county	Level III

(b.5) Notwithstanding the provisions of paragraph (b) of this subsection (1), beginning February 1, 2013, the Centennial south campus of the Centennial correctional facility shall not be operated by the department for the purpose of housing inmates in the housing units but, if necessary, may be maintained to provide support and other services to the Centennial correctional facility. The department shall actively pursue options to sell or lease the Centennial south campus of the Centennial correctional facility, which is also known as

Colorado state penitentiary II or CSP II. Any proceeds received as a result of a sale or lease of Centennial south campus of the Centennial correctional facility shall be first applied to the payment of the certificates of participation.

(c) For the purposes of retrofitting the Pueblo minimum center from a level II facility to a level III facility, the department shall expend moneys received from the federal "Jobs and Growth Tax Relief Reconciliation Act of 2003", as amended, Pub.L. 108-27, and shall not request additional capital construction dollars for this purpose.

(2) Subsection (1) of this section shall be construed to set forth the features and general operation status of the facilities described in that subsection. Nothing in subsection (1) of this section shall be construed to define or restrict the custody level of inmates placed in the facilities described in that subsection.

(3) (Deleted by amendment, L. 2000, p. 831, § 6, effective May 24, 2000.)

(4) Repealed.

(5) Monthly the department shall submit a project status report on construction and monthly population and capacity report to the office of state planning and budgeting, the joint budget committee, the capital development committee, and legislative council. The monthly population and capacity report shall include information on state and private contract facilities including but not limited to operational capacity for the previous month, the month just ending and capacity changes, on grounds population, and operational capacity for this period in the previous year. The department shall include total beds occupied in each facility, state or private contract, by custody level and by gender. The report shall itemize operational capacities for jail backlog, community corrections, parole, youthful offenders, escapees, and revocations.

Source: L. 93: Entire section added, p. 1976, § 2, effective July 1. L. 95: Entire section amended, p. 873, § 7, effective May 24; (3)(a) amended, p. 1273, § 6, effective June 5. L. 97: (1) amended, p. 1586, § 2, effective June 4. L. 98: (4) amended, p. 727, § 8, effective May 18. L. 2000: (1), (3), and (4) amended and (5) added, p. 831, § 6, effective May 24. L. 2001: IP(1)(b) amended, p. 1271, § 21, effective June 5; (4) repealed, p. 1176, § 4, effective August 8. L. 2004: (1)(b) amended, p. 244, § 5, effective April 5; (1)(b) amended, p. 192, § 5, effective August 4. L. 2005: (1)(b) amended and (1)(c) added, p. 229, § 1, effective August 8. L. 2009: (1)(b) amended, (SB 09-034), ch. 55, p. 195, § 1, effective August 5. L. 2011: (1)(b) amended, (SB 11-214), ch. 147, p. 511, § 2, effective March 1, 2012. L. 2012: (1)(b.5) added, (HB 12-1337), ch. 144, p. 522, § 1, effective August 8.

Editor's note: Amendments to subsection (1)(b) by Senate Bill 04-123 and Senate Bill 04-067 were harmonized.

17-1-104.4. Future correctional facility needs. (Repealed)

Source: L. 94: Entire section added, p. 1091, § 1, effective May 9; (3)(b) amended, p. 2615, § 24, effective July 1. L. 95: (2)(b) and (3) amended and (4), (5), (6), and (7) added, pp. 1277, 1274, §§ 15, 8, effective June 5; (3)(b) amended, p. 638, § 25, effective July 1. L. 96: (2)(a)(I) amended, p. 1150, § 14, effective July 1. L. 97: (3)(b) amended and (8) to (10) added, p. 1584, § 1, effective June 4. L. 2000: Entire section repealed, p. 834, § 7, effective May 24.

17-1-104.5. Incarceration of inmates from other states - private contract prison facilities. (1) The general assembly finds and declares that the importation of prisoners from other states into correctional facilities not operated by the department of corrections is a matter of statewide concern.

(2) No inmate from a state other than Colorado may be received into the state of Colorado and be housed in a private contract prison facility or a prison facility operated by a political subdivision of the state:

(a) Without the express approval of the executive director, which approval shall not be unreasonably withheld; and

(b) Unless the private contract prison facility or a prison facility operated by a political subdivision is designed to meet or exceed the appropriate security level for the inmate.

Source: L. 88: Entire section added, p. 711, § 13, effective July 1. L. 96: Entire section amended, p. 1147, § 3, effective July 1. L. 98: Entire section amended, p. 1237, § 2, effective August 5.

ANNOTATION

This section applies to transfers of out-of-state prisoners to a private prison facility in Colorado and habeas corpus petition by inmate is subject to this section. The Interstate Corrections Compact, §§ 24-60-1601 to 24-60-1603 and the Western Interstate Corrections Compact, §§ 24-60-801 to 24-60-805, do not apply to transfers to private correctional facilities in this state. Slater v. McKinna, 997 P.2d 1196 (Colo. 2000).

Insofar as the provisions of the Interstate Corrections Compact, §§ 24-60-1601 to 24-

60-1603, and the Western Interstate Corrections Compact, §§ 24-60-801 to 24-60-805, are inconsistent with this section, this section prevails since it is the more specific. Slater v. McKinna, 997 P.2d 1196 (Colo. 2000).

Agreement authorizing transfer of out-of-state inmate to private prison in Colorado complies with this section and inmate is not entitled to habeas corpus relief. Slater v. McKinna, 997 P.2d 1196 (Colo. 2000).

17-1-104.6. Planning and review requirements - legislative intent. (1) The general assembly hereby finds and declares that the construction, expansion, renovation, or improvement of state-built and operated department of corrections facilities is a matter of statewide and not local concern. Therefore, the department, in authorizing and financing the construction, expansion, renovation, or improvement of its facilities, is exempt from regional, county, and local planning requirements, including those specified in section 30-28-110, C.R.S., and those authorized by section 29-20-104, C.R.S.

(2) Notwithstanding the provisions of subsection (1) of this section, whenever the department plans to locate a new corrections facility or expand an existing corrections facility, the department shall submit facility program plans to the governing body of the county or municipality in which the facility is proposed to be located or expanded and afford the governing body an opportunity for advisory review of such plans.

(3) The intent of the general assembly in enacting this section is to clarify the meaning of current law concerning regional, county, and local planning requirements and to clarify that the general assembly never intended to require the department to submit plans to authorize or construct its facilities for approval by local, county, or regional planning authorities. Accordingly, this section is intended to apply to causes of action pending on or filed on or after July 1, 1996.

Source: L. 96: Entire section added, p. 1147, § 4, effective July 1.

17-1-104.7. Management plan for housing of juveniles - report. (Repealed)

Source: L. 96: Entire section added, p. 1681, § 5, effective January 1, 1997. L. 2000: Entire section repealed, p. 834, § 7, effective May 24.

17-1-104.8. Legislative review of facilities program plans for correctional facilities. (1) Prior to any appropriation by the general assembly for the construction of a new, expanded, renovated, or improved correctional facility, and no later than November 1 prior to the beginning of the budget year for which the appropriation is made, the department shall submit a proposed facility program plan for each proposed new, expanded, renovated, or improved correctional facility to the capital development committee. The capital development committee shall make a recommendation regarding the facility program plan

to the joint budget committee. The general assembly may contract with a consultant to provide assistance to the capital development committee and the joint budget committee in the review of facilities program plans submitted by the department.

(2) For the purposes of this section, "facility program plan" means a pre-architectural design program, as that term is understood in the architectural profession. A facility program plan shall include but need not be limited to the number of beds proposed to be included in the new correctional facility or the addition to an existing correctional facility, the primary security level of the proposed facility or addition, the staffing plan of the proposed facility or addition, and a description of any educational or ancillary support facilities required for the proposed facility or addition.

Source: L. 94: Entire section added, p. 1091, § 1, effective May 9. L. 95: Entire section amended, p. 1273, § 7, effective June 5. L. 96: Entire section amended, p. 1147, § 5, effective July 1.

Cross references: For the legislative declaration contained in the 1995 act amending this section, see section 23 of chapter 243, Session Laws of Colorado 1995.

17-1-104.9. Custody levels for state inmates at private prisons - correctional emergency - definition. (1) Based upon available appropriations and based upon an annual review by the general assembly, the department is authorized to permanently place state inmates classified as medium custody and below in private contract prisons. Except as otherwise provided in subsection (2) of this section, the department may not place state inmates classified higher than medium custody in private contract prisons or in private prison facilities located outside the state of Colorado. This section does not prevent a private contract prison from incarcerating an inmate who has been reclassified to a higher custody designation as a result of an offense committed within the private contract prison. However, it is the intent of the general assembly that the department move any inmate of a higher custody designation out of the private contract prison as soon as space is available at a state-operated correctional facility.

(2) (a) At the request of the executive director, the governor may, in his or her discretion, declare a correctional emergency and by proclamation authorize the department to place state inmates classified higher than medium custody in private contract prisons or in private prison facilities located outside the state of Colorado. A proclamation issued under this subsection (2) shall remain in effect for thirty days.

(b) At the request of the executive director, the governor may, in his or her discretion, renew a declaration of correctional emergency and reissue a proclamation in accordance with paragraph (a) of this subsection (2) for one or more additional thirty-day periods as the governor deems appropriate.

(c) For purposes of this section, "correctional emergency" means a riot, a disturbance, a homicide, or inmate violence occurring in a correctional facility or in transit to or from a correctional facility, or a situation involving inmates that presents a clear and immediate danger to the safety, security, and control of the department. "Correctional emergency" does not include inmate overcrowding.

Source: L. 2000: Entire section added, p. 834, § 8, effective May 24. L. 2006: Entire section amended, p. 658, § 1, effective August 7.

17-1-105. Powers of executive director. (1) The executive director shall have and exercise:

(a) All the right and power to transfer an inmate between correctional facilities.

(b) Repealed.

(c) The authority to enter into contracts and agreements with other jurisdictions, including other states, the federal government, and political subdivisions of this state, for the confinement and maintenance in state correctional facilities of inmates sentenced to imprisonment by the courts of such other jurisdictions. The executive director shall notify

the appropriate authorities of other jurisdictions, as the executive director deems appropriate, of the availability of space in state correctional facilities for the confinement and maintenance of inmates from other jurisdictions.

(d) The authority to lease real property and personal property of the department and any interest therein pursuant to law;

(e) The authority to enter into contracts with any county for the placement of inmates pursuant to section 16-11-308.5, C.R.S.;

(f) The authority to enter into contracts and agreements with other jurisdictions, including other states, the federal government, and political subdivisions of this state, for the confinement and maintenance of offenders sentenced to imprisonment by the courts of this state and the authority to reimburse such jurisdictions for the expenses incurred by such jurisdictions in the confinement and maintenance of said offenders;

(g) The authority to issue administrative warrants, solely for the purpose of returning to a correctional facility, jail, or community corrections center, offenders who have escaped from the custody and care of the department, community corrections, the parole board, or the division of adult parole, containing notice to appropriate law enforcement agencies that there is probable cause to believe that an offender has escaped from custody;

(h) The authority to enter into written agreements with any local, state, regional, or federal law enforcement agency operating within the state to allow such agencies and the department to provide personnel or operational support to one another, if deemed available by the executive director, in support of emergency law enforcement operations in Colorado;

(i) The authority to enter into written agreements with any local, state, regional, or federal law enforcement agency operating within the state to permit department personnel to assist in apprehending offenders who have escaped from the custody of the department.

(1.5) The executive director shall have such other powers and functions as are prescribed for heads of principal departments in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S.

(2) (a) The executive director shall, subject to approval by the capital development committee and subject to annual appropriation, be authorized to enter into agreements under which the state may acquire title to correctional facilities developed and constructed with private funds upon payment of the stipulated aggregate annual payments within a period of time not to exceed thirty years. The executive director shall also consider all costs associated with the agreement, including indirect costs for administration and monitoring of the agreement and total costs of the agreement including principal and interest.

(b) The executive director shall establish design standards and specifications which shall be met by any facility which is to be occupied pursuant to this subsection (2).

(c) Any proposal which meets such design standards and specifications and which has been approved by the capital development committee shall be specifically authorized, prior to its execution, by a separate bill enacted by the general assembly. Subsequent to such authorization by the general assembly in such manner, payments by the state may be made from moneys appropriated by the general assembly without the necessity of a separate bill.

(d) Payments under such agreements shall be included in the capital construction fund, subject to annual appropriation by the general assembly, and shall be certified, audited, and paid in the same manner as all other accounts and expenditures are paid out of such funds appropriated to the capital construction fund. Such obligations shall not create an indebtedness of the state within the meaning of any provisions of the state constitution or laws of the state concerning or limiting the creation of indebtedness of the state.

(e) Each agreement entered into pursuant to this subsection (2) may contain such terms, provisions, and conditions as the executive director deems appropriate, including provisions by which the state may receive fee title to the real and personal property which is the subject of each agreement on or prior to the expiration of the terms thereof, including all optional terms.

(f) Property acquired or occupied pursuant to this subsection (2) shall be exempt from taxation so long as it is used for a public purpose connected with any authorized work or programs of the department.

(g) Subject to annual appropriations by the general assembly, agreements entered into pursuant to this subsection (2) shall be enforceable in any court of competent jurisdiction in the state.

(3) The entity with which the department enters into an agreement pursuant to subsection (2) of this section shall submit a detailed plan for the department of corrections to assume responsibility for a correctional facility when the contract between the state and the entity terminates. The state, through the executive director of the department of corrections, may terminate the agreement for cause after written notice of material deficiencies and after sixty workdays have been provided to the entity to correct the material deficiencies. If any event occurs involving the noncompliance with or violation of contract terms and presents a serious threat to the safety, health, or security of the inmates, employees, or the public, the department of corrections may temporarily assume responsibility for the correctional facility. In addition, the entity shall submit a plan for the temporary assumption of operations of a correctional facility by the department of corrections in the event of bankruptcy or the financial insolvency of the entity. The entity shall provide an emergency plan to address inmate disturbances, employee work stoppages, strikes, or other serious events. The plan shall comply with applicable national correctional standards. The state may assume responsibility for the operation of a facility upon approval by the general assembly through the enactment of legislation.

Source: **L. 77:** Entire title R&RE, p. 905, § 10, effective August 1. **L. 79:** (1)(a) and (1)(c) amended and (1)(b) repealed, pp. 685, 705, §§ 23, 88, effective July 1. **L. 85:** (1)(c) amended, p. 1360, § 12, effective June 28. **L. 86:** (1)(d) added, p. 751, § 1, effective April 24. **L. 88:** (2) added, p. 699, § 1, effective May 17; (1)(e) added, p. 677, § 2, effective July 1; (1)(e) and (1)(f) added, p. 710, § 8, effective July 1. **L. 93:** (1)(c) amended, p. 53, § 16, effective July 1. **L. 94:** (1.5) added, p. 563, § 4, effective April 6. **L. 95:** (3) added, p. 1271, § 3, effective June 5. **L. 96:** (1)(f) amended, p. 1149, § 6, effective July 1. **L. 97:** (1)(g) to (1)(i) added, p. 27, § 2, effective March 20. **L. 2000:** (1)(a), (1)(c), and (1)(g) amended, p. 834, § 9, effective May 24.

Editor's note: This section is similar to former § 27-1-105 as it existed prior to 1977.

ANNOTATION

This section allowing for contracts to confine inmates in out-of-state facilities does not violate compact clause nor commerce clause. *People v. Wood*, 999 P.2d 227 (Colo. App. 2000).

"Other jurisdictions" as defined in this section includes political subdivisions of other

states and thus the executive director has authority to enter into contracts with counties of other states. *Arnold v. Colo. Dept. of Corr.*, 978 P.2d 149 (Colo. App. 1999).

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

17-1-105.1. Accreditation of private contract prisons.

(1) Repealed.

(2) Prior to submitting building plans to any county, municipality, city and county, or other local governmental agency any company proposing to construct a private prison within the state shall conduct at least one hearing in the county where the facility is proposed to be constructed for public input following at least twenty days' notice published in a newspaper of general circulation in the county in which the private prison is to be located.

(3) (a) A private prison shall not contract to house any inmate, except on a temporary basis, unless within two years of the date that it accepts its first inmate it holds a current accreditation by the American correctional association.

(b) The executive director may extend the time period for a private prison to obtain the accreditation required by paragraph (a) of this subsection (3) upon a showing of good cause.

Source: L. 98: Entire section added, p. 1236, § 1, effective August 5. **L. 2000:** (1) repealed, p. 835, § 10, effective May 24.

17-1-105.5. Contract rates. (1) Contracts for the confinement and maintenance of state inmates in private contract facilities or facilities operated by a political subdivision of the state entered into pursuant to this article shall be at rates that are negotiated by the department; except that the rate shall not exceed the maximum rate that is provided in the annual general appropriation bill.

(2) Repealed.

Source: L. 96: Entire section added, p. 1149, § 7, effective July 1. **L. 2008:** Entire section amended, p. 375, § 1, effective April 10.

Editor's note: Subsection (2)(d) provided for the repeal of subsection (2), effective June 30, 2009. (See L. 2008, p. 375.)

17-1-106. Transfer of functions. (Repealed)

Source: L. 77: Entire title R&RE, p. 905, § 10, effective August 1. **L. 2000:** Entire section repealed, p. 835, § 11, effective May 24.

17-1-107. Department may accept gifts, donations, and grants. The department may accept, or refuse to accept, on behalf of and in the name of the state, gifts, donations, and grants, including grants of federal funds, for any purpose connected with the work or programs of the department. The executive director, with the approval of the governor, shall have the power to direct the disposition of any such gift, donation, or grant so accepted for any purpose consistent with the terms and conditions under which given.

Source: L. 77: Entire title R&RE, p. 906, § 10, effective August 1.

17-1-107.5. State criminal alien assistance program cash fund - creation. (1) There is hereby created in the state treasury the state criminal alien assistance program cash fund. The fund shall consist of moneys received by the state under the federal state criminal alien assistance program of the federal "Immigration and Nationality Act", 8 U.S.C. sec. 1231 (i). All such moneys shall be transmitted to the state treasurer, who shall credit the same to the fund. The moneys in the fund shall be subject to appropriation by the general assembly to the department of corrections for the 2004-05 state fiscal year and each fiscal year thereafter for the purposes of defraying the costs of incarcerating undocumented criminal aliens sentenced to a term of imprisonment with the department. All investment earnings derived from the deposit and investment of moneys in the fund shall remain in the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of the fiscal year shall remain in the fund and shall not be transferred or credited to the general fund or another fund.

(2) For the purpose of maximizing revenues in the state criminal alien assistance program cash fund, the governor shall, in connection with an annual request for compensation to the state for incarcerating undocumented criminal aliens pursuant to the federal "Immigration and Nationality Act", 8 U.S.C. sec. 1231 (i), submit to the United States attorney general the average per-inmate cost and the total cost of incarcerating such undocumented criminal aliens for the state fiscal year for which the request is made.

Source: L. 2005: Entire section added, p. 726, § 1, effective June 1.

17-1-108. Transfer of inmates. (1) A person committed to the care and custody of the department as an inmate who is transferred to another institution, agency, or person for care and keeping, or who is transferred from a jail to the department, shall be transferred

with medical records and any other record necessary and relevant to the nature and length of the transfer. Such records shall be provided to the person or agency who will receive the inmate, and the receiving person or agency shall acknowledge receipt of the records and approve of the transfer.

(2) (Deleted by amendment, L. 94, p. 603, § 4, effective July 1, 1994.)

Source: L. 77: Entire title R&RE, p. 906, § 10, effective August 1. L. 79: (1) amended, p. 686, § 24, effective July 1. L. 89: (2) amended, p. 828, § 38, effective July 1. L. 94: Entire section amended, p. 603, § 4, effective July 1; (1) amended, p. 1650, § 94, effective May 31.

Cross references: For transfer of inmates with mental illness or a developmental disability, see article 23 of this title.

17-1-109. Duties and functions of the warden. (1) The warden of each correctional facility shall exercise the powers and perform the duties and functions assigned to the warden by this article under the supervision and control of the executive director or the executive director's designee.

(2) (a) The warden of each correctional facility should, wherever possible, take such measures as are reasonably necessary to restrict the confinement of any person who actively participates in disruptive security-threat group behavior, as defined in paragraph (b) of this subsection (2), so as to prevent contact with other inmates at such facility. The warden should, wherever possible, also take such measures as are reasonably necessary to prevent recruitment of new security-threat group members from among the general inmate population. Association with an inmate gang or security-threat group alone shall not be sufficient to meet the requirements of this paragraph (a).

(b) For the purposes of this subsection (2), unless the context otherwise requires, "security-threat group" means a group of three or more individuals acting in concert or individually in an activity that is characterized by criminal conduct or conduct that violates the department's code of penal discipline for the purpose of disrupting prison operations, recruiting new members, damaging property, or inflicting or threatening to inflict harm to employees, contract workers, volunteers, or other state inmates.

Source: L. 77: Entire title R&RE, p. 906, § 10, effective August 1. L. 79: Entire section amended, p. 686, § 25, effective July 1. L. 89: Entire section amended, p. 872, § 1, effective June 5. L. 97: (2) amended, p. 29, § 7, effective March 20. L. 2000: (1) and (2)(a) amended, p. 835, § 12, effective May 24. L. 2011: (2) amended, (SB 11-176), ch. 289, p. 1342, § 2, effective July 1.

17-1-109.5. Correctional facility employees - rules. (1) On and after April 1, 2004, the department shall not hire a person who is required to register as a sex offender pursuant to the provisions of the "Colorado Sex Offender Registration Act", article 22 of title 16, C.R.S., to work at a correctional facility.

(2) The department shall ensure that any person who is employed to work at a correctional facility as of April 1, 2004, and who is required to register as a sex offender pursuant to the provisions of the "Colorado Sex Offender Registration Act", article 22 of title 16, C.R.S., does not have unsupervised contact with an inmate on and after April 1, 2004.

(3) If a person, while employed by the department, is convicted of an offense that requires the employee to register as a sex offender pursuant to the provisions of the "Colorado Sex Offender Registration Act", article 22 of title 16, C.R.S., the employee shall immediately notify the department of the conviction and the registration requirement. The department shall ensure that the employee does not have unsupervised contact with an inmate on and after the date it receives notice pursuant to this subsection (3).

(4) The executive director shall adopt such rules as may be necessary to ensure compliance with the requirements of this section.

Source: L. 2004: Entire section added, p. 230, § 1, effective April 1.

17-1-110. Joint review committee on corrections. (Repealed)

Source: L. 78: Entire section added, p. 124, § 2, effective April 18.

Editor's note: When this section was enacted in 1978, the general assembly provided for the repeal of this section upon occupancy of the maximum security facility. Because the facility has been occupied since December 24, 1980, the repeal date for this section is also December 24, 1980.

17-1-111. Certain provisions of the administrative procedure act not to apply. The provisions of this title relating to the placement, assignment, management, discipline, and classification of inmates shall not be subject to section 24-4-103, 24-4-105, or 24-4-106, C.R.S.

Source: L. 83: Entire section added, p. 687, § 1, effective May 20. **L. 90:** Entire section amended, p. 954, § 22, effective June 7. **L. 2000:** Entire section amended, p. 836, § 13, effective May 24. **L. 2004:** Entire section amended, p. 1197, § 49, effective August 4.

ANNOTATION

Any right that may have existed to obtain review of a prison disciplinary action under the APA was eliminated by the enactment of this section. *Crawford v. State Dept. of Corr.*, 895 P.2d 1156 (Colo. App. 1995).

This section precludes review of prison disciplinary actions under § 24-4-106 of the APA. *Crawford v. State Dept. of Corr.*, 895 P.2d 1156 (Colo. App. 1995).

17-1-112. Expenses - reimbursement by department. (1) Subject to available appropriations the department shall reimburse any county or city and county for a portion of the expenses and costs incurred by that county or city and county in the confinement and maintenance in a local jail of any person who is sentenced to a term of imprisonment in a correctional facility. The general assembly shall annually establish the amount of reimbursement in the general appropriations bill. Such reimbursement shall be for each day following seventy-two hours after such sentence is imposed but prior to the transmittal of the sentenced inmate to a department facility. Subject to available appropriations, the department may contract with any county or city and county for the expenses incurred by that county or city and county in the confinement and maintenance of any person who is sentenced to a term of imprisonment pursuant to section 16-11-308.5, C.R.S.

(1.5) In no event shall any agreement to reimburse any city and county or county affect or reduce any city and county's or county's duty to exercise reasonable care and use its best efforts to supervise and use reasonable precautions to assure the adequate care of any state inmate.

(1.7) On or after April 19, 1993, each city and county or county shall send an invoice to the executive director within three months after the expenses and costs for the confinement and maintenance of inmates in local jails are incurred; however, each city and county or county is encouraged to send such invoice on a monthly basis, when possible. Failure by a city and county or county to send an invoice to the executive director within three months after such expenses and costs are incurred shall result in a forfeiture of any reimbursement by the state for such expenses and costs.

(2) Any moneys to which a county or city and county may be entitled pursuant to the provisions of this section shall be paid to the treasurer of the county or the manager of revenue of the city and county, who shall credit the same to the general fund of the county or city and county or such other fund as the board of county commissioners of the county or the city council of the city and county may direct and who shall account for such moneys as provided by law.

(3) (Deleted by amendment, L. 88, p. 710, § 9, effective July 1, 1988.)

Source: L. 85: Entire section added, p. 1339, § 1, effective July 1. **L. 88:** Entire section amended, p. 710, § 9, effective July 1. **L. 89:** (1.5) added, p. 879, § 1, effective June 5. **L. 89, 1st Ex. Sess.:** (1) amended, p. 20, § 4, effective July 1. **L. 91:** (1) and (1.5) amended, p. 337, § 2, effective July 1, 1992. **L. 93:** (1) and (1.5) amended and (1.7) added, p. 405, § 2, effective April 19. **L. 95:** (2) amended, p. 880, § 17, effective May 24. **L. 2000:** (1), (1.5), and (1.7) amended, p. 836, § 14, effective May 24.

ANNOTATION

“Subject to appropriation”, as seen in subsection (1), limits a remedy and not a legal right. Local municipalities have the right to receive reimbursement from the department of corrections for incurred expenses, but the implementation of that right is subject to available appropriations. It expresses the intent of the legislature that the satisfaction of state obligations to local governments for housing state prisoners shall be dependent on future appropriations. State for Use of Dept. of Corr. v. Pena, 855 P.2d 805 (Colo. 1993) (decided under law in effect prior to 1988 amendment).

To the extent appropriations are insufficient to cover expenses incurred by the department of corrections, that department cannot

order and implement full relief. The department does have the obligation to bring to the legislature’s attention the inadequacy of funding. State for Use of Dept. of Corr. v. Pena, 855 P.2d 805 (Colo. 1993) (decided under law in effect prior to 1988 amendment).

The department of correction’s liability pursuant to this section is not dependent upon the availability of funds. Therefore, the city and county of Denver’s entitlement to judgment is not affected by lack of sufficient appropriations. State for Use of Dept. of Corr. v. Pena, 837 P.2d 210 (Colo. App. 1992), aff’d 855 P.2d 805 (Colo. 1993) (decided under law in effect prior to the 1988 amendment).

17-1-112.5. Annual audit by state auditor. (Repealed)

Source: L. 91: Entire section added, p. 338, § 3, effective May 24. **L. 93:** Entire section repealed, p. 406, § 3, effective April 19.

17-1-113. Medical visits - charge to inmates - legislative declaration. (1) (a) The general assembly hereby finds that the procedures for charging inmates a copayment for medical services are confusing to department personnel and, as a result, are inconsistently applied.

(b) The general assembly therefore finds and determines that the department should establish clear and consistent written procedures concerning copayments for medical, dental, mental health, and optometric services rendered to or on behalf of inmates and should require the facilities rendering the services to comply with the procedures, including the maintenance of detailed records regarding the assessment of copayments.

(2) The department shall assess a copayment, in an amount established by written procedures of the executive director pursuant to subsection (4) of this section, not to exceed five dollars per visit, against an inmate’s account for every inmate-initiated request for medical or mental health services provided to the inmate by a physician, physician’s assistant, nurse practitioner, registered nurse, or licensed practical nurse. The department shall assess a copayment, in an amount established by written procedures of the executive director pursuant to subsection (4) of this section, against an inmate’s account for every inmate-initiated visit by the inmate to a dentist or optometrist. The amount of the copayment for the dental or optometric services need not be the same as the copayment for medical or mental health services.

(3) The department shall communicate the copayment procedures to every correctional facility that provides medical, dental, mental health, and optometric services to or on behalf of inmates to ensure that all department personnel consistently and regularly assess the required copayment.

(4) The executive director shall establish written procedures relating to medical, dental, mental health, and optometric service copayments, which procedures shall address, but need not be limited to, the following:

(a) The amount of the copayment to be assessed against an inmate’s account for inmate-initiated medical services, including but not limited to mental health services, which

copayment shall not exceed the direct and indirect costs associated with any type of medical or mental health service that may be rendered;

(b) The amount of the copayment to be assessed against an inmate's account for inmate-initiated dental and optometric services, which copayment shall not exceed the direct and indirect costs associated with any dental or optometric service that may be rendered;

(c) The detailed procedures that department personnel are to follow in assessing the copayments;

(d) The specific services for which a copayment will be assessed, waived, or reduced, as well as the specific and exclusive bases upon which a copayment may be waived by department personnel, including but not limited to the inmate's inability to pay the copayment, the health needs of the inmate and the public health and safety needs of the institution;

(e) The information to be obtained by department personnel at the time of the inmate's medical, dental, mental health, or optometric visit on a standardized department form, including the inmate's name, the inmate's identification number, the amount of the copayment assessed, if any, the reason for the visit, the type of service rendered, and the basis for any waiver of the copayment; and

(f) The appropriate action that will be taken, consistent with state personnel rules, against department personnel who fail to comply with the copayment procedures.

(5) The department shall monitor the information collected pursuant to paragraph (e) of subsection (4) of this section to ensure that the copayment procedures are being applied consistently to all inmates.

(6) Repealed.

Source: **L. 87:** Entire section added, p. 649, § 1, effective July 1. **L. 89:** Entire section amended, p. 880, § 1, effective July 1. **L. 98:** Entire section amended, p. 202, § 1, effective April 10. **L. 2000:** (6) repealed, p. 836, § 15, effective May 24; (6) repealed, p. 1545, § 2, effective August 2. **L. 2008:** Entire section amended, p. 294, § 1, effective August 5.

ANNOTATION

A state may establish reasonable inmate copayments for the provision of medical care as long as the state meets an inmate's serious medical needs and may determine whether a gov-

ernmental entity or the inmate must pay the cost of any medical services provided. *Negron v. Gillespie*, 111 P.3d 556 (Colo. App. 2005).

17-1-113.1. Administration or monitoring of medications to persons in correctional facilities. (1) The executive director has the power to direct the administration or monitoring of medications to persons in correctional facilities, as described in section 25-1.5-301 (2) (a), C.R.S., under the executive director's control, in a manner consistent with part 3 of article 1.5 of title 25, C.R.S.

(2) The executive director may authorize the transfer, delivery, or distribution to a corporation, individual, or other entity, other than a consumer, entitled to possess prescription drugs in an amount that is less than, equal to, or in excess of five percent of the total number of dosage units or drugs dispensed and distributed on an annual basis.

Source: **L. 92:** Entire section added, p. 1149, § 4, effective July 1. **L. 2000:** Entire section amended, p. 837, § 16, effective May 24. **L. 2003:** Entire section amended, p. 704, § 24, effective July 1; entire section amended, p. 957, § 17, effective July 1.

Editor's note: Amendments to this section by Senate Bill 03-002 and Senate Bill 03-119 were harmonized.

17-1-113.3. Telemedicine - study - report - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 1553, § 1, effective August 7.

Editor's note: Subsection (3) provided for the repeal of this section, effective July 1, 2007. (See L. 2006, p. 1553.)

17-1-113.5. Inmates held in correctional facilities - medical benefits application assistance - county of residence. (1) (a) Except as otherwise provided in paragraph (b) of this subsection (1), on and after January 1, 2003, any person who is sentenced to a term of imprisonment in a correctional facility who was receiving medical assistance pursuant to section 25.5-5-101 (1) (f) or 25.5-5-201 (1) (j), C.R.S., immediately prior to entering the correctional facility, or who is reasonably expected to meet eligibility criteria pursuant to section 25.5-5-101 (1) (f) or 25.5-5-201 (1) (j), C.R.S., upon release, shall receive assistance from correctional facility personnel in applying for such medical assistance at least ninety days prior to release.

(b) On and after January 1, 2003, any person who is sentenced to a term of imprisonment in a correctional facility who was eligible for supplemental security income benefits under Title II of the federal "Social Security Act" immediately prior to entering the correctional facility, or who is reasonably expected to meet eligibility criteria for supplemental security income benefits upon release, shall receive assistance from the correctional facility personnel in applying for such supplemental security income benefits at least ninety days prior to release or sooner, if possible.

(2) The department of health care policy and financing shall provide information and training on medical assistance eligibility requirements and assistance to each correctional facility to assist in and expedite the application process for medical assistance for any inmate held in custody who meets the requirements of paragraph (a) of subsection (1) of this section.

(3) The department of human services shall provide information and education regarding the supplemental security income systems and processes to each correctional facility.

(4) (a) For purposes of determining eligibility pursuant to section 25.5-4-205, C.R.S., the county of residence of the inmate held in custody shall be the county specified by the inmate as his or her county of residence upon release.

(b) The department of health care policy and financing shall promulgate rules to simplify the processing of applications for medical assistance pursuant to paragraph (a) of subsection (1) of this section and to allow inmates determined to be eligible for such medical assistance to access the medical assistance upon release and thereafter. If a county department of social services determines that an inmate is eligible for medical assistance, the county shall enroll the inmate in medicaid effective upon release of the inmate. At the time of the inmate's release, the correctional facility shall give the inmate information and paperwork necessary for the inmate to access medical assistance. Such information shall be provided by the applicable county department of social services.

(c) The department of corrections shall attempt to enter into prerelease agreements with local social security administration offices, and, if appropriate, the county departments of social services, the department of human services, or the department of health care policy and financing to simplify the processing of applications for medicaid or for supplemental security income to enroll inmates who are eligible for medical assistance pursuant to section 25.5-5-101 (1) (f) or 25.5-5-201 (1) (j), C.R.S., effective upon release and to provide such inmates with the information and paperwork necessary to access medical assistance immediately upon release.

(5) (Deleted by amendment, L. 2007, p. 1991, § 1, effective June 1, 2007.)

Source: L. 2002: Entire section added, p. 805, § 1, effective July 1. L. 2003: (1)(a) and (4)(c) amended, p. 415, § 4, effective March 5. L. 2005: (1)(a) and (4)(c) amended, p. 4, § 7, effective January 1; (5) amended, p. 250, § 3, effective July 1. L. 2006: (1)(a), (4)(a), and (4)(c) amended, p. 2004, § 57, effective July 1. L. 2007: (2), (3), (4)(b), (4)(c), and (5) amended, p. 1991, § 1, effective June 1.

17-1-113.7. Prohibition against the use of restraints on pregnant inmates in the custody of correctional facilities and private contract prisons. (1) The staff of a correctional facility or private contract prison, when restraining a female inmate, shall use the least restrictive restraints necessary to ensure safety if the staff of the correctional facility or private contract prison have actual knowledge or a reasonable belief that the inmate is pregnant. The requirement that staff use the least restrictive restraints necessary to ensure safety shall continue during postpartum recovery and transport to or from a correctional facility and private contract prison.

(2) (a) (I) Staff of a correctional facility, private contract prison, or medical facility shall not use restraints of any kind on a pregnant inmate during labor and delivery of the child; except that staff may use restraints if:

(A) The medical staff determine that restraints are medically necessary for safe childbirth;

(B) The prison staff or medical staff determine that the inmate presents an immediate and serious risk of harm to herself, to other patients, or to medical staff; or

(C) The warden or his or her designee determines that the inmate poses a substantial risk of escape that cannot reasonably be reduced by the use of other existing means.

(II) Notwithstanding any provision of subparagraph (I) of this paragraph (a) to the contrary, under no circumstances shall staff use leg shackles or waist restraints on an inmate during labor and delivery of the child, postpartum recovery while in a medical facility, or transport to or from a medical facility for childbirth.

(b) The correctional facility, private contract prison, or medical facility staff authorizing the use of restraints on a pregnant inmate during labor or delivery of the child shall make a written record of the use of the restraints, which record shall include, at a minimum, the type of restraint used, the circumstances that necessitated the use of the restraint, and the length of time the restraint was used. The staff of the correctional facility or private contract prison shall retain the record for a minimum of five years and shall make the record available for public inspection with individually identifying information redacted from the record unless the inmate who is the subject of the record gives prior written consent for the public release of the record. The written record of the use of restraint shall not constitute a medical record under state or federal law.

(3) Upon return to a correctional facility or private contract prison after childbirth, the inmate shall be entitled to have a member of the correctional facility's or private contract prison's medical staff present during any strip search.

(4) When an inmate's pregnancy is determined, the staff of a correctional facility or private contract prison shall inform a pregnant inmate in writing in a language and in a manner understandable to the inmate of the provisions of this section concerning the use of restraints and the presence of medical staff during a strip search.

(5) The executive director of the department of corrections shall ensure that the staff of the department of corrections and of private contract prisons receive adequate training concerning the provisions of this section.

Source: L. 2010: Entire section added, (SB 10-193), ch. 312, p. 1463, § 1, effective January 1, 2011.

17-1-113.9. Use of administrative segregation for state inmates - reporting.

(1) On or before January 1, 2012, and each January 1 thereafter, the executive director shall provide a written report to the judiciary committees of the senate and house of representatives, or any successor committees, concerning the status of administrative segregation; reclassification efforts for offenders with mental illnesses or developmental disabilities, including duration of stay, reason for placement, and number and percentage discharged; and any internal reform efforts since July 1, 2011.

(2) Any cost savings achieved as a result of the implementation of sections 17-22.5-302 (1.3) and 17-22.5-405 (8) shall be appropriated and redirected to the department to support behavior-modification programs, incentive programs, mental health services or programs, or similar efforts designed as viable alternatives to administrative segregation.

Source: L. 2011: Entire section added, (SB 11-176), ch. 289, p. 1342, § 1, effective July 1.

17-1-114. Pool of funds - continuance of community supervision. There is hereby created in the state treasury a fund to be known as the community supervision supplemental fund, which shall consist of moneys appropriated by the general assembly. All moneys in the fund shall be subject to withdrawal by the department of corrections, the judicial department, or the department of public safety for the purpose of continuing community supervision, such as parole supervision, probation supervision, community corrections programs, or home electronic monitoring over offenders who would otherwise be removed to secure custody due to lack of resources. Such moneys may be withdrawn upon a request by the department of corrections, the judicial department, or the department of public safety which is made to the director of the office of state planning and budgeting. The director of the office of state planning and budgeting, in consultation with the joint budget committee, shall approve or disapprove the request made by each department and budget the amount of such request. Any withdrawal approved by the director of the office of state planning and budgeting shall be dispersed to the department making the request.

Source: L. 90: Entire section added, p. 944, § 13, effective June 7.

17-1-115. Investigators employed by the department - notification to local law enforcement agencies. (Repealed)

Source: L. 92: Entire section added, p. 432, § 2, effective April 23. **L. 99:** Entire section repealed, p. 424, § 3, effective April 30.

17-1-115.5. Prison sexual assault prevention program. (1) The department shall develop, with respect to sexual assaults that occur in correctional facilities operated by or pursuant to a contract with the department, policies and procedures to:

(a) Require disciplinary action for employees who fail to report incidences of sexual assault to the inspector general appointed pursuant to section 17-1-103.8;

(b) Require the inspector general or the department of corrections investigator, whichever is appropriate, after completing an investigation for sexual assault, to submit the findings to the district attorney with jurisdiction over the facility in which the alleged sexual assault occurred;

(c) Prohibit retaliation and disincentives for reporting sexual assaults;

(d) Provide, in situations in which there is reason to believe that a sexual assault has occurred, reasonable and appropriate measures to ensure victim safety by separating the victim from the assailant, if known;

(e) Ensure the confidentiality of prison rape complaints and protection of inmates who make complaints of prison rape;

(f) Provide acute trauma care for sexual assault victims, including but not limited to treatment of injuries, HIV/AIDS prophylactic measures, and testing for sexually transmitted diseases;

(g) Provide, at intake and periodically thereafter, department-approved, easy-to-understand information developed by the department on sexual assault prevention, treatment, reporting, and counseling in consultation with community groups with expertise in sexual assault prevention, treatment, reporting, and counseling;

(h) Provide sexual-assault-specific training to department mental health professionals and all employees who have direct contact with inmates regarding treatment and methods of prevention and investigation;

(i) Provide confidential mental health counseling for victims of sexual assault;

(j) Monitor victims of sexual assault for suicidal impulses, post-traumatic stress disorder, depression, and other mental health consequences resulting from the sexual assault; and

(k) Require termination of an employee who engages in a sexual assault on or sexual conduct with an inmate consistent with constitutional due process protections and state personnel laws and rules.

(2) Investigation of a sexual assault shall be conducted by investigators trained in the investigation of sex crimes. The investigation shall include, but need not be limited to, use of forensic rape kits, questioning of suspects and witnesses, and gathering and preserving relevant evidence.

(3) The department shall annually report the data that it is required to compile and report to the federal bureau of justice statistics as required by the federal "Prison Rape Elimination Act of 2003", Pub.L. 108-79, as amended, to the judiciary committees of the house of representatives and the senate, or any successor committees.

Source: L. 2007: Entire section added, p. 1545, § 1, effective May 31. **L. 2008:** (1)(b) amended, p. 466, § 2, effective April 14; (3) amended, p. 1885, § 26, effective August 5.

17-1-116. Corrections expansion reserve fund. There is hereby created in the state treasury the corrections expansion reserve fund. Moneys in the fund shall be subject to annual appropriation by the general assembly for the purpose of complying with the provisions of section 2-2-703, C.R.S., which requires that any bill which results in a net increase in periods of imprisonment in state correctional facilities provide for the funding of any increased capital construction costs or increased operating costs associated therewith. Any unexpended or unencumbered moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not revert to or be transferred to the general fund or any other fund of the state.

Source: L. 93, 1st Ex. Sess.: Entire section added, p. 8, § 10, effective September 13.

17-1-117. Appropriation to comply with section 2-2-703 - HB 94-1052. (Repealed)

Source: L. 94: Entire section added, p. 1345, § 2, effective July 1. **L. 2000:** Entire section repealed, p. 837, § 17, effective May 24.

17-1-118. Appropriation to comply with section 2-2-703 - HB 96-1361. (Repealed)

Source: L. 96: Entire section added, p. 1335, § 2, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

17-1-119. Lethal perimeter security systems for correctional facilities - governmental immunity - limitations. (1) The general assembly hereby finds and declares that the installation and operation of electrified, lethal perimeter security systems at certain state correctional facilities will enhance the safety of the citizens of this state and will result in reduced costs for operating such correctional facilities.

(2) The department is authorized, through its agents and contractors, to design and construct electrified, lethal perimeter security systems at correctional facilities to be managed, operated, supervised, and controlled by the department if the department determines the use of such security systems to be necessary and appropriate.

(3) The department, any agent of the department, or contractor hired by the department for the design and construction of an electrified, lethal perimeter security system at a state correctional facility shall be provided all protections of governmental immunity provided to public employees by article 10 of title 24, C.R.S., including but not limited to the payment of judgments and settlements, the provision of legal defense, and the payment of costs incurred in court actions in regard to any and all claims arising from the design and construction, consistent with the design approved by the department, of the lethal aspect of such security system.

(4) The provisions of subsection (3) of this section shall be construed as a specific exception for independent contractors hired to design and construct electrified, lethal perimeter security systems at state correctional facilities from the general exclusion of independent contractors from the protections of governmental immunity provided in article 10 of title 24, C.R.S.

Source: L. 97: Entire section added, p. 1587, § 3, effective June 4.

17-1-119.5. Compilation of data related to inmates with children attending school.

(1) The department of corrections shall obtain information from each inmate concerning whether the inmate is the parent of a child who is under the age of eighteen in the state of Colorado and, if so, whether the child is enrolled in a school in the state and the school district or state charter school in which the child is enrolled. In the process of obtaining the information from the inmate, the department shall not provide the inmate with information that would pose a safety threat to the child or child's family.

(2) The department shall collect and compile information related to programs that assist students whose parents are incarcerated.

Source: L. 2005: Entire section added, p. 951, § 1, effective June 2.

17-1-120. Appropriation to comply with section 2-2-703 - HB 97-1077 and HB 97-1060. (Repealed)

Source: L. 97: Entire section added, p. 1549, § 26, effective July 1; entire section added, p. 992, § 5, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

17-1-121. Appropriation to comply with section 2-2-703 - HB 97-1186. (Repealed)

Source: L. 97: Entire section added, p. 1592, § 2, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

17-1-122. Appropriation to comply with section 2-2-703 - HB 98-1160. (Repealed)

Source: L. 98: Entire section added, p. 1448, § 42, effective July 1. **L. 2002:** (1)(c)(I) repealed, p. 675, § 2, effective May 28. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

17-1-123. Appropriation to comply with section 2-2-703 - HB 98-1156. (Repealed)

Source: L. 98: Entire section added, p. 1294, § 16, effective November 1. **L. 2002:** (1)(e) repealed, p. 675, § 3, effective May 28. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-124 in House Bill 98-1156 but was renumbered on revision for ease of location.

17-1-124. Appropriation to comply with section 2-2-703 - SB 98-021. (Repealed)

Source: L. 98: Entire section added, p. 1265, § 3, effective July 1. **L. 2002:** (1)(d)(I) repealed, p. 675, § 4, effective May 28. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-128 in Senate Bill 98-21 but was renumbered on revision for ease of location.

17-1-125. Appropriation to comply with section 2-2-703 - HB 99-1068. (Repealed)

Source: L. 99: Entire section added, p. 661, § 3, effective July 1. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-126. Appropriation to comply with section 2-2-703 - HB 00-1247. (Repealed)

Source: L. 2000: Entire section added, p. 643, § 2, effective July 1. L. 2002: (1)(c)(I) repealed, p. 676, § 5, effective May 28. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-127. Appropriation to comply with section 2-2-703 - HB 00-1158. (Repealed)

Source: L. 2000: Entire section added, p. 1014, § 8, effective July 1. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-128. Appropriation to comply with section 2-2-703 - HB 00-1111. (Repealed)

Source: L. 2000: Entire section added, p. 648, § 6, effective July 1. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-129. Appropriation to comply with section 2-2-703 - HB 00-1214. (Repealed)

Source: L. 2000: Entire section added, p. 638, § 2, effective July 1. L. 2002: (1)(c)(I) repealed, p. 676, § 6, effective May 28. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-130. Appropriation to comply with section 2-2-703 - HB 00-1201. (Repealed)

Source: L. 2000: Entire section added, p. 635, § 7, effective July 1. L. 2002: (1)(c)(I) repealed, p. 676, § 7, effective May 28. L. 2004: (1)(e)(I) repealed, p. 686, § 2, effective July 1. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-131. Appropriation to comply with section 2-2-703 - HB 00-1317. (Repealed)

Source: L. 2000: Entire section added, p. 928, § 23, effective July 1. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-132. Appropriation to comply with section 2-2-703 - HB 00-1107. (Repealed)

Source: L. 2000: Entire section added, p. 712, § 50, effective July 1. L. 2002: (1)(c)(I) repealed, p. 677, § 8, effective May 28. L. 2008: Entire section repealed, p. 1885, § 27, effective August 5.

17-1-133. Appropriation to comply with section 2-2-703 - HB 01-1205. (Repealed)

Source: **L. 2001:** Entire section added, p. 527, § 3, effective May 22. **L. 2002:** (1)(a) repealed, p. 677, § 9, effective May 28. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

17-1-134. Appropriation to comply with section 2-2-703 - SB 01-046. (Repealed)

Source: **L. 2001:** Entire section added, p. 606, § 5, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-133 in Senate Bill 01-046 but was renumbered on revision for ease of location.

17-1-135. Appropriation to comply with section 2-2-703 - HB 01-1204. (Repealed)

Source: **L. 2001:** Entire section added, p. 1010, § 3, effective July 1. **L. 2003:** (1)(a) repealed, p. 1470, § 3, effective May 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-133 in House Bill 01-1204 but was renumbered on revision for ease of location.

17-1-136. Appropriation to comply with section 2-2-703 - SB 01-210. (Repealed)

Source: **L. 2001:** Entire section added, p. 568, § 6, effective May 29. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-133 in Senate Bill 01-210 but was renumbered on revision for ease of location.

17-1-137. Appropriation to comply with section 2-2-703 - HB 01-1242. (Repealed)

Source: **L. 2001:** Entire section added, p. 860, § 10, effective July 1. **L. 2002:** (1)(b)(I) repealed, p. 677, § 10, effective May 28. **L. 2003:** (1)(c)(I) repealed, p. 1470, § 4, effective May 1. **L. 2004:** (1)(d)(I) repealed, p. 686, § 3, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-133 in House Bill 01-1242 but was renumbered on revision for ease of location.

17-1-138. Appropriation to comply with section 2-2-703 - HB 01-1344. (Repealed)

Source: **L. 2001:** Entire section added, p. 1058, § 2, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-133 in House Bill 01-1344 but was renumbered on revision for ease of location.

17-1-139. Appropriation to comply with section 2-2-703 - HB 02-1301. (Repealed)

Source: **L. 2002:** Entire section added, p. 811, § 3, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

17-1-140. Appropriation to comply with section 2-2-703 - HB 02-1283. (Repealed)

Source: **L. 2002:** Entire section added, p. 1196, § 3, effective June 3. **L. 2003:** (1)(a) repealed, p. 327, § 3, effective March 5. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-139 in House Bill 02-1283 but was renumbered on revision for ease of location.

17-1-141. Appropriation to comply with section 2-2-703 - HB 02-1396. (Repealed)

Source: **L. 2002:** Entire section added, p. 1128, § 3, effective June 3. **L. 2003:** (1)(a) repealed, p. 327, § 4, effective March 5. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-139 in House Bill 02-1396 but was renumbered on revision for ease of location.

17-1-142. Appropriation to comply with section 2-2-703 - SB 02-050. (Repealed)

Source: **L. 2002:** Entire section added, p. 1265, § 2, effective August 7. **L. 2003:** (1)(a) repealed, p. 328, § 5, effective March 5; (1)(b)(I) repealed, p. 1470, § 5, effective May 1. **L. 2004:** (1)(c)(I) and (1)(d)(I) repealed, p. 686, § 4, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-139 in Senate Bill 02-050 but was renumbered on revision for ease of location.

17-1-143. Appropriation to comply with section 2-2-703 - HB 02-1038. (Repealed)

Source: **L. 2002:** Entire section added, p. 1270, § 2, effective July 1. **L. 2003:** (1)(a) repealed, p. 328, § 6, effective March 5; (1)(b)(I) repealed, p. 1471, § 6, effective May 1. **L. 2004:** (1)(c)(I) repealed, p. 687, § 5, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-139 in House Bill 02-1038 but was renumbered on revision for ease of location.

17-1-144. Appropriation to comply with section 2-2-703 - HB 02S-1006. (Repealed)

Source: **L. 2002, 3rd Ex. Sess.:** Entire section added, p. 40, § 9, effective July 17. **L. 2003:** (1)(a) repealed, p. 328, § 7, effective March 5. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

17-1-145. Appropriation to comply with section 2-2-703 - HB 02S-1006. (Repealed)

Source: **L. 2002, 3rd Ex. Sess.:** Entire section added, p. 41, § 11, effective July 17. **L. 2004:** (1)(a) repealed, p. 687, § 6, effective July 1. **L. 2008:** Entire section repealed, p. 1885, § 27, effective August 5.

Editor's note: This section was originally numbered as § 17-1-144 in section 11 of House Bill 02S-1006 but was renumbered on revision for ease of location.

17-1-146. Appropriation to comply with section 2-2-703 - HB 03-1004 - repeal. (Repealed)

Source: **L. 2003:** Entire section added, p. 2383, § 3, effective July 1. **L. 2008:** (2) added, p. 1885, § 28, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2008. (See L. 2008, p. 1885.)

17-1-147. Appropriation to comply with section 2-2-703 - HB 03-1138 - repeal. (Repealed)

Source: **L. 2003:** Entire section added, p. 2164, § 6, effective July 1. **L. 2004:** (1)(a) repealed, p. 687, § 7, effective July 1. **L. 2008:** (2) added, p. 1885, § 29, effective August 5.

Editor's note: (1) This section was originally numbered as § 17-1-146 in House Bill 03-1138 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2008. (See L. 2008, p. 1885.)

17-1-148. Appropriation to comply with section 2-2-703 - HB 03-1213 - repeal. (Repealed)

Source: **L. 2003:** Entire section added, p. 1883, § 2, effective July 1. **L. 2008:** (2) added, p. 1885, § 30, effective August 5.

Editor's note: (1) This section was originally numbered as § 17-1-146 in House Bill 03-1213 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2008. (See L. 2008, p. 1885.)

17-1-149. Appropriation to comply with section 2-2-703 - HB 03-1317 - repeal. (Repealed)

Source: **L. 2003:** Entire section added, p. 2388, § 5, effective July 1, 2004. **L. 2004:** (1)(a) and (1)(b)(I) repealed, p. 688, § 8, effective July 1. **L. 2008:** (2) added, p. 1885, § 31, effective August 5.

Editor's note: (1) This section was originally numbered as § 17-1-146 in House Bill 03-1317 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2008. (See L. 2008, p. 1885.)

17-1-150. Appropriation to comply with section 2-2-703 - HB 04-1016 - repeal. (Repealed)

Source: L. 2004: Entire section added, p. 800, § 2, effective May 21. **L. 2008:** (2) added, p. 1886, § 32, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2009. (See L. 2008, p. 1886.)

17-1-151. Appropriation to comply with section 2-2-703 - HB 04-1003 - repeal. (Repealed)

Source: L. 2004: Entire section added, p. 1082, § 6, effective July 1. **L. 2008:** (2) added, p. 1886, § 33, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2009. (See L. 2008, p. 1886.)

17-1-152. Appropriation to comply with section 2-2-703 - HB 04-1021 - repeal. (Repealed)

Source: L. 2004: Entire section added, p. 789, § 14, effective July 1. **L. 2008:** (2) added, p. 1886, § 34, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2009. (See L. 2008, p. 1886.)

17-1-153. Appropriation to comply with section 2-2-703 - SB 06-207 - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 1308, § 3, effective May 30. **L. 2008:** (2) added, p. 1886, § 35, effective August 5. **L. 2010:** (1)(d)(I) repealed, (HB 10-1389), ch. 206, p. 895, § 2, effective May 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1886.)

17-1-154. Appropriation to comply with section 2-2-703 - HB 06-1151 - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 2048, § 2, effective July 1. **L. 2008:** (2) added, p. 1886, § 36, effective August 5.

Editor's note: (1) This section was originally numbered as § 17-1-153 in House Bill 06-1151 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1886.)

17-1-155. Appropriation to comply with section 2-2-703 - HB 06-1011 - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 2059, § 10, effective July 1. **L. 2008:** (2) added, p. 1886, § 37, effective August 5. **L. 2010:** (1)(d)(I) repealed, (HB 10-1389), ch. 206, p. 895, § 3, effective May 5.

Editor's note: (1) This section was originally numbered as § 17-1-153 in House Bill 06-1011 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1886.)

17-1-156. Appropriation to comply with section 2-2-703 - HB 06-1145 - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 1706, § 5, effective July 1. L. 2008: (2) added, p. 1886, § 38, effective August 5.

Editor's note: (1) This section was originally numbered as § 17-1-153 in House Bill 06-1145 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1886.)

17-1-157. Appropriation to comply with section 2-2-703 - HB 06-1326 - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 1324, § 11, effective July 1. L. 2008: (2) added, p. 1886, § 39, effective August 5.

Editor's note: (1) This section was originally numbered as § 17-1-153 in House Bill 06-1326 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1886.)

17-1-158. Appropriation to comply with section 2-2-703 - SB 06-206 - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 1302, § 2, effective May 30. L. 2008: (2) added, p. 1887, § 40, effective August 5. L. 2010: (1)(d)(I) repealed, (HB 10-1389), ch. 206, p. 896, § 4, effective May 5.

Editor's note: (1) This section was originally numbered as § 17-1-153 in Senate Bill 06-206 but was renumbered on revision for ease of location.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1887.)

17-1-159. Appropriation to comply with section 2-2-703 - HB 06-1092 - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 2044, § 6, effective July 1. L. 2008: (2) added, p. 1887, § 41, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1887.)

17-1-160. Appropriation to comply with section 2-2-703 - SB 06S-004 - repeal. (Repealed)

Source: L. 2006, 1st Ex. Sess.: Entire section added, p. 11, § 2, effective July 31. L. 2008: (2) added, p. 1887, § 42, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1887.)

17-1-161. Appropriation to comply with section 2-2-703 - SB 06S-005 - repeal. (Repealed)

Source: L. 2006, 1st Ex. Sess.: Entire section added, p. 15, § 2, effective July 31. L. 2008: (2) added, p. 1887, § 43, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1887.)

17-1-162. Appropriation to comply with section 2-2-703 - SB 06S-007 - repeal. (Repealed)

Source: L. 2006, 1st Ex. Sess.: Entire section added, p. 19, § 2, effective July 31. L. 2008: (2) added, p. 1887, § 44, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2011. (See L. 2008, p. 1887.)

17-1-163. Appropriation to comply with section 2-2-703 - HB 07-1040 - repeal. (Repealed)

Source: L. 2007: Entire section added, p. 1773, § 3, effective June 1. L. 2008: (2) added, p. 1887, § 45, effective August 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2012. (See L. 2008, p. 1887.)

17-1-164. Appropriation to comply with section 2-2-703 - SB 07-096 - repeal. (Repealed)

Source: L. 2007: Entire section added, p. 2006, § 3, effective July 1. L. 2008: (2) added, p. 1887, § 46, effective August 5. L. 2010: (1)(c)(I) repealed, (HB 10-1389), ch. 206, p. 896, § 5, effective May 5.

Editor's note: Subsection (2) provided for the repeal this section, effective July 1, 2012. (See L. 2008, p. 1887.)

17-1-165. Appropriation to comply with section 2-2-703 - HB 07-1326 - repeal. (Repealed)

Source: L. 2007: Entire section added, p. 1682, § 5, effective July 1. L. 2008: (2) added, p. 1887, § 47, effective August 5. L. 2010: (1)(c)(I) repealed, (HB 10-1389), ch. 206, p. 896, § 6, effective May 5.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2012. (See L. 2008, p. 1887.)

PART 2

CORRECTIONS PRIVATIZATION - REQUESTS FOR PROPOSALS PROCESS

17-1-201. Duties of department. (1) The department shall adopt rules and implement a process to issue requests for competitive proposals for the use and development of private contract prisons.

(2) No later than December 1 of each fiscal year, beginning with the 1996-97 fiscal year, the executive director shall submit a report to the speaker of the house of represen-

tatives and the president of the senate concerning the status of contracts in effect, and, with respect to completed prisons, the effectiveness of each private contract prison governed by a contract with the department.

Source: **L. 95:** Entire part added, p. 1267, § 1, effective June 5. **L. 2000:** Entire section amended, p. 837, § 18, effective May 24. **L. 2004:** (1) amended, p. 127, § 1, effective August 4.

17-1-202. Requests for competitive proposals and contract requirements. (1) Before entering into any contract for designing, financing, acquiring, constructing, or operating a private contract prison or any contract for any combination of these functions, the department may issue a request for competitive proposals. Prior to issuing a request for competitive proposals requiring new construction under this section, the department shall notify the capital development committee, established pursuant to section 2-3-1302, C.R.S. The department's rules, at a minimum, shall require that any contract proposed and awarded by the executive director pursuant to this part 2 shall be governed by the following principles:

(a) A contract shall be negotiated with the contractor which, in the determination of the department, is found to be the most qualified and the most competitive under the circumstances; except that a contract for private correctional facilities shall not be executed unless the executive director of the department of corrections determines that the contractor has demonstrated compliance with the following standards:

(I) The qualifications, experience, and management personnel necessary to carry out the terms of the contract. At a minimum, this standard shall prohibit the contractor from employing a person who is required to register pursuant to the provisions of the "Colorado Sex Offender Registration Act", article 22 of title 16, C.R.S., to work in the private correctional facility. In connection with this standard, the contractor shall require applicants for employment to submit a set of fingerprints to the Colorado bureau of investigation for a criminal background check as provided in section 17-1-204.

(II) The ability to expedite the location, design, and construction of a private correctional facility; and

(III) The ability to comply with applicable laws, court orders, and national correctional standards.

(b) A contractor shall agree to indemnify the state and the department of corrections, including their officials and agents, against any and all liability including but not limited to any civil rights claims. The department of corrections shall require proof of satisfactory insurance, the amount to be determined by the department of corrections following consultation with the division of insurance in the department of regulatory agencies.

(c) The contractor shall seek, obtain, and maintain accreditation by the association responsible for adopting national correctional standards. In addition, the contractor shall comply with the association's amendments to the accreditation standards upon approval of the amendments by the department of corrections.

(d) The proposed private contract prisons and the management plans for inmates shall meet applicable national correctional standards and the requirements of applicable court orders and state law.

(e) The contractor shall agree to abide by operations standards for correctional facilities adopted by the executive director of the department of corrections.

(f) The contractor shall be responsible for a range of dental, medical, and psychological services and diet, education, and work programs at least equal to those services and programs provided by the department of corrections at comparable state correctional facilities. The work and education programs shall be designed to reduce recidivism.

(g) The executive director shall monitor all private contract prisons. Each contractor shall bear the costs of monitoring associated with out-of-state inmates and shall reimburse the department on a per-inmate basis for out-of-state inmates, but shall not bear the costs of monitoring associated with Colorado inmates.

(1.5) For the purposes of a contract in existence as of April 1, 2004, if a contractor employs a person in a private correctional facility who is required to register as a sex

offender pursuant to the provisions of the "Colorado Sex Offender Registration Act", article 22 of title 16, C.R.S., the contractor shall ensure that the person does not have unsupervised contact with an inmate on and after April 1, 2004. Failure to comply with the provisions of this subsection (1.5) shall constitute a breach and grounds for termination of the contract.

(2) A contract entered into under this part 2 does not accord third-party beneficiary status to any inmate or to any member of the general public.

(3) Each contract shall include any other requirements the department considers necessary and appropriate for carrying out the purposes of this part 2.

Source: L. 95: Entire part added, p. 1268, § 1, effective June 5. L. 2000: IP(1), (1)(d), and (1)(g) amended, p. 837, § 19, effective May 24. L. 2004: (1)(a)(I) amended and (1.5) added, p. 231, § 2, effective April 1; (1)(g) amended, p. 753, § 1, effective May 12; IP(1) and IP(1)(a) amended, p. 127, § 2, effective August 4. L. 2006: IP(1) amended, p. 1059, § 1, effective May 25.

17-1-202.5. Private prison planning process. (1) In any fiscal year, if the general assembly determines that the amount of moneys credited to the capital construction fund, created in section 24-75-302, C.R.S., is not sufficient to pay for the design and construction of a correctional facility for adult offenders that is deemed necessary to satisfy future prison bed projections and needs, the department may request competitive proposals from private prison providers three years before desired occupancy of the correctional facility. Prior to issuing a request for competitive proposals requiring new construction under this section, the department shall notify the capital development committee, established pursuant to section 2-3-1302, C.R.S.

(2) (a) The department, during the request for competitive proposals process described in subsection (1) of this section, shall determine the level of security, the desired location, and the number of beds necessary for the facility, as well as other criteria applicable to the appropriate conditions of confinement to be maintained at the facility. The department shall be under no obligation or duty to place offenders in a facility covered by this section.

(b) The department in all instances shall ensure that requests for competitive proposals adequately inform prospective contractors that the department will give priority to proposals that satisfy the requirements of section 17-1-202 and that are competitive to the extent they contain terms that are most favorable to the department. The department shall, to the extent possible, also take steps to provide a competitive market environment for prospective contractors and to avoid decreased competition and the creation of a monopoly in the market.

(3) Nothing in this section shall be construed to require or permit the department to lend or pledge the credit or faith of the department or of the state in any manner that would violate section 1 of article XI of the Colorado constitution.

Source: L. 2004: Entire section added, p. 127, § 3, effective August 4. L. 2006: (1) amended, p. 1059, § 2, effective May 25.

17-1-203. Powers and duties not delegable to contractor. (1) A contract executed pursuant to this part 2 shall not be construed as authorizing, allowing, or delegating authority to the contractor to:

(a) Choose the correctional facility to which an inmate is initially assigned or subsequently transferred. The contractor may request, in writing, that an inmate be transferred to a facility operated by the department. The executive director and the contractor shall develop and implement a cooperative agreement for transferring inmates between a correctional facility operated by the department and a private contract prison. The department and the contractor must comply with the cooperative agreement.

(b) Develop or adopt disciplinary rules or penalties that differ from the disciplinary rules and penalties that apply to inmates housed in correctional facilities operated by the department of corrections;

(c) Make a final determination on a disciplinary action that affects the liberty of an inmate. The contractor may remove an inmate from the general prison population during an emergency, before final resolution of a disciplinary hearing, or in response to an inmate's request for assigned housing in protective custody.

(d) Make a decision that affects the sentence imposed upon or the time served by an inmate, including a decision to award, deny, or forfeit earned time;

(e) Make recommendations to the state board of parole with respect to the denial or granting of parole or release; however, the contractor may submit written reports to the state board of parole and shall respond to any written request by the state board of parole for information;

(f) Develop and implement requirements that inmates engage in any type of work, except to the extent that those requirements are accepted by the department;

(g) Determine inmate eligibility for any form of release from a correctional facility.

Source: L. 95: Entire part added, p. 1269, § 1, effective June 5. **L. 2000:** (1)(a) amended, p. 838, § 20, effective May 24.

ANNOTATION

Subsection (1)(c) sets forth three separate circumstances in which a contractor may remove a prison inmate from the general prison population. The clause "before final resolution of a disciplinary hearing" is a separate category and does not modify the phrase "during an emergency". *Gatrell v. Kurtz*, 207 P.3d 916 (Colo. App. 2009).

Because private prison lacks authority to make a final determination on a disciplinary action that affects the liberty of an inmate, timely filing of an appeal is measured from the date of the private prison's monitoring unit's decision and not the date of the warden's decision. *Geerdes v. Colo. Dept. of Corr.*, 226 P.3d 1261 (Colo. App. 2010).

17-1-204. Background checks. (1) The Colorado bureau of investigation may accept fingerprints of individuals who apply for employment at a private correctional facility and who shall be subject to background checks in accordance with section 17-1-202 (1) (a) (I).

(2) For the purpose of conducting background checks, to the extent provided for by federal law, the Colorado bureau of investigation may exchange with the department state, multistate, and federal criminal history records of individuals who apply for employment at a private correctional facility.

Source: L. 95: Entire part added, p. 1270, § 1, effective June 5.

17-1-205. Contract termination - control of a correctional facility by the department. A contractor shall submit a detailed plan for the department to assume temporary responsibility for a private contract prison when the contract between the state and the contractor terminates. The state, through the executive director, may terminate the contract for cause, including but not limited to failure to obtain or maintain facility accreditation, after written notice of material deficiencies and after sixty workdays have been provided to the contractor to correct the material deficiencies. If any event occurs involving the noncompliance with or violation of contract terms and presents a serious threat to the safety, health, or security of the inmates, employees, or the public, the department may temporarily assume responsibility for the private contract prison. In addition, a contractor shall submit a plan for the temporary assumption of operations and purchase of a private contract prison by the department in the event of bankruptcy or the financial insolvency of the contractor. The contractor shall provide an emergency plan to address inmate disturbances, employee work stoppages, strikes, or other serious events. The plan shall comply with applicable national correctional standards. Nothing in this section shall be construed to require the state to assume the responsibility for the operation of private contract prisons and costs associated with contractual termination described in this section. If the state chooses, it may assume responsibility upon approval by the general assembly through the enactment of legislation.

Source: **L. 95:** Entire part added, p. 1270, § 1, effective June 5. **L. 2000:** Entire section amended, p. 838, § 21, effective May 24.

17-1-206. Inmates in custody of the department. The provisions of section 16-11-308, C.R.S., shall apply to inmates placed in a private contract prison pursuant to this part 2.

Source: **L. 95:** Entire part added, p. 1271, § 1, effective June 5. **L. 2000:** Entire section amended, p. 838, § 22, effective May 24.

17-1-206.5. Preparole release and revocation facility - community return-to-custody facility. (1) On or before December 1, 2001, the department shall issue a request for proposal for the construction and operation of a private contract prison to serve as a parole and revocation center, that shall be a level III facility, as described in section 17-1-104.3 (1) (a) (III).

(2) The prison described in subsection (1) of this section shall contain at least three hundred beds and incarcerate any of the following:

(a) Inmates who have not been convicted of a crime of violence as defined in section 18-1.3-406, C.R.S., and who have no more than nineteen months remaining until such inmate's parole eligibility date;

(b) Inmates who have been convicted of a crime of violence as defined in section 18-1.3-406, C.R.S., and who have no more than nine months remaining until such inmate's parole eligibility date; or

(c) Offenders whose parole has been revoked; except that such incarceration shall be for no more than one hundred eighty days.

(3) In addition to the parole release and revocation facility described in subsections (1) and (2) of this section, the department has the authority to operate community return-to-custody facilities and provide other support and monitoring services as a revocation facility for the placement of nonviolent parolees whose parole is revoked pursuant to section 17-2-103 (11) (b) (III) under the following conditions:

(a) The facilities shall be limited to the placement of nonviolent parolees whose parole is revoked pursuant to section 17-2-103 (11) (b) (III);

(b) The scope of the facilities' programming shall be limited to services and monitoring that address the failure of a nonviolent parolee whose parole is revoked pursuant to section 17-2-103 (11) (b) (III) and will allow for limited performance-based access to the community. A request for proposals for such services and monitoring shall be issued by the department on or before August 31, 2003, and the contracts awarded by November 2003.

(c) The department may assess and collect fees from parolees placed in the facility pursuant to section 17-2-103 (11) (b) (III).

Source: **L. 2001:** Entire section added, p. 501, § 1, effective May 16. **L. 2002:** (2)(a) and (2)(b) amended, p. 1499, § 157, effective October 1. **L. 2003:** (3) added, p. 2679, § 6, effective July 1.

Editor's note: The provisions of this section as enacted by House Bill 01-1370 were renumbered on revision to conform to statutory format.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (2)(a) and (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-1-207. Applicability of part. This part 2 shall not apply to the contracts between counties and the department of corrections under which the county agrees to house the backlog of inmates as provided by section 16-11-308.5, C.R.S., which contracts shall be governed by said section. In addition, this part 2 shall not apply to any contract entered into by the department under circumstances where the contract has been reviewed in accordance with section 17-1-105 (2).

Source: **L. 95:** Entire part added, p. 1271, § 1, effective June 5.

Parole and Probation

ARTICLE 2

Correctional Services

Editor’s note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in article 1 of this title.
(2) For additional historical information concerning the repeal and reenactment of this title, see the editor’s note at the beginning of this title.

Cross references: For the “Uniform Act for Out-of-State Parolee Supervision”, see part 3 of article 60 of title 24.

PART 1		17-2-205.	Time of parole not considered when convict is reincarcerated. (Repealed)
DIVISION OF ADULT PAROLE		17-2-206.	Parole not to be construed as discharge. (Repealed)
17-2-100.2.	Legislative intent regarding parole.	17-2-207.	Parole - regulations.
17-2-101.	Division of adult parole.	17-2-208.	Effective date and application. (Repealed)
17-2-102.	Division of adult parole - general powers, duties, and functions - definitions.	17-2-209.	Civil proceedings - inmate subject to parole.
17-2-103.	Arrest of parolee - revocation proceedings.	17-2-210.	Duties of board.
17-2-103.5.	Revocation proceedings - parolee arrested for certain offenses.	17-2-211.	Jurisdiction of courts.
17-2-104.	Records - reports - publications.	17-2-212.	Duty of warden.
17-2-105.	Appropriation. (Repealed)	17-2-213.	Application of part.
17-2-106.	Branch parole offices - acquisition - duty to inform public.	17-2-214.	Right to attend parole hearings.
		17-2-215.	Notification of parole proceeding.
		17-2-216.	Application of sections 17-2-214 and 17-2-215.
		17-2-217.	Release hearing officers - pilot program.
PART 2		PART 3	
STATE BOARD OF PAROLE		COOPERATIVE RETURN OF PAROLE AND PROBATION VIOLATORS	
17-2-201.	State board of parole.	17-2-301.	Short title.
17-2-201.5.	Study of parole system. (Repealed)	17-2-302.	Director - powers.
17-2-202.	Request for transfer - penitentiary to reformatory. (Repealed)	17-2-303.	Deputization.
17-2-202.5.	Administrative hearing officers and release hearing officers - qualifications - duties.	17-2-304.	Interstate agreements.
17-2-203.	Request for transfer - reformatory to penitentiary. (Repealed)	PART 4	
17-2-204.	Parole may issue - when.	PREPAROLE FACILITIES AND PROGRAMS	
		17-2-401 to	
		17-2-405.	(Repealed)

PART 1

DIVISION OF ADULT PAROLE

Cross references: For home detention programs for parolees, see § 17-27.8-105.

17-2-100.2. Legislative intent regarding parole. The general assembly hereby finds and declares that the primary consideration for any decision to grant parole shall be the public safety. The general assembly further finds and declares that, since parole is a

privilege granted by the general assembly and not a right guaranteed under the state or federal constitutions, if the parolee violates the conditions of his parole, that privilege may be revoked.

Source: L. 87: Entire section added, p. 650, § 1, effective July 1.

17-2-101. Division of adult parole. In order to promote the maximum efficiency, economy, and continuity of services in carrying out the purposes of this part 1, the division of administration created by the "State Parole Reorganization Act of 1951", formerly transferred to the department of institutions and identified as the division of parole, and the director thereof are hereby transferred by a **type 3** transfer to the department of corrections as the division of adult parole and the director thereof, and the division of parole is abolished. The division shall be organized as directed by the executive director.

Source: L. 77: Entire title R&RE, p. 906, § 10, effective August 1. **L. 2000:** Entire section amended, p. 839, § 23, effective May 24.

Editor's note: (1) This section is similar to former § 17-1-101 as it existed prior to 1977.

(2) The "State Parole Reorganization Act of 1951" was originally entitled the "State Department of Parole, Reorganization Act of 1951" (see L. 51, p. 333, § 1 and § 17-1-101, C.R.S. 1973, as that section existed prior to August 1, 1977).

Cross references: For **type 3** transfers, see § 24-1-105 (3).

17-2-102. Division of adult parole - general powers, duties, and functions - definitions. (1) The division of adult parole in the department shall administer the adult parole program. The division shall keep a complete record in respect to all domestic as well as interstate parolees. The director of the division of adult parole shall exercise the power of suspension of paroles in the interim of the meetings of the state board of parole, referred to in this part 1 as the "board", and in connection therewith the director may arrest such suspended parolee without warrant and return such suspended parolee to an appropriately secure facility to await the further action of the board. In case of such suspension of parole, the director shall send to the board, at its first session thereafter, a transcript of all proceedings taken in connection with such suspension and the reasons for his or her action.

(2) (Deleted by amendment, L. 2000, p. 839, § 24, effective May 24, 2000.)

(3) The director of the division of adult parole, pursuant to the provisions of section 13 of article XII of the state constitution, shall appoint such other officers and employees as may be necessary to properly supervise all adult parolees released from any state correctional institution or private contract prison together with such other persons as are accepted for supervision under the interstate compact.

(4) and (5) (Deleted by amendment, L. 2000, p. 839, § 24, effective May 24, 2000.)

(6) Repealed.

(7) (Deleted by amendment, L. 2000, p. 839, § 24, effective May 24, 2000.)

(8) The division of adult parole shall establish and administer appropriate programs of education and treatment and other productive activities, which programs and activities are designed to assist in the rehabilitation of an offender.

(8.5) (a) Any parolee, on parole as a result of a conviction of any felony, who is under the supervision of the division of adult parole pursuant to this part 1 and who is initially tested for the illegal or unauthorized use of a controlled substance and the result of such test is positive shall be subject to any or all of the following actions:

(I) An immediate warrantless arrest;

(II) An immediate increase in the level of supervision, including but not limited to intensive supervision;

(III) Random screenings for the detection of the illegal or unauthorized use of a controlled substance, which use may serve as the basis for any other community placement;

(IV) Referral to a substance abuse treatment program.

(b) If any parolee described in paragraph (a) of this subsection (8.5) is subjected to a second or subsequent test for the illegal or unauthorized use of a controlled substance and the result of the test is positive, the community parole officer shall take one or more of the following actions:

- (I) Make an immediate warrantless arrest;
 - (II) Seek a parole revocation in accordance with section 17-2-103;
 - (III) Immediately increase the level of supervision, including but not limited to intensive supervision;
 - (IV) Increase the number of drug screenings for the illegal or unauthorized use of controlled substances;
 - (V) Refer the parolee to a substance abuse treatment program.
- (c) This subsection (8.5) shall not apply to any parolee to whom article 11.5 of title 16, C.R.S., applies.

(9) (Deleted by amendment, L. 2000, p. 839, § 24, effective May 24, 2000.)

(10) (a) The division of adult parole shall, in accordance with section 17-2-106:

(I) Notify a municipality of any site within such municipality that the division has selected to become a branch parole office; or

(II) Notify a county of any site within such county that the division has selected to become a branch parole office if the site is not within a municipality located in the county.

(b) For purposes of this subsection (10) and section 17-2-106, “branch parole office” means any real estate in this state that the division of adult parole, on behalf of the department of corrections, may acquire by purchase, leasehold, or other method for the purpose of operating an office to perform any function required or permitted by this title concerning parolee interview, reporting, testing, screening, and supervision.

(11) The division of adult parole shall provide to the judiciary committees of the senate and the house of representatives, or any successor committees, a status report on the effect on parole outcomes and use of any moneys allocated pursuant to House Bill 10-1360, enacted in 2010.

Source: L. 77: Entire title R&RE, p. 907, § 10, effective August 1. L. 79: (6) repealed, p. 705, § 88, effective July 1. L. 80: (7) and (8) added, p. 525, § 1, effective March 25. L. 82: (2) amended, p. 352, § 7, effective April 30. L. 87: (9) added, p. 650, § 2, effective July 1. L. 89: (8.5) added, p. 877, § 13, effective June 5. L. 91: (8.5)(c) added, p. 442, § 5, effective May 29. L. 2000: (1) to (5), (7), (8), IP(8.5)(a), and (9) amended, p. 839, § 24, effective May 24. L. 2001: (10) added, p. 662, § 1, effective August 8. L. 2008: IP(8.5)(b) amended, p. 655, § 3, effective April 25. L. 2010: (11) added, (HB 10-1360), ch. 263, p. 1196, § 7, effective May 25.

Editor’s note: This section is similar to former § 17-1-102 as it existed prior to 1977.

Cross references: For the interstate compact referred to in subsection (3) of this section, see part 3 of article 60 of title 24.

ANNOTATION

The plain language of subsection (8.5)(c) of this section and § 17-2-201 (5.5)(g) prohibits the application of either subsection (8.5) of this section or § 17-2-201 (5.5) to any parolee to whom the Substance Abuse Act, article 11.5 of title 16, applies. Whidden v. People, 78 P.3d 1092 (Colo. 2003).

Subsection (8.5), when read together with § 17-2-201 (5.5)(d), prohibits parole revocation upon initial drug or alcohol testing even if the result is positive, but does allow revoca-

tion upon any subsequent positive test even if the initial test was not positive. People v. Whidden, 56 P.3d 1201 (Colo. App. 2002), *aff’d* on other grounds, 78 P.3d 1092 (Colo. 2003).

Court rejected the contention that subsection (8.5) restricts the parole board’s authority to revoke defendant’s parole for a single violation based on a positive test for use of illegal drugs. People v. Whidden, 56 P.3d 1201 (Colo. App. 2002), *aff’d* on other grounds, 78 P.3d 1092 (Colo. 2003).

17-2-103. Arrest of parolee - revocation proceedings. (1) The director of the division of adult parole or any community parole officer may arrest any parolee when:

- (a) He has a warrant commanding that such parolee be arrested; or
- (b) He has probable cause to believe that a warrant for the parolee's arrest has been issued in this state or another state for any criminal offense or for violation of a condition of parole; or
- (c) Any offense under the laws of this state has been or is being committed by the parolee in his presence; or
- (d) He has probable cause to believe that a crime has been committed and that the parolee has committed such crime; or
- (e) He has probable cause to believe that the parolee has violated a condition of his parole or probable cause to believe that the parolee is leaving or about to leave the state, or that the parolee will fail or refuse to appear before the board to answer charges of violations of one or more conditions of parole, or that the arrest of the parolee is necessary to prevent physical harm to the parolee or another person or to prevent the commission of a crime; or
- (f) The parolee, who is on parole as a result of a conviction of any felony, has been tested for the illegal or unauthorized use of a controlled substance and the result of such test is positive.

(2) (a) A board hearing relating to the revocation of parole shall be held, at the discretion of the board, in the courthouse or other facility that is acceptable to the board in the county in which the alleged violation occurred, the county of the parolee's confinement, or the county of the parolee's residence if not confined.

(b) In all hearings relating to revocation of parole, one member of the board shall hear the case to a conclusion, unless the chairperson of the board assigns another board member due to the illness or unavailability of the first board member. The parolee may appeal to two members of the board. Such appeal shall be on the record.

(c) At evidentiary hearings concerning revocation of parole, the district attorney of the county in which the hearing is held may be in attendance to present the case.

(d) At all hearings before the board which are held outside of the institution to which the parolee is sentenced, it is the duty of the county sheriff to provide for the safety of all persons present. All counties shall make sufficient room available to conduct parole revocation proceedings in their respective courthouses or other facilities that are acceptable to the board.

(e) All votes of the board at any hearing or appeal held pursuant to this section shall be recorded by member and shall be a public record open to inspection and shall be subject to the provisions of part 3 of article 72 of title 24, C.R.S.

(3) (a) Whenever a community parole officer has reasonable grounds to believe that a condition of parole has been violated by any parolee, he or she may issue a summons requiring the parolee to appear before the board at a specified time and place to answer charges of violation of one or more conditions of parole. The summons shall be accompanied by a copy of the complaint filed before the board seeking revocation of parole. Willful failure of the parolee to appear before the board as required by the summons is a violation of a condition of parole.

(b) A community parole officer may request that the board issue a warrant for the arrest of a parolee for violation of the conditions of his or her parole by filing a complaint with the board showing probable cause to believe that the parolee has violated a condition of his or her parole. The warrant may be executed by a peace officer, as described in section 16-2.5-101, C.R.S.

(4) (a) If, rather than issuing a summons, a community parole officer makes an arrest of a parolee, with or without a warrant, or the parolee is otherwise arrested, the parolee shall be held in a county jail or a preparole facility or program pending action by the community parole officer pursuant to subsection (5) of this section.

(b) Repealed.

(5) Not later than ten working days after the arrest of any parolee, as provided in subsection (4) of this section, the community parole officer shall complete his or her investigation and either:

(a) File a complaint before the board in which the facts are alleged upon which a revocation of parole is sought; or

(b) Order the release of the parolee and request that any warrant be quashed and that any complaint be dismissed, and parole shall be restored; or

(c) Order the release of the parolee and issue a summons requiring the parolee to appear before the board at a specified time and place to answer charges of violation of one or more conditions of parole.

(6) (a) Any complaint filed by the community parole officer in which revocation of parole is sought shall contain the name of the parolee and his or her department of corrections number, identify the nature of the charges that are alleged to justify revocation of his or her parole, the substance of the evidence sustaining the charges, and the condition of parole alleged to have been violated, including the date and approximate location thereof, together with the signature of the community parole officer. A copy thereof shall be given to the parolee a reasonable length of time before any parole board hearing.

(b) At any time after the filing of a complaint, the director of the division of adult parole may cause the revocation proceedings to be dismissed by giving written notification of the decision for the dismissal to the board, the community parole officer, and the parolee. Upon receipt of the notification by the director, the community parole officer shall order the release of the parolee pursuant to subsection (5) of this section, and parole shall be restored.

(c) The filing of a complaint by the community parole officer tolls the expiration of the parolee's parole.

(7) If the parolee is in custody pursuant to subsection (4) of this section, or the parolee was arrested and then released pursuant to paragraph (c) of subsection (5) of this section, the hearing on revocation shall be held within a reasonable time, not to exceed thirty days after the parolee was arrested; except that the board may grant a delay when it finds good cause to exist therefor. If the parolee was issued a summons, the final hearing shall be held within thirty working days from the date the summons was issued; except that the board may grant a delay when it finds good cause to exist therefor. The board shall notify the sheriff, the community parole officer, and the parolee of the date, time, and place of the hearing. It shall be the responsibility of the sheriff to assure the presence of the parolee being held in custody at the time and place of the hearing and to provide for the safety of all present.

(8) Prior to appearance before the board, a parolee shall be advised in writing by the director of the division of adult parole concerning the nature of the charges that are alleged to justify revocation of parole and the substance of the evidence sustaining the charges; the parolee shall be given a copy of the complaint unless he or she has already received one; the parolee shall be informed of the consequences which may follow in the event parole is revoked; the parolee shall then be advised that a full and final hearing will be held before the board at which hearing the parolee will be required to plead guilty or not guilty to the charges contained in the complaint; and the parolee shall be further advised that at the hearing before the board he or she may be represented by an attorney and that he or she may testify and present witnesses and documentary evidence in defense of the charges or in mitigation or explanation thereof. The hearing may be continued by the board upon a showing of good cause.

(9) (a) In the event of a plea of not guilty, the division of adult parole, at the final hearing before the board, shall have the burden of establishing by a preponderance of the evidence the violation of a condition of parole; except that the commission of a criminal offense must be established beyond a reasonable doubt, unless the parolee has been convicted thereof in a criminal proceeding. When it appears that the alleged violation of a condition or conditions of parole consists of an offense with which the parolee is charged in a criminal case then pending, testimony given before the board in a parole revocation proceeding shall not be admissible in such criminal proceeding before a court. When, in a parole revocation hearing, the alleged violation of a condition of parole is the parolee's failure to pay court-ordered compensation to appointed counsel, probation fees, court costs, restitution, or reparations, evidence of the failure to pay shall constitute prima facie evidence of a violation. The board may revoke the parole if requested to do so by the parolee. Any evidence having probative value shall be admissible in all proceedings related

to a parole violation complaint, regardless of its admissibility under the exclusionary rules of evidence, if the parolee is accorded a fair opportunity to rebut hearsay evidence. The parolee shall have the right to confront and to cross-examine adverse witnesses unless the board specifically finds good cause for not allowing confrontation of an informer.

(b) If the parolee has been convicted of a criminal offense while on parole, the board shall accept said conviction as conclusive proof of a violation and shall conduct a hearing as to the disposition of the parole only.

(10) Repealed.

(11) (a) If the board determines that a violation of a condition or conditions of parole has been committed, the board shall, within five working days after the completion of the final hearing, either revoke the parole, as provided in paragraph (b) of this subsection (11), or continue it in effect, or modify the conditions of parole if circumstances then shown to exist require such modifications. If parole is revoked, the board shall serve upon the parolee a written statement as to the evidence relied on and the reasons for revoking parole.

(b) (I) If the board determines that the parolee has violated parole through commission of a crime, the board may revoke parole and request the sheriff of the county in which the hearing is held to transport the parolee to a place of confinement designated by the executive director.

(II) If the board determines that the parolee has violated any condition of parole other than commission of a crime and is not subject to the provisions of subparagraph (III), (III.5), (IV), or (VI) of this paragraph (b), the board may:

(A) Revoke parole and request the sheriff of the county in which the hearing is held to transport the parolee to a place of confinement designated by the executive director; or

(B) Revoke parole for a period not to exceed one hundred eighty days and request the sheriff of the county in which the hearing is held to transport the parolee to a community corrections program pursuant to section 18-1.3-301 (3), C.R.S., a place of confinement within the department of corrections, or any private facility that is under contract to the department of corrections; or

(C) Revoke parole for a period not to exceed ninety days and request the sheriff of the county in which the hearing is held to transport the parolee to the county jail of such county or to any private facility that is under contract to the department of corrections; or

(D) Revoke parole for a period not to exceed one hundred eighty days and request the sheriff of the county in which the hearing is heard to transport the parolee to the facility described in section 17-1-206.5.

(II.5) The board may extend a period of parole revocation imposed pursuant to sub-subparagraph (A), (B), (C), or (D) of subparagraph (II) of this paragraph (b) beyond the specified maximum if the parolee violates a condition of the parolee's placement pursuant to the notice and hearing procedures in this section.

(III) If the board determines that the parolee has violated any condition of parole that does not involve the commission of a crime, the parolee has no active felony warrant, felony detainer, or pending felony criminal charge, and the parolee was on parole for an offense that was a class 5 or class 6 nonviolent felony as defined in section 17-22.5-405 (5) (b), except for menacing as defined in section 18-3-206, C.R.S., or any unlawful sexual behavior contained in section 16-22-102 (9), C.R.S., or unless the parolee was subject to article 6.5 of title 18, C.R.S., or section 18-6-801, C.R.S., the board may revoke parole for a period not to exceed one hundred eighty days and request the sheriff of the county in which the hearing is held to transport the parolee to the facility described in section 17-1-206.5 (3).

(III.5) If the board determines that the parolee has violated any condition of parole that does not involve the commission of a crime, the parolee has no active felony warrant, felony detainer, or pending felony criminal charge, and the parolee was on parole for an offense that was a class 4 nonviolent felony as defined in section 17-22.5-405 (5) (b), except for stalking as described in section 18-9-111 (4), C.R.S., as it existed prior to August 11, 2010, or section 18-3-602, C.R.S., or any unlawful sexual behavior described in section 16-22-102 (9), C.R.S., or unless the parolee was subject to article 6.5 of title 18, C.R.S., or section 18-6-801, C.R.S., and the board revokes parole, the board may request the sheriff of the county in which the hearing is held to transport the parolee to the facility described in section 17-1-206.5 (3) for a period not to exceed one hundred eighty days.

(IV) If the board determines that the parolee has violated any condition of parole other than commission of a new crime and the parolee was not on parole for a crime of violence as defined in section 18-1.3-406 (2), C.R.S., the board may:

(A) Revoke parole for a period not to exceed ninety days and request the sheriff of the county in which the hearing is held to transport the parolee to a place of confinement designated by the executive director if, at the time of the revocation hearing, the inmate is assessed as below high risk based upon a research-based risk assessment instrument approved by the department of corrections and the state board of parole; or

(B) Revoke parole for a period not to exceed one hundred eighty days and request the sheriff of the county in which the hearing is held to transport the parolee to a place of confinement designated by the executive director if, at the time of the revocation hearing, the inmate is assessed as high risk or greater based upon a research-based risk assessment instrument approved by the department of corrections and the state board of parole; or

(C) Revoke parole for a period not to exceed one hundred eighty days and request the sheriff of the county in which the hearing is held to transport the parolee to a community corrections program; or

(D) Revoke parole for a period not to exceed one hundred eighty days and request the sheriff of the county in which the hearing is held to transport the parolee to the facility described in section 17-1-206.5.

(V) The board may extend a period of parole revocation imposed pursuant to subparagraph (A), (B), (C), or (D) of subparagraph (IV) of this paragraph (b) beyond the specified maximum if the parolee violates a condition of the parolee's placement pursuant to the notice and hearing procedures in this section.

(VI) If the board determines that a parolee who has been designated as a sexually violent predator pursuant to section 18-3-414.5, C.R.S., or found to be a sexually violent predator or its equivalent in any other state or jurisdiction, including but not limited to a military or federal jurisdiction, has violated any condition of parole, the board may revoke parole and request the sheriff of the county in which the hearing is held to transport the parolee to a place of confinement designated by the executive director.

(c) If the board determines that the parolee is in need of treatment and is amenable to treatment, the board shall consider placing the parolee in one of the following treatment options and, if appropriate, may modify the conditions of parole to include:

(I) Participation in an outpatient program for the treatment of substance abuse, mental illness, or co-occurring disorders; or

(II) (A) Placement in a residential treatment program for the treatment of substance abuse, mental illness, or co-occurring disorders, which program is under contract with the department of public safety and may include, but need not be limited to, intensive residential treatment, therapeutic community, and mental health programs.

(B) A parolee may be placed in a residential treatment program only upon acceptance by the residential treatment program and any community corrections board with jurisdiction over the residential treatment program. Residential treatment programs and community corrections boards are encouraged to develop an expedited review process to facilitate decision-making and placement of the parolee, if accepted.

(d) If the parole board orders the parolee to participate in a treatment program as a condition of parole pursuant to paragraph (c) of this subsection (11), the level of treatment ordered shall be consistent with the treatment level need of the parolee based upon an assessment instrument approved for use by the unit within the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse.

(e) If the parolee is unsuccessful in participating in a treatment program ordered pursuant to paragraph (c) of this subsection (11) and his or her participation is terminated, the board may consider placement of the parolee in additional treatment, as appropriate, including a higher level of treatment.

(11.5) Each fiscal year, the general assembly shall appropriate a portion of the savings generated by House Bill 10-1360, enacted in 2010. This appropriation shall be used only for re-entry support services for parolees related to obtaining employment, housing, transportation, substance abuse treatment, mental health treatment, mental health medication, or

offender-specific services. The appropriation shall be made after consideration of the division of adult parole's status report required pursuant to section 17-2-102 (11).

(12) If the community parole officer is informed by any law enforcement agency that a parolee has been arrested for a criminal offense and is being detained in the county jail, the community parole officer shall file a complaint alleging the criminal offense as a violation of parole. The community parole officer shall advise the board of any pending criminal proceeding and shall request that a parole revocation proceeding be deferred pending a disposition of the criminal charge.

(13) (a) The board may revoke the parole if requested to do so by the parolee. If a parolee requests to have his or her parole revoked, the parolee shall provide the board a justifiable reason for requesting revocation of parole.

(b) Prior to revoking parole upon the request of a parolee, the board may recommend or implement appropriate interventions in order to assist in the parolee with reintegration and prevent a return to incarceration.

(c) If the board revokes the parole upon the request of the parolee, the board shall proceed pursuant to paragraph (b) of subsection (11) of this section.

(14) If the board revokes parole and places the parolee in custody, completion of the term of custody shall not constitute discharge of the parolee's remaining period of parole unless the term of custody is equal to the parolee's remaining period of parole.

Source: **L. 77:** Entire title R&RE, p. 908, § 10, effective August 1. **L. 78:** (11) amended, p. 356, § 2, effective April 27. **L. 79:** (2)(a), (2)(d), (4), (5)(a), (6)(b), and (9)(a) amended, p. 686, § 26, effective July 1. **L. 83:** (9)(a) amended, p. 665, § 6, effective July 1. **L. 85:** (1)(e), (2)(a), (2)(b), (2)(d), (3), (4)(a), (5), (6), (7), (8), (9), and (11) amended and (2)(c), (4)(b), and (10) repealed, pp. 633, 641, §§ 1, 11, effective July 1; (2)(e) added, p. 643, § 1, effective July 1. **L. 87:** (2)(a), (2)(b), (2)(d), (6)(b), (7) to (9), and (11) amended, p. 952, § 55, effective March 13; (2)(b) amended, (2)(c) RC&RE, and (6)(c) added, p. 651, §§ 3, 4, 5, effective July 1. **L. 89:** (12) added, p. 863, § 5, effective April 12; (1)(f) added, p. 877, § 14, effective June 5. **L. 90:** (4)(a) amended, p. 944, § 15, effective June 7. **L. 94:** (2)(a), (2)(b), (2)(d), (6)(b), (7), (8), (9), and (11) amended, pp. 2600, 2594, §§ 13, 1, effective June 3. **L. 95:** (11)(b)(II)(B) amended, p. 1097, § 16, effective May 31. **L. 2000:** IP(1), (6)(b), (8), and (9)(a) amended, p. 840, § 25, effective May 24. **L. 2001:** (11)(b)(II)(C) amended and (11)(b)(II)(D) added, p. 502, § 2, effective May 16. **L. 2002:** (11)(b)(II)(B) amended, p. 1499, § 158, effective October 1. **L. 2003:** (9)(a) and (11)(b) amended and (13) and (14) added, p. 2674, § 1, effective July 1; (3)(b) amended, p. 1614, § 9, effective August 6. **L. 2008:** IP(1), (3), (4)(a), IP(5), (6), (7), and (12) amended, p. 655, § 4, effective April 25; (11)(b)(III) amended, p. 1035, § 1, effective August 5. **L. 2010:** IP(11)(b)(II) amended and (11)(b)(VI) added, (HB 10-1089), ch. 56, p. 204, § 1, effective March 31; IP(11)(b)(II), (11)(b)(IV), and (11)(b)(V) amended and (11)(b)(III.5), (11)(c), (11)(d), (11)(e), and (11.5) added, (HB 10-1360), ch. 263, pp. 1193, 1194, 1196, § 2, 4, 5, effective May 25; IP(11)(b)(II) amended and (11)(b)(III.5) added, (HB 10-1360), ch. 263, p. 1194, § 3, effective August 11. **L. 2011:** (11)(d) amended, (HB 11-1303), ch. 264, p. 1156, § 28, effective August 10.

Editor's note: (1) This section is similar to former § 17-1-103 as it existed prior to 1977.

(2) Amendments to subsection (11) in sections 1 and 13 of Senate Bill 94-172 were harmonized.

(3) Amendments to IP(11)(b)(II) by House Bill 10-1089 and House Bill 10-1360 were harmonized.

Cross references: (1) For other provisions concerning parole revocation proceedings, see § 17-2-201.

(2) For the legislative declaration contained in the 2002 act amending subsection (11)(b)(II)(B), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

- I. General Consideration.
- II. Arrest and Investigation of Parolee.
- III. Revocation Proceedings.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For note, "The Evolution of the Police Officer's Right to Arrest Without a Warrant in Colorado", see 43 Den. L.J. 366 (1966). For comment on *Williams v. Patterson* (389 F.2d 374 (10th Cir. 1968)), see 40 U. Colo. L. Rev. 617 (1968). For article, "Due Process, Equal Protection and State Parole Revocation Proceedings", see 42 U. Colo. L. Rev. 197 (1970).

Annotator's note. Since § 17-2-103 is similar to § 17-1-103 as it existed prior to the 1977 repeal and reenactment of this title, relevant cases construing that provision have been included in the annotations to this section.

No violation of ex post facto clause of federal constitution when provisions which were in existence when a prisoner is sentenced are deleted prior to prisoner's arrest for violation of parole. *Turman v. Romer*, 729 F. Supp. 1276 (D. Colo. 1990).

For purposes of determining when the thirty-day time limitation for a parole revocation hearing begins to run, the parolee is not considered "arrested" until he is delivered into the custody of Colorado authorities. *Turman v. Buckallew*, 784 P.2d 774 (Colo. 1989).

Parole officer's decision to hold the plaintiff pending a parole revocation hearing is protected by qualified immunity, not absolute immunity, by virtue of the distance of the decision from the judicial process. *Mee v. Ortega*, 967 F.2d 423 (10th Cir. 1992).

Whereas, damage resulting from parole officer's testimony at state habeas proceeding was protected by absolute immunity, because as a witness, the parole officer directly serves the court. *Mee v. Ortega*, 967 F.2d 423 (10th Cir. 1992).

Subsection (6)(c) of this section does not negate or change the general rule for applying presentence confinement credit set forth in § 18-1.3-405, which provides that a defendant receive presentence confinement credit on his or her original sentence and not on the new sentence. Rather, the filing of a parole revocation complaint merely provides jurisdiction to the parole board, but once the parole board makes its decision, the time starts running again from the date of the complaint whether the complaint is dismissed or parole is revoked.

People v. Wallin, 167 P.3d 183 (Colo. App. 2007).

II. ARREST AND INVESTIGATION OF PAROLEE.

Parolees, as a class, pose a greater threat of criminal activity to law enforcement authorities than ordinary citizens. *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975).

The parole authority must be vested with the power to investigate a parolee to ascertain whether a parole violation has occurred if it is to fulfill its statutory function. *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975).

The police officer does not have the broad power to supervise parolees that is granted to parole officers. *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975).

A parole officer may cause a police officer to accompany him when a search is being made. *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975).

The fact that a person is on parole does not justify a search without a warrant by any law enforcement officer, other than a parole officer. *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975).

Presence of reasonable cause eliminates need for warrant. A parole officer who is investigating a parole violation is required to have reasonable grounds to believe that a parole violation has occurred. Under these circumstances, when he conducts his search in connection with that investigation, the need for a search warrant is eliminated. *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975) (decided prior to the enactment of § 17-2-201 (5)(f)(I)(D)).

Unrelated evidence admissible in prosecution of another crime. Evidence seized within the scope of a reasonable search by a parole officer, even though unrelated to the parole violation, is admissible in the prosecution of another crime. *People v. Anderson*, 189 Colo. 34, 536 P.2d 302 (1975).

Arrest ends constructive custody. The arrest of a parolee for an alleged violation of the conditions of his parole results in a transposition from constructive to physical custody of such parolee. *Schooley v. Wilson*, 150 Colo. 483, 374 P.2d 353 (1962).

Section limits period of imprisonment, not authority of board to act. The time limitations contained in this section do not limit or prescribe the time within which the parole board must act in order to properly suspend or revoke one's parole. Such time limitations only fix the maximum period of time a suspected parole violator may be held in jail by the parole authorities while they investigate his activities and determine what action should be taken. *Folks v.*

Patterson, 159 Colo. 403, 412 P.2d 214 (1966); Mora v. Patterson, 370 F.2d 923 (10th Cir. 1967); Goetz v. Gunter, 830 P.2d 1154 (Colo. App. 1992).

Thus, board may revoke parole after 15 [now 30] days. The contention that the parole board was deprived of any power to revoke parole once the 15-day [now 30-day] period had passed has been decided adversely, and the supreme court adheres to this ruling. Williams v. Patterson, 161 Colo. 259, 421 P.2d 474 (1966).

Actions prior to revocation are moot. Once the parole board has revoked one's parole, the fact that such person prior to such revocation may have been held for more than the period permitted by this section is of no moment. Folks v. Patterson, 159 Colo. 403, 412 P.2d 214 (1966).

Questions with respect to matters transpiring prior to the time a parolee is transferred to the state penitentiary are not justiciable after the transfer. Mora v. Patterson, 370 F.2d 923 (10th Cir. 1967).

Habeas corpus is the remedy for an unlawful restraint of one's liberty under this section as well as for an unlawful imprisonment, and a person on parole can resort to the remedy of habeas corpus where parole officers are not following the mandate of this section in regard to revocatory proceedings. Schooley v. Wilson, 150 Colo. 483, 374 P.2d 353 (1962).

Where a parolee was arrested and held in actual custody more than 15 [now 30] days without release or revocation of his parole in violation of this section, habeas corpus was the proper remedy. Schooley v. Wilson, 150 Colo. 483, 374 P.2d 353 (1962).

Habeas corpus will lie where a parolee was being detained by the authorities for a time longer than that permitted by this section prior to the parole board's alternative action of either releasing him or revoking his parole. Johnson v. Tinsley, 157 Colo. 539, 404 P.2d 159 (1965).

Relief is discharge only prior to revocation. The proviso now appearing in this section that no parolee shall be kept in jail by the division of parole for a period of more than 15 [now 30] days means that a suspected parole violator who is held in jail for more than 15 [now 30] days while his activities are being investigated is entitled to relief by way of habeas corpus, the relief being discharge-not from the penitentiary or institution following revocation-but from the institution to which confined prior to revocation. People ex rel. Patterson v. District Court, 159 Colo. 142, 410 P.2d 630 (1966).

Since subsection (4)(a) does not expressly require the county to accept "technical" parole violators and evidence existed to show the county jail was overcrowded, the county had no obligation to accept such parole violators. State for Use of Dept. of Corr. v. Pena, 837 P.2d 210 (Colo. App. 1992).

Subsection (1)(e) does not define a city or county's obligation to accept technical parole violators. The State of Colorado, for the Use of the Dept. of Corr. v. Pena, 855 P.2d 805 (Colo. 1993).

Subsection (4)(a) does not mandate that a county or city accept all alleged parole violators who are arrested. The right to arrest and take a parolee to jail for detention does not entail a duty on the part of jails to accept, without discretion, such parolees. The State of Colorado, for the Use of the Dept. of Corr. v. Pena, 855 P.2d 805 (Colo. 1993) (decided under law in effect prior to 1990 amendment).

Subsection (11), read in conjunction with §§ 17-2-201 (5.5)(d) and 17-2-102 (8.5), does not require revocation of parole upon an initial positive drug or alcohol testing. But parole board had authority to revoke defendant's parole based on a single drug or alcohol violation when it occurred in a subsequent test. People v. Whidden, 56 P.3d 1201 (Colo. App. 2002), aff'd on other grounds, 78 P.3d 1092 (Colo. 2003).

The substance abuse in the criminal justice system statutes, article 11.5 of title 16, and this section authorize, but do not require, the board to revoke parole and return a parolee to the department of corrections based upon a single positive drug test that occurs after the baseline test. People v. Whidden, 78 P.3d 1092 (Colo. 2003).

III. REVOCATION PROCEEDINGS.

Probable cause hearing required as promptly as convenient. Although this section is silent regarding a time limitation within which the probable cause hearing required by subsection (4) must be held, due process requires only that a hearing be conducted as "promptly as convenient". Mijares v. Shipley, 197 Colo. 282, 592 P.2d 414 (1979).

Due process requires fairness in revocation hearings. Parolees in parole revocation hearings are not entitled to the specifics of due process available to an accused in the first instance, but this in no way negates their right to enjoy due process as that mandate reflects the right of all persons to inherent fairness in all compulsive processes. Martinez v. Patterson, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L. Ed.2d 868 (1971).

While the parolee's liberty cannot be terminated without reason, it does not follow that he is entitled to all of the federal constitutional procedures and safeguards guaranteed by the due process clause of the fourteenth amendment. Thus, he is not entitled to a speedy public trial pursuant to the sixth amendment, but is entitled to a fair hearing for the purpose of ascertaining whether or not he has violated his parole. Hutchison v. Patterson, 267 F. Supp. 433 (D. Colo. 1967).

The due process clause of the fourteenth amendment of the federal constitution does not generate rights to confrontation, to cross-examination, or to compulsory process at parole revocation hearings. Due process does not comprehend the dual rights to witnesses under oath and evidence in conditional release hearings. *Firkins v. Colo.*, 434 F.2d 1232 (10th Cir. 1970).

This includes right to know charges and hearing free of caprice. The right of a prisoner to be heard at a revocation hearing is inviolative; so, too, is the right to know and be specifically informed of the charges and the nature of the evidence against him; and, finally, the right to be free from pure caprice on the part of the discretionary authority before whom the proceedings occur. The right to gather and file written statements before the board is an empty right unless parole violators are given notice of the charges prior to their hearing before the parole board. *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L. Ed.2d 868 (1971).

There is no federal constitutional right to counsel at a parole revocation proceeding. *Wilkerson v. Patterson*, 303 F. Supp. 665 (D. Colo. 1969).

There is no constitutional right to counsel at parole revocation hearings. *Firkins v. Colo.*, 434 F.2d 1232 (10th Cir. 1970).

The denial of the assistance of counsel at a parole revocation hearing was no ground for federal habeas corpus relief. *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968); *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L. Ed.2d 868 (1971).

Failure to appoint counsel under former section did not deny equal protection. The argument for a federal constitutional right to appointed counsel under the equal protection clause does not apply where the services rendered by a retained counsel are slight and not dependent on unique capabilities with which the attorney is endowed by virtue of his legal training. An indigent defendant suffers no substantial disadvantage because an attorney is not made available to him to write letters to the state parole board. No invidious discrimination is present and no violation of the equal protection clause has occurred. *Wilkerson v. Patterson*, 303 F. Supp. 665 (D. Colo. 1969); *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L. Ed.2d 868 (1971).

Parole revocation reincarceration is not a new sentence. Since the sentencing power of the judiciary is not implicated, there is no separation of powers or due process violation. *People v. Barber*, 74 P.3d 444 (Colo. App. 2003).

No statutory duty to preserve testimony in parole revocation hearing. Neither the state parole board nor an administrative law judge

conducting a parole revocation hearing has a statutory duty to preserve the testimony at a parole revocation hearing. In fact, such testimony is inadmissible in a criminal proceeding against the parolee based on the offense giving rise to the parole violation. *People v. Schrecongost*, 796 P.2d 45 (Colo. App. 1990), aff'd, 810 P.2d 1068 (Colo. 1991).

If a parolee pleads not guilty to a parole violation complaint alleging the commission of a crime for which he has not been convicted, the authority seeking parole revocation has the burden of establishing beyond a reasonable doubt that the parolee committed the alleged offense. *People v. White*, 804 P.2d 247 (Colo. App. 1990).

Retroactive application of subsection (12) denied under Crim. P. 35(c)(1) because Crim. P. 35(c)(1) provides a remedy to an offender whose conviction or sentence is affected by a change in the law during the pendency of a direct appeal of such conviction or sentence, but not to an offender claiming the benefit of changes in the law that occur during the pendency of other postconviction proceedings. *People v. White*, 804 P.2d 247 (Colo. App. 1990).

This section does not limit the amount of time within which the parole board must act on the issue of revocation of parole. *Goetz v. Gunter*, 830 P.2d 1154 (Colo. App. 1992).

The tolling provisions in subsection (6) do not impose additional punishment on the parolee. If the board determines there was no parole violation, the parolee's status should be reinstated as if no complaint had been filed. *Goetz v. Gunter*, 830 P.2d 1154 (Colo. App. 1992).

Where a complaint was filed against the parolee near the end of the parole term and the board dismissed the first complaint and brought a second complaint after the parolee's term had expired, the board was without jurisdiction to revoke the parolee's parole based on the second complaint. *Goetz v. Gunter*, 830 P.2d 1154 (Colo. App. 1992).

Tolling of expiration of parole upon the filing of a parole violation complaint does not impose additional punishment and does not violate the prohibition against ex post facto laws. *Goetz v. Gunter*, 830 P.2d 1154 (Colo. App. 1992).

Rather, it allows the parole board to maintain its jurisdiction over parolee while authorities investigate the alleged parole violations and to hold a revocation hearing. *Goetz v. Gunter*, 830 P.2d 1154 (Colo. App. 1992).

Tolling of expiration of parole upon filing of a parole violation complaint by parole officer applies to all offenders, including those who committed crimes before the statute was enacted. *Duran v. Price*, 868 P.2d 375 (Colo. 1994).

The plain meaning of subsection (7) provides that, upon finding good cause by the parole board, a parole revocation hearing can be delayed beyond 30 days after the parolee's arrest and a parolee can be held in custody for a reasonable time pending a revocation hearing.

The section does not convey automatic good cause to delay a parole hearing for pending resolution of an underlying criminal case, nor does the statute require a parolee to be released from custody after 30 days. Colo. Dept. of Corr. v. Madison, 85 P.3d 542 (Colo. 2004).

17-2-103.5. Revocation proceedings - parolee arrested for certain offenses.

(1) (a) Notwithstanding any provision of section 17-2-103, a community parole officer shall file a complaint seeking revocation of the parole of any parolee who:

(I) Is found in possession of a deadly weapon as defined in section 18-1-901, C.R.S.;

(II) Is arrested and charged with:

(A) A felony;

(B) A crime of violence as defined in section 16-1-104 (8.5), C.R.S.;

(C) A misdemeanor assault involving a deadly weapon or resulting in bodily injury to the victim;

(D) Sexual assault in the third degree as defined in section 18-3-404 (2), C.R.S., as it existed prior to July 1, 2000; or

(E) Unlawful sexual contact as defined in section 18-3-404 (2), C.R.S.

(b) A community parole officer shall present to the district attorney of the proper judicial district for the purpose of prosecution all the facts ascertained by the community parole officer and all other papers, documents, or evidence pertaining thereto that the community parole officer has in his or her possession for any parolee found in possession of a weapon pursuant to section 18-12-108, C.R.S.

(c) A hearing relating to such revocation shall be held, unless a board member is advised that a criminal charge is still pending and no technical violations are alleged, or where the parolee does not request revocation, in which case the hearing shall be delayed until a disposition concerning the criminal charge is reached.

(2) If the hearing officer or board member conducting the hearing pursuant to subsection (1) of this section finds the parolee guilty of the conduct charged but decides against revoking the parole of the parolee, the record of such hearing shall be reviewed within fifteen days of the decision by two members of the board, exclusive of the board member who conducted the hearing, who may overturn the decision and order the parole to be revoked.

Source: L. 87: Entire section added, p. 651, § 6, effective July 1. L. 89: (1) amended, p. 863, § 6, effective April 12. L. 94: (1) amended, p. 2602, § 14, effective June 3. L. 2000: (1) amended, p. 633, § 4, effective July 1. L. 2008: IP(1)(a) and (1)(b) amended, p. 656, § 5, effective April 25; (1)(a)(II)(C) and (1)(a)(II)(D) amended and (1)(a)(II)(E) added, p. 1887, § 48, effective August 5.

17-2-104. Records - reports - publications. (1) The office of director of the division of adult parole shall be maintained as a clearing house for all information on domestic as well as interstate parolees, and the director shall prescribe, prepare, and furnish such forms, records, and reports as the executive director may require from time to time. Such data and information so compiled shall not be considered to be public records but shall be held to be confidential in character.

(2) The director shall report to the executive director at such times and on such matters as the executive director may require; except that confidential information shall not be made public. Publications of the director circulated in quantity outside the division shall be subject to the approval and control of the executive director.

Source: L. 77: Entire title R&RE, p. 911, § 10, effective August 1. L. 2000: (1) amended, p. 841, § 26, effective May 24.

Editor's note: This section is similar to former § 17-1-104 as it existed prior to 1977.

ANNOTATION

Confidential records subject to subpoena and court inspection. Although the parole board's records may be considered to be confidential and not accessible to the public, this should not insulate the records from subpoena and inspection by the court when a prisoner makes out a prima facie case of abuse of discre-

tion or caprice on the part of the board in parole revocation proceedings. *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L. Ed.2d 868 (1971) (decided under former § 17-1-104 as it existed prior to the 1977 repeal and reenactment of this title).

17-2-105. Appropriation. (Repealed)

Source: L. 77: Entire title R&RE, p. 911, § 10, effective August 1. L. 2000: Entire section repealed, p. 841, § 27, effective May 24.

Editor's note: This section was similar to former § 17-1-105 as it existed prior to 1977.

17-2-106. Branch parole offices - acquisition - duty to inform public. (1) (a) The director of the division of adult parole shall contemporaneously send written notice to the chief executive officer of the municipality and the city council or board of trustees of the municipality in which the division intends to operate the branch parole office.

(b) If the site of the branch parole office that the division intends to operate is not located within a municipality, the director of the division shall send written notice to the board of county commissioners of the county in which the division intends to operate the branch parole office.

(c) For purposes of this section:

(I) "Actual acquisition" means the legal process necessary to vest the department of corrections with fee title or a new leasehold interest in real estate that the division of adult parole intends to operate as a branch parole office in a new location.

(II) "Branch parole office" means any real estate in this state that the division of adult parole, on behalf of the department of corrections, may acquire by purchase, leasehold, or other method for the purpose of operating an office to perform any function required or permitted by this title concerning parolee interview, reporting, testing, screening, and supervision.

(2) A municipality or county notified pursuant to subsection (1) of this section may notify its residents and invite public review and comment on the division's selection of the branch parole office site through public meeting, public hearing, or any other public forum deemed appropriate by the municipality or county.

(3) Nothing in this section shall be construed to hinder or prohibit the department of corrections, division of adult parole, from engaging in the selection or the actual acquisition of any site to operate as a branch parole office that the department or division determines will best enable the division to perform and exercise its duties and powers under this title.

Source: L. 2001: Entire section added, p. 662, § 2, effective August 8. L. 2002: (3) amended, p. 1016, § 21, effective June 1.

Cross references: For the definition of "branch parole office" as it applies to this section, see also § 17-2-102 (10)(b).

PART 2

STATE BOARD OF PAROLE

17-2-201. State board of parole. (1) (a) There is hereby created a state board of parole, referred to in this part 2 as the "board", which shall consist of seven members. The

members of the board shall be appointed by the governor and confirmed by the senate, and they shall devote their full time to their duties as members of the board. The members shall be appointed for three-year terms and may serve consecutive terms. The governor may remove a board member for incompetency, neglect of duty, malfeasance in office, continued failure to use the risk assessment guidelines as required by section 17-22.5-404, or failure to regularly attend meetings as determined by the governor. Final conviction of a felony during the term of office of a board member shall automatically result in the disqualification of the member from further service on the board. The board shall be composed of representatives from multidisciplinary areas of expertise. Two members shall have experience in law enforcement and one member shall have experience in offender supervision, including parole, probation, or community corrections. Four members shall have experience in other relevant fields. Each member of the board shall have a minimum of five years of experience in a relevant field, and knowledge of parole laws and guidelines, rehabilitation, correctional administration, the functioning of the criminal justice system, issues associated with victims of crime, the duties of parole board members, and actuarial risk assessment instruments and other offender assessment instruments used by the board and the department of corrections. A person who has been convicted of a felony or of a misdemeanor involving moral turpitude or who has any financial interests which conflict with the duties of a member of the parole board shall not be eligible for appointment.

(b) The parole board in existence prior to July 1, 1987, is abolished on July 1, 1987. The governor shall appoint a new parole board pursuant to this section, two members of which shall be appointed for terms of three years, two members of which shall be appointed for terms of two years, and one member of which shall be appointed for a term of one year. Thereafter, members shall be appointed for terms of three years. If a member is appointed during a period of time in which the general assembly is not in session, that member shall serve on a temporary basis until the general assembly next convenes.

(c) The parole board in existence prior to July 1, 1990, shall be expanded to seven members on July 1, 1990. The governor shall appoint an additional law enforcement representative and an additional citizen representative to the board, one for a term of two years to expire on July 1, 1992, and one for a term of three years to expire on July 30, 1993. Thereafter, such members shall be appointed for terms of three years.

(d) The governor may appoint a temporary member to replace any member of the board who becomes temporarily incapacitated. Such temporary member shall not require senate confirmation unless he serves for a period longer than ninety days and shall serve at the pleasure of the governor or until the incapacitated member of the parole board is able to resume his duties. Any temporary member shall assume all the powers and duties of the incapacitated member. Any such temporary member shall have the same qualifications as a permanent member as defined in paragraph (a) of this subsection (1). The board may not have more than two temporary members at any time.

(e) Each board member shall complete a minimum of twenty hours of continuing education or training every year in order to maintain proficiency and to remain current on changes in parole laws and developments in the field. Each parole board member shall submit to the chairperson proof of attendance and details regarding any continuing education or training attended including the date, place, topic, the length of the training, the trainer's name, and any agency or organizational affiliation. Members may attend trainings individually or as part of a specific training offered to the parole board as a whole. The sole remedy for failure to comply with training and data collection requirements shall be removal of the board member by the governor, and the failure to comply with training and data collection requirements shall not create any right for any offender.

(2) The governor shall appoint one of the members of the board as the chairperson of the board and shall also appoint one of the members as the vice-chairperson. Such appointments are subject to change by the governor. The chairperson shall be the administrative head of the board. The chairperson shall assure that board policy and rules and regulations are enforced. The chairperson shall also assure that proper calendars for hearings are compiled and that members are assigned to conduct such hearings. The vice-chairperson shall act in the absence of the chairperson and may fulfill such administrative duties as are delegated by the chairperson.

(3) The chairperson, in addition to other provisions of law, has the following powers and duties:

(a) To promulgate rules governing the granting and revocation of parole, including special needs parole pursuant to section 17-22.5-403.5, from correctional facilities where adult offenders are confined and the fixing of terms of parole and release dates. All rules governing the granting and revocation of parole promulgated by the chairperson shall be subject to the approval of a majority of the board and shall be promulgated pursuant to the provisions of section 24-4-103, C.R.S.

(b) To promulgate rules for the conduct of board members, the procedures for board hearings, and procedures for the board to comply with state fiscal and procurement regulations. All administrative rules and regulations promulgated by the chairperson shall be promulgated pursuant to the provisions of section 24-4-103, C.R.S.

(c) To develop and update a written operational manual for parole board members, release hearing officers, and administrative hearing officers under contract with the board by December 31, 2012. The operational manual shall include, but need not be limited to, board policies and rules, a summary of state laws governing the board, and all administrative release and revocation guidelines that the parole board is required to use. The chairperson will ensure that all new parole board members receive training and orientation on the operational manual.

(c.5) (Deleted by amendment, L. 2011, (SB 11-241), ch. 200, p. 833, § 3, effective May 23, 2011.)

(d) To adopt a policy pursuant to which the board may conduct parole hearings, parole revocation hearings, and board meetings using video conferencing technology. At a minimum, the policy shall identify:

(I) The agenda items, if any, that the board may not consider during video conferences of hearings or meetings;

(II) The correctional facilities that the chairperson determines will be accessible via video teleconferencing for purposes of conducting hearings or meetings. In identifying such correctional facilities, the chairperson may include the Colorado mental health institute at Pueblo for purposes of hearings held at the institute pursuant to subsection (10) of this section.

(e) To ensure that parole board members, release hearing officers, and administrative hearing officers under contract with the board fulfill the annual training requirements described in paragraph (e) of subsection (1) of this section and in section 17-2-202.5. The chairperson shall notify the governor if any board member, release hearing officer, or administrative hearing officer fails to comply with the training requirements.

(f) To ensure that parole board members, release hearing officers, and administrative hearing officers under contract with the board are accurately collecting data and information on his or her decision-making as required by section 17-22.5-404 (6). The chairperson shall notify the governor immediately if any board member, release hearing officer, or administrative hearing officer fails to comply with data collection requirements.

(g) To conduct an annual comprehensive review of board functions to identify workload inefficiencies and to develop strategies or recommendations to address any workload inefficiencies.

(h) (I) To contract with licensed attorneys to serve as administrative hearing officers to conduct parole revocation hearings pursuant to rules adopted by the parole board; or

(II) To appoint an administrative law judge pursuant to the provisions of section 24-30-1003, C.R.S., to conduct parole revocation hearings pursuant to the rules and regulations promulgated pursuant to this subsection (3). Any references to the board regarding parole revocation hearings or revocation of parole shall include an administrative law judge appointed pursuant to this paragraph (h).

(h.1) To contract with qualified individuals to serve as release hearing officers:

(I) To conduct parole application hearings for inmates convicted of class 4, class 5, or class 6 felonies who have been assessed to be less than high risk by the Colorado risk assessment scale developed pursuant to section 17-22.5-404 (2) (a), C.R.S., pursuant to rules adopted by the parole board; and

(II) To set parole conditions for inmates eligible for release to mandatory parole.

(3.5) The chairperson shall annually make a presentation to the judiciary committees of the house of representatives and the senate, or any successor committees, regarding the operations of the board and the information required by section 17-22.5-404.5 (4).

(4) The board has the following powers and duties:

(a) To meet as often as necessary every month to consider all applications for parole. The board may parole any person who is sentenced or committed to a correctional facility when such person has served his or her minimum sentence, less time allowed for good behavior, and there is a strong and reasonable probability that the person will not thereafter violate the law and that release of such person from institutional custody is compatible with the welfare of society. If the board refuses an application for parole, the board shall reconsider the granting of parole to such person within one year thereafter, or earlier if the board so chooses, and shall continue to reconsider the granting of parole each year thereafter until such person is granted parole or until such person is discharged pursuant to law; except that, if the person applying for parole was convicted of any class 3 sexual offense described in part 4 of article 3 of title 18, C.R.S., a habitual criminal offense as defined in section 18-1.3-801 (2.5), C.R.S., or of any offense subject to the requirements of section 18-1.3-904, C.R.S., the board need only reconsider granting parole to such person once every three years, until the board grants such person parole or until such person is discharged pursuant to law, or if the person applying for parole was convicted of a class 1 or class 2 felony that constitutes a crime of violence, as defined in section 18-1.3-406, C.R.S., the board need only reconsider granting parole to such person once every five years, until the board grants such person parole or until such person is discharged pursuant to law.

(b) To conduct hearings on parole revocations as required by section 17-2-103. Such hearings shall be exempt from the requirements set forth in section 24-4-105, C.R.S. Judicial review of any revocation of parole shall be held pursuant to section 18-1-410 (1) (h), C.R.S.

(c) To issue, pursuant to rules and regulations, an order of exigent circumstances to place an offender under parole supervision immediately upon release from a correctional facility when the board is prevented from complying with publication and interview requirements due to the application of time served prior to confinement in a correctional facility and the operation of good time credits;

(d) To carry out the duties prescribed in article 11.5 of title 16, C.R.S.;

(e) To carry out the duties prescribed in article 11.7 of title 16, C.R.S.;

(f) (I) To conduct a parole release review in lieu of a hearing, without the presence of the inmate, if:

(A) The application for release is for special needs parole pursuant to section 17-22.5-403.5, and victim notification is not required pursuant to section 24-4.1-302.5, C.R.S.; or

(B) A detainer from the United States immigration and customs enforcement agency has been filed with the department, the inmate meets the criteria for the presumption of parole in section 17-22-404.8, and victim notification is not required pursuant to section 24-4.1-302.5, C.R.S.

(II) The board shall notify the inmate's case manager if the board decides to conduct a parole release review without the presence of the inmate, and the case manager shall notify the inmate of the board's decision. The case manager may request that the board reconsider and conduct a hearing with the inmate present.

(5) (a) As to any person sentenced for conviction of a felony committed prior to July 1, 1979, or of a misdemeanor and as to any person sentenced for conviction of an offense involving unlawful sexual behavior or for which the factual basis involved an offense involving unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., committed prior to July 1, 1996, or a class 1 felony and as to any person sentenced as a habitual criminal pursuant to section 18-1.3-801, C.R.S., for an offense committed prior to July 1, 2003, the board has the sole power to grant or refuse to grant parole and to fix the condition thereof and has full discretion to set the duration of the term of parole granted, but in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court or five years, whichever is less; except that the five-year limitation shall not apply to parole granted pursuant to section 17-22.5-403.7 for a class 1 felony.

(a.3) (I) Any person sentenced as a habitual criminal pursuant to section 18-1.3-801 (1.5) or (2), C.R.S., for an offense committed on or after July 1, 2003, shall be subject to the mandatory parole set forth in section 18-1.3-401 (1) (a) (V) (A), C.R.S., for the class of felony of which the person is convicted.

(II) As to any person sentenced as a habitual criminal pursuant to section 18-1.3-801 (1) or (2.5), C.R.S., for an offense committed on or after July 1, 2003, upon completion of forty calendar years of incarceration in the department of corrections, the parole board may schedule a hearing to determine whether the inmate may be released on parole. If the inmate is released on parole, the life sentence shall continue and shall not be deemed to be discharged until such time as the parole board may discharge the offender. The offender shall serve at least five years on parole prior to discharge. If the parole board revokes the parole, the offender shall be returned to the department of corrections to serve the remainder of the life sentence. The parole board need only reconsider granting parole to such inmate once every three years.

(a.5) Except as otherwise provided in paragraph (a.7) of this subsection (5), as to any person sentenced for conviction of an offense involving unlawful sexual behavior or for which the factual basis involved an offense involving unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., committed on or after July 1, 1996, but prior to July 1, 2002, the board has the sole power to grant or refuse to grant parole and to fix the condition thereof and has full discretion to set the duration of the term of parole granted, but in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court.

(a.6) As to any person who is sentenced for conviction of an offense committed on or after July 1, 2002, involving unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., or for conviction of an offense committed on or after July 1, 2002, the underlying factual basis of which involved unlawful sexual behavior, and who is not subject to the provisions of part 10 of article 1.3 of title 18, C.R.S., such person shall be subject to the mandatory period of parole set forth in section 18-1.3-401 (1) (a) (V) (A), C.R.S.

(a.7) As to any person sentenced for conviction of a sex offense pursuant to the provisions of part 10 of article 1.3 of title 18, C.R.S., committed on or after November 1, 1998, the board shall grant parole or refuse to grant parole, fix the conditions thereof, and set the duration of the term of parole granted pursuant to the provisions of part 10 of article 1.3 of title 18, C.R.S.

(b) Conditions imposed for parole may include, but are not limited to, requiring that the offender pay reasonable costs of supervision of parole or placing the offender on home detention as defined in section 18-1.3-106 (1.1), C.R.S.

(c) (I) As a condition of every parole, the board shall order that the offender make restitution to the victim or victims of his or her conduct. The amount of such restitution shall be determined by the court pursuant to article 18.5 of title 16, C.R.S. The board shall fix the manner and time of payment of restitution as a condition of parole. Such order shall require the offender to make restitution within the period of time that the offender is on parole as specified by the board. In the event that the defendant does not make full restitution by the date specified by the board, the restitution may be collected as provided for in article 18.5 of title 16, C.R.S.

(II) If the offender fails to pay the restitution, he or she may be returned to the board and, upon proof of failure to pay, the board shall:

(A) (Deleted by amendment, L. 96, p. 1779, § 5, effective June 3, 1996.)

(B) Order that the offender continue on parole or extend the period of parole, either subject to the same condition or modified conditions of parole; or

(C) Revoke the parole and request the sheriff of the county in which the hearing is held to transport the parolee to a place of confinement designated by the executive director; or

(D) Revoke parole for a period not to exceed one hundred eighty days and request the sheriff of the county in which the hearing is held to transport the parolee to a community corrections program pursuant to section 18-1.3-301 (3), C.R.S., a place of confinement within the department of corrections, or any private facility that is under contract with the department of corrections; or

(E) Revoke parole for a period not to exceed ninety days and request the sheriff of the county in which the hearing is held to transport the parolee to the county jail of such county or to any private facility that is under contract with the department of corrections.

(III) (Deleted by amendment, L. 2000, p. 1043, § 4, effective September 1, 2000.)

(d) If, as a condition of parole pursuant to paragraph (b) of this subsection (5), a parolee will be required to attend a postsecondary educational institution as a part of his parole plan, the board, before granting parole, shall first notify the postsecondary educational institution and the prosecuting attorney of the parolee's plan and request their comments thereon. The notice shall include all relevant information pertaining to the person and the crime for which he was convicted. The postsecondary educational institution and the prosecuting attorney shall reply to the board in writing within ten days of receipt of the notification or within such other reasonable time in excess of ten days as specified by the board. The postsecondary educational institution's reply shall include a statement of whether or not it will accept the parolee as a student. Acceptance by a state postsecondary educational institution shall be pursuant to section 23-5-106, C.R.S.

(e) As a condition of parole of every person convicted of the class 2 felony of sexual assault in the first degree under section 18-3-402 (3), C.R.S., for an offense committed prior to November 1, 1998, the board shall require that the parolee participate in a program of mental health counseling or receive appropriate treatment to the extent that the board deems appropriate to effectuate the successful reintegration of the parolee into the community.

(f) (I) As a condition of every parole, the parolee shall sign a written agreement that contains such parole conditions as deemed appropriate by the board, which conditions shall include but need not be limited to the following:

(A) That the parolee shall go directly to a place designated by the board upon his release from the institution to which he has been confined;

(B) That the parolee shall establish a residence of record and shall not change it without the knowledge and consent of his or her community parole officer and that the parolee shall not leave the area or the state without the permission of his or her community parole officer;

(C) That the parolee shall obey all state and federal laws and municipal ordinances, conduct himself or herself as a law-abiding citizen, and obey and cooperate with his or her community parole officer;

(D) That the parolee shall make reports as directed by his or her community parole officer, permit residential visits by the community parole officer, submit to urinalysis or other drug tests, and allow the community parole officer to make searches of his or her person, residence, or vehicle;

(E) That the parolee shall not own, possess, or have under his control or in his custody any firearm or other deadly weapon;

(F) That the parolee shall not associate with any other person on parole, on probation, or with a criminal record or with any inmate of a correctional facility without the permission of his or her community parole officer;

(G) That the parolee shall seek and obtain employment or shall participate in a full-time educational or vocational program while on parole, unless such requirement is waived by his or her community parole officer;

(H) That the parolee shall not abuse alcoholic beverages or use illegal drugs while on parole;

(I) That the parolee shall abide by any other condition the board may determine to be necessary;

(J) That the parolee shall contact any delegate child support enforcement unit with whom the parolee may have a child support case to arrange and fulfill a payment plan to pay current child support, child support arrearages, or child support debt due under a court or administrative order.

(II) The parole agreement shall also contain a notification to the parolee that, should he violate any of the said conditions or should his behavior while on parole indicate the potentiality for criminality or violence, his parole may be subject to revocation.

(III) The provisions of this paragraph (f) shall apply to any person paroled on or after July 1, 1987, and to any person whose parole conditions are modified by the board on or after said date.

(g) (I) As a condition of parole, the board shall require any offender convicted of or who pled guilty or nolo contendere to an offense for which the factual basis involved a sexual offense as described in part 4 of article 3 of title 18, C.R.S., to submit to chemical testing of a biological substance sample from the offender to determine the genetic markers thereof and to chemical testing of his or her saliva to determine the secretor status thereof. Such testing shall occur prior to the offender's release from incarceration, and the results thereof shall be filed with and maintained by the Colorado bureau of investigation. The results of such tests shall be furnished to any law enforcement agency upon request.

(II) The provisions of this paragraph (g) shall apply to any person who is paroled on or after May 29, 1988, and to any person whose parole conditions are modified by the board on or after said date.

(III) Any costs of implementing this paragraph (g) shall be derived solely from appropriations made from moneys in the victims assistance and law enforcement fund created pursuant to section 24-33.5-506, C.R.S.

(h) Repealed.

(i) (Deleted by amendment, L. 2001, p. 955, § 3, effective July 1, 2001.)

(j) As a condition of parole, the board may order any person who is not otherwise subject to the provisions of article 22 of title 16, C.R.S., and is convicted of an offense, the underlying factual basis of which is determined by the department of corrections to involve unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., to register as a sex offender for the period of the person's parole. Such registration shall be completed as provided in article 22 of title 16, C.R.S. Within five business days after completion of the period of parole and final discharge from the legal custody of the department of corrections, the department of corrections shall notify the Colorado bureau of investigation to remove the person's name from the Colorado sex offender registry.

(k) As a condition of every grant of parole, the board shall require the offender to execute a written prior waiver of extradition stating that the offender consents to extradition to this state and waives all formal procedures incidental to extradition proceedings in the event that the offender is arrested in another state upon an allegation that the defendant has violated the terms of his or her parole, and acknowledging that the offender shall not be admitted to bail in any other state pending extradition to this state.

(5.5) (a) As a condition of parole, the board shall require every parolee at the parolee's own expense to submit to random chemical testing of a biological substance sample from the parolee to determine the presence of drugs or alcohol. Such testing shall take place as follows:

(I) Immediately upon the parolee's release from incarceration in order to establish a baseline sample;

(II) Within the first thirty days from the date of parole;

(III) On or after sixty-one days but not later than six months from the date of parole; and

(IV) Annually on or after one year from the date of parole for the duration of parole.

(b) For purposes of this subsection (5.5), "drug" means:

(I) Any "controlled substance" as defined in section 18-18-102 (5), C.R.S.; and

(II) Any "drug" as defined in section 27-80-203 (13), C.R.S., if chemical testing conducted pursuant to paragraph (a) of this subsection (5.5) reveals such drug is present at such a level as to be considered abusive pursuant to regulations established by the board in consultation with the department of human services.

(c) (I) The community parole officer shall be responsible for acquiring at random, but within the time requirements of paragraph (a) of this subsection (5.5), a biological substance sample from a parolee.

(II) At the time the community parole officer acquires a biological substance sample pursuant to subparagraph (I) of this paragraph (c), the community parole officer shall direct the parolee to pay the necessary fee for the testing of his or her biological substance sample directly to the private laboratory under contract with the department, the department of public safety, or a local governmental agency pursuant to subparagraph (IV) of this paragraph (c).

(III) The community parole officer shall submit the biological substance sample to a private laboratory under contract with the department, the department of public safety, or a local governmental agency pursuant to subparagraph (IV) of this paragraph (c) for testing. The contracting laboratory shall return the results of the tests to the community parole officer within five working days after receipt of the sample. The results of the test shall be made available by the community parole officer to the parolee or the parolee's attorney on request.

(IV) The department and the department of public safety and local governmental agencies for inmates paroled to community corrections facilities shall enter into one or more contracts with private laboratories for chemical testing under this subsection (5.5). Any private laboratory that contracts with the department, the department of public safety, or a local governmental agency shall use appropriate methods to ensure compliance with evidentiary rules and requirements. Any contract entered into pursuant to this subparagraph (IV) shall specify the fee to be charged the parolee for chemical biological substance sample testing.

(d) (I) If a chemical test administered pursuant to the requirements of this subsection (5.5) reflects the presence of drugs or alcohol, the parolee may be required to participate at his own expense in an appropriate drug or alcohol program, community correctional nonresidential program, mental health program, or other fee-based or non-fee-based treatment program approved by the parole board.

(II) (A) Any subsequent chemical testing reflecting the presence of alcohol may be grounds for arrest of the parolee and the initiation of revocation proceedings at the discretion of the community parole officer pursuant to section 17-2-103.

(B) A parolee may be arrested and a proceeding for revocation may be initiated pursuant to the provisions of section 17-2-103 if any subsequent chemical test reflects the presence of drugs pursuant to subparagraph (I) of paragraph (b) of this subsection (5.5).

(C) A parolee may be arrested and proceedings for revocation may be initiated pursuant to section 17-2-103 if any subsequent chemical test reveals the presence of drugs as defined in subparagraph (II) of paragraph (b) of this subsection (5.5) at a level considered to be abusive as established by the board pursuant to said section.

(e) A parolee who refuses to submit to chemical testing of a sample of his or her biological substance pursuant to the requirements of this subsection (5.5) shall be arrested, and revocation proceedings shall be initiated pursuant to section 17-2-103.

(f) Section 16-3-309, C.R.S., pertaining to the admissibility of laboratory tests shall apply to the admissibility of chemical tests required by this subsection (5.5) in parole revocation hearings conducted pursuant to section 17-2-103.

(g) This subsection (5.5) shall not apply to any parolee to whom article 11.5 of title 16, C.R.S., applies.

(5.7) If, as a condition of parole, an offender is required to undergo counseling or treatment, unless the parole board determines that treatment at another facility or with another person is warranted, such treatment or counseling shall be at a facility or with a person:

(a) Approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S., if the treatment is for alcohol or drug abuse;

(b) Certified or approved by the sex offender management board, established in section 16-11.7-103, C.R.S., if the offender is a sex offender;

(c) Certified or approved by a domestic violence treatment board, established pursuant to part 8 of article 6 of title 18, C.R.S., if the offender was convicted of or the underlying factual basis of the offense included an act of domestic violence as defined in section 18-6-800.3, C.R.S.; or

(d) Licensed or certified by the division of adult parole in the department of corrections, the department of regulatory agencies, the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, the state board of nursing, or the Colorado medical board, whichever is appropriate for the required treatment or counseling.

(5.8) Notwithstanding the provisions of subsection (5.7) of this section, if, as a condition of parole, an offender who was convicted of or pled guilty to an offense involving unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., is required to undergo counseling or treatment, such treatment or counseling shall be at a facility or with a person listed in subsection (5.7) of this section and the parole board may not determine treatment at another facility or with another person is warranted.

(6) The board has the authority at any time after the period of any parole is fixed to shorten the period thereof or to lengthen said period within the limits specified in subsection (5) of this section; except that the provisions of this subsection (6) shall not apply to any person sentenced as a sex offender pursuant to part 10 of article 1.3 of title 18, C.R.S.

(7) The board has exclusive power to conduct all proceedings involving an application for revocation of parole.

(8) The board has the power, in the performance of official duties, to issue warrants and subpoenas, to compel the attendance of witnesses and the production of books, papers, and other documents pertinent to the subject of its inquiry, and to administer oaths and take the testimony of persons under oath. The issuance of a warrant tolls the expiration of a parolee's parole.

(9) (a) (I) Whenever an inmate initially applies for parole, the board shall conduct an interview with the inmate. At such interview at least one member of the board shall be present. Any final action on an application shall not be required to be made in the presence of the inmate or parolee, and any such action shall require the concurrence of at least two members of the board. When the two members do not concur, a third member shall review the record and, if deemed necessary, interview the applicant and cast the deciding vote. Any subsequent application for parole shall be considered by the board in accordance with the provisions of paragraph (a) of subsection (4) of this section.

(II) The provisions of subparagraph (I) of this paragraph (a) shall also apply to all interviews of inmates who apply for parole pursuant to section 17-22.5-303, who were sentenced for an offense committed on or after July 1, 1979.

(b) When a recommendation has been made before the board for revocation or modification of a parole, the final disposition of such application shall be reduced to writing. The parolee shall be advised by the board of the final decision at the conclusion of the hearing or within a period not to exceed five working days following said hearing; however, a parolee may waive the five-day notice requirement. A copy of the final order of the board shall be delivered to the parolee within ten working days after the completion of the hearing.

(c) If the parolee decides to appeal the decision to revoke his parole, such appeal shall be filed within thirty days of such decision. The parolee shall remain in custody pending the appeal. Two members of the board, excluding the one who conducted the revocation proceeding, shall review the record within fifteen working days after the filing of the appeal. They shall notify the parolee of their decision in writing within ten working days after such decision has been made.

(d) The district attorney or the attorney general may appeal the decision of a member of the board to two members of the board, excluding the member who conducted the parole revocation proceeding.

(10) The board shall interview all parole applicants at the institution or in the community in which the inmate is physically held or through teleconferencing as provided in subparagraph (II) of paragraph (d) of subsection (3) of this section. The site location of an interview shall not be changed within the thirty days preceding the interview date without the approval of the board. Any inmate of an adult correctional institution who has been transferred by executive order or by civil commitment or ordered by a court of law to the Colorado mental health institute at Pueblo may be heard at the Colorado mental health institute at Pueblo upon an application for parole.

(11) Repealed.

(12) All votes of the board at any hearing or appeal held pursuant to this section shall be recorded by member and shall be a public record open to inspection and shall be subject to the provisions of part 3 of article 72 of title 24, C.R.S.

(13) (a) The board may appoint or contract with an attorney to represent a parolee at a parole revocation hearing only if:

- (I) The parolee denies that he violated the condition or conditions of his parole, as set forth in the complaint;
- (II) The parolee is incapable of speaking effectively for himself;
- (III) The parolee establishes to the satisfaction of the board that he is indigent; and
- (IV) The board, after reviewing the complaint, makes specific findings in writing that the issues to be resolved are complex and that the parolee requires the assistance of counsel.

(b) Repealed.

(14) The board shall consider the parole of a person whose parole is revoked either for a technical violation or based on a self-revocation at least once within one hundred eighty days after the revocation if the person's release date is more than nine months from the date of the person's revocation; except that a person whose parole is revoked based on a technical violation that involved the use of a weapon shall not be considered for parole for one year.

(15) Each correctional facility and private contract prison shall make available to the board hearing room space and video teleconferencing technology that are acceptable to the board for the purpose of conducting parole hearings within the administrative area or another location within the facility acceptable to the board.

Source: **L. 77:** Entire title R&RE, p. 911, § 10, effective August 1. **L. 79:** (3)(a), (3)(b), (6), and (7) amended, (3)(c) repealed, pp. 688, 705, §§ 27, 88, effective July 1; (3)(f) added and (5)(a) amended, p. 666, §§ 11, 12, effective July 1. **L. 81:** (5)(b) amended and (5)(c) added, p. 942, § 2, effective July 1. **L. 84:** (5)(d) added, p. 497, § 2, effective April 5; (3)(g) added and (5)(c)(II)(B) amended, p. 511, §§ 2, 1, effective April 13; (5)(c)(II)(B) amended, p. 524, § 4, effective July 1. **L. 85:** (3) and (4) R&RE, p. 639, § 4, effective June 6; (1), (2), (7), (8), (9), and (11) amended, pp. 637, 638, §§ 2, 3, effective July 1; (5)(c)(I) and (5)(c)(III) amended, p. 628, § 2, effective July 1; (5)(e) added, p. 667, § 4, effective July 1; (12) added, p. 643, § 2, effective July 1. **L. 87:** (3)(c), (7), (8), and (9)(b) amended, p. 954, § 56, effective March 13; (1)(b) amended, p. 906, § 11, effective June 15; (1) and (9)(c) amended and (5)(f) and (13) added, pp. 651, 653, §§ 7, 8, effective July 1; (5.5) added, p. 660, § 1, effective July 1. **L. 88:** (5)(g) added, p. 701, § 1, effective May 29; (5)(b) amended, p. 709, § 5, effective July 1. **L. 90:** (1)(a) and (1)(b) amended and (1)(c) and (1)(d) added, p. 959, § 1, effective June 7. **L. 91:** (10) amended, p. 1142, § 5, effective May 18; (4)(d) and (5.5)(g) added, p. 442, §§ 6, 7, effective May 29. **L. 92:** (1)(a) amended, p. 2172, § 22, effective June 2; (4)(e) added, p. 461, § 5, effective June 2; (5)(f)(I)(H) and (5)(f)(I)(I) amended and (5)(f)(I)(J) added, p. 211, § 14, effective August 1. **L. 94:** (1)(b), (3)(c), (4)(a), (7), (8), (9)(a)(I), and (9)(b) amended, pp. 2595, 2596, 2598, §§ 3, 4, 5, 8, effective June 3; (5.5)(b)(II) and (5.5)(c) amended, p. 2732, § 355, effective July 1. **L. 95:** (3)(c) and (9)(b) amended, p. 1272, § 5, effective June 5; (5.5)(c) amended, p. 465, § 9, effective July 1. **L. 96:** (5)(c) amended, p. 1779, § 5, effective June 3; (5)(a) amended and (5)(a.5) added, p. 1584, § 6, effective July 1. **L. 97:** (5)(c)(I) amended, p. 1566, § 14, effective July 1. **L. 98:** (13)(b) repealed, p. 727, § 9, effective May 18; (5)(a.7) added and (5)(e) and (6) amended, p. 1291, §§ 10, 11, effective November 1. **L. 99:** (5)(h) and (5)(i) added, p. 1168, § 2, effective July 1. **L. 2000:** (11) repealed, p. 842, § 28, effective May 24; (3)(d) added, p. 1056, § 1, effective May 26; (5.7) added, p. 236, § 7, effective July 1; (5)(c) amended, p. 1043, § 4, effective September 1; (3)(a) amended, p. 1496, § 3, effective July 1, 2001. **L. 2001:** (3)(c.5) added, p. 502, § 3, effective May 16; (5.8) added, p. 658, § 7, effective May 30; (5)(g), (5)(h), and (5)(i) amended, p. 955, § 3, effective July 1. **L. 2002:** (5)(a.5) amended and (5)(a.6) added, p. 125, § 2, effective March 26; (5.7)(a) amended, p. 666, § 11, effective May 28; (5)(g)(I) and (5.8) amended, p. 1017, § 22, effective June 1; (5)(a), (5)(a.5), (5)(a.6), and (5.8) amended and (5)(j) added, pp. 1185, 1192, 1181, §§ 19, 40, 5, effective July 1; (5)(g)(I) and (5)(h)(I) amended, p. 1152, § 8, effective July 1; (4)(a), (5)(a), (5)(a.6), (5)(a.7), (5)(b), (5)(c)(II)(D), and (6) amended, pp. 1500, 1566, §§ 159, 388, effective October 1. **L. 2003:** (5)(g)(I) amended, p. 1433, § 25, effective April 29 and (5)(a) amended and (5)(a.3) added, p. 1436, § 33, effective July 1; (4)(a) amended, p. 813, § 3, effective July 1; (14) added, p. 2676, § 3, effective July 1. **L. 2004:** (1)(a), (1)(b), and (1)(c) amended, p. 437, § 1, effective April 13; (10) amended and (15) added, p. 587, § 1, effective April 21. **L. 2006:** (5)(a) amended, p. 1054, § 7,

effective May 25; (5)(k) added, p. 342, § 5, effective July 1; (5)(h)(IV) added by revision, pp. 1689, 1693, §§ 6, 17. **L. 2008:** IP(5.5)(a), (5.5)(c), and (5.5)(e) amended, p. 461, § 1, effective April 14; (5)(f)(I)(B), (5)(f)(I)(C), (5)(f)(I)(D), (5)(f)(I)(F), (5)(f)(I)(G), (5.5)(c)(I), (5.5)(c)(II), (5.5)(c)(III), and (5.5)(d)(II)(A) amended, p. 657, § 6, effective April 25; (5.5)(c)(II) amended, p. 1888, § 49, effective August 5. **L. 2010:** (5.7)(a) amended, (SB 10-175), ch. 188, p. 784, § 24, effective April 29; (3.5) added, (HB 10-1374), ch. 261, p. 1187, § 9, effective May 25; (5.7)(d) amended, (HB 10-1260), ch. 403, p. 1986, § 75, effective July 1; (9)(a)(I) amended, (HB 10-1422), ch. 419, p. 2073, § 30, effective August 11. **L. 2011:** (1)(a), (3)(c), and (3)(c.5) amended and (1)(e), (3)(e), (3)(f), (3)(g), (3)(h), (3)(h.1), and (4)(f) added, (SB 11-241), ch. 200, pp. 832, 833, 834, §§ 2, 3, 4, effective May 23; (3.5) amended, (HB 11-1064), ch. 234, p. 1010, § 2, effective May 27; (5.7)(d) amended, (HB 11-1303), ch. 264, p. 1156, § 29, effective August 10. **L. 2012:** (3)(h.1)(I) amended, (HB 12-1310), ch. 268, p. 1403, § 27, effective June 7; (5.5)(b) amended, (HB 12-1311), ch. 281, p. 1617, § 36, effective July 1.

Editor's note: (1) This section is similar to former § 17-1-201 as it existed prior to 1977.

(2) Amendments to subsections (5)(a) and (5)(a.6) by House Bill 02-1046 and Senate Bill 02-010 were harmonized, effective October 1, 2002. Amendments to subsection (5)(a.5) by House Bill 02-1223 and Senate Bill 02-010 were harmonized. Amendments to subsection (5)(g)(I) by Senate Bill 02-159 and Senate Bill 02-019 were harmonized. Amendments to subsection (5.8) by Senate Bill 02-159 and Senate Bill 02-010 were harmonized.

(3) Subsection (5)(h)(IV) provided for the repeal of subsection (5)(h), effective July 1, 2007. (See L. 2006, pp. 1689, 1693.)

(4) Amendments to subsection (5.5)(c) by Senate Bill 08-171 and Senate Bill 08-172 were harmonized.

Cross references: For the legislative declaration contained in the 1994 act amending subsections (5.5)(b)(II) and (5.5)(c), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsections (4)(a), (5)(a), (5)(a.6), (5)(a.7), (5)(b), (5)(c)(II)(D), and (6), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2006 act amending subsection (5)(a), see section 1 of chapter 228, Session Laws of Colorado 2006.

ANNOTATION

- I. General Consideration.
- II. Power to Grant Parole.
- III. Power to Revoke Parole.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962).

Annotator's note. Since § 17-2-201 is similar to § 17-1-201 as it existed prior to the 1977 repeal and reenactment of this title, relevant cases construing that provision have been included in the annotations to this section.

Section 16-13-101 does not violate the constitution. Even though a person sentenced to life imprisonment may be eligible for parole before a person sentenced for a term of not less than 25 years and not more than 50 years under § 16-13-101, it does not violate the equal protection clause because the statutory scheme gives the parole board discretionary power to grant parole on the basis of factors other than the length of a prisoner's sentence and this is reasonably related to a legitimate government interest. *People v. Alexander*, 797 P.2d 1250 (Colo. 1990).

While obtaining and analyzing the DNA or saliva of an inmate convicted of a sex offense is a search and seizure implicating fourth amendment concerns, it is a reasonable search and seizure in light of an inmate's diminished privacy rights; the minimal intrusion of saliva and blood tests; and the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints. *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996).

Since DNA samples are not testimonial in nature, requiring such samples from inmates does not amount to compulsory self-incrimination under the fifth amendment. *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996).

Taking DNA samples only from inmates convicted of sex offenses does not deprive those inmates of the equal protection of the laws since a rational relationship exists between the government's decision to classify inmates as convicted sex offenders and the government's stated objective to investigate and prosecute unsolved and future sex crimes. *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996).

Subsection (5)(g), by its plain language, applies only to those offenders who are convicted of a sexual offense after the date the statute took effect (May 29, 1988) and who subsequently are eligible for parole. Thus the statute was not retrospectively applied to defendant who was convicted July 28, 1988, as a sex offender. *Jamison v. People*, 988 P.2d 177 (Colo. App. 1999).

As applied to the defendant, the 1994 amendment to subsection (4)(a) that decreased the frequency of parole suitability hearings for certain classes of prisoners did not violate the ex post facto clause of the United States Constitution. *Raymer v. Enright*, 113 F.3d 172 (10th Cir. 1997).

The parole board, as a Colorado state agency, benefits from the immunity conferred by the eleventh amendment to the federal constitution. *Hughes v. Colo. Dept. of Corr.*, 594 F. Supp. 2d 1226 (D. Colo. 2009).

The trial court correctly determined that the board of parole is exempt from the requirements of the APA. This section governs the responsibilities, authority, and discretion of the board. *McCallum v. Colo. State Bd. of Parole*, 23 P.3d 1226 (Colo. App. 2000).

Review of acts of parole board. Acts of the parole board being definitely of grace are not such a function as is reviewable by the courts by certiorari, habeas corpus or mandamus. *Berry v. State Bd. of Parole*, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L.Ed.2d 507 (1962).

A person denied parole can seek judicial review only as provided by C.R.C.P. 106(a)(2). In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

It is only when the Colorado state board of parole has failed to exercise its statutory duties that the courts of Colorado have the power to review the board's actions. In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

Absent specific criteria which mandate release. The Colorado statutory scheme does not create a constitutionally protected entitlement to parole. *Thompson v. Riveland*, 714 P.2d 1338 (Colo. App. 1986); *Andretti v. Johnson*, 779 P.2d 382 (Colo. 1989).

Persons sentenced as habitual criminals are subject to the discretionary parole period established in subsection (5)(a). *People v. Denton*, 91 P.3d 388 (Colo. App. 2003).

Subsection (5)(a) mandates that parole is discretionary for sexual offenders. *Grenemyer v. Gunter*, 770 F. Supp. 1432 (D. Colo. 1991).

There is no mandatory parole for persons convicted of an offense involving unlawful sexual behavior committed on or after July 1, 1996, but prior to November 1, 1998. Pursuant to subsection (5)(a.5), the parole board sets the length of parole that cannot exceed the sentence

imposed. *People v. Cooper*, 8 P.3d 554 (Colo. App. 1999), aff'd, 27 P.3d 348 (Colo. 2001).

Rather, subsection (5)(a.5) requires discretionary parole for an offense involving unlawful sexual behavior, as defined in § 18-3-412.5 (1), and for an offense for which the factual basis involved an offense involving unlawful sexual behavior. Thus, an offense that is not an unlawful sexual behavior offense will still trigger the discretionary parole requirement as long as there is a factual basis that involves an offense involving unlawful sexual behavior. *People v. Pahlavan*, 83 P.3d 1138 (Colo. App. 2003).

The phrase "in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court" means the period of parole granted by the board cannot be longer than the unserved portion of the sentence of incarceration. *Martin v. People*, 27 P.3d 846 (Colo. 2001).

The phrase "maximum sentence" refers only to the sentence of incarceration. *Martin v. People*, 27 P.3d 846 (Colo. 2001).

The provisions of subsection (5)(a) of this section and § 18-1-105 (1)(a)(V)(C) are in conflict. Subsection (5)(a) is a specific provision related to the parole of sex offenders while § 18-1-105 (1)(a)(V)(C) is the general sentencing statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, subsection (5)(a) of this section shall be given effect for all sex offender parole for crimes committed before July 1, 1996. *Martin v. People*, 27 P.3d 846 (Colo. 2001); *People v. Pauley*, 42 P.3d 57 (Colo. App. 2001).

Subsection (5)(a.5) of this section is a specific provision related to the parole of sex offenders while § 18-1-105 (1)(a)(V) is the general sentencing statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, subsection (5)(a.5) of this section shall be given effect for all sex offender parole for crimes committed between July 1, 1996, and July 1, 1998. *People v. Cooper*, 27 P.3d 348 (Colo. 2001).

Sex offenders convicted of offenses occurring between July 1, 1993, and July 1, 1998, are subject to discretionary parole pursuant to subsection (5)(a), and not mandatory parole pursuant to § 18-1-105 (1)(a)(V)(C). *People v. Koehler*, 30 P.3d 694 (Colo. App. 2000).

Under subsections (5)(a) and (5)(a.5), a factual basis for unlawful sexual behavior must be established by statements made by the defendant, facts or fact-finding stipulated to by the defendant, or facts found by a jury. *People v. Rockwell*, 125 P.3d 410 (Colo. 2005).

Habitual offenders are subject to a period of discretionary parole rather than a period of statutory mandatory parole. The provisions of subsection (5)(a) of this section and § 17-2-

213 irreconcilably conflict with the provisions of § 17-22.5-403 (7) and § 18-1-105 (1)(a)(V). Thus, the specific provision of subsection (5)(a) of this section and § 17-2-213 prevail over the general provisions of § 17-22.5-403 (7) and § 18-1-105 (1)(a)(V). *People v. Falls*, 58 P.3d 1140 (Colo. App. 2002).

The provisions of subsection (5)(a) of this section and § 17-22.5-403 (7) are in conflict. Subsection (5)(a) of this section is a specific provision related to the parole of sex offenders while § 17-22.5-403 (7) is the mandatory parole statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, subsection (5)(a) of this section is an exception to § 17-22.5-403 (7), which creates a specialized schedule for sex offenders who committed crimes prior to July 1, 1996. *Martin v. People*, 27 P.3d 846 (Colo. 2001).

Subsection (5)(a.5) of this section is a specific provision related to the parole of sex offenders while § 17-22.5-403 (7) is the mandatory parole statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, subsection (5)(a.5) of this section is an exception to § 17-22.5-403 (7), which creates a specialized schedule for sex offenders who committed crimes between July 1, 1996, and July 1, 1998. *People v. Cooper*, 27 P.3d 348 (Colo. 2001).

Where plaintiff does not dispute that parole in Colorado is discretionary, subsection (5)(g) does not implicate any liberty interest protected by due process by conditioning parole on an inmate's submission of DNA samples. *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996).

Immunity of state officials from civil liability. Federal officials are immune from any form of civil liability arising out of the authorized performance of official judgment or discretionary functions. Allegations of malice, while sufficient to raise a cause of action in those few jurisdictions recognizing only a qualified privilege, do not defeat the absolute liability recognized by the great weight of federal decisions. Advancing the effective administration of state government is a no less important policy goal than securing fearless federal decision-making. *Belveal v. Bray*, 253 F. Supp. 606 (D. Colo. 1966).

Subsection (5)(f)(I)(D) authorizes a warrantless search if it is conducted in furtherance of the purposes of parole, i.e., related to the rehabilitation and supervision of the parolee; and it is not arbitrary, capricious, or harassing. *People v. McCullough*, 6 P.3d 774 (Colo. 2000).

Although it becomes the duty of the parole board to provide, as a condition of parole, that offender make restitution to the victim or victim's immediate family, it is error for court to require that defendant pay restitution to the

police of cost of extradition. The proper way to effectuate this result is for court to enter judgment in favor of state of Colorado for amount of costs of prosecution under § 16-1-501. *People v. Lemons*, 824 P.2d 56 (Colo. App. 1991).

Position as officer of state parole board not fundamental right. An officer of the state parole board has no property or vested interest in the public office and procedural protections of due process do not apply. *Wilkerson v. State of Colo.*, 830 P.2d 1121 (Colo. App. 1992).

While the trial court is authorized to fix the amount of restitution owing by the defendant, the manner and time of payment of restitution is exclusively within the jurisdiction of the parole board. *People v. Strock*, 931 P.2d 538 (Colo. App. 1996).

Under subsection (5)(c)(I) the term "victim" includes insurers and other parties who have suffered a loss because of a contractual relationship with the immediate victim. *People v. Rivera*, 968 P.2d 1061 (Colo. App. 1997).

Searches by parole officers of a parolee's residence pursuant to the statutory waiver (subsection (5)(f)(I)(D)) require no more than reasonable suspicion, supported by specific and articulable facts that the parolee has committed a parole violation or crime. *People v. Tafoya*, 985 P.2d 26 (Colo. App. 1999).

Search of parolee's residence was a special-needs parole search because participating police officer acted under the direction of a parole officer. Special-needs exception to the warrant and probable-cause requirements applies when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. A parole officer must authorize the search and would normally be present during the search, and the search must be related to the rehabilitation and supervision of the parolee. *United States v. Warren*, 566 F.3d 1211 (10th Cir.), cert. denied, ___ U.S. ___, 130 S. Ct. 569, 175 L. Ed. 2d 393 (2009).

Although the department of corrections did not have the statutory authority to draw defendant's blood for a DNA test, suppression of the DNA evidence is not warranted. In contrast to a constitutional violation, a statutory violation does not ordinarily require suppression of relevant evidence. Generally, only willful and recurrent statutory violations require exclusion of evidence. In this case there was no evidence of willfulness or recurrence, so suppression is not required. *People v. Shreck*, 107 P.3d 1048 (Colo. App. 2004).

The plain language of subsection (5.5)(g) of this section and § 17-2-102 (8.5)(c) prohibits the application of either subsection (5.5) of this section or § 17-2-102 (8.5) to any parolee to whom the Substance Abuse Act, article 11.5 of title 16, applies. *Whidden v. People*, 78 P.3d 1092 (Colo. 2003).

Applied in *Sorenson v. Zapien*, 455 F. Supp. 1207 (D. Colo. 1978); *Turman v. Buckallew*, 784 P.2d 774 (Colo. 1989); *People v. Apodaca*, 998 P.2d 25 (Colo. App. 1999).

II. POWER TO GRANT PAROLE.

Parole is a mere matter of grace, favor, or privilege and is not a matter of right. *Berry v. State Bd. of Parole*, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L.Ed.2d 507 (1962); *Ferchaw v. Tinsley*, 234 F. Supp. 922 (D. Colo. 1964); *Folks v. Patterson*, 159 Colo. 403, 412 P.2d 214 (1966).

Parole is a privilege, and no prisoner is entitled to it as a matter of right. *Silva v. People*, 158 Colo. 326, 407 P.2d 38 (1965).

Parole is a privilege under Colorado law. *Belveal v. Bray*, 253 F. Supp. 606 (D. Colo. 1966).

It is exercise of discipline by state. Acts authorizing the parole of convicts are an exercise of the power of discipline possessed by the state, implemented through the general assembly. *Silva v. People*, 158 Colo. 326, 407 P.2d 38 (1965).

Imposition of mandatory term of parole not within court's jurisdiction, but is within the exclusive province of the parole board. *People v. Howard*, 886 P.2d 296 (Colo. App. 1994).

The parole board has absolute discretion in the granting or denial of parole. The determinations involved in granting parole depend exclusively on the judgment and discretion of the board. *Wilkerson v. Patterson*, 174 Colo. 264, 483 P.2d 365 (1971).

The ultimate decision as to the granting or denial of parole is entrusted to the state parole board. *Ferchaw v. Tinsley*, 234 F. Supp. 922 (D. Colo. 1964).

The decision of the Colorado state board of parole to grant or deny parole is clearly discretionary since parole is a privilege, and no prisoner is entitled to it as a matter of right. In *re* *Question Concerning State Judicial Review*, 199 Colo. 463, 610 P.2d 1340 (1980).

The decision to grant parole or absolute release to an inmate incarcerated for an indeterminate sentence under the Colorado Sex Offender Lifetime Supervision Act is vested within the sound discretion of the state parole board. The parole board's discretion is plenary and is not subject to judicial review. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003).

The parole board must act within scope of delegated authority. The parole board is authorized to act only in specified ways. Absolute quasi-judicial immunity to acts not permitted by law does not serve the purpose of more efficient government. Officials who act without the scope of their delegated authority must, at the least,

proceed at their own risk. *Belveal v. Bray*, 253 F. Supp. 606 (D. Colo. 1966).

Decision of the board to deny parole is not an abuse of discretion as long as there is sufficient evidence before the board to support its decision. *Mulberry v. Neal*, 96 F. Supp.2d 1149 (D. Colo. 2000).

An inmate has a substantial interest in knowing the reason or reasons from the board for denial of parole. *Johnson v. Heggie*, 362 F. Supp. 851 (D. Colo. 1973).

And board must give written reasons. Notwithstanding any other policy to the contrary, the board must, by the very terms and conditions of its own rules and regulations, give written reasons for denial or deferral of parole to the inmate concerned. *Johnson v. Heggie*, 362 F. Supp. 851 (D. Colo. 1973).

The general assembly did not intend to provide a mandatory period of parole. *Wilkerson v. Patterson*, 174 Colo. 264, 483 P.2d 365 (1971).

Board must reconsider application yearly after denial. The parole board is explicitly not required to grant an application, but when it does not grant a parole, it must reconsider the application each succeeding year until the prisoner is discharged pursuant to law, that is, until he has fully served the maximum term of his sentence less time allowed for good behavior, if any. *Wilkerson v. Patterson*, 174 Colo. 264, 483 P.2d 365 (1971).

Habeas corpus in the federal district court is not available to secure relief from the decisions of the parole board as to the grant or denial of parole. *Ferchaw v. Tinsley*, 234 F. Supp. 922 (D. Colo. 1964).

Denial of parole raises no federal question of due process. The action of the parole board denying petitioner parole and requiring him to serve the maximum sentence originally imposed by the sentencing court raises no federal question of violation of due process or equal protection. *Ferchaw v. Tinsley*, 234 F. Supp. 922 (D. Colo. 1964).

Restitution as a condition of parole. Sentence which ordered defendant to pay restitution as a condition of parole after serving time in prison is consistent with the applicable statutory scheme governing parole and restitution. *People v. Martinez*, 734 P.2d 650 (Colo. App. 1987).

The court's duty to fix the amount of restitution is not confined to sentences to probation but applies equally to sentences to imprisonment. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

A codefendant is jointly responsible for restitution when he is also a complicitor in the crime. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

Codefendants were participants and complicitors in the same criminal acts, therefore, each is responsible for the damage he

caused and also for the damage caused by the other. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

Where the parole board fails to issue a warrant for the arrest of a parolee, and the period of parole expires, law enforcement agencies have no authority to arrest the parolee, and the good faith exception and the fellow officer rule do not apply. *People v. Fields*, 785 P.2d 611 (Colo. 1990).

Subsection (5)(a) plainly and unambiguously provides that all habitual criminals sentenced pursuant to § 16-13-101 are subject to discretionary parole, regardless of when their current offenses were committed. *People v. Marquez*, 983 P.2d 159 (Colo. App. 1999).

Under subsection (5)(a), parole for inmates convicted of sexual offenses under § 16-13-202 (5) was discretionary, not mandatory. *Lustgarden v. Kautzky*, 811 P.2d 1098 (Colo. 1991); *Lustgarden v. Gunter*, 779 F. Supp. 500 (D. Colo. 1991); *Lustgarden v. Gunter*, 966 F.2d 552 (10th Cir. 1992), cert. denied, 506 U.S. 1008, 113 S. Ct. 624, 121 L.Ed.2d 556 (1992); *Jackson v. Zavaras*, 963 P.2d 1118 (Colo. App. 1998).

The provisions of § 16-13-216 (1) granting yearly parole consideration for persons sentenced to an indeterminate term pursuant to § 16-13-203 conflict with the provisions of subsection (4)(a) of this section, which allow the parole board to consider parole for sex offenders every three years. Since subsection (4)(a) is the later enacted statute, the provisions of subsection (4) prevail. A person sentenced to an indeterminate sentence pursuant to § 16-13-203 is entitled to parole consideration only every three years. *White v. Van Pelt*, 55 P.3d 823 (Colo. App. 2002).

Where defendant was convicted of both a sexual offense and attempted murder, and received equal and concurrent sentences for each crime, parole was discretionary pursuant to subsection (5)(a). *Mahn v. Gunter*, 978 F.2d 599 (10th Cir. 1992).

No equal protection violation where offender convicted of a nonsexual offense would receive mandatory parole, but an offender convicted of a comparable nonsexual offense in which there is an underlying factual basis of unlawful sexual behavior would receive discretionary parole under subsection (5)(a). Offenders are not similarly situated because different behavior triggers the different parole requirements. *People v. Fritschler*, 87 P.3d 186 (Colo. App. 2003).

Retroactive application of the parole board's reinterpretation of subsection (5)(a), where the reinterpretation of the ambiguous statutory language was foreseeable, did not result in a violation of the ex post facto clause or the due process requirements. *Lustgarden v. Gunter*, 779 F. Supp. 500 (D. Colo. 1991);

Lustgarden v. Gunter, 966 F.2d 552 (10th Cir. 1992), cert. denied, 506 U.S. 1008, 113 S. Ct. 624, 121 L.Ed.2d 556 (1992).

Because subsection (5)(a) leaves it to the parole board's discretion whether to grant parole before a sex offender completes his sentence, petitioner's unilateral belief that good-time credits would result in his early release did not give rise to a constitutionally protected interest. *Lustgarden v. Gunter*, 779 F. Supp. 500 (D. Colo. 1991); *Lustgarden v. Gunter*, 966 F.2d 552 (10th Cir. 1992), cert. denied, 506 U.S. 1008, 113 S. Ct. 624, 121 L.Ed.2d 556 (1992).

Where defendant was convicted of sexually assaulting the victim over a period of four years that ended July 6, 1998, the elements of the crime were not complete, and the crime was not committed, until that date. Therefore, the provisions of subsection (5)(a.5) apply and, if the parole board releases the defendant to a period of discretionary parole when he has more than five years of his prison sentence remaining, the length of the parole period may be up to the full amount of the unserved portion of his sentence and shall not be subject to the five-year cap. *People v. Myers*, 45 P.3d 756 (Colo. App. 2001).

Consideration of application for parole is matter entrusted solely to the discretion of the parole board for parolee convicted of sexual offenses. *White v. People*, 866 P.2d 1371 (Colo. 1994).

Court may correct erroneous sentence of person convicted of unlawful sexual offense from one-year probation to the period set forth in subsection (5)(a). *People v. Reynolds*, 907 P.2d 670 (Colo. App. 1995).

Court may correct the mittimus where the trial court neglected to specify that its sentence included a mandatory period of parole. *People v. Mayes*, 981 P.2d 1106 (Colo. App. 1999).

Parole decision is subtle and dependent on an amalgam of elements some of which are factual and many of which are purely subjective appraisals by the parole board members based upon their experience. *White v. People*, 866 P.2d 1371 (Colo. 1994).

Although parole agreement is anticipated, it is not a condition to grant of parole but a condition to release on parole. Regulations do not suggest that grant of parole not effective until prisoner actually released from custody. Prisoner granted parole to a county detainer and serving consecutive sentence on another conviction made prima facie case for writ of habeas corpus relief when he alleged that parole had not been suspended or rescinded. *Cardiel v. Brittan*, 833 P.2d 748 (Colo. 1992) (decided prior to enactment of § 17-2-201 (5)(f)(I)).

III. POWER TO REVOKE PAROLE.

Law reviews. For article, "Due Process, Equal Protection and State Parole Revocation

Proceedings", see 42 U. Colo. L. Rev. 197 (1970).

The decision to revoke is discretionary, and the degree to which personal factors dictate a positive disposition is not susceptible to legal analysis. *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L.Ed.2d 868 (1971).

Rules of board provide adequate opportunity to be heard. The rules and regulations of the state board of parole providing that where the parolee has been returned to custody he shall be brought before the board for interview, that he shall be informed of the reason for the suspension and of grounds asserted for revocation, and shall be given an opportunity to be heard in regard thereto, satisfy the requirements of law in that they adequately provide for an inquiry by the board together with an opportunity for the parolee to be heard with respect to the alleged violations. *Hutchison v. Patterson*, 267 F. Supp. 433 (D. Colo. 1967).

Probation and parole revocation distinguished. Probation revocation proceedings involving deferred sentencing are quite distinct from parole revocation proceedings. The Colorado provisions on probation, § 16-11-201 et seq., do not provide probationers more in substance than what is accorded parolees. *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L.Ed.2d 868 (1971).

Acts of parole board in revoking parole were not subject to review by the judiciary, be it through the medium of certiorari, habeas cor-

pus or mandamus. *Folks v. Patterson*, 159 Colo. 403, 412 P.2d 214 (1966).

Colorado affords no judicial review of the acts of the state board of parole in conducting revocation proceedings and therefore no state remedy is available to petitioner upon his claim that his present confinement is unlawfully premised on a parole revocation hearing at which he was denied due process. *Green v. Patterson*, 370 F.2d 560 (10th Cir. 1966).

Federal court found no prejudice where parolees did not deny violations. Appellants' allegations do not at any place deny that they violated the conditions of their respective paroles. Appellants easily could have made a record in this regard and in the absence of that the court cannot conclude that any appellant was prejudiced in the proceedings before the parole board. In view of the nature of the decision to be made in parole revocation proceedings, the presumption of correctness accorded to the proceedings of parole boards, and limited review of such decisions for abuse of discretion, the court cannot conclude that the parole revocation proceedings accorded each appellant lacked inherent fairness. *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970), cert. denied, 402 U.S. 934, 91 S. Ct. 1528, 28 L.Ed.2d 868 (1971).

Subsection (5.5)(d), when read together with § 17-2-102, prohibits parole revocation upon initial drug or alcohol testing even if the result is positive, but does allow revocation upon any subsequent positive test if the initial test was not positive. *People v. Whidden*, 56 P.3d 1201 (Colo. App. 2002), aff'd on other grounds, 78 P.3d 1092 (Colo. 2003).

17-2-201.5. Study of parole system. (Repealed)

Source: L. 97: Entire section added, p. 30, § 9, effective March 20. L. 2000: Entire section repealed, p. 842, § 29, effective May 24.

17-2-202. Request for transfer - penitentiary to reformatory. (Repealed)

Source: L. 77: Entire title R&RE, p. 914, § 10, effective August 1. L. 85: Entire section repealed, p. 641, § 11, effective July 1.

Editor's note: This section was similar to former § 17-1-202 as it existed prior to 1977.

17-2-202.5. Administrative hearing officers and release hearing officers - qualifications - duties. (1) (a) To be eligible to serve as an administrative hearing officer or administrative law judge under contract with the board, an attorney shall have five years' experience in the practice of law and be knowledgeable of parole laws and guidelines, offender rehabilitation, correctional administration, the functioning of the criminal justice system, issues associated with victims of crime, the duties of parole board members, and actuarial risk assessment instruments and other offender assessment instruments used by the board and the department of corrections.

(b) An administrative hearing officer or administrative law judge under contract with the board is required to complete twelve hours annually of continuing education or training consistent with section 17-2-201 (1) (e).

(c) An administrative hearing officer or administrative law judge under contract with the board shall comply with the data and information collection on decision-making as required by section 17-22.5-404 (6) and shall transmit this information as directed by the chairperson or board policy.

(d) The sole remedy for failure to comply with training and data collection requirements shall be termination of the employee, and the failure to comply with training and data collection requirements shall not create any right for any offender.

(2) (a) A release hearing officer shall have three years of relevant experience and be knowledgeable of parole laws and guidelines, offender rehabilitation, correctional administration, the functioning of the criminal justice system, the issues associated with victims of crime, the duties of parole board members, and actuarial risk assessment instruments and other offender assessment instruments used by the board and the department of corrections.

(b) A release hearing officer under contract with the board is required to complete twelve hours annually of continuing education or training consistent with section 17-2-201 (1) (e).

(c) A release hearing officer shall comply with the data and information collection on decision-making required by section 17-22.5-404 (6) and shall transmit this information as directed by the chairperson or board policy.

(d) The sole remedy for failure to comply with training and data collection requirements shall be termination of the employee, and the failure to comply with training and data collection requirements shall not create any right for any offender.

Source: L. 2011: Entire section added, (SB 11-241), ch. 200, p. 835, § 5, effective May 23.

17-2-203. Request for transfer - reformatory to penitentiary. (Repealed)

Source: L. 77: Entire title R&RE, p. 914, § 10, effective August 1. **L. 79:** Entire section repealed, p. 705, § 88, effective July 1.

Editor's note: This section was similar to former § 17-1-203 as it existed prior to 1977.

17-2-204. Parole may issue - when. (1) The board, pursuant to rules and regulations, may issue a parole or permit to go at large to any inmate who now is imprisoned in a correctional facility and who may have served the minimum term pronounced by the court or, in the absence of such minimum term pronounced by the court, the minimum term provided by law for the crime for which he was convicted.

(2) (a) Any inmate who does not wish to be considered for parole shall sign a waiver witnessed by an institutional supervisory employee no later than thirty days prior to the date of the scheduled parole hearing. Except as otherwise provided in this subsection (2), any waiver signed by an inmate in accordance with this subsection (2) shall become effective on the date of signing and shall remain in effect for six months after the date of the scheduled parole hearing. The inmate may not withdraw such waiver or submit an application for parole at any time during the six-month period.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (2), an inmate who waives parole consideration may, no later than thirty days prior to the date of the scheduled parole hearing, make a written request that the six-month waiver period be shortened to a lesser period of time. Such request shall specifically state grounds constituting sufficient and reasonable cause as to why the six-month waiver period should be shortened. Such request shall also specifically state the lesser period of time being requested by the inmate. The chairperson of the board, vice-chairperson of the board, or the designee of either, in his or her discretion, shall grant or deny the inmate's request for the shortened waiver period made under this paragraph (b).

(c) If the inmate's request for the shortened waiver period is made and granted in accordance with paragraph (b) of this subsection (2), the inmate may not, at any time prior to the date of the rescheduled parole hearing, make another such request. In the event such

inmate is not prepared for or otherwise not ready to proceed at the rescheduled parole hearing, the inmate shall be deemed to have waived parole consideration for a period of six months following the date of such hearing.

Source: L. 77: Entire title R&RE, p. 914, § 10, effective August 1. L. 79: (1) amended, p. 688, § 28, effective July 1. L. 85: Entire section amended, p. 640, § 5, effective July 1. L. 2002: (2) amended, p. 38, § 1, effective March 21.

Editor's note: This section is similar to former § 17-1-204 as it existed prior to 1977.

ANNOTATION

Annotator's note. Since § 17-2-204 is similar to former § 17-1-204 as it existed prior to the 1977 repeal and reenactment of this title, relevant cases construing that provision have been included in the annotations to this section.

Parole is a matter of grace, favor, or privilege and a prisoner is not entitled thereto as a matter of right. *Berry v. State Bd. of Parole*, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied,

370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed.2d 507 (1962).

Under parole procedures an indeterminate sentence usually results in an earlier release, and it cannot be said to be harsh or excessive so as to require the scrutiny of an appellate court. *Nugent v. District Court*, 184 Colo. 353, 520 P.2d 592 (1974).

17-2-205. Time of parole not considered when convict is reincarcerated. (Repealed)

Source: L. 77: Entire title R&RE, p. 915, § 10, effective August 1. L. 79: Entire section amended, p. 689, § 29, effective July 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 17-1-205 as it existed prior to 1977.

17-2-206. Parole not to be construed as discharge. (Repealed)

Source: L. 77: Entire title R&RE, p. 915, § 10, effective August 1. L. 79: Entire section amended, p. 689, § 30, effective July 1. L. 81: Entire section amended, p. 959, § 1, effective July 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 17-1-206 as it existed prior to 1977.

17-2-207. Parole - regulations.

(1) and (2) Repealed.

(3) Offenders on parole shall remain under legal custody and shall be subject at any time to be returned to a correctional facility.

(4) From and after the suspension, cancellation, or revocation of the parole of any prisoner and until his return to custody, he shall be deemed a parole violator and fugitive from justice, and no part of the time during which he was on parole shall be deemed a part of his term.

Source: L. 77: Entire title R&RE, p. 915, § 10, effective August 1. L. 79: (1) and (3) amended, p. 689, § 31, effective July 1; (2) amended, p. 1635, § 26, effective July 1. L. 84: (1) and (2) repealed, p. 524, § 2, effective July 1. L. 85: (3) amended, p. 640, § 6, effective July 1. L. 2010: (3) amended, (HB 10-1374), ch. 261, p. 1181, § 4, effective May 25.

Editor's note: This section is similar to former § 17-1-207 as it existed prior to 1977.

Cross references: For other provisions concerning parole regulations, see § 17-22.5-104.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

Annotator's note. Since § 17-2-207 is similar to § 17-1-207 as it existed prior to the 1977 repeal and reenactment of this title, relevant cases construing that provision have been included in the annotations to this section.

A parolee is subject to restrictions which are not applicable to other citizens. *People v. Salvador*, 189 Colo. 181, 539 P.2d 1273 (1975).

And he is not free from legal restraint by the penal authorities, but is constructively a prisoner of the state in the legal custody and under the control of the state department of institutions. *Schooley v. Wilson*, 150 Colo. 483, 374 P.2d 353 (1962); *People v. Lucero*, 772 P.2d 58 (Colo. 1989).

One who is on parole is granted a special privilege to be outside the walls of the institu-

tion while serving his sentence as a matter of legislative grace. At the same time the parolee remains in constructive custody and is subject to be returned to the enclosure at any time. *Hutchison v. Patterson*, 267 F. Supp. 433 (D. Colo. 1967).

Release on parole in no way alters the fact that appellant is still under sentence; that he is in technical custody; and that he is under supervision. *People v. Salvador*, 189 Colo. 181, 539 P.2d 1273 (1975); *People v. Hunter*, 738 P.2d 20 (Colo. App. 1986), *aff'd*, 757 P.2d 631 (Colo. 1988).

Probable cause and duty to arrest. Where parole agent was aware of appellant's status as a parole violator and as a fugitive, this knowledge constituted probable cause for appellant's arrest, which the parole officer had a duty to effect, with or without a warrant. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975).

17-2-208. Effective date and application. (Repealed)

Source: L. 77: Entire title R&RE, p. 915, § 10, effective August 1. L. 79: Entire section amended, p. 689, § 32, effective July 1; entire section amended, p. 1635, § 27, effective July 19. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 17-1-208 as it existed prior to 1977.

17-2-209. Civil proceedings - inmate subject to parole. When an inmate has met all of the requirements to be eligible for parole, but the board has reason to believe that the offender may have a mental illness pursuant to article 65 of title 27, C.R.S., the board shall initiate civil proceedings pursuant to article 23 of this title and articles 10.5, 11, 14, 65, 67, 92, 93, and 94 of title 27, C.R.S.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1. L. 85: Entire section amended, p. 641, § 7, effective July 1. L. 2006: Entire section amended, p. 1398, § 45, effective August 7. L. 2010: Entire section amended, (SB 10-175), ch. 188, page 784, § 25, effective April 29.

Editor's note: (1) This section is similar to former § 17-1-209 as it existed prior to 1977.

(2) Articles 11 and 14 of title 27, which are included in the reference in this section, were repealed by L. 85, p. 1016, § 46.

17-2-210. Duties of board. The board, acting through its chairperson or an assistant or a community parole officer, shall promptly commence civil proceedings pursuant to section 17-2-209 and shall notify the office of the attorney general, who shall then represent the board in the hearings.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1. L. 85: Entire section amended, p. 641, § 8, effective July 1. L. 2008: Entire section amended, p. 658, § 7, effective April 25.

Editor's note: This section is similar to former § 17-1-210 as it existed prior to 1977.

17-2-211. Jurisdiction of courts. All civil actions under sections 17-2-209 to 17-2-212 shall be brought in the court of proper jurisdiction in the county of Pueblo, state of Colorado. Wherever and whenever possible, qualified witnesses in the field of mental health shall be obtained from the Colorado mental health institute at Pueblo.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1. L. 91: Entire section amended, p. 1143, § 6, effective May 18.

Editor's note: This section is similar to former § 17-1-211 as it existed prior to 1977.

17-2-212. Duty of warden. If the board has previously considered an inmate for release and the inmate is still imprisoned and if the inmate's mental condition is questioned by a warden of a correctional facility, it is the duty of said warden to notify the chairperson of the board at least forty days prior to the discharge of the inmate, and the chairperson then shall proceed in the same manner outlined in sections 17-2-210 and 17-2-211.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1. L. 79: Entire section amended, p. 690, § 33, effective July 1. L. 85: Entire section amended, p. 641, § 9, effective July 1. L. 2000: Entire section amended, p. 842, § 30, effective May 24.

Editor's note: This section is similar to former § 17-1-212 as it existed prior to 1977.

17-2-213. Application of part. Effective July 1, 1979, the provisions of this part 2 relating to the power of the state board of parole to grant parole and to establish the duration of the term of parole shall apply only to persons sentenced for conviction of a felony committed prior to July 1, 1979, persons sentenced for conviction of a misdemeanor, persons sentenced for conviction of a sex offense, as defined in section 18-1.3-903 (5), C.R.S., or a class 1 felony, and persons sentenced as habitual criminals pursuant to section 18-1.3-801, C.R.S. Parole for persons sentenced for conviction of a class 2, class 3, class 4, or class 5 felony committed on or after July 1, 1979, shall be as provided in section 18-1.3-401, C.R.S., and article 22.5 of this title.

Source: L. 79: Entire section added, p. 667, § 13, effective July 1. L. 2002: Entire section amended, p. 1501, § 160, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Habitual offenders are subject to a period of discretionary parole rather than a period of statutory mandatory parole. The provisions of § 17-2-201 (5)(a) and this section irreconcilably conflict with the provisions of § 17-22.5-

403 (7) and § 18-1-105 (1)(a)(V). Thus, the specific provision of § 17-2-201 (5)(a) and this section prevail over the general provisions of § 17-22.5-403 (7) and § 18-1-105 (1)(a)(V). *People v. Falls*, 58 P.3d 1140 (Colo. App. 2002).

17-2-214. Right to attend parole hearings. (1) The victim of any crime or any person requested by the victim to appear on behalf of such victim or a relative of the victim, if the victim has died or is a minor or is incapacitated and unable to appear, has the right to attend any parole proceeding under this title relative to said crime and has the right to appear, personally or with counsel, at the proceeding and to reasonably express his or her views concerning the crime, the offender, and whether or not the offender should be released on parole, and if so released under what conditions. The board, in deciding whether to release the offender on parole, and if so under what conditions, shall consider the testimony of such person.

(2) (a) In the case of any offenses against the person, as specified in article 3 of title

18, C.R.S., notice of any parole proceeding shall be sent by the department of corrections, working in cooperation with the board, to any victim of the crime or relative of the victim, if the victim has died, at least sixty days before the hearing. Such notice shall be sent to the last address in the possession of the department of corrections or the board, and the victim of the crime or relative of the victim, if the victim has died, has the duty to keep the department of corrections or the board informed of his or her most current address.

(b) In the case of any offenses other than offenses against the person as specified in article 3 of title 18, C.R.S., notice of any parole proceeding shall be sent by the department of corrections, working in cooperation with the board, only upon request to the department of corrections or the board, to any victim of the crime or relative of a victim, if the victim has died, who makes such a request at least sixty days before the hearing. Such notice shall be sent to the last address in the possession of the department of corrections or the board, and the victim of the crime or relative of the victim, if the victim has died, has the duty to keep the department of corrections or the board informed of his or her most current address.

Source: L. 84: Entire section added, p. 499, § 2, effective July 1. L. 85: (1) amended, p. 643, § 3, effective July 1. L. 94: (2) amended, p. 2599, § 11, effective June 3.

Cross references: For the right to attend sentencing proceedings, see § 16-11-601; for the right to attend dispositional, review, and restitution proceedings under the “Colorado Children’s Code”, see § 19-2-112.

17-2-215. Notification of parole proceeding. In addition to the notice required by section 17-2-214 (2), the department of corrections shall establish a system of notification under which any person may make a written request to the department of corrections or the board for the notification of any parole proceeding concerning an offender, which notice shall be given by the department of corrections, working in cooperation with the board, at least thirty days before the hearing. Such notice shall be sent to the last-known address of the person making a written request for notification in the possession of the department of corrections or the board, and the person making such written request for notification has the duty to keep the department of corrections or the board informed of his or her current address.

Source: L. 85: Entire section added, p. 644, § 4. L. 94: Entire section amended, p. 2599, § 12, effective June 3.

17-2-216. Application of sections 17-2-214 and 17-2-215. The provisions of sections 17-2-214 and 17-2-215 shall apply to any parole proceeding held on or after July 1, 1985, irrespective of when the offender was sentenced or incarcerated.

Source: L. 85: Entire section added, p. 644, § 4, effective July 1.

17-2-217. Release hearing officers - pilot program. (1) The department and the board are hereby authorized to conduct a release hearing officers pilot program that utilizes the officers described in section 17-2-201 (3) (c.5).

(2) Repealed.

Source: L. 2001: Entire section added, p. 502, § 4, effective May 16. L. 2008: (2) repealed, p. 1888, § 50, effective August 5.

PART 3

COOPERATIVE RETURN OF PAROLE AND PROBATION VIOLATORS

17-2-301. Short title. This part 3 shall be known and may be cited as the “Cooperative Return of Parole and Probation Violators Act of 1957”.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1.

17-2-302. Director - powers. The executive director is authorized to deputize any person regularly employed by the state of Colorado, or any person regularly employed by another state, to act as an officer and agent of this state in effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state. In any matter relating to the return of such a person, any agent so deputized shall have all the powers of a police official of this state.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1. **L. 2000:** Entire section amended, p. 843, § 31, effective May 24.

17-2-303. Deputization. Any deputization pursuant to section 17-2-302 shall be in writing, and any person authorized to act as an agent of this state pursuant to this part 3 shall carry formal evidence of his deputization and shall produce the same upon demand.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1.

17-2-304. Interstate agreements. The executive director is authorized to enter into contracts with similar officials of any other state, subject to approval of the governor, for the purpose of sharing an equitable portion of the cost of effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state.

Source: L. 77: Entire title R&RE, p. 916, § 10, effective August 1. **L. 2000:** Entire section amended, p. 843, § 32, effective May 24.

PART 4

PREPAROLE FACILITIES AND PROGRAMS

17-2-401 to 17-2-405. (Repealed)

Source: L. 97: Entire part repealed, p. 31, § 10, effective March 20.

Editor's note: This part 4 was added in 1990. For amendments to this part 4 prior to its repeal in 1997, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

Care and Custody - Reimbursement

ARTICLE 10

Cost of Care Reimbursement

Editor's note: This article was added in 1989. This article was repealed and reenacted in 1994, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

17-10-101.	Legislative declaration.		cost of care - when com-
17-10-102.	Definitions.		menced.
17-10-103.	Action for reimbursement of	17-10-105.	Jurisdiction - process.
	cost of care.	17-10-106.	Costs of the action - payment
17-10-104.	Action for reimbursement of		by offender.

17-10-101. Legislative declaration. The general assembly hereby finds that persons who are convicted of offenses in the state which result in such persons being confined to a local jail or a correctional facility, being sentenced to home detention, being placed on probation by the sentencing court, or being placed on parole by the state board of parole should be required, where appropriate, to reimburse the state or a county or a city and county for the cost of care incurred as a result of such sentence. The general assembly further finds that a convicted person's financial circumstances may be fraudulently misrepresented to the sentencing court or that such circumstances may change after sentencing so that a person who is unable to pay the cost of care at sentencing may be or become able to contribute to the cost of care at a later date.

Source: **L. 94:** Entire article R&RE, p. 1359, § 4, effective July 1. **L. 95:** Entire section amended, p. 10, § 1, effective July 1.

17-10-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Cost of care" means the cost to the department or a county or a city and county charged with the custody of an offender for providing room, board, clothing, medical care, and other normal living expenses for an offender confined to a local jail or a correctional facility, or any costs associated with maintaining an offender in a home detention program contracted for by the department of public safety, as determined by the executive director of the department of corrections or the executive director of the department of public safety, whichever is appropriate, or the cost of supervision of probation when the offender is granted probation, or the cost of supervision of parole when the offender is placed on parole by the state board of parole, as determined by the court.

(2) "Estate" means any tangible or intangible properties, real or personal, belonging to or due to an offender, including income or payments to such person received or earned prior to or during incarceration from salary or wages, bonuses, annuities, pensions, or retirement benefits, or any source whatsoever except federal benefits of any kind. Real property that is held in joint ownership or ownership in common with an offender's spouse, while being used and occupied by the spouse as a place of residence, shall not be considered a part of the estate of the offender for the purposes of this article.

(3) "Offender" means a person confined to a correctional facility or a local jail as the result of a conviction of a crime or to home detention, a person placed on probation by the sentencing court, or a person placed on parole by the state board of parole.

Source: **L. 94:** Entire article R&RE, p. 1360, § 4, effective July 1. **L. 96:** (2) amended, p. 1844, § 16, effective July 1.

Editor's note: (1) This section is similar to former § 17-10-102 as it existed prior to 1994.

(2) Subsection (3) was amended in Senate Bill 94-172. Those amendments were superseded by the repeal and reenactment of this entire article in Senate Bill 94-143. (See L. 94, p. 2598.)

17-10-103. Action for reimbursement of cost of care. (1) When any person has been sentenced to confinement in a local jail or a correctional facility or to home detention or has been granted probation or has been placed on parole by the state board of parole and the sentencing court has not entered an order pursuant to section 18-1.3-701, C.R.S., requiring such person to pay the full cost of care incurred during such person's sentence, the state, the appropriate prosecuting attorney, the department of corrections, the judicial department, or any government agency which has incurred cost of care of such person may file an action for reimbursement for cost of care.

(2) In an action filed pursuant to this article, the plaintiff seeking reimbursement for cost of care shall demonstrate that the offender substantially misrepresented such offender's financial status to the sentencing court or that such offender's financial circumstances have changed substantially after sentencing.

(3) If, after a hearing, the court determines that the offender has sufficient assets to pay all or part of the cost of care, the court shall order the offender to make such payments

toward the cost of care as are appropriate under the circumstances. In setting the amount of such payments, the court shall take into consideration and make allowances for any restitution ordered to the victim or victims of a crime, which shall take priority over any payments ordered pursuant to this article, and for the maintenance and support of the offender's spouse, dependent children, or any other persons having a legal right to support and maintenance out of the offender's estate. If the offender is confined to a local jail or a correctional facility or is under home detention, the court shall also consider the financial needs of the offender for the six-month period immediately following the offender's release, for the purpose of allowing the offender to seek employment. The court shall determine the amount which shall be paid by the offender for cost of care, which amount shall in no event be in excess of the per capita cost of maintaining prisoners in the local jail or a correctional facility, the per capita cost of maintaining an offender under home detention, the per capita cost of supervising an offender on probation, or the per capita cost of supervising an offender placed on parole, as the case may be.

(4) After the set-offs for restitution and for maintenance and support as provided in subsection (3) of this section, any amounts recovered pursuant to this section that are available to reimburse the costs of providing medical care shall be used to reimburse the state for the state's financial participation for medical assistance if medical care is provided for the inmate or an infant of a female inmate under the "Colorado Medical Assistance Act", articles 4, 5, and 6 of title 25.5, C.R.S.

Source: **L. 94:** Entire article R&RE, p. 1360, § 4, effective July 1. **L. 95:** (4) added, p. 336, § 4, effective April 27; (2) amended, p. 10, § 2, effective July 1. **L. 2002:** (1) amended, p. 1501, § 161, effective October 1. **L. 2006:** (4) amended, p. 2004, § 58, effective July 1.

Editor's note: This section is similar to former § 17-10-104 as it existed prior to 1994.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-10-104. Action for reimbursement of cost of care - when commenced. (1) An action may be commenced pursuant to section 17-10-103 against any offender:

- (a) At any time during the imprisonment of such offender;
- (b) During the period of probation supervision of such offender; or
- (c) Within two years after the offender's release from imprisonment or release from probation supervision.

(2) A plaintiff may recover the expenses incurred on behalf of an offender during the entire period the offender has been confined in a correctional facility or a local jail, under home detention, under probation supervision, or placed on parole.

Source: **L. 94:** Entire article R&RE, p. 1361, § 4, effective July 1.

Editor's note: (1) This section is similar to former § 17-10-105 as it existed prior to 1994.

(2) The provisions of this section were renumbered to conform to C.R.S. standard numbering format.

17-10-105. Jurisdiction - process. (1) An action to recover cost of care brought pursuant to this article shall be brought in the district court of any county in which the offender has been confined, supervised on probation, or placed on parole.

(2) The practice and procedure in an action to recover cost of care shall be governed by the Colorado rules of civil procedure.

Source: **L. 94:** Entire article R&RE, p. 1361, § 4, effective July 1.

17-10-106. Costs of the action - payment by offender. If the court determines that the offender has a sufficient estate to pay the cost of care, the court may also order that such offender pay the costs of any action filed pursuant to this article.

Source: L. 94: Entire article R&RE, p. 1361, § 4, effective July 1.

Editor's note: This section is similar to former § 17-10-106 as it existed prior to 1994.

CORRECTIONAL FACILITIES AND PROGRAMS

Facilities

ARTICLE 18

Correctional Facilities - Statutory Appropriations

Editor's note: Amendments to this article by House Bill 08-1115, House Bill 08-1352, House Bill 08-1194, and Senate Bill 08-239 were harmonized.

17-18-101.	Appropriation to comply with section 2-2-703 - HB 08-1115 - repeal.	17-18-105.	1194 - repeal. Appropriation to comply with section 2-2-703 - HB 10-1081 - repeal.
17-18-102.	Appropriation to comply with section 2-2-703 - HB 08-1352 - repeal.	17-18-106.	Appropriation to comply with section 2-2-703 - HB 10-1277 - repeal.
17-18-103.	Appropriation to comply with section 2-2-703 - SB 08-239 - repeal.	17-18-107.	Appropriation to comply with section 2-2-703 - SB 10-128 - repeal.
17-18-104.	Appropriation to comply with section 2-2-703 - HB 08-		

17-18-101. Appropriation to comply with section 2-2-703 - HB 08-1115 - repeal.
(1) Pursuant to section 2-2-703, C.R.S., the following statutory appropriations, or so much thereof as may be necessary, are made in order to implement House Bill 08-1115, enacted at the second regular session of the sixty-sixth general assembly:

(a) For the fiscal year beginning July 1, 2008, in addition to any other appropriation, there is hereby appropriated from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of one hundred twenty-five thousand one hundred sixty-five dollars (\$125,165).

(b) For the fiscal year beginning July 1, 2009, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand seven hundred fifty-eight dollars (\$28,758).

(c) (I) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated, from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of one hundred twelve thousand six hundred forty-nine dollars (\$112,649).

(II) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand seven hundred fifty-eight dollars (\$28,758).

(d) For the fiscal year beginning July 1, 2011, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of fifty-four thousand six hundred forty dollars (\$54,640).

(e) (I) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated, from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of one hundred twelve thousand six hundred forty-nine dollars (\$112,649).

(II) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand seven hundred fifty-eight dollars (\$28,758).

(2) This section is repealed, effective July 1, 2013.

Source: L. 2008: Entire article added, p. 1029, § 2, effective July 1.

17-18-102. Appropriation to comply with section 2-2-703 - HB 08-1352 - repeal.

(1) Pursuant to section 2-2-703, C.R.S., the following statutory appropriations, or so much thereof as may be necessary, are made in order to implement House Bill 08-1352, enacted at the second regular session of the sixty-sixth general assembly:

(a) (I) For the fiscal year beginning July 1, 2008, in addition to any other appropriation, there is hereby appropriated from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of two million one hundred twenty-seven thousand eight hundred five dollars (\$2,127,805).

(II) For the fiscal year beginning July 1, 2008, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of two hundred seventeen thousand five hundred sixty-six dollars (\$217,566).

(b) For the fiscal year beginning July 1, 2009, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of two hundred seventeen thousand five hundred sixty-six dollars (\$217,566).

(c) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of two hundred seventeen thousand five hundred sixty-six dollars (\$217,566).

(d) For the fiscal year beginning July 1, 2011, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of two hundred seventeen thousand five hundred sixty-six dollars (\$217,566).

(e) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of two hundred seventeen thousand five hundred sixty-six dollars (\$217,566).

(2) This section is repealed, effective July 1, 2013.

Source: L. 2008: Entire article added, p. 1035, § 2, effective August 5.

Editor's note: This section was originally numbered as § 17-18-101 in House Bill 08-1352 but has been renumbered on revision for ease of location.

17-18-103. Appropriation to comply with section 2-2-703 - SB 08-239 - repeal.

(1) Pursuant to section 2-2-703, C.R.S., the following statutory appropriations, or so much thereof as may be necessary, are made in order to implement Senate Bill 08-239, enacted at the second regular session of the sixty-sixth general assembly:

(a) For the fiscal year beginning July 1, 2008, in addition to any other appropriation, there is hereby appropriated from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of one hundred twenty-five thousand one hundred sixty-five dollars (\$125,165).

(b) (I) For the fiscal year beginning July 1, 2009, in addition to any other appropriation, there is hereby appropriated, from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of one hundred twenty-five thousand one hundred sixty-five dollars (\$125,165).

(II) For the fiscal year beginning July 1, 2009, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand seven hundred fifty-eight dollars (\$28,758).

(c) (I) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated, from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of one hundred thirty-seven thousand six hundred eighty-two dollars (\$137,682).

(II) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of fifty-seven thousand five hundred sixteen dollars (\$57,516).

(d) (I) For the fiscal year beginning July 1, 2011, in addition to any other appropriation, there is hereby appropriated, from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of three hundred seventy-five thousand four hundred ninety-five dollars (\$375,495).

(II) For the fiscal year beginning July 1, 2011, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of eighty-nine thousand one hundred fifty dollars (\$89,150).

(e) (I) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated, from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of three hundred seventy-five thousand four hundred ninety-five dollars (\$375,495).

(II) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of one hundred seventy-five thousand four hundred twenty-four dollars (\$175,424).

(2) This section is repealed, effective July 1, 2013.

Source: L. 2008: Entire article added, p. 850, § 2, effective July 1.

Editor's note: This section was originally numbered as § 17-18-101 in Senate Bill 08-239 but has been renumbered on revision for ease of location.

17-18-104. Appropriation to comply with section 2-2-703 - HB 08-1194 - repeal.

(1) Pursuant to section 2-2-703, C.R.S., the following statutory appropriations, or so much thereof as may be necessary, are made in order to implement House Bill 08-1194, enacted at the second regular session of the sixty-sixth general assembly:

(a) For the fiscal year beginning July 1, 2008, in addition to any other appropriation, there is hereby appropriated from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of one hundred twenty-five thousand one hundred sixty-five dollars (\$125,165).

(b) (I) Repealed.

(II) For the fiscal year beginning July 1, 2009, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand seven hundred fifty-eight dollars (\$28,758).

(c) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of thirty-one thousand six hundred thirty-four dollars (\$31,634).

(d) For the fiscal year beginning July 1, 2011, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of thirty-one thousand six hundred thirty-four dollars (\$31,634).

(e) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of thirty-one thousand six hundred thirty-four dollars (\$31,634).

(2) This section is repealed, effective July 1, 2013.

Source: L. 2008: Entire article added, p. 838, § 9, effective September 1. **L. 2010:** (1)(b)(I) repealed, (HB 10-1389), ch. 206, p. 897, § 7, effective May 5.

Editor's note: This section was originally numbered as § 17-18-101 in House Bill 08-1194 but has been renumbered on revision for ease of location.

Cross references: For the legislative declaration contained in the 2008 act enacting this section, see section 1 of chapter 221, Session Laws of Colorado 2008.

17-18-105. Appropriation to comply with section 2-2-703 - HB 10-1081 - repeal.

(1) Pursuant to section 2-2-703, C.R.S., the following statutory appropriations, or so much thereof as may be necessary, are made in order to implement House Bill 10-1081, enacted at the second regular session of the sixty-seventh general assembly:

(a) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of ninety-one thousand three hundred seventy dollars (\$91,370).

(b) For the fiscal year beginning July 1, 2011, in addition to any other appropriation, there is hereby appropriated to the department of corrections, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand eight hundred dollars (\$28,800).

(c) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated to the department of corrections, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand eight hundred dollars (\$28,800).

(d) For the fiscal year beginning July 1, 2013, in addition to any other appropriation, there is hereby appropriated to the department of corrections, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand eight hundred dollars (\$28,800).

(e) For the fiscal year beginning July 1, 2014, in addition to any other appropriation, there is hereby appropriated to the department of corrections, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand eight hundred dollars (\$28,800).

(2) This section is repealed, effective July 1, 2015.

Source: L. 2010: Entire section added, (HB 10-1081), ch. 256, p. 1141, § 7, effective August 11.

17-18-106. Appropriation to comply with section 2-2-703 - HB 10-1277 - repeal.

(1) Pursuant to section 2-2-703, C.R.S., the following statutory appropriations, or so much thereof as may be necessary, are made in order to implement House Bill 10-1277, enacted in 2010:

(a) For the fiscal year beginning July 1, 2010, in addition to any other appropriation, there is hereby appropriated from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of eighty-three thousand eight hundred sixty-one dollars (\$83,861).

(b) For the fiscal year beginning July 1, 2011, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand fourteen dollars (\$28,014).

(c) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated to the department, out of any moneys in the general fund not otherwise appropriated, the sum of four thousand four hundred eighty-two dollars (\$4,482).

(2) This section is repealed, effective July 1, 2013.

Source: L. 2010: Entire section added, (HB 10-1277), ch. 262, p. 1191, § 4, effective July 1.

17-18-107. Appropriation to comply with section 2-2-703 - SB 10-128 - repeal.

(1) Pursuant to section 2-2-703, C.R.S., the following statutory appropriations, or so much thereof as may be necessary, are made in order to implement Senate Bill 10-128, enacted at the second regular session of the sixty-seventh general assembly:

(a) For the fiscal year beginning July 1, 2012, in addition to any other appropriation, there is hereby appropriated from the capital construction fund created in section 24-75-302, C.R.S., to the corrections expansion reserve fund created in section 17-1-116, the sum of eighty-three thousand eight hundred sixty-one dollars (\$83,861).

(b) For the fiscal year beginning July 1, 2013, in addition to any other appropriation, there is hereby appropriated to the department of corrections, out of any moneys in the general fund not otherwise appropriated, the sum of twenty-eight thousand fourteen dollars (\$28,014).

(c) For the fiscal year beginning July 1, 2014, in addition to any other appropriation, there is hereby appropriated to the department of corrections, out of any moneys in the general fund not otherwise appropriated, the sum of four thousand four hundred eighty-two dollars (\$4,482).

(2) This section is repealed, effective July 1, 2015.

Source: L. 2010: Entire section added, (SB 10-128), ch. 415, p. 2048, § 10, effective July 1.

Cross references: For the designation of correctional facilities and authorization for the construction thereof, see sections 1 and 2 of chapter 120, Session Laws of Colorado 1990.

ARTICLE 19

**Correctional Facilities -
Visitors and Employees**

Editor's note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in §§ 27-2-109 and 27-2-110.

(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

17-19-101. Visitors at correctional facilities.

17-19-102. Employees of correctional facilities.

17-19-101. Visitors at correctional facilities. (1) Any person who wishes to enter a correctional facility shall be asked, prior to entering the facility, to sign a consent form in which the visitor shall give his consent to be stopped and searched by a person of the same sex and to have his vehicle, if any, searched without probable cause while in the correctional facility. Said form shall be as promulgated by the executive director with the advice of the attorney general. A person who refuses to sign said form shall not be admitted to a correctional facility.

(2) At each entrance to a correctional facility, the executive director shall cause to be displayed at all times in a prominent place a sign in English and in Spanish with a minimum height of two feet and a minimum width of three feet and with each letter to be a minimum of two inches in height, which shall read as follows:

NOTICE

ANY PERSON WHO WISHES TO ENTER THIS CORRECTIONAL FACILITY SHALL BE ASKED, PRIOR TO ENTERING THE FACILITY, TO SIGN A CONSENT FORM IN WHICH SAID PERSON SHALL GIVE HIS CONSENT TO BE STOPPED AND SEARCHED BY A PERSON OF THE SAME SEX AND TO HAVE HIS VEHICLE, IF ANY, SEARCHED WITHOUT PROBABLE

CAUSE WHILE IN THE CORRECTIONAL FACILITY. ANY PERSON WHO REFUSES TO SIGN SAID FORM SHALL NOT BE ADMITTED TO THIS CORRECTIONAL FACILITY.

(3) "Correctional facility", as used in this section, means any facility under the supervision of the department in which persons are or may be lawfully held in custody as a result of conviction of a crime.

Source: L. 77: Entire title R&RE, p. 917, § 10, effective August 1.

Editor's note: This section is similar to former § 27-2-109 as it existed prior to 1977.

Cross references: For visitors at the state penitentiary, see § 17-20-124.

ANNOTATION

Searches of prison visitors outside of the correctional facility on less than probable cause are unlawful. The clear language of this section, confining searches of prison visitors to the correctional facility, acknowledges the justification for allowing such searches on less than probable cause, which is the need to prevent the introduction of contraband and weapons into the prison rather than to detect evidence of a crime. *People v. Lingo*, 806 P.2d 949 (Colo. 1991).

Strip search exceeded the scope of the defendant's consent under this section where the defendant was arrested at the correctional facility, then removed from the facility to the sheriff's office where the strip search was conducted. *People v. Lingo*, 806 P.2d 949 (Colo. 1991).
As to searches of visitors as condition of entering penitentiary, see *People v. Thompson*, 185 Colo. 208, 523 P.2d 128 (1974) (decided under repealed § 27-20-124).

17-19-102. Employees of correctional facilities. Any person who wishes to become or to continue as an employee, including but not limited to contract employees and volunteers, of a correctional facility, as defined in section 17-19-101 (3), shall sign, as a condition of his or her employment or of volunteering, a consent form in which the employee or volunteer shall give his or her consent to be stopped and searched without probable cause by a person of the same sex while engaged in the performance of his or her duties within or around the correctional facility. Said form shall be as promulgated by the executive director with the advice of the attorney general.

Source: L. 77: Entire title R&RE, p. 917, § 10, effective August 1. L. 2000: Entire section amended, p. 843, § 33, effective May 24.

Editor's note: This section is similar to former § 27-2-110 as it existed prior to 1977.

ARTICLE 20

Correctional Facilities

Editor's note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in article 20 of title 27.
(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

Law reviews: For article, "Civil Rights", which discusses Tenth Circuit decisions dealing with prisoners' rights, see 61 Den. L.J. 182 (1984).

17-20-101.	State institutions.		duct. (Repealed)
17-20-102.	Administration of correctional facilities - wardens - reports.	17-20-105.	Trusty prisoners - allowance. (Repealed)
17-20-103.	Wardens and others - conservators of peace.	17-20-106.	Forfeiture of good time. (Repealed)
17-20-104.	Reduced time for good con-	17-20-107.	Good time credit allowable. (Repealed)

17-20-108.	Credits forfeited upon misbehavior. (Repealed)	17-20-117.	Labor of inmates.
17-20-109.	Sections affect only certain prisoners. (Repealed)	17-20-118.	Computation of time. (Repealed)
17-20-110.	Forfeiture for violation of rules. (Repealed)	17-20-119.	Discharge - clothes, money, transportation. (Repealed)
17-20-111.	One continuous sentence. (Repealed)	17-20-120.	Convict to leave county. (Repealed)
17-20-112.	Wardens shall record infractions.	17-20-121.	Failure to observe conditions - penalty. (Repealed)
17-20-113.	Behavior certificate - citizenship. (Repealed)	17-20-122.	Justification of officer.
17-20-114.	Federal prisoners - others. (Repealed)	17-20-123.	Insurrection - duty of citizens.
17-20-114.5.	Restriction of privileges in correctional facilities - restriction of privileges because of lawsuit filed without justification.	17-20-124.	Visitors at correctional facilities.
17-20-115.	Persons to perform labor.	17-20-125.	Revolving fund. (Repealed)
17-20-116.	County or municipal roadwork. (Repealed)	17-20-126.	Correctional facilities for women. (Repealed)
		17-20-127.	Canteen, vending machine, and library fund created - receipts - disbursements. (Repealed)
		17-20-128.	State authorized to receive Fort Lyon property - repeal. (Repealed)

17-20-101. State institutions. All correctional facilities under the supervision of the executive director, wherever located, shall be maintained as state institutions.

Source: **L. 77:** Entire title R&RE, p. 917, § 10, effective August 1. **L. 79:** Entire section amended, p. 690, § 34, effective July 1. **L. 93:** Entire section amended, p. 49, § 1, effective July 1.

Editor's note: This section is similar to former § 27-20-101 as it existed prior to 1977.

ANNOTATION

The reformatory and penitentiary are creatures of the constitution, not of the general assembly, and legislative acts concerning them

must be construed accordingly. *Hessick v. Moynihan*, 83 Colo. 43, 262 P. 907 (1927) (decided under repealed § 27-20-101).

17-20-102. Administration of correctional facilities - wardens - reports. (1) The organization and administration of all correctional facilities under the supervision of the executive director shall be the responsibility of such executive director.

(2) (Deleted by amendment, L. 93, p. 49, § 2, effective July 1, 1993.)

(3) The wardens of correctional facilities shall report to such persons as the executive director designates at such times and on such matters as the executive director may require. Publications of all correctional facilities under the supervision of the executive director that are intended to be circulated in quantity outside such facilities are subject to the approval and control of the executive director or the executive director's designee.

Source: **L. 77:** Entire title R&RE, p. 917, § 10, effective August 1. **L. 79:** Entire section amended, p. 690, § 35, effective July 1. **L. 93:** Entire section amended, p. 49, § 2, effective July 1. **L. 94:** (3) amended, p. 603, § 5, effective July 1. **L. 2000:** (3) amended, p. 843, § 34, effective May 24.

Editor's note: This section is similar to former § 27-20-102 as it existed prior to 1977.

17-20-103. Wardens and others - conservators of peace. The wardens of all correctional facilities under the supervision of the executive director and the staff of such correctional facilities shall be conservators of the peace. As such they shall have the power

to arrest or cause to be arrested, with or without process, upon any grounds owned or leased by this state and used by such correctional facilities, any person who breaks the peace, has an outstanding arrest warrant, or is found upon said grounds violating any criminal law of this state and to turn such person over to local law enforcement for detainment and disposition. Local law enforcement authorities are obligated to respond at the facilities' request to carry out the provisions of this section.

Source: **L. 77:** Entire title R&RE, p. 918, § 10, effective August 1. **L. 79:** Entire section amended, p. 690, § 36, effective July 1. **L. 93:** Entire section amended, p. 50, § 3, effective July 1. **L. 94:** Entire section amended, p. 603, § 6, effective July 1. **L. 2000:** Entire section amended, p. 843, § 35, effective May 24.

Editor's note: This section is similar to former § 27-20-103 as it existed prior to 1977.

Cross references: For authority of a peace officer to make an arrest, see part 1 of article 3 of title 16; for use of physical force by an authorized official of a jail, prison, or correctional institution, see § 18-1-703(1)(b).

ANNOTATION

Guard's authority does not include engaging in undercover activities. A penitentiary guard, accused of aiding an escape, whose theory of the case is that he was attempting to apprehend an escaped criminal by using undercover techniques, is not entitled to a jury instruction on the affirmative defense of execution of

public duty when his authority to make an arrest is limited to penitentiary grounds and there is no evidence he had any authorization to engage in undercover activities. *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979).

Applied in *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978).

17-20-104. Reduced time for good conduct. (Repealed)

Source: **L. 77:** Entire title R&RE, p. 918, § 10, effective August 1. **L. 79:** Entire section amended, p. 691, § 37, effective July 1. **L. 84:** Entire section repealed, p. 515, § 1, effective March 16; entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-104 as it existed prior to 1977.

17-20-105. Trusty prisoners - allowance. (Repealed)

Source: **L. 77:** Entire title R&RE, p. 918, § 10, effective August 1. **L. 79:** Entire section amended, p. 691, § 38, effective July 1. **L. 84:** Entire section repealed, p. 515, § 1, effective March 16; entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-105 as it existed prior to 1977.

17-20-106. Forfeiture of good time. (Repealed)

Source: **L. 77:** Entire title R&RE, p. 918, § 10, effective August 1. **L. 79:** Entire section amended, p. 691, § 39, effective July 1. **L. 84:** Entire section repealed, p. 515, § 1, effective March 16; entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-106 as it existed prior to 1977.

17-20-107. Good time credit allowable. (Repealed)

Source: L. 77: Entire title R&RE, p. 919, § 10, effective August 1. L. 79: (1), (2), IP (3), and (4) amended, p. 692, § 40, effective July 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-107 as it existed prior to 1977.

17-20-108. Credits forfeited upon misbehavior. (Repealed)

Source: L. 77: Entire title R&RE, p. 920, § 10, effective August 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-108 as it existed prior to 1977.

17-20-109. Sections affect only certain prisoners. (Repealed)

Source: L. 77: Entire title R&RE, p. 920, § 10, effective August 1. L. 79: Entire section amended, p. 693, § 41, effective July 1. L. 84: Entire section repealed, p. 515, § 1, effective March 16; entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-109 as it existed prior to 1977.

17-20-110. Forfeiture for violation of rules. (Repealed)

Source: L. 77: Entire title R&RE, p. 920, § 10, effective August 1. L. 79: Entire section amended, p. 693, § 42, effective July 1. L. 84: Entire section repealed, p. 515, § 1, effective March 16; entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-110 as it existed prior to 1977.

17-20-111. One continuous sentence. (Repealed)

Source: L. 77: Entire title R&RE, p. 920, § 10, effective August 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-111 as it existed prior to 1977.

17-20-112. Wardens shall record infractions. It is the duty of the wardens to keep a record of all infractions of the prison rules and regulations, as prescribed by the department.

Source: L. 77: Entire title R&RE, p. 920, § 10, effective August 1. L. 79: Entire section amended, p. 693, § 43, effective July 1. L. 2000: Entire section amended, p. 844, § 36, effective May 24.

Editor's note: This section is similar to former § 27-20-112 as it existed prior to 1977.

17-20-113. Behavior certificate - citizenship. (Repealed)

Source: L. 77: Entire title R&RE, p. 920, § 10, effective August 1. L. 79: Entire section amended, p. 693, § 44, effective July 1. L. 93: Entire section repealed, p. 50, § 4, effective July 1.

Editor's note: This section was similar to former § 27-20-113 as it existed prior to 1977.

17-20-114. Federal prisoners - others. (Repealed)

Source: **L. 77:** Entire title R&RE, p. 920, § 10, effective August 1. **L. 79:** Entire section amended, p. 693, § 45, effective July 1. **L. 93:** Entire section repealed, p. 50, § 5, effective July 1.

Editor's note: This section was similar to former § 27-20-114 as it existed prior to 1977.

17-20-114.5. Restriction of privileges in correctional facilities - restriction of privileges because of lawsuit filed without justification. (1) Any person convicted of a crime and confined in any state correctional facility listed in section 17-1-104.3 is not entitled to any privileges that may be made available by the department. If any such person is required by the department to perform any available labor, participate in any available educational program or work program, undergo any available counseling, or any one or a combination of the foregoing and such person does not perform the labor, participate in the program, undergo the counseling, or do any one or a combination of the foregoing as required by the department, the department shall deny specified privileges to such person. The privileges that the department shall deny to such person include, but are not limited to, television, radios, entertainment systems, and access to snacks. If the department denies television privileges, it may allow a person to watch television for educational purposes, including public television broadcasts transmitted to or available to the facility. A person who is physically unable to perform labor, participate in an educational program or work program, or undergo counseling may be allowed the privileges specified in this subsection (1). Nothing in this subsection (1) shall be construed to grant as a right any such labor, program, or counseling or any privileges listed in this subsection (1).

(2) (a) If any person is convicted of a crime and confined in any state correctional facility listed in section 17-1-104.3 or in any facility that houses adult offenders and such person files a lawsuit against the state of Colorado or against any state government official, officer, employee, or agent, the department or its agent having custody of the person shall deny specified privileges to such person if, upon the motion of any party or the court itself, a state or federal court finds that the action, or any part thereof, lacked substantial justification, was baseless, or was malicious or that the action, or any part thereof, was interposed for harassment. As used in this subsection (2), "lacked substantial justification" has the same meaning as that provided for such term in section 13-17-102 (4), C.R.S.

(b) The privileges denied to a person pursuant to the provisions of this subsection (2) include, but are not limited to, the privileges described in subsection (1) of this section. The department or its agent having custody of the person shall deny the privileges to the person for a period not to exceed one hundred twenty days for any such lawsuit.

(c) The department or its agent having custody of the person may not deny privileges to a person pursuant to the provisions of this subsection (2) if the court determines the lawsuit was asserted by the person in a good faith attempt to establish a new theory of law in Colorado.

(d) The department or its agent having custody of the person may determine not to deny privileges to a person pursuant to the provisions of this subsection (2) if, after filing the lawsuit, a voluntary dismissal of the action is filed within a reasonable time after the person filing the dismissal knew, or reasonably should have known, that he or she would not prevail in the action.

Source: **L. 94:** Entire section added, p. 1407, § 1, effective July 1. **L. 95:** Entire section amended, p. 300, § 1, effective July 1. **L. 2000:** (1) amended, p. 844, § 37, effective May 24.

17-20-115. Persons to perform labor. All persons convicted of any crime and confined in any state correctional facilities under the laws of this state, except such as are precluded by the terms of the judgment of conviction, shall perform labor under such rules and regulations as may be prescribed by the department.

Source: L. 77: Entire title R&RE, p. 921, § 10, effective August 1. L. 79: Entire section amended, p. 694, § 46, effective July 1. L. 93: Entire section amended, p. 50, § 6, effective July 1.

Editor's note: This section is similar to former § 27-20-115 as it existed prior to 1977.

ANNOTATION

Applied in *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979).

17-20-116. County or municipal roadwork. (Repealed)

Source: L. 77: Entire title R&RE, p. 921, § 10, effective August 1. L. 79: Entire section amended, p. 694, § 47, effective July 1. L. 93: Entire section amended, p. 51, § 7, effective July 1. L. 94: Entire section amended, p. 603, § 7, effective July 1. L. 95: Entire section repealed, p. 875, § 8, effective May 24.

Editor's note: This section was similar to former § 27-20-116 as it existed prior to 1977.

17-20-117. Labor of inmates. Every able-bodied inmate shall be put to and kept at the work most suitable to such inmate's capacity and most advantageous to the people of this state. Inmates who work in the department shall not be entitled to any right, benefit, or privilege applicable to employees of the state of Colorado.

Source: L. 77: Entire title R&RE, p. 921, § 10, effective August 1. L. 79: Entire section amended, p. 694, § 48, effective July 1. L. 93: Entire section amended, p. 51, § 8, effective July 1. L. 2000: Entire section amended, p. 844, § 38, effective May 24.

Editor's note: This section is similar to former § 27-20-117 as it existed prior to 1977.

Cross references: For correctional industries, see article 24 of this title.

ANNOTATION

Law reviews. For comment on *State v. Estate of Burnell* (165 Colo. 205, 439 P.2d 38 (1969)), see 45 Den. L. J. 788 (1968).

Annotator's note. Since § 17-20-117 is similar to repealed § 27-20-117, relevant cases construing that provision have been included in the annotations to this section.

The costs of maintaining and caring for those in the various institutions of the state, be they penal or medical, are recoverable. Only the manner of recovering the costs differ; able-bodied convicts are put to work, and the estates of the mentally deficient or criminally insane in public institutions are charged with costs of care. *State v. Estate of Burnell*, 165 Colo. 205, 439 P.2d 38, appeal dismissed per curiam, 393 U.S. 13, 89 S. Ct. 46, 21 L. Ed.2d 13, reh'g denied, 393 U.S. 992, 89 S. Ct. 441, 21 L. Ed.2d 458 (1968).

This legislative classification is reasonable. In making the distinction between the method of recovering the costs of confining and maintaining convicted criminals and of caring for and

treating the criminally insane, the legislative difference in class is not unreasonable. The general assembly has given recognition to the fact that the criminally insane persons are ill and that many usually cannot be put to profitable work. *State v. Estate of Burnell*, 165 Colo. 205, 439 P.2d 38, appeal dismissed per curiam, 393 U.S. 13, 89 S. Ct. 46, 21 L. Ed.2d 13, reh'g denied, 393 U.S. 992, 89 S. Ct. 441, 21 L. Ed.2d 458 (1968).

Thus, prisoners are required to perform labor and services for which they are paid after deducting an amount sufficient to pay the cost of maintenance of the convicts. In re *Estate of Buzzelle v. Colo. State Hosp.*, 176 Colo. 554, 491 P.2d 1369 (1971).

Statute excludes inmates from workmen's compensation coverage. *Orr v. Indus. Comm'n*, 691 P.2d 1145 (Colo. App. 1984) (decided prior to enactment of § 8-52-104.5), aff'd on other grounds, 716 P.2d 1106 (Colo. 1986).

Applied in *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979).

17-20-118. Computation of time. (Repealed)

Source: L. 77: Entire title R&RE, p. 921, § 10, effective August 1. L. 79: Entire section amended, p. 694, § 49, effective July 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-118 as it existed prior to 1977.

17-20-119. Discharge - clothes, money, transportation. (Repealed)

Source: L. 77: Entire title R&RE, p. 921, § 10, effective August 1. L. 79: Entire section amended, p. 695, § 50, effective July 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-119 as it existed prior to 1977.

17-20-120. Convict to leave county. (Repealed)

Source: L. 77: Entire title R&RE, p. 922, § 10, effective August 1. L. 79: Entire section amended, p. 695, § 51, effective July 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-120 as it existed prior to 1977.

17-20-121. Failure to observe conditions - penalty. (Repealed)

Source: L. 77: Entire title R&RE, p. 922, § 10, effective August 1. L. 79: Entire section amended, p. 696, § 52, effective July 1. L. 84: Entire section repealed, p. 524, § 2, effective July 1.

Editor's note: This section was similar to former § 27-20-121 as it existed prior to 1977.

17-20-122. Justification of officer. If an inmate sentenced to any state correctional facility resists the authority of any officer or refuses to obey any officer's lawful commands, it is the duty of such officer immediately to enforce obedience by the use of such weapons or other aid as may be effectual. If in so doing any inmate thus resisting is wounded or killed by such officer or such officer's assistants, such use of force is justified and any officer using such force shall be held guiltless; but such officer shall not be excused for using greater force than the emergency of the case demands.

Source: L. 77: Entire title R&RE, p. 922, § 10, effective August 1. L. 79: Entire section amended, p. 696, § 53, effective July 1. L. 93: Entire section amended, p. 51, § 9, effective July 1.

Editor's note: This section is similar to former § 27-20-122 as it existed prior to 1977.

Cross references: For the use of physical force by an authorized official of a jail, prison, or correctional institution, see § 18-1-703 (1)(b); for use of force in preventing escape from a detention facility, see § 18-1-707 (8).

17-20-123. Insurrection - duty of citizens. It is the duty of all the officers and other citizens of the state, by every means in their power, to suppress any insurrection among the inmates sentenced to any correctional facilities under the supervision of the executive director and to prevent the escape or rescue of any such inmate therefrom, or from any other legal confinement, or from any person in whose legal custody such inmate may be. If, in so doing or in arresting any inmate who may have escaped, such officer or other person

wounds or kills such inmate or other person aiding or assisting such inmate, such officer or other person shall be justified and held guiltless; but such officer or other person shall not be excused for using greater force than the emergency of the case demands.

Source: **L. 77:** Entire title R&RE, p. 922, § 10, effective August 1. **L. 79:** Entire section amended, p. 696, § 54, effective July 1. **L. 93:** Entire section amended, p. 51, § 10, effective July 1.

Editor's note: This section is similar to former § 27-20-123 as it existed prior to 1977.

Cross references: For authority of a peace officer to enlist the services of a private citizen and the liability of said person in performing such service, see § 16-3-202; for authority of sheriffs to command aid, see § 30-10-516.

17-20-124. Visitors at correctional facilities. The following persons are authorized to visit any correctional facilities under the supervision of the executive director at pleasure: The governor and the judges of the supreme court, court of appeals, and district courts. No other persons shall be permitted to go within a correctional facility where inmates are confined, except as otherwise provided under prison rules or by special permission of the warden.

Source: **L. 77:** Entire title R&RE, p. 922, § 10, effective August 1. **L. 79:** Entire section amended, p. 696, § 55, effective July 1. **L. 93:** Entire section amended, p. 52, § 11, effective July 1. **L. 94:** Entire section amended, p. 604, § 8, effective July 1. **L. 2000:** Entire section amended, p. 844, § 39, effective May 24.

Editor's note: This section is similar to former § 27-20-124 as it existed prior to 1977.

Cross references: For visitors at correctional facilities, see § 17-19-101.

ANNOTATION

For searches of visitors as condition for entering penitentiary, see People v. Thompson, 185 Colo. 208, 523 P.2d 128 (1974) (decided under repealed § 27-20-124).

17-20-125. Revolving fund. (Repealed)

Source: **L. 77:** Entire title R&RE, p. 923, § 10, effective August 1. **L. 79:** Entire section amended, p. 696, § 56, effective July 1. **L. 93:** Entire section repealed, p. 52, § 12, effective July 1.

Editor's note: This section was similar to former § 27-20-125 as it existed prior to 1977.

17-20-126. Correctional facilities for women. (Repealed)

Source: **L. 93:** Entire section added, p. 52, § 13, effective July 1. **L. 2000:** Entire section repealed, p. 845, § 40, effective May 24.

17-20-127. Canteen, vending machine, and library fund created - receipts - disbursements. (Repealed)

Source: **L. 93:** Entire section added, p. 52, § 13, effective July 1. **L. 2000:** Entire section amended, p. 845, § 41, effective May 24. **L. 2002:** Entire section repealed, p. 57, § 4, effective July 1.

Cross references: For current provisions concerning the canteen, vending machine, and library account, see § 17-24-126.

17-20-128. State authorized to receive Fort Lyon property - repeal. (Repealed)

Source: L. 2001: Entire section added, p. 497, § 2, effective May 3. L. 2011: (3) added by revision, (SB 11-214), ch. 147, pp. 512, 513, §§ 3, 4.

Editor's note: Subsection (3) provided for the repeal of this section, effective March 1, 2012. (See L. 2011, pp. 512, 513.)

Cross references: For the legislative declaration contained in the 2001 act enacting this section, see section 1 of chapter 155, Session Laws of Colorado 2001.

ARTICLE 21

Women's Correctional Institution

17-21-101 and 17-21-102. (Repealed)

Source: L. 93: Entire article repealed, p. 55, § 22, effective July 1.

Editor's note: (1) The provisions of this article were similar to article 21 of title 27 as it existed prior to 1977.

(2) This title was repealed and reenacted in 1977, and this article was subsequently repealed in 1993. For amendments to this article prior to its repeal in 1993, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the title heading.

ARTICLE 22

Reformatory

17-22-101 to 17-22-110. (Repealed)

Source: L. 93: Entire article repealed, p. 55, § 22, effective July 1.

Editor's note: (1) The provisions of this article were similar to article 22 of title 27 as it existed prior to 1977.

(2) This title was repealed and reenacted in 1977, and this article was subsequently repealed in 1993. For amendments to this article prior to its repeal in 1993, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the title heading.

ARTICLE 22.5

Inmate and Parole Time Computation

Editor's note: This article was added in 1979. This article was repealed and reenacted in 1984, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1984, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

PART 1

APPLICABILITY

- 17-22.5-101. One continuous sentence.
- 17-22.5-102. Custody of department.

- 17-22.5-102.5. Purpose of parole.
- 17-22.5-103. Computation of time.
- 17-22.5-104. Parole - regulations.
- 17-22.5-105. Applicability of part.
- 17-22.5-106. Right to attend parole hearings
- right to notification of pa-

- 17-22.5-107.

role hearings. (Repealed)

Administrative release and re-vocation guidelines - crea-tion.
- 17-22.5-304.

Part affects only certain in-mates.

17-22.5-305.

Eligibility for other statutory provisions.

17-22.5-306.

Transfer of functions.

PART 2

OFFENDERS SENTENCED FOR
CRIMES COMMITTED PRIOR TO
JULY 1, 1979

- 17-22.5-201.

Good time credit allowable.
- 17-22.5-202.

Ticket to leave - discharge - clothes, money, transporta-tion.
- 17-22.5-203.

Time of parole not considered when inmate is reincarcerated.

PART 3

OFFENDERS SENTENCED FOR
CRIMES COMMITTED ON OR
AFTER JULY 1, 1979

- 17-22.5-301.

Good time.
- 17-22.5-302.

Earned time.
- 17-22.5-303.

Parole.
- 17-22.5-303.3.

Violent offenders - parole.
- 17-22.5-303.5.

Parole guidelines. (Repealed)

PART 4

PAROLE ELIGIBILITY AND
DISCHARGE FROM CUSTODY

- 17-22.5-401.

Legislative declaration.
- 17-22.5-402.

Discharge from custody.
- 17-22.5-403.

Parole eligibility.
- 17-22.5-403.5.

Special needs parole.
- 17-22.5-403.7.

Parole eligibility - class 1 fel-ony - juvenile offender con- victed as adult.
- 17-22.5-404.

Parole guidelines.
- 17-22.5-404.5.

Presumption of parole - drug offenders - repeal.
- 17-22.5-404.7.

Presumption of parole - nonvi- olent offenders with ICE detainees.
- 17-22.5-405.

Earned time - earned release time - achievement earned time.
- 17-22.5-406.

Applicability of part.
- 17-22.5-407.

Genetic testing as condition of parole - repeal. (Repealed)

PART 1

APPLICABILITY

17-22.5-101. One continuous sentence. For the purposes of this article, when any inmate has been committed under several convictions with separate sentences, the depart- ment shall construe all sentences as one continuous sentence.

Source: L. 84: Entire article R&RE, p. 517, § 1, effective July 1.

ANNOTATION

Cumulative sentence valid. A cumulative sentence of imprisonment for a period not ex- ceeding in the aggregate the maximum term fixed for a single offense, imposed by a judg- ment rendered on a number of indictments for felony which have been consolidated for trial only, is valid. *Parker v. People*, 13 Colo. 155, 21 P. 1120 (1889) (decided under repealed § 27-20-111).

Under application of this section, consecu- tive sentences would be considered one sen- tence, and thus, a defendant would not be eli- gible for release on parole until completion of all incarceration. *People v. Baker*, 703 P.2d 631 (Colo. App. 1985) (decided under former § 17-20-111).

Multiple sentences may be imposed to run as one continuous sentence with a single pe- riod of mandatory parole where defendant is

sentenced under § 18-1.3-401 (1)(a)(V)(E). *People v. Starcher*, 107 P.3d 1127 (Colo. App. 2004).

Department of corrections correctly con- strued separate consecutive sentences as one continuous sentence for purposes of deter- mining parole eligibility. *McKnight v. Riveland*, 728 P.2d 1297 (Colo. App. 1986).

For purposes of establishing a parole eli- gibility date, when an inmate has been convicted of several offenses with separate sentences, the department of corrections “shall construe all sentences as one continuous sentence.” *People v. Santisteven*, 868 P.2d 415 (Colo. App. 1993).

Department of corrections’ policy of apply- ing a single system of credits to a composite “governing sentence” created for each inmate by considering all of the inmate’s sentences together to arrive at a minimum governing sen-

tence and a maximum governing sentence is reasonable and contravenes no legislative or constitutional rights or policies. *Price v. Mills*, 728 P.2d 715 (Colo. 1986).

The courts have no jurisdiction to fix parole eligibility, which is the responsibility of

the department of corrections, and any attempt to do so is an illegal attempt to circumvent legislative dictates. *People v. Anaya*, 894 P.2d 28 (Colo. App. 1994).

Applied in *People v. Broga*, 750 P.2d 59 (Colo. 1988).

17-22.5-102. Custody of department. When any person is sentenced to any correctional facility, that person shall be deemed to be in the custody of the executive director or his designee and shall begin serving his sentence on the date of sentencing.

Source: L. 84: Entire article R&RE, p. 517, § 1, effective July 1.

ANNOTATION

This section does not require a Colorado sentence that is imposed to run consecutively to an out-of-state sentence to begin to run on the date the Colorado sentence is imposed. It simply clarifies a defendant's custodial status

after sentencing when the defendant remains in the county jail awaiting transfer to a correctional facility. *People v. Mackey*, 101 P.3d 1143 (Colo. App. 2004).

17-22.5-102.5. Purpose of parole. (1) The purposes of this article with respect to parole are:

(a) To punish a convicted offender by assuring that his length of incarceration and period of parole supervision are in relation to the seriousness of his offense;

(b) To assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in length of incarceration, and establishing fair procedures for the imposition of a period of parole supervision; and

(c) To promote rehabilitation by encouraging the successful reintegration of convicted offenders into the community while recognizing the need for public safety.

Source: L. 85: Entire section added, p. 648, § 2, effective July 1.

ANNOTATION

Sex offenders and nonsexual offenders are not similarly situated for purposes of equal protection analysis because they are subject to

different parole laws. *People v. Walker*, 75 P.3d 722 (Colo. App. 2002); *People v. Fritschler*, 87 P.3d 186 (Colo. App. 2003).

17-22.5-103. Computation of time. No inmate shall be discharged from the department until he has remained the full term for which he was sentenced, to be computed on and after the day on which he was received into the same and excluding any time the inmate may have been at large by reason of escape therefrom, unless he is pardoned or otherwise released by legal authority.

Source: L. 84: Entire article R&RE, p. 517, § 1, effective July 1.

ANNOTATION

Annotator's note. Since § 17-22.5-103 is similar to repealed §§ 17-20-118 and 27-20-118, relevant cases construing those provisions have been included with the annotations to this section.

A prisoner must serve his sentence in the penitentiary or in such other penal institution

to which he may be legally transferred or ordered confined. *Lange v. Schauer*, 184 Colo. 373, 520 P.2d 753 (1974).

When defendant was confined in the state hospital as a result of a totally unrelated transaction which occurred during a period of escape, he was not serving his sentence and was not

entitled to credit for the time of such confinement. *Lange v. Schauer*, 184 Colo. 373, 520 P.2d 753 (1974).

Pretrial confinement time subtracted prior to computing credits. Pretrial confinement time should be subtracted from the sentence prior to computing good time and similar credits. *Menchetti v. Wilson*, 43 Colo. App. 19, 597 P.2d 1054 (1979); *Vashone-Carusio v. Suthers*, 29 P.3d 339 (Colo. App. 2001).

There was no statutory requirement that the good time and other credits of former §§ 17-20-104, 17-20-105, and 17-20-107, be credited against presentence confinement. *Menchetti v. Wilson*, 43 Colo. App. 19, 597 P.2d 1054 (1979).

Under former § 17-20-118 and § 16-11-308, a defendant is entitled to credit against a sentence for time spent in the county jail after sentencing. *People v. Mack*, 681 P.2d 949 (Colo. 1984).

17-22.5-104. Parole - regulations. (1) Any inmate in the custody of the department may be allowed to go on parole in accordance with section 17-22.5-403, subject to the provisions and conditions contained in this article and article 2 of this title.

(2) (a) No inmate imprisoned under a life sentence for a crime committed before July 1, 1977, shall be paroled until such inmate has served at least ten calendar years, and no application for parole shall be made or considered during such period of ten years.

(b) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1977, but before July 1, 1985, shall be paroled until such inmate has served at least twenty calendar years, and no application for parole shall be made or considered during such period of twenty years.

(c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(d) (I) No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life sentence pursuant to section 16-13-101 (2), C.R.S., as it existed prior to July 1, 1993, for a crime committed on or after July 1, 1990, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(II) This paragraph (d) shall not apply to any inmate sentenced pursuant to section 18-1.3-801 (2), C.R.S., for any crime committed on or after July 1, 1993, and any such inmate shall be eligible for parole in accordance with section 17-22.5-403.

(III) No inmate imprisoned under a life sentence pursuant to section 18-1.3-801 (2.5), C.R.S., and no inmate imprisoned under a life sentence pursuant to section 18-1.3-801 (1), C.R.S., on and after July 1, 1994, for a crime committed on and after that date, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(IV) Notwithstanding the provisions of subparagraph (I) of this paragraph (d), an inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 2006, who was convicted as an adult following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., may be eligible for parole after the inmate has served at least forty calendar years. An application for parole shall not be made or considered during the period of forty calendar years.

(3) Repealed.

Source: **L. 84:** Entire article R&RE, p. 518, § 1, effective July 1. **L. 85:** (2)(b) amended and (2)(c) added, p. 648, § 3, effective July 1; (2)(b) amended and (2)(c) added, p. 657, § 5, effective July 1. **L. 87:** (3) added, p. 654, § 9, effective July 1. **L. 90:** (1) amended, p. 954, § 24, effective July 1; (2)(d) added, p. 928, § 3, effective July 1. **L. 91:** (2)(d) amended, p. 404, § 4, effective June 6. **L. 93:** (1) and (2) amended, p. 1977, § 3, effective July 1. **L. 94:** (2)(d)(III) amended, p. 1472, § 2, effective May 31. **L. 2002:** (2)(d)(II) and (2)(d)(III) amended, p. 1501, § 162, effective October 1. **L. 2006:** (2)(d)(IV) added, p. 1052, § 3, effective May 25.

Editor's note: Subsection (3)(b) provided for the repeal of subsection (3), effective July 1, 1990. (See L. 87, p. 654.)

Cross references: (1) For other provisions concerning parole regulations, see § 17-2-207.

(2) For the legislative declaration contained in the 2002 act amending subsections (2)(d)(II) and (2)(d)(III), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2006 act enacting subsection (2)(d)(IV), see section 1 of chapter 228, Session Laws of Colorado 2006.

ANNOTATION

Prisoners who received life sentences for crimes committed before July 1, 1977, are not entitled to parole consideration until ten calendar years have passed from the date the sentence was imposed. *Derrick v. Colo. Bd. of Parole*, 747 P.2d 696 (Colo. App. 1987).

Prisoners who received life sentences for crimes committed on or after July 1, 1977, but before July 1, 1985, are not entitled to parole consideration until 20 calendar years have passed from the date the sentence was imposed. *People v. Payseno*, 954 P.2d 631 (Colo. App. 1997).

Since § 16-11-802 (1)(b) (now § 18-1.3-1302 (1)(b)) has a later effective date, was later enacted, and operates in an ameliorative manner for criminal defendants, it controls, and that portion of § 18-1-105 (4) (now § 18-1.3-401 (4)) which provides for no possibility of parole for persons sentenced to life imprisonment following conviction for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991, is abrogated by this later enactment. Thus, § 16-11-103 (1)(b) (now § 18-1.3-1201 (1)(b)), as amended by House Bill 91S-1001, controls parole eligibility for convictions and sentences to life imprisonment based on class 1 felony offenses

occurring on or after September 20, 1991, and § 16-11-802 (1)(b) (now § 18-1.3-1302 (1)(b)) controls parole eligibility for class 1 felony offenses occurring during the period from July 1, 1990 until September 19, 1991. *People v. District Court*, 834 P.2d 236 (Colo. 1992).

Prisoner's parole eligibility date is determined by the date on which the prisoner's felony was committed rather than the date of adjudication as an habitual offender. *Collins v. Gunter*, 834 P.2d 1283 (Colo. 1992).

This section does not mandate that a prisoner be deemed to have been paroled ten years after the date of sentencing for a crime committed prior to July 1, 1979, if a parole hearing is not held on that date. For crimes committed prior to July 1, 1979, parole of prisoners from correctional institutions is a matter within the sole discretion of the parole board. *Martinez v. Furlong*, 893 P.2d 130 (Colo. 1995).

Under the plain meaning of this section and § 16-11-306, prisoners are entitled to credit against their life sentences for time spent in presentence confinement. Inmate, therefore, was entitled to a parole eligibility date that was calculated to include 329 days of presentence confinement credit. *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999).

17-22.5-105. Applicability of part. The provisions of this part 1 shall apply to all offenders sentenced to the department.

Source: L. 84: Entire article R&RE, p. 518, § 1, effective July 1.

17-22.5-106. Right to attend parole hearings - right to notification of parole hearings. (Repealed)

Source: L. 84: Entire section added, p. 503, § 5, effective July 1. **L. 85:** Entire section amended, p. 644, § 5, effective July 1. **L. 94:** Entire section repealed, p. 2598, § 10, effective June 3.

17-22.5-107. Administrative release and revocation guidelines - creation. (1) (a) The division of criminal justice in the department of public safety, in consultation with the state board of parole, shall develop an administrative release guideline instrument for use by the board in evaluating applications for parole.

(b) The administrative release guideline instrument shall be used to provide the state board of parole with consistent and comprehensive information relevant to the factors listed in section 17-22.5-404 (4) (a). The instrument shall include a matrix of advisory-release-decision recommendations for the different risk levels.

(2) (a) The department of corrections, in consultation with the state board of parole, shall develop administrative revocation guidelines for use by the board in evaluating complaints filed for parole revocation.

(b) The administrative revocation guidelines shall be used to provide the state board of parole with consistent and comprehensive information based on the factors identified in section 17-22.5-404 (5) (a). The guidelines shall include a matrix of advisory-decision recommendations for the different risk levels.

Source: L. 2010: Entire section added, (HB 10-1374), ch. 261, p. 1180, § 3, effective May 25.

PART 2

OFFENDERS SENTENCED FOR CRIMES COMMITTED PRIOR TO JULY 1, 1979

17-22.5-201. Good time credit allowable. (1) Unless otherwise provided by law, every inmate confined in a correctional facility of the department who has committed no infraction of the rules or regulations of the department or the laws of the state and who performs in a faithful, diligent, industrious, orderly, and peaceable manner the work, duties, and tasks assigned to him to the satisfaction of the executive director or any of his designees may be allowed time credit reductions as follows: A deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of his term of confinement, and correspondingly for any part of the year if such term of confinement is for less than a year. The mode of computing credits shall be as follows:

Number of yrs. of sentence	Good time that may be earned	Total good time that may be earned	Time to be served if full credits are earned and al- lowed
1st year	2 months	2 months	10 months
2nd year	2 months	4 months	1 year 8 months
3rd year	4 months	8 months	2 years 4 months
4th year	4 months	1 year	3 years
5th year	5 months	1 year 5 months	3 years 7 months
6th year	5 months	1 year 10 months	4 years 2 months
7th year	5 months	2 years 3 months	4 years 9 months
8th year	5 months	2 years 8 months	5 years 4 months
9th year	5 months	3 years 1 month	5 years 11 months
10th year	5 months	3 years 6 months	6 years 6 months

and so continuing through as many years as may be the time of confinement.

(2) To those inmates whom the executive director or any of his designees may designate as trustees and who conduct themselves in accordance with departmental rules and perform their work in a creditable manner, upon approval of the executive director or any of his designees, additional good time to that allowed in the table set forth in subsection (1) of this section, not to exceed ten days in any one calendar month, shall be credited upon the time remaining to be served, such credit to be allowed only upon the actual number of months served in each year in a correctional facility of the department.

(3) The executive director or any of his designees may grant to any inmate confined in a correctional facility additional good time credit to that allowed under subsections (1) and (2) of this section, not to exceed five days per month for each calendar year remaining to be served, for the following reasons:

(a) Meritorious service by an inmate; or

(b) Outstanding performance of assigned tasks in correctional industries.

(4) The executive director or any of his designees may restore to the credit of any inmate confined in a correctional facility all or any portion of good time credits which have been forfeited by the inmate as a result of any disciplinary action or provision of law.

(5) (a) The provisions of this section shall apply to a defendant whose sentence was stayed pending appeal prior to July 1, 1972, but who was confined pending disposition of the appeal. Such credit shall be against the maximum and minimum terms of his sentence for the entire period of confinement served while the stay of execution was in effect.

(b) A defendant whose sentence is stayed pending appeal after July 1, 1972, but who is confined pending disposition of the appeal is entitled to the credit provided by this section against the maximum and minimum terms of his sentence for the entire period of confinement served while the stay of execution was in effect.

(6) If any inmate assaults any keeper, guard, foreman, officer, inmate, or other person, or threatens or endangers the person or life of anyone, or violates or disregards any departmental rule or regulation, or neglects or refuses to do the work to which he is assigned, or is guilty of any misconduct, or violates any of the rules or regulations governing parole, the department may order the forfeiture of all time credits theretofore earned by or allowed to him before the commission of such offense under this section.

Source: L. 84: Entire article R&RE, p. 518, § 1, effective July 1.

Editor's note: This section is similar to former § 17-20-107 as it existed prior to 1984.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

Annotator's note. Since § 17-22.5-201 is similar to repealed §§ 17-20-107 and 27-20-107, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionality. Former § 17-20-107 did not deny equal protection of the laws even though it distinguished between those persons who remain in jail before conviction and those who make bail. *People v. Turman*, 659 P.2d 1368 (Colo. 1983).

Provisions of this section are limited by § 17-22.5-104 (2)(a), which provides that an inmate imprisoned under a life sentence committed before July 1, 1977, shall not be paroled until he has served at least ten calendar years, such period to commence on the day of sentencing, with no reduction for meritorious good time credits. *People v. Goodwin*, 768 P.2d 715 (Colo. App. 1988).

Good conduct credits are in the nature of a reward which are granted to the convict for his commendable behavior and are designed to induce similar conduct during the remainder of the convict's imprisonment. *Alexander v. Wilson*, 189 Colo. 321, 540 P.2d 331 (1975); *Hall v. Zavaras*, 916 P.2d 634 (Colo. App. 1996).

There is nothing in subsection (1) to indicate that good time is to be given only after each year is served. Rather, credits are to be projected for portions of each year of an inmate's sentence. *Vashone-Caruso v. Suthers*, 29 P.3d 339 (Colo. App. 2001).

But the plain language of subsection (2) governing trusty time, unlike the language of

subsection (1), requires that trusty time be credited against actual time to be served. *Vashone-Caruso v. Suthers*, 29 P.3d 339 (Colo. App. 2001).

Term, "may," as used in subsection (3), grants discretion to the department of corrections in the grant or denial of good time credit. Thus, an inmate has no legitimate claim of entitlement to the award of meritorious good time credits. *Hall v. Zavaras*, 916 P.2d 634 (Colo. App. 1996).

The decision to withhold or condition good time credits does not constitute the imposition of additional punishment. *Hall v. Zavaras*, 916 P.2d 634 (Colo. App. 1996).

The allowance of credit for good conduct is not a right but rather a benefit conferred by the state, and for that reason, the conditions under which a sentence will be shortened are controlled entirely by statute. *Alexander v. Wilson*, 189 Colo. 321, 540 P.2d 331 (1975).

By its express terms, this statute is limited in application to state convicts incarcerated in the penitentiary of this state as the general assembly has not seen fit to extend the privilege of good conduct credit to prisoners for time spent in confinement outside of this state immediately prior to imprisonment in this state. *Alexander v. Wilson*, 189 Colo. 321, 540 P.2d 331 (1975).

It is the convict's behavior in the penitentiary of this state, not that of some other jurisdiction, which is being rewarded by this section. *Alexander v. Wilson*, 189 Colo. 321, 540 P.2d 331 (1975).

This statute plainly requires that an inmate serve a given month in confinement before trusty time credit for such month may be deducted from the remainder of the inmate's

sentence. *People v. Bastardo*, 725 P.2d 88 (Colo. App. 1986); *McLeod v. Brittain*, 728 P.2d 1296 (Colo. 1986).

Good time credits not credited against pre-sentence confinement. Pretrial confinement time should be subtracted from the sentence prior to computing good time and similar credits. *Menchetti v. Wilson*, 43 Colo. App. 19, 597 P.2d 1054 (1979).

There is no statutory requirement that the good time and other credits of §§ 17-20-104,

17-20-105, and 17-20-107, be credited against presentence confinement. *Menchetti v. Wilson*, 43 Colo. App. 19, 597 P.2d 1054 (1979).

Aggregation of consecutive sentences is proper when calculating good time credit. *People v. Broga*, 750 P.2d 59 (Colo. 1988); *Vashone-Carusio v. Suthers*, 29 P.3d 339 (Colo. App. 2001).

17-22.5-202. Ticket to leave - discharge - clothes, money, transportation. (1) Ten days prior to the date on which any inmate confined in a correctional facility is entitled to be discharged or to be paroled from said correctional facility, the executive director or the executive director's designee shall give such inmate a ticket of leave therefrom, which shall entitle the inmate to depart from said correctional facility. The executive director or the executive director's designee shall at the same time furnish such inmate with suitable clothing and may furnish transportation, at the expense of the state, from the place at which said correctional facility is located to the place of the inmate's residence in Colorado, or any other place in Colorado. The executive director or the executive director's designee shall also furnish to any inmate being discharged, other than a parolee, one hundred dollars. The executive director or the executive director's designee may furnish any inmate being released on parole a reasonable sum of money not to exceed one hundred dollars; except that, if the executive director or the executive director's designee furnishes less than one hundred dollars, the difference between one hundred dollars and the amount furnished shall be credited to an account for such parolee. Notwithstanding any other provision of this subsection (1), if the inmate has previously been returned to custody in a correctional facility after being paroled and before the completion of his or her period of parole and previously received such sum of money, the executive director or the executive director's designee shall not furnish a sum of money to the inmate. The executive director or the executive director's designee shall certify any amount so credited to the division of adult parole, and any such amount shall be distributed to an inmate in accordance with rules promulgated by the department.

(2) An inmate furnished with a ticket of leave for discharge shall be deemed to be fully discharged from the sentence upon which he was confined at the end of said ten-day period.

(3) Prior to the release from a correctional facility by discharge or parole of any person imprisoned for the commission of a child abuse offense which occurred within the state of Colorado, the executive director shall:

- (a) Notify the Colorado bureau of investigation of:
 - (I) The identity of the offender; and
 - (II) The anticipated release date of the offender; and
 - (III) The last-known home address of the offender; and
 - (IV) The parole address of the offender; and
 - (V) The results of a chemical test of a sex offender's biological substance sample in accordance with paragraph (b.5) of this subsection (3);

(b) Notify the local law enforcement agency having jurisdiction over the last-known home address of the offender of:

- (I) The identity of the offender; and
- (II) The last-known home address of the offender; and
- (III) The anticipated release date of the offender; and
- (IV) The parole address of the offender;

(b.5) (I) On and after July 1, 1994, direct appropriate personnel with the department of corrections to require any offender who is released from the custody of the department of corrections having completed serving a sentence for an offense involving unlawful sexual behavior or for which the factual basis involved unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., who is under their jurisdiction to sign a notice that informs the offender of the duty to register with local law enforcement agencies in accordance with

the provisions of article 22 of title 16, C.R.S. The same persons, after obtaining a signed notice from an offender, shall notify local law enforcement agencies where the offender plans to reside of the offender's address within forty-eight hours after an offender has been placed on parole or probation when such an address is provided in the signed notice. Department of corrections personnel shall provide such notice no later than two days before the offender is to be released from the department of corrections.

(II) Repealed.

(III) The department may use reasonable force to obtain a biological substance sample in accordance with section 16-11-102.4, C.R.S. In addition, any person who refuses to comply with section 16-11-102.4, C.R.S., may be denied parole, or, if such person has been granted parole, such parole may be revoked.

(c) Notify the local law enforcement agency having jurisdiction over the parole address of the offender if the parole address is not the same as the last-known home address of the offender of:

(I) The identity of the offender; and

(II) The anticipated release date of the offender; and

(III) The last-known home address of the offender; and

(IV) The parole address of the offender;

(d) Notify the victim or victims individually or through those persons with whom they reside of:

(I) The identity of the offender; and

(II) The anticipated release date of the offender; and

(III) The last-known home address of the offender; and

(IV) The parole address of the offender;

(e) Check with the Colorado bureau of investigation to determine whether there are any outstanding warrants for the arrest of any person confined for the commission of a Colorado child abuse offense and about to be released from a correctional facility, and, if so, said release shall be into the custody of the law enforcement agency issuing the warrant.

(3.5) Repealed.

(4) (a) If the victim of a child abuse crime under section 18-6-401, C.R.S., or a relative of the victim, if the victim has died or is a minor or is incapacitated, or any person requested by the victim to receive notice has requested notice from the parole board of any parole proceedings pursuant to section 17-2-214, relative to the person convicted of said crime, the executive director shall not be required to provide duplicate notice under paragraph (d) of subsection (3) of this section.

(b) The notice to the victim pursuant to paragraph (d) of subsection (3) of this section shall be sent by the department to the last-known address in the possession of the department, and the victim of the crime or a relative of the victim, if the victim has died or is a minor or is incapacitated, or any person requested by the victim to receive notice has the duty to keep the department informed of his or her most current address.

Source: L. 84: Entire article R&RE, p. 519, § 1, effective July 1. L. 87: (3) and (4) added, p. 688, § 1, effective July 1. L. 94: (3)(b.5) added, p. 1739, § 2, effective July 1. L. 95: (3)(a) and (3)(b.5) amended, p. 880, § 18, effective May 24. L. 96: (3)(b.5)(I) and (3)(b.5)(II) amended, p. 1585, § 7, effective July 1. L. 97: (1) amended, p. 26, § 1, effective March 20. L. 2000: (1) amended, p. 852, § 61, effective May 24; (3.5) added, p. 1027, § 6, effective July 1. L. 2001: (3)(b.5)(II) amended, p. 957, § 4, effective July 1. L. 2002: (3)(a), (3)(b.5), and (3.5) amended, p. 1152, § 9, effective July 1; (3)(b.5)(I) and (3)(b.5)(II) amended, p. 1185, § 20, effective July 1. L. 2003: (3.5) amended, p. 1990, § 31, effective May 22. L. 2006: (3)(b.5)(II)(B) and (3.5)(b) added by revision, pp. 1689, 1693, §§ 7, 17. L. 2007: (3)(b.5)(III) amended, p. 2028, § 34, effective June 1.

Editor's note: (1) Amendments to subsection (3)(b.5) by Senate Bill 02-010 and Senate Bill 02-019 were harmonized.

(2) Subsection (3) (b.5) (II) (B) provided for the repeal of subsection (3) (b.5) (II), effective July 1, 2007. (See L. 2006, pp. 1689, 1693.)

(3) Subsection (3.5) (b) provided for the repeal of subsection (3.5), effective July 1, 2007. (See L. 2006, pp. 1689, 1693.)

17-22.5-203. Time of parole not considered when inmate is reincarcerated.

(1) The paroled inmate, upon an order of the state board of parole, may be returned to the custody of the department according to the terms of his original sentence, and, in computing the period of his confinement, the time between his release and his return to said custody shall not be considered any part of the term of his sentence.

(2) Parole shall not be construed in any sense to operate as a discharge of any inmate paroled under the provisions of law but simply a permit to any such inmate to go outside a correctional facility; and, if, while so at large, he behaves and conducts himself as not to incur his reincarceration, he shall be deemed to be still serving out the sentence imposed upon him by the court and shall be entitled to good time the same as if he had not been paroled, except as provided in subsection (3) of this section. If the said paroled inmate is returned to the department, he shall serve out his original sentence, as provided for in this part 2.

(3) No inmate released on parole on or after July 1, 1981, shall be entitled to a good time deduction from his sentence while on parole. In the event that his parole is revoked, he shall become eligible for any good time deductions authorized pursuant to this article on the date he is returned to the custody of the department.

Source: L. 84: Entire article R&RE, p. 520, § 1, effective July 1.

ANNOTATION

Annotator's note. Since § 17-22.5-203 is similar to repealed §§ 17-2-205 and 17-2-206, relevant cases construing those provisions have been included in the annotations to this section.

Time on parole is not considered to be time which applies against the sentence when the parolee is reincarcerated. *Ferchaw v. Tinsley*, 234 F. Supp. 922 (D. Colo. 1964).

Under this section where a paroled convict returns to prison for violation of his parole, the time between his release on parole and his return to prison shall not be taken to be any part of the time served in computing the period to be served under original sentence. *Furlow v. Tinsley*, 151 Colo. 280, 377 P.2d 132 (1962).

This statutory refusal to count time spent on parole when sentence is resumed does not violate federal due process. *Firkins v. Colo.*, 434 F.2d 1232 (10th Cir. 1970).

And is not ground for release on habeas corpus. Where petition for habeas corpus contained allegations that petitioner should have been given credit for time served while on parole, his ground for release was improper as a matter of law. *Minor v. Tinsley*, 154 Colo. 249, 389 P.2d 850 (1964).

Statute prohibits awarding credits to parolee against his original sentences for time he was later incarcerated awaiting trial on subsequent criminal charges. *Santisteven v. Johnson*, 751 P.2d 621 (Colo. 1988).

Statute prohibits giving parolee credit for time served prior to his parole revocation, while being held on an unrelated charge. *Wiedemer v. People*, 784 P.2d 739 (Colo. 1989).

A parolee is subject to restrictions which are not applicable to other citizens. *People v. Salvador*, 189 Colo. 181, 539 P.2d 1273 (1975).

And he is not free from legal restraint by the penal authorities, but is constructively a prisoner of the state in the legal custody and under the control of the department of institutions. *Schooley v. Wilson*, 150 Colo. 483, 374 P.2d 353 (1962).

Release on parole in no way alters the fact that appellant is still under sentence; that he is in technical custody; and that he is under supervision. *People v. Salvador*, 189 Colo. 181, 539 P.2d 1273 (1975).

Parolee is not in custody of department, for purposes of this section, from time parole detainee is lodged against him, where parolee had been arrested and confined for acts of forgery and remained in physical custody of Denver authorities until his parole was revoked. *Santisteven v. Johnson*, 751 P.2d 621 (Colo. 1988).

Tolling of expiration of parole upon the filing of a violation complaint does not impose additional punishment on parole violator. *Goetz v. Gunter*, 830 P.2d 1154 (Colo. App. 1992).

The phrase "return to said custody" refers to the time of parole revocation. *Wiedemer v. People*, 784 P.2d 739 (Colo. 1989).

When a parolee is returned to custody, the time between his or her release and return to custody is not considered part of the term of the sentence. "Return to custody" means the time at which parole is revoked, not the time at which

the defendant is reincarcerated. *People v. Norton*, 49 P.3d 344 (Colo. App. 2001), rev'd on other grounds, 63 P.3d 339 (Colo. 2003).

The probationer has a substantially different status from that of the parolee. The imposition of sentence in his case has been suspended and thus unlike the parolee he is not serving a sentence while on probation. *Hutchison v. Patterson*, 267 F. Supp. 433 (D. Colo. 1967).

Parole does not operate as a discharge. A paroled prisoner who receives a ticket and leaves the prison as provided by this section is not discharged and can later be restrained as a parole violator. *Johnson v. Tinsley*, 157 Colo. 539, 404 P.2d 159 (1965) (decided under repealed § 27-20-120).

PART 3

OFFENDERS SENTENCED FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1979

17-22.5-301. Good time. (1) Each person sentenced for a crime committed on or after July 1, 1979, but before July 1, 1981, whose conduct indicates that he has substantially observed all of the rules and regulations of the institution or facility in which he has been confined and has faithfully performed the duties assigned to him shall be entitled to a good time deduction of fifteen days a month from his sentence. The good time authorized by this section shall vest quarterly and may not be withdrawn once it has vested. No more than forty-five days of good time may be withheld by the department in any three-month period of sentence.

(2) Each person sentenced for a crime committed on or after July 1, 1981, but before July 1, 1985, shall be subject to all the provisions of this part 3; except that the good time authorized by this section shall vest semiannually and no more than ninety days of good time may be withheld by the department in any six-month period of sentence.

(3) Each person sentenced for a crime committed on or after July 1, 1985, shall be subject to all the provisions of this part 3; except that the good time authorized by this section shall not vest and may be withheld or deducted by the department.

(4) Nothing in this section shall be so construed as to prevent the department from withholding good time earnable in subsequent periods of sentence, but not yet earned, for conduct occurring in a given period of sentence.

Source: **L. 84:** Entire article R&RE, p. 520, § 1, effective July 1. **L. 85:** (3) amended, p. 646, § 1, effective June 6. **L. 98:** (3) amended, p. 727, § 10, effective May 18.

Editor's note: This section is similar to former § 17-22.5-101 as it existed prior to 1984.

ANNOTATION

Annotator's note. Since § 17-22.5-301 is similar to former § 17-22.5-101, relevant cases construing that provision have been included with the annotations to this section. For other cases construing good time provisions, see the annotations under § 17-22.5-201.

There is no constitutional right to good-time credits for presentence confinement. *People v. Cooper*, 662 P.2d 478 (Colo. 1983); *People v. Turman*, 659 P.2d 1368 (Colo. 1983).

But former § 17-22.5-101 mandated good-time credit for presentence confinement. *People v. Chavez*, 659 P.2d 1381 (Colo. 1983).

The creation and distribution of good time credits is a matter committed to the authority of the legislature. A trial court order stipulating that credit be given an inmate for good time, presentence confinement, and time served in a

community corrections program does not override the discretionary authority granted the department of corrections by the general assembly to withhold or withdraw such credits. *Renneke v. Kautzky*, 782 P.2d 343 (Colo. 1989).

For crimes committed on or after July 1, 1985, credit for good time is within discretionary authority of the department of corrections. Since the department of corrections may withhold or deduct good time credits, an inmate's maximum control date, as initially calculated by the department of corrections, is not necessarily the date upon which he is entitled to unconditional release. *Renneke v. Kautzky*, 782 P.2d 343 (Colo. 1989).

Presentence confinement. There is no statutory requirement that a sentencing court include in the mittimus information concerning a defen-

defendant's eligibility for good time credit for time spent in presentence confinement. Although such information is often included in the mittimus, it is the department of corrections alone which ultimately determines whether a defendant receives and maintains good time credit. *People v. White*, 981 P.2d 624 (Colo. App. 1998).

Confinement in county jail. To the extent that a defendant's sentence is served by confinement in county jail, the good-time credit provisions of former § 17-22.5-101 applied. *People v. Chavez*, 659 P.2d 1381 (Colo. 1983); *People v. Roedel*, 701 P.2d 891 (Colo. App. 1985).

By statute, good time credit for presentence confinement exists only in the case of crimes committed on or after July 1, 1979. *People v. Emig*, 676 P.2d 1156 (Colo. 1984).

When defendant entitled to credits. Where the trial court accepts a stipulation stating that the defendant substantially observed all of the rules and regulations of the county jail and faithfully performed the duties assigned to him, he is entitled to good-time credits for his presentence confinement. *People v. Hamilton*, 662 P.2d 177 (Colo. 1983); *People v. Roedel*, 701 P.2d 891 (Colo. App. 1985).

Where presentence report reflects that defendant had met the other requirements for a "good time" credit for the period of his presentence confinement, this section requires that the department of corrections recognize such credit. *People v. Chavez*, 659 P.2d 1381 (Colo. 1983); *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Use of word "shall" mandates good time deduction to each person whose conduct indicates that he or she has observed the rules and regulations of the facility in which such person is confined. *People v. Galvin*, 835 P.2d 603 (Colo. App. 1992).

Because equal protection and due process claims were not clearly established rights at the time presentence good time credits of inmate were improperly withheld, individual defendants are qualifiedly immune from suit for compensatory damages. *Griess v. State of Colo.*, 841 F.2d 1042 (10th Cir. 1988) (decided under former § 17-20-107).

An inmate who is incarcerated in the state prison system is eligible for two types of time deduction from his sentence. The first is "good time", under this section, which rewards the inmate who substantially observes the rules and regulations of the facility in which he is confined and who faithfully performs his assigned duties. The second is "earned time" pursuant to § 17-22.5-302 (1) which is provided if the in-

mate makes substantial progress in matters such as work and training. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989).

Aggregation of consecutive sentences is proper when calculating good time credit. *People v. Broga*, 750 P.2d 59 (Colo. 1988).

Good time and earned time credits do not constitute service of sentence and are only used to determine inmate's parole eligibility date. *Thorson v. Dept. of Corr.*, 801 P.2d 540 (Colo. 1990); *Myers v. Price*, 842 P.2d 229 (Colo. 1992).

Although the legislature revised and relocated the good time, earned time, and parole provisions originally included in § 16-11-310, eventually moving them to their present location in the statutes in this section and §§ 17-22.5-302 and 17-22.5-303, there is nothing in those revisions which would indicate that § 16-11-310 was meant to render inoperative the provision in § 17-22.5-303 allowing reincarceration for a parole violation. Such an interpretation is unjustified since it would severely undermine the ability of the parole system to effect the successful reintegration of former inmates into the community while recognizing the need for public safety. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989).

The earned time and good time provisions of this section and § 17-22.5-302 do not preclude the reincarceration of an inmate for violation of his parole. These sections, together with § 16-11-310 (now repealed), were only intended to establish the mandatory date of release on parole. Thus, with respect to parole, the good time and earned time credits "vest" only for the purpose of determining parole eligibility, not for purposes of determining whether reincarceration is possible once a former inmate has violated his parole. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989); *Williamson v. Jordan*, 797 P.2d 744 (Colo. 1990); *Jones v. Martinez*, 799 P.2d 385 (Colo. 1990).

Section does not limit the place of confinement where good-time credit can be earned to only those facilities under the supervision of the department of corrections. Community corrections board also has the discretion to withhold or deduct against good-time credits. *People v. Galvin*, 835 P.2d 603 (Colo. App. 1992).

Good time and earned time credits are not to be credited towards service of sentence but only toward eligibility for parole. *Rather v. Suthers*, 973 P.2d 1264 (Colo. 1999).

Person convicted of a sex offense is not entitled to mandatory parole; therefore, the accumulation of good time and earned time credits do not make person eligible for immediate release. *Rather v. Suthers*, 973 P.2d 1264 (Colo. 1999).

17-22.5-302. Earned time. (1) In addition to the good time authorized in section 17-22.5-301, earned time, not to exceed thirty days for every six months of incarceration,

may be deducted from the inmate's sentence upon a demonstration to the department by the inmate that he has made substantial and consistent progress in each of the following categories:

- (a) Work and training, including attendance, promptness, performance, cooperation, care of materials, and safety;
- (b) Group living, including housekeeping, personal hygiene, cooperation, social adjustment, and double bunking;
- (c) Participation in counseling sessions and involvement in self-help groups;
- (d) Progress toward the goals and programs established by the Colorado diagnostic program.

(1.3) Notwithstanding the provisions of subsection (1) of this section to the contrary, after his or her first ninety days in administrative segregation, a state inmate in administrative segregation shall be eligible to receive earned time if he or she meets the criteria required by this section or any modified criteria developed by the department to allow a state inmate to receive the maximum amount of earned time allowable for good behavior and participation in any programs available to the state inmate in administrative segregation.

(1.5) (a) In addition to the thirty days of earned time authorized in subsection (1) of this section, an inmate who makes positive progress, in accordance with performance standards, goals, and objectives established by the department, in the correctional education program established pursuant to section 17-32-105, shall receive earned time pursuant to section 17-22.5-405; except that, if, upon review of the inmate's performance record, the inmate has failed to satisfactorily perform in the literacy corrections or correctional education program, any earned time received pursuant to this paragraph (a) may be withdrawn as provided in subsection (4) of this section. For purposes of this paragraph (a), "positive progress", at a minimum, means that the person is attentive, responsive, and cooperative during the course of instruction and satisfactorily completes required work assignments equivalent to the courses and hours necessary for advancement at a rate of one grade level per calendar year in the school district where such inmate was last enrolled.

(b) Repealed.

(2) The department shall develop objective standards for measuring substantial and consistent progress in the categories listed in subsection (1) of this section. Such standards shall be applied in all evaluations of inmates for the earned time authorized in this section.

(3) For each inmate sentenced for a crime committed on or after July 1, 1979, but before July 1, 1985, the department shall review the performance record of the inmate and shall grant, consistent with the provisions of this section, an earned time deduction from the sentence imposed. Such review shall be conducted at least annually; except that, in the case of an inmate who has one year or less of his sentence remaining to be served, the review shall be conducted at least semiannually. The earned time deduction authorized by this section shall vest upon being granted and may not be withdrawn once it is granted.

(4) For each inmate sentenced for a crime committed on or after July 1, 1985, the department shall review the performance record of the inmate and may grant, withhold, withdraw, or restore, consistent with the provisions of this section, an earned time deduction from the sentence imposed. Such review shall be conducted as specified in subsection (3) of this section; except that the earned time deduction authorized by this subsection (4) shall not vest upon being granted and may be withdrawn once it is granted.

(5) For each inmate sentenced for a crime committed on or after July 1, 1987, the department shall not credit such inmate with more than one-half of his allowable earned time for any six-month period or portion thereof unless such inmate was employed or was participating in institutional training or treatment programs provided by the department or was participating in some combination of such employment, training, or treatment programs. This subsection (5) shall not apply to those inmates excused from such employment or programs for medical reasons.

Source: L. 84: Entire article R&RE, p. 521, § 1, effective July 1. L. 87: (5) added, p. 654, § 10, effective March 27. L. 88: (1.5) added, p. 697, § 3, effective July 1. L. 90: (1.5)(a) amended and (1.5)(b) repealed, pp. 976, 977, §§ 3, 7, effective July 1. L. 91:

(1.5)(a) amended, p. 431, § 9, effective May 24. **L. 92:** (1.5)(a) amended, p. 2173, § 23, effective June 2. **L. 2011:** (1.3) added, (SB 11-176), ch. 289, p. 1343, § 3, effective July 1.

Editor's note: This section is similar to former § 17-22.5-102 as it existed prior to 1984.

Cross references: For the Colorado diagnostic program, see article 40 of this title.

ANNOTATION

An inmate does not have a vested right in earned time, so the inmate's punishment is not increased by withholding earned time from the inmate for not participating in sex offender treatment. *Reeves v. Colo. Dept. of Corr.*, 155 P.3d 648 (Colo. App. 2007).

The creation and distribution of credits to be applied against an inmate's sentence are matters committed to the authority of the legislature; trial court orders do not prevail over the letter and intent of statutory provisions adopted by the general assembly. *Renneke v. Kautzky*, 782 P.2d 343 (Colo. 1989).

For crimes committed on or after July 1, 1985, deductions for earned time are within discretionary authority of the department of corrections. Since the department of corrections may withhold, withdraw, or restore earned time deductions, an inmate's maximum control date, as initially calculated by the department of corrections, is not necessarily the date upon which he is entitled to unconditional release. *Renneke v. Kautzky*, 782 P.2d 343 (Colo. 1989).

Granting of earned time credit for educational programs under subsection (1.5) lies with the discretion of the department. To read "shall" in subsection (1.5) in a mandatory sense would create an absurd result. An inmate has no clear right to receive and department has no clear duty to grant earned time credit. *Verrier v. Dept. of Corr.*, 77 P.3d 875 (Colo. App. 2003).

An inmate who is incarcerated in the state prison system is eligible for two types of time deduction from his sentence. The first is "good time" pursuant to § 17-22.5-301, which rewards the inmate who substantially observes the rules and regulations of the facility in which he is confined and who faithfully performs his assigned duties. The second is "earned time" under this section which is provided if the inmate makes substantial progress in matters such

as work and training. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989).

Inmate not entitled to earned time for time spent in county jail because statutory requirements of this section were not met. *People v. Alderman*, 720 P.2d 1000 (Colo. App. 1986).

Good time and earned time credits do not constitute service of sentence and are only used to determine inmate's parole eligibility date. *Thorson v. Dept. of Corr.*, 801 P.2d 540 (Colo. 1990); *Myers v. Price*, 842 P.2d 229 (Colo. 1992).

Subsection (3) of this section and §§ 16-11-310 (now repealed), 17-22.5-301 (2), and 17-22.5-303 (2) do not preclude the reincarceration of a person for violating his parole even though his time served, together with his good time and earned time credits accrued, equal or exceed the length of the sentence originally imposed. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989); *Williamson v. Jordan*, 797 P.2d 744 (Colo. 1990); *Jones v. Martinez*, 799 P.2d 385 (Colo. 1990).

The earned time and good time provisions of this section and § 17-22.5-301 do not preclude the reincarceration of an inmate for violation of his parole. These sections, together with § 16-11-310 (now repealed), were only intended to establish the mandatory date of release on parole. Thus, with respect to parole, the good time and earned time credits "vest" only for the purpose of determining parole eligibility, not for purposes of determining whether reincarceration is possible once a former inmate has violated his parole. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989); *Williamson v. Jordan*, 797 P.2d 744 (Colo. 1990); *Jones v. Martinez*, 799 P.2d 385 (Colo. 1990).

Inmates in administrative segregation do not meet certain criteria required for an award of earned time credits, even under the apparently mandatory subsection. *Tempelman v. Gunter*, 16 F.3d 367 (10th Cir. 1994).

17-22.5-303. Parole. (1) As to any person sentenced for a class 2, class 3, class 4, or class 5 felony committed on or after July 1, 1979, but before July 1, 1981, the division of adult parole shall provide a one-year period of parole supervision and assistance in securing employment, housing, and such other services as may effect the successful reintegration of such offender into the community while recognizing the need for public safety; except that the state board of parole may discharge an offender at any time during the year upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision. The conditions of parole for any

such person shall be established by the state board of parole prior to his release from incarceration. Upon a determination that the conditions of parole have been violated in any parole revocation proceeding, the state board of parole shall continue the parole in effect, modify the conditions of parole if circumstances then shown to exist require such modifications, or revoke the parole and order the return of the offender to the institution in which he was originally received for a period of not more than six months. For second and subsequent revocations of parole, the offender shall be reincarcerated; but in no event shall any such person spend more than one year under parole supervision and reincarceration as provided in this section. The good time deduction authorized by section 17-22.5-301 shall apply to periods of reincarceration provided for in this section.

(2) As to any person sentenced for a class 2, class 3, class 4, or class 5 felony committed on or after July 1, 1981, and before July 1, 1984, the division of adult parole shall provide a one-year period of parole supervision and assistance in securing employment, housing, and such other services as may effect the successful reintegration of such offender into the community while recognizing the need for public safety; except that the state board of parole may discharge an offender at any time during the year upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision. The conditions of parole for any such person shall be subject to section 17-2-201 (5) (b) and (5) (c) prior to his or her release from incarceration; but in no event shall any such person whose initial parole has not been revoked spend more than one year under parole supervision, as provided in this section. Upon a determination that the conditions of parole have been violated in any such parole revocation proceeding, the state board of parole shall continue the parole in effect, modify the conditions of parole if circumstances then shown to exist require such modifications, or revoke the parole and order the return of the offender to the institution in which he or she was originally received for a period of not more than two years; but in no event shall any period of reincarceration, subsequent term of parole, and sentence actually served exceed the sentence imposed pursuant to section 18-1.3-401, C.R.S. The good time deduction authorized by section 17-22.5-301 shall apply to periods of reincarceration provided for in this section.

(3) The state board of parole, working in conjunction with the department, shall adopt risk assessment guidelines, based upon risk of violence to the general population, to be utilized for determining whether any person sentenced pursuant to the provisions of section 18-1.3-401, C.R.S., for committing a class 2, class 3, class 4, or class 5 felony committed on or after July 1, 1984, but before July 1, 1985, may be suitable for release on his or her parole eligibility date or shall be subject to extended parole of up to three years. Such guidelines shall include provisions which take into consideration the progress toward rehabilitation made by the individual as well as the necessity of guarding the welfare of the community.

(4) As to any person sentenced for a class 2, class 3, class 4, or class 5 felony committed on or after July 1, 1984, but before July 1, 1985, the division of adult parole shall either release an offender on his or her parole eligibility date, pursuant to the determination made by the state board of parole, or shall provide up to three years of parole for any offender who is determined by the state board of parole to present a high risk to the general population upon release from incarceration. For persons who are provided parole, the division of adult parole shall provide a period of up to three years of parole supervision and assistance in securing employment, housing, and such other services as may effect the successful reintegration of such offender into the community while recognizing the need for public safety. The conditions for parole for any such offender under this subsection (4) shall be established pursuant to section 17-2-201 (5) (b) and (5) (c) by the state board of parole prior to his or her release from incarceration. Upon a determination that the conditions of parole have been violated in a parole revocation proceeding, the state board of parole shall continue the parole in effect, modify the conditions of parole if circumstances then shown to exist require such modifications, or revoke the parole and order the return of the offender to the institution in which he or she was originally received for a period of not more than five years. In no event shall any period of reincarceration, subsequent term of parole, and sentence actually served exceed the sentence imposed pursuant to section 18-1.3-401,

C.R.S. The state board of parole may discharge an offender granted parole under this section at any time during the term of parole upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision. The good time deduction authorized by section 17-22.5-301 shall apply to periods of reincarceration provided for in this section.

(5) Pursuant to section 17-2-201 (9) (a), an interview of an inmate who applies for parole, who was sentenced for an offense committed on or after July 1, 1979, may be conducted by one member of the parole board.

(6) Any person sentenced for a class 2, class 3, class 4, class 5, or class 6 felony committed on or after July 1, 1985, shall be eligible for parole after such person has served the sentence imposed less any time authorized for good time earned pursuant to section 17-22.5-301 and for earned time pursuant to section 17-22.5-302. Upon an application for parole, the state board of parole, working in conjunction with the department and using the guidelines established pursuant to section 17-22.5-404, shall determine whether or not to grant parole and, if granted, the length of the period of parole, which may be for a period of up to five years. If an application for parole is refused by the state board of parole, the state board shall reconsider within one year thereafter the granting of parole to such person and shall continue the reconsideration each year thereafter until such person is granted parole or until such person is discharged pursuant to law; except that, if the person applying for parole was convicted of any class 3 sexual offense described in part 4 of article 3 of title 18, C.R.S., a habitual criminal offense as defined in section 18-1.3-801 (2.5), C.R.S., or of any offense subject to the requirements of section 18-1.3-904, C.R.S., the board need only reconsider granting parole to such person once every three years, until the board grants such person parole or until such person is discharged pursuant to law, or if the person applying for parole was convicted of a class 1 or class 2 felony that constitutes a crime of violence, as defined in section 18-1.3-406, C.R.S., the board need only reconsider granting parole to such person once every five years, until the board grants such person parole or until such person is discharged pursuant to law.

(7) For persons who are granted parole pursuant to subsection (6) of this section, the division of adult parole shall provide a period of up to five years of parole supervision and assistance in securing employment, housing, and such other services as may effect the successful reintegration of such offender into the community while recognizing the need for public safety. The conditions for parole for any such offender under this subsection (7) shall be established pursuant to section 17-22.5-404 by the state board of parole prior to such offender's release from incarceration. Upon a determination that the conditions of parole have been violated in a parole revocation proceeding, the state board of parole shall continue the parole in effect, modify the conditions of parole if circumstances then shown to exist require such modifications, which circumstances shall be set forth in writing, or revoke the parole and order the return of the offender to a place of confinement designated by the executive director for a period of not more than five years. In computing the period of reincarceration for an offender other than an offender sentenced for a nonviolent felony offense, as defined in section 17-22.5-405 (5), the time between the offender's release on parole and return to custody in Colorado for revocation of such parole shall not be considered to be any part of the term of the sentence. In no event shall any period of reincarceration and sentence actually served exceed the sentence imposed pursuant to section 18-1.3-401, C.R.S. The state board of parole may discharge an offender granted parole under this section at any time during the term of parole upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision.

(8) The state board of parole shall consider the parole of a person whose parole is revoked either for a technical violation or based on a self-revocation at least once within one hundred eighty days after the revocation if the person's release date is more than nine months from the date of the person's revocation; except that a person whose parole is revoked based on a technical violation that involved the use of a weapon shall not be considered for parole for one year.

Source: L. 84: Entire article R&RE, p. 521, § 1, effective July 1. L. 85: (3) and (4) amended and (6) and (7) added, p. 648, § 4, effective July 1; (5) added, p. 641, § 10,

effective July 1. **L. 87:** (7) amended, p. 654, § 11, effective July 1. **L. 90:** (6) amended, p. 924, § 6, effective March 27. **L. 92:** (6) and (7) amended, p. 2173, § 24, effective June 2. **L. 94:** (6) amended, p. 2597, § 6, effective June 3. **L. 95:** (7) amended, p. 877, § 12, effective May 24. **L. 2000:** (1), (2), (4), and (7) amended, p. 853, § 62, effective May 24. **L. 2002:** (2), (3), (4), (6), and (7) amended, p. 1502, § 163, effective October 1. **L. 2003:** (6) amended, p. 812, § 1, effective July 1; (8) added, p. 2676, § 2, effective July 1. **L. 2008:** (7) amended, p. 1756, § 4, effective July 1.

Editor's note: This section is similar to former § 17-22.5-103 as it existed prior to 1984.

Cross references: (1) For parole revocation proceedings, see §§ 17-2-103 and 17-2-201; for the right to attend parole hearings, see § 17-2-214.

(2) For the legislative declaration contained in the 2002 act amending subsections (2), (3), (4), (6), and (7), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

It is not a violation of the ex post facto clause found in article II section 11 of the Colorado Constitution to apply the amendment of this section which requires that parole time not be credited upon a second parole violation to a defendant who violates parole after the effective date of the amendment. *Gasper v. Gunter*, 851 P.2d 912 (Colo. 1993); *People v. Gallegos*, 975 P.2d 1135 (Colo. App. 1998).

1994 amendments to subsection (6) create only a speculative and attenuated risk of producing the prohibited effect of increasing the actual punishment for the covered crimes. These speculative effects are insufficient to establish a violation of the ex post facto prohibition. *Funari v. Zavaras*, 914 P.2d 508 (Colo. App. 1996).

Trial courts do not have the authority to impose a period of parole as part of a sentence. Only the parole board has the authority to determine whether and for what period parole is appropriate. *People v. Mendez*, 897 P.2d 868 (Colo. App. 1995).

A defendant is not legally entitled to good time credit, even though he or she may become eligible for such credit. *People v. McCreddie*, 938 P.2d 528 (Colo. 1997).

For felonies committed on or after July 1, 1985, good time and earned time credits are within discretionary authority of the department of corrections. Since the department of corrections may withdraw good time and earned time credits, an inmate's maximum control date, as initially calculated by the department of corrections, is not necessarily the date upon which he is entitled to unconditional release. *Renneke v. Kautzky*, 782 P.2d 343 (Colo. 1989).

Only purpose of accumulation of good time credits is for determining parole eligibility date of inmates and such credits do not constitute service of sentence. *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991); *Myers v. Price*, 842 P.2d 229 (Colo. 1992).

Parole violator reincarcerated for the lesser of two years or the remainder of sen-

tence originally imposed. Subsection (2) provides that a parole violator may be returned to the institution in which he was originally received for a period of not more than two years, but in no event may the reincarceration and the subsequent term of parole and the sentence actually served exceed the sentence originally imposed. Thus, the parole board's imposition of a two-year term of reincarceration was improper. *People v. Leedom*, 781 P.2d 173 (Colo. App. 1989).

For purposes of a parole revocation, the term "sentence already served" in subsection (2) includes all previous periods of incarceration plus all previous periods of release on parole. *People v. Browning*, 809 P.2d 1086 (Colo. App. 1990).

Effect of parole violation on discretion to impose sentence to be served concurrently or consecutively. Even though a parolee could be reincarcerated after parole revocation for a maximum period of only six months, for the purposes of sentencing for a subsequent offense committed while on parole, the parolee was reincarcerated for the original offense. Therefore, the court sentencing for the subsequent offense had the discretion to impose the sentence to run consecutively to the period of reincarceration. *People v. Lucero*, 772 P.2d 58 (Colo. 1989).

Subsection (2) of this section and §§ 16-11-310 (now repealed), 17-22.5-301 (2), and 17-22.5-302 (3) do not preclude the reincarceration of a person for violating his parole even though his time served, together with his good time and earned time credits accrued, equal or exceed the length of the sentence originally imposed. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989); *Williamson v. Jordan*, 797 P.2d 744 (Colo. 1990); *Jones v. Martinez*, 799 P.2d 385 (Colo. 1990).

Although the legislature revised and relocated the good time, earned time, and parole provisions originally included § 16-11-310 (now repealed), eventually moving them to

their present location in the statutes at §§ 17-22.5-301 to 17-22.5-303, there is nothing in those revisions which would indicate that § 16-11-310 was meant to render inoperative the provision in this section allowing reincarceration for a parole violation. Such an interpretation is unjustified since it would severely undermine the ability of the parole system to effect the successful reintegration of former inmates into the community while recognizing the need for public safety. *Bynum v. Kautzky*, 784 P.2d 735 (Colo. 1989).

Plain and clear language of this section requires that a parole violator not be reincarcerated for a period in excess of the balance of time to be served on such person's original sentence and that good time credits acquired during reincarceration be applied in a manner that will not so extend the balance of such person's original sentence. *Anderson v. Kautzky*, 786 P.2d 1082 (Colo. 1989).

Credits may not be carried forward. Good time and earned time credits received during original period of incarceration do not apply to period of reincarceration. *Williamson v. Jordan*, 797 P.2d 744 (Colo. App. 1990); *Jones v. Martinez*, 799 P.2d 385 (Colo. 1990).

Good time and earned time credits cannot be used to diminish defendant's sentence and accelerate release date. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992) (decided under section as it existed prior to its repeal in 1988).

It was foreseeable that § 16-11-310 would not be construed in such manner as to defeat the purpose or eliminate the requirement of parole. The possibility of reincarceration for violating conditions of parole necessarily rejects the concept of an incarcerated person meriting diminution of sentence by credits for good be-

havior prior to being released on a conditional basis. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992) (decided under section as it existed prior to its repeal in 1988); *Fultz v. Embry*, 158 F.3d 1101 (10th Cir. 1998).

Inmate who was eligible for mandatory parole under the longest of three concurrent sentences imposed upon him was entitled to be released on parole. *Vaughn v. Gunter*, 820 P.2d 659 (Colo. 1991).

Parole board has authority to impose parole on inmates who committed offenses between July 1, 1984, and July 1, 1985, pursuant to subsection (4) regardless of whether sentencing court imposed illegal sentence by imposing period of parole. *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991).

In determining a defendant's parole date where consecutive sentences have been imposed and both the mandatory and discretionary parole statutes apply, the court should construe the consecutive sentences as one continuous sentence. The defendant's right to mandatory parole under the first conviction is nullified by his two subsequent discretionary parole convictions. *Spoto v. Colo. State Dept. of Corr.*, 883 P.2d 11 (Colo. 1994); *People v. Gallegos*, 975 P.2d 1135 (Colo. App. 1998); *Badger v. Suthers*, 985 P.2d 1042 (Colo. 1999).

Department of corrections acted properly when it combined all of defendant's sentences, treating them as a continuous sentence, before the applicable parole date was determined. *People v. Gallegos*, 975 P.2d 1135 (Colo. App. 1998).

When a defendant is paroled under this section or under § 17-22.5-403, he must be reincarcerated for a parole violation under the same statute. *People v. Gallegos*, 975 P.2d 1135 (Colo. App. 1998).

17-22.5-303.3. Violent offenders - parole. (1) Any person sentenced for second degree murder, first degree assault, first degree kidnapping, unless the first degree kidnapping is a class 1 felony, first or second degree sexual assault, first degree arson, first degree burglary, or aggravated robbery, committed on or after July 1, 1987, who has previously been convicted of a crime of violence, shall be eligible for parole after he has served seventy-five percent of the sentence imposed less any time authorized for earned time pursuant to section 17-22.5-302. Thereafter, the provisions of section 17-22.5-303 (6) and (7) shall apply.

(2) Any person sentenced for any crime enumerated in subsection (1) of this section, who has twice previously been convicted for a crime of violence, shall be eligible for parole after he has served the sentence imposed less any time authorized for earned time pursuant to section 17-22.5-302. Thereafter, the provisions of section 17-22.5-303 (6) and (7) shall apply.

(3) The governor may grant parole to an offender to whom this section applies before such offender's parole eligibility date if, in the governor's opinion, extraordinary mitigating circumstances exist and such offender's release from institutional custody is compatible with the safety and welfare of society.

Source: L. 87: Entire section added, p. 655, § 12, effective July 1. L. 88: (1) amended, p. 1435, § 28, effective June 11.

ANNOTATION

Definition of "crime of violence" in § 16-11-309 applies in determining when a convicted person is eligible for parole under § 17-22.5-303.3 (1). *Busch v. Gunter*, 870 P.2d 586 (Colo. App. 1993).

A convicted person is eligible for parole after serving seventy-five percent of the per-

son's sentence if previously convicted of a crime in which a deadly weapon was used, possessed, or threatened to be used. *Busch v. Gunter*, 870 P.2d 586 (Colo. App. 1993).

17-22.5-303.5. Parole guidelines. (Repealed)

Source: L. 85: Entire section added, p. 650, § 5, effective July 1. **L. 87:** (1) amended and (5) to (7) added, p. 655, § 13, effective July 1. **L. 88:** (2)(a)(IX) amended and (2)(a)(XI) added, p. 697, § 4, effective July 1. **L. 90:** (1) amended, p. 925, § 7, effective March 27; (2)(a)(XII) added, p. 977, § 4, effective July 1. **L. 91:** Entire section repealed, p. 335, § 2, effective May 18.

17-22.5-304. Part affects only certain inmates. The good time provisions of this part 3 are effective July 1, 1979, and shall apply only to those persons convicted of crimes committed on or after said date. No person subject to the good time provisions of part 2 of this article shall be eligible for any of the provisions authorized by this part 3.

Source: L. 84: Entire article R&RE, p. 523, § 1, effective July 1. **L. 85:** Entire section amended, p. 652, § 6, effective July 1; Entire section amended, p. 1372, § 51, effective July 1.

ANNOTATION

This part 3 applies only to those persons convicted of crimes committed on or after July 1, 1979, which reflects a legislative decision that persons convicted of more than one offense may not receive double credits while

serving sentences resulting from the circumstance that the offenses were committed both before and on or after July 1, 1979. *Price v. Mills*, 728 P.2d 715 (Colo. 1986).

17-22.5-305. Eligibility for other statutory provisions. (1) No person subject to the provisions of section 17-22.5-301 (1) shall be eligible for any of the time limit and vesting provisions of section 17-22.5-301 (2) or (3) or 17-22.5-302 (4).

(2) No person subject to the provisions of section 17-22.5-301 (2) shall be eligible for any of the time limit and vesting provisions of section 17-22.5-301 (1) or (3) or 17-22.5-302 (4).

(3) No person subject to the provisions of section 17-22.5-301 (3) shall be eligible for any of the time limit and vesting provisions of section 17-22.5-301 (1) or (2) or 17-22.5-302 (3).

Source: L. 84: Entire article R&RE, p. 523, § 1, effective July 1.

17-22.5-306. Transfer of functions. The executive director shall, on and after July 1, 1984, execute, administer, perform, and enforce the rights, powers, duties, functions, and obligations formerly vested in the state board of parole with respect to the earned time provisions of section 17-22.5-302. Notwithstanding any other provision of law to the contrary, the state board of parole shall carry out all of its other functions as if this section had not been enacted.

Source: L. 84: Entire article R&RE, p. 523, § 1, effective July 1.

PART 4

PAROLE ELIGIBILITY AND DISCHARGE FROM CUSTODY

Law reviews: For article, "1990 Criminal Law Legislative Update", see 19 Colo. Law. 2049 (1990).

17-22.5-401. Legislative declaration. The general assembly hereby declares that if any inmate does not demonstrate positive behavior during incarceration, such inmate should be required to serve out the full sentence imposed upon such inmate. If any inmate does demonstrate positive behavior during incarceration, such inmate should be considered for release from incarceration prior to the end of the full sentence imposed upon him. Therefore, the general assembly, in enacting this part 4, intends to provide standards whereby any inmate can earn a reduction of incarceration time and to provide incentives for inmates to demonstrate positive behavior during incarceration.

Source: L. 90: Entire part added, p. 946, § 19, effective June 7.

17-22.5-402. Discharge from custody. (1) No inmate shall be discharged from the department until he has remained the full term for which he was sentenced, to be computed on and after the date upon which the sentence becomes effective and excluding any time the inmate may have been at large by reason of escape therefrom, unless he is pardoned or otherwise released by legal authority.

(2) Notwithstanding subsection (1) of this section, the full term for which an inmate is sentenced shall be reduced by any earned release time and earned time granted pursuant to section 17-22.5-405, except as provided in section 17-22.5-403 (3) and (3.5).

(3) This part 4 shall not apply to any offender to whom section 17-22.5-104 (2) (a), (2) (b), (2) (c), (2) (d) (I), (2) (d) (II), or (2) (d) (III) applies.

Source: L. 90: Entire part added, p. 947, § 19, effective June 7. **L. 2004:** (2) amended, p. 1741, § 2, effective June 4. **L. 2006:** (3) amended, p. 1053, § 4, effective May 25. **L. 2009:** (2) amended, (HB 09-1351), ch. 359, p. 1867, § 2, effective June 1.

Cross references: For the legislative declaration contained in the 2006 act amending subsection (3), see section 1 of chapter 228, Session Laws of Colorado 2006.

ANNOTATION

An inmate is not entitled to unconditional release under this section when the inmate has a sufficient amount of good time and earned time credits, when combined with time served, to satisfy the inmate's sentence. The statutory scheme regarding eligibility for parole and dis-

charge reflect the general assembly's intent that good time and earned time credits apply for the purpose of determining an inmate's eligibility for parole. *Meyers v. Price*, 842 P.2d 229 (Colo. 1992).

17-22.5-403. Parole eligibility. (1) Any person sentenced for a class 2, class 3, class 4, class 5, or class 6 felony, or any unclassified felony, shall be eligible for parole after such person has served fifty percent of the sentence imposed upon such person, less any time authorized for earned time granted pursuant to section 17-22.5-405. However, the date established by this subsection (1) upon which any person shall be eligible for parole may be extended by the executive director for misconduct during incarceration. The executive director shall promulgate rules and regulations concerning when and under what conditions any inmate's parole eligibility date may be extended. Such rules and regulations shall be promulgated in such a manner as to promote fairness and consistency in the treatment of all inmates.

(2) (a) Notwithstanding subsection (1) of this section, any person convicted and sentenced for second degree murder, first degree assault, first degree kidnapping unless the

first degree kidnapping is a class 1 felony, first or second degree sexual assault, first degree arson, first degree burglary, or aggravated robbery, committed on or after June 7, 1990, and before July 1, 2004, which person has previously been convicted of a crime which would have been a crime of violence as defined in section 18-1.3-406, C.R.S., shall be eligible for parole after such person has served seventy-five percent of the sentence imposed upon such person, less any time authorized for earned time granted pursuant to section 17-22.5-405.

(b) The provisions of paragraph (a) of this subsection (2) shall not apply to persons sentenced pursuant to part 10 of article 1.3 of title 18, C.R.S.

(2.5) (a) Notwithstanding subsection (1) of this section, any person convicted and sentenced for second degree murder, first degree assault, first degree kidnapping unless the first degree kidnapping is a class 1 felony, first degree arson, first degree burglary, or aggravated robbery, committed on or after July 1, 2004, shall be eligible for parole after such person has served seventy-five percent of the sentence imposed upon such person, less any time authorized for earned time granted pursuant to section 17-22.5-405.

(b) The provisions of paragraph (a) of this subsection (2.5) shall only apply to:

(I) A person convicted and sentenced for a crime listed in paragraph (a) of this subsection (2.5) that is a class 2 or class 3 felony offense; or

(II) A person convicted and sentenced for a crime listed in paragraph (a) of this subsection (2.5) that is a class 4 or class 5 felony offense, which person has previously been convicted of a crime of violence as defined in section 18-1.3-406, C.R.S.

(3) Notwithstanding subsection (1) or (2) of this section, any person convicted and sentenced for any crime enumerated in subsection (2) of this section, committed on or after June 7, 1990, and before July 1, 2004, who has twice previously been convicted for a crime which would have been a crime of violence as defined in section 18-1.3-406, C.R.S., shall be eligible for parole after such person has served seventy-five percent of the sentence served upon such person, at which time such person shall be referred by the department to the state board of parole which may place such person on parole for a period of time which does not exceed the time remaining on such person's original sentence. For offenses committed on or after July 1, 1993, such person shall be placed on parole for the period of time specified in section 18-1.3-401 (1) (a) (V), C.R.S. Section 17-22.5-402 (2) shall not apply to any such offender.

(3.5) (a) Notwithstanding subsection (1) or (2.5) of this section, any person convicted and sentenced for any crime enumerated in subsection (2.5) of this section, committed on or after July 1, 2004, who has previously been convicted for a crime which would have been a crime of violence as defined in section 18-1.3-406, C.R.S., shall be eligible for parole after such person has served seventy-five percent of the sentence served upon such person, at which time such person shall be referred by the department to the state board of parole which may place the person on parole for the period of time specified in section 18-1.3-401 (1) (a) (V), C.R.S. Section 17-22.5-402 (2) shall not apply to any such offender.

(b) The provisions of paragraph (a) of this subsection (3.5) shall only apply to:

(I) A person convicted and sentenced for a crime listed in paragraph (a) of subsection (2.5) of this section that is a class 2 or class 3 felony offense; or

(II) A person convicted and sentenced for a crime listed in paragraph (a) of subsection (2.5) of this section that is a class 4 or class 5 felony offense, which person has twice previously been convicted of a crime of violence as defined in section 18-1.3-406, C.R.S.

(4) The governor may grant parole to an inmate to whom subsection (2) or (3) of this section applies prior to such inmate's parole eligibility date or discharge date if, in the governor's opinion, extraordinary mitigating circumstances exist and such inmate's release from institutional custody is compatible with the safety and welfare of society.

(5) For any offender who is incarcerated for an offense committed prior to July 1, 1993, upon application for parole, the state board of parole, working in conjunction with the department and using the guidelines established pursuant to section 17-22.5-404, shall determine whether or not to grant parole and, if granted, the length of the period of parole. The state board of parole may set the length of the period of parole for any time period up to the date of final discharge as determined in accordance with section 17-22.5-402. If an application for parole is refused by the state board of parole, the state board of parole shall reconsider within one year thereafter whether such inmate should be granted parole. The

state board of parole shall continue such reconsideration each year thereafter until such inmate is granted parole or until such inmate is discharged pursuant to law; except that, if the inmate applying for parole was convicted of a class 1 or class 2 crime of violence, as defined in section 18-1.3-406, C.R.S., any class 3 sexual offense described in part 4 of article 3 of title 18, C.R.S., a habitual criminal offense as defined in section 18-1.3-801 (2.5), C.R.S., or of any offense subject to the requirements of section 18-1.3-904, C.R.S., the board need only reconsider granting parole to such inmate once every three years, until the board grants such inmate parole or until such inmate is discharged pursuant to law.

(6) For persons who are granted parole pursuant to subsection (5) of this section, the division of adult parole shall provide parole supervision and assistance in securing employment, housing, and such other services as may effect the successful reintegration of such offender into the community while recognizing the need for public safety. The conditions for parole for any such offender under this subsection (6) shall be established pursuant to section 17-22.5-404 by the state board of parole prior to such offender's release from incarceration. Upon a determination that the conditions of parole have been violated in a parole revocation proceeding, the state board of parole shall continue the parole in effect, modify the conditions of parole if circumstances then shown to exist require such modifications, which circumstances shall be set forth in writing, or revoke the parole and order the return of the offender to a place of confinement designated by the executive director for any period of time up to the period remaining on such person's sentence until the discharge date as determined by section 17-22.5-402 or one year, whichever is longer. In computing the period of reincarceration for an offender other than an offender sentenced for a nonviolent felony offense, as defined in section 17-22.5-405 (5), the time between the offender's release on parole and return to custody in Colorado for revocation of such parole shall not be considered to be part of the term of the sentence. The state board of parole may discharge an offender granted parole under this section at any time during the term of parole upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision.

(7) (a) For any offender who is incarcerated for an offense committed on or after July 1, 1993, upon application for parole, the state board of parole, working in conjunction with the department and using the guidelines established pursuant to section 17-22.5-404, shall determine whether or not to grant parole. The state board of parole, if it determines that placing an offender on parole is appropriate, shall set the length of the period of parole at the mandatory period of parole established in section 18-1.3-401 (1) (a) (V), C.R.S., except as otherwise provided for specified offenses in section 17-2-201 (5) (a), (5) (a.5), and (5) (a.7). If an application for parole is refused by the state board of parole, the state board of parole shall reconsider within one year thereafter whether such inmate should be granted parole. The state board of parole shall continue such reconsideration each year thereafter until such inmate is granted parole or until such inmate is discharged pursuant to law; except that, if the inmate applying for parole was convicted of any sex offense, as defined in section 18-1.3-1003 (5), C.R.S., a habitual criminal offense as defined in section 18-1.3-801 (2.5), C.R.S., or of any offense subject to the requirements of section 18-1.3-904, C.R.S., the board need only reconsider granting parole to such inmate once every three years, until the board grants such inmate parole or until such inmate is discharged pursuant to law, or if the person applying for parole was convicted of a class 2 felony that constitutes a crime of violence, as defined in section 18-1.3-406, C.R.S., the board need only reconsider granting parole to such person once every five years, until the board grants such person parole or until such person is discharged pursuant to law.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (7), for any sex offender, as defined in section 18-1.3-1003 (4), C.R.S., who is sentenced pursuant to the provisions of part 10 of article 1.3 of title 18, C.R.S., for commission of a sex offense committed on or after November 1, 1998, the state board of parole shall determine whether or not to grant parole as provided in section 18-1.3-1006, C.R.S. If the state board of parole determines that placing a sex offender on parole is appropriate, it shall set an indeterminate period of parole as provided in section 18-1.3-1006, C.R.S. If the state board of parole does not release a sex offender on parole, it shall reconsider release on parole at least once every

three years until the state board of parole determines the sex offender meets the criteria for parole specified in section 18-1.3-1006 (1), C.R.S.

(8) (a) For persons who are granted parole pursuant to paragraph (a) of subsection (7) of this section, the division of adult parole shall provide parole supervision and assistance in securing employment, housing, and such other services as may affect the successful reintegration of such offender into the community while recognizing the need for public safety. The conditions for parole for any such offender under this paragraph (a) shall be established pursuant to section 17-22.5-404 by the state board of parole prior to such offender's release from incarceration. Upon a determination that the conditions of parole have been violated in a parole revocation proceeding, the state board of parole shall continue the parole in effect, modify the conditions of parole if circumstances then shown to exist require such modifications, which circumstances shall be set forth in writing, or revoke the parole and order the return of the offender to a place of confinement designated by the executive director for any period of time up to the period remaining on such person's mandatory period of parole established in section 18-1.3-401 (1) (a) (V), C.R.S. Any offender who has been reincarcerated due to a parole revocation pursuant to this paragraph (a) shall be eligible for parole at any time during such reincarceration. The state board of parole may discharge an offender granted parole under this section at any time during the term of parole upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision. In making any such determination, the state board of parole shall make written findings as to why such offender is no longer in need of parole supervision.

(b) For sex offenders, as defined in section 18-1.3-1003 (4), C.R.S., who are convicted of an offense committed on or after November 1, 1998, and who are granted parole pursuant to paragraph (b) of subsection (7) of this section, the division of adult parole shall provide parole supervision and assistance in securing employment, housing, and such other services as may affect the successful reintegration of the sex offender into the community while recognizing the need for public safety. The conditions for parole for any sex offender shall be established pursuant to section 18-1.3-1006, C.R.S., and section 17-22.5-404 by the state board of parole prior to the sex offender's release from incarceration. Upon a determination in a parole revocation proceeding that the sex offender has violated the conditions of parole, the state board of parole shall continue the parole in effect, modify the conditions of parole if circumstances then shown to exist require such modifications, which circumstances shall be set forth in writing, or revoke the parole and order the return of the sex offender to a place of confinement designated by the executive director for any period of time up to the remainder of the sex offender's natural life. The revocation hearing shall be held and the state board of parole shall make its determination as provided in section 18-1.3-1010, C.R.S. Following reincarceration, the sex offender's eligibility for parole shall be determined pursuant to section 18-1.3-1006, C.R.S. The state board of parole may discharge a sex offender from parole as provided in section 18-1.3-1006 (3), C.R.S.

(9) The state board of parole shall consider the parole of a person whose parole is revoked either for a technical violation or based on a self-revocation at least once within one hundred eighty days after the revocation if the person's release date is more than nine months from the date of the person's revocation; except that a person whose parole is revoked based on a technical violation that involved the use of a weapon shall not be considered for parole for one year.

Source: **L. 90:** Entire part added, p. 947, § 19, effective June 7. **L. 93:** (1) amended, p. 1730, § 11, effective July 1; entire section amended, p. 1978, § 4, effective July 1. **L. 94:** (5) and (7) amended, p. 2597, § 7, effective June 3. **L. 95:** (6) amended, p. 878, § 13, effective May 24. **L. 98:** (9) added, p. 1445, § 37, effective July 1; (7) and (8) amended, p. 1291, § 12, effective November 1. **L. 2000:** (6), (8), and (9)(c) amended, p. 854, § 63, effective May 24. **L. 2002:** (7)(a) amended, p. 125, § 3, effective March 26; (2), (3), (5), (7)(a), (7)(b), (8)(a), (8)(b), and (9)(a) amended, p. 1504, § 164, effective October 1. **L. 2003:** (2) amended, p. 975, § 10, effective April 17; (7)(a) amended, p. 813, § 2, effective July 1; (9) amended, p. 2677, § 4, effective July 1. **L. 2004:** (2) and (3) amended and (2.5) and (3.5) added, p. 1739, § 1, effective June 4. **L. 2008:** (6) amended, p. 1756, § 5, effective July 1.

Editor's note: Amendments to this section by House Bill 93-1302 and House Bill 93-1088 were harmonized. Amendments to subsection (7)(a) by House Bill 02-1223 and House Bill 02-1046 were harmonized, effective October 1, 2002.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (2), (3), (5), (7)(a), (7)(b), (8)(a), (8)(b), and (9)(a), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Application of the triennial review authorized in subsection (5) does not violate the ex post facto clauses in the federal or state constitution. *Martinez v. Colo. State Bd. of Parole*, 989 P.2d 256 (Colo. App. 1999).

Retrospective application of the 1993 mandatory parole provisions of this section, in conjunction with § 18-1-105 (1)(a)(V), not violative of ex post facto clause where defendant had pleaded guilty to underlying offense with stipulation that the offense occurred within a time frame that happened to include time periods both prior and subsequent to the date such provisions were enacted. *People v. Flagg*, 18 P.3d 792 (Colo. App. 2000).

Retroactive application of the policy of the parole board to no longer reconsider a parole application two months early does not extend a prisoner's actual period of confinement and is appropriate. *Mulberry v. Neal*, 96 F. Supp.2d 1149 (D. Colo. 2000).

In enacting statutory section, general assembly did not intend 75% provision to apply only to persons whose prior violent crime resulted in a separate charge and separate conviction. Instead, general assembly's general goal was to make parole eligibility more difficult for all persons who have previously committed a violent crime. *Outler v. Norton*, 934 P.2d 922 (Colo. App. 1997).

Subsection (1) applies only to an offender sentenced for a crime committed on or after July 1, 1979. *Vashone-Caruso v. Suthers*, 29 P.3d 339 (Colo. App. 2001).

Plain and ordinary meaning of the words "would have been a crime of violence" as used in the section includes the situation in which a criminal defendant has been previously convicted of a crime which satisfies definition of crime of violence contained in § 16-11-309 (2). *Outler v. Norton*, 934 P.2d 922 (Colo. App. 1997).

The language of subsection (3) is unambiguous and contains no qualification that the crimes arise out of separate criminal transactions and have been separately tried and convicted. *Koucherik v. Zavaras*, 940 P.2d 1063 (Colo. App. 1996).

Defendant's assertion that the application of subsection (3) to his circumstances denied him equal protection of the law was not supported by any evidence and defendant therefore failed to meet his burden to show that he was

being treated differently from other persons who were similarly situated. *Koucherik v. Zavaras*, 940 P.2d 1063 (Colo. App. 1996).

Extension of inmate's parole eligibility date under subsection (2)(a) or (3) does not alter or increase inmate's sentence. *Jenner v. Ortiz*, 155 P.3d 563 (Colo. App. 2006).

Defendant's post-conviction challenge to imposition of mandatory parole period as an unconstitutional violation of the double jeopardy clause based on the assertion that only the parole board has the authority to impose parole was denied, since the parole board only administers parole and the court imposes it; hence there is no separate penalty imposed in a separate proceeding. *People v. Xiong*, 10 P.3d 719 (Colo. App. 2000).

With a mandatory parole period, an offender does not begin serving the period of parole until his or her prison sentence has been fully served or the parole board determines that he or she is ready for parole. *People v. Hall*, 87 P.3d 210 (Colo. App. 2003).

While an offender subject to discretionary parole will never be confined for a period greater than the original sentence imposed, an offender subject to mandatory parole faces a sentence to prison, a period of parole, and possibly another period of confinement not necessarily limited to the original term of incarceration imposed. *People v. Hall*, 87 P.3d 210 (Colo. App. 2003).

Only the parole board, not a parole officer, has the authority to direct that an offender attend a community corrections program as a condition of parole. *People v. Lanzieri*, 996 P.2d 156 (Colo. App. 1999), rev'd on other grounds, 25 P.3d 1170 (Colo. 2001).

Subsection (9) does not violate separation of powers or double jeopardy. The constitution does not provide that sentencing is within the sole province of the judiciary. The general assembly has the power to prescribe punishment and limit the court's sentencing authority. In this case, the general assembly, by enacting subsection (9), simply extended Colorado's parole supervision scheme to provide additional means for successfully reintegrating offenders into the community consistent with public safety. *People v. Jackson*, 109 P.3d 1017 (Colo. App. 2004).

Defendant was on notice that, under certain circumstances, he or she could be subject to post-release supervision and reincarceration fol-

lowing mandatory parole. Thus, he or she could not have had a legitimate expectation of finality in the sentence announced by the court at sentencing. Therefore, the defendant's double jeopardy rights were not violated when, because of intervening circumstances, the defendant was subject to the additional period of statutorily required supervision. *People v. Jackson*, 109 P.3d 1017 (Colo. App. 2004).

Department of corrections acted properly when it combined all of defendant's sentences, treating them as a continuous sentence, before the applicable parole date was determined. *People v. Gallegos*, 975 P.2d 1135 (Colo. App. 1998).

When a defendant is paroled under this section or under § 17-22.5-303, he must be reincarcerated for a parole violation under the same statute. *People v. Gallegos*, 975 P.2d 1135 (Colo. App. 1998).

A period of confinement attributable to a parole revocation was not a "period of mandatory parole". When a person is reincarcerated on a parole revocation, he is no longer serving his original sentence. Therefore, when a person is sentenced for the crime of escape during a period of mandatory parole for another offense, ordering such a sentence to run consecutive with the period of incarceration for the parole revocation did not violate § 18-1.3-401 (1)(a)(V)(E). *People v. Luther*, 58 P.3d 1013 (Colo. 2002).

Subsection (5) applied to defendant convicted of first degree murder, even though defendant was not convicted of a separate count of crime of violence. This subsection does not require proof of conviction of a crime of violence count, instead it applies to any defendant convicted of any crime described as a crime of violence in § 16-11-309. *Martinez v. Colo. State Bd. of Parole*, 989 P.2d 256 (Colo. App. 1999).

Defendant's argument that he did not enter into a voluntary plea because he was not advised that a violation of mandatory parole could lead to reincarceration was without merit. Pursuant to subsection (7), a term of mandatory parole is imposed in addition to, and not in lieu of, a term of incarceration. If parole is granted, it must be for the mandatory period

established by statute and it is implied that an advisement on mandatory parole includes notice that violation of such parole may result in imprisonment. *People v. Jones*, 957 P.2d 1046 (Colo. App. 1997).

The provisions of § 17-2-201 (5)(a) and subsection (7) of this section are in conflict. Section 17-2-201 (5)(a) is a specific provision related to the parole of sex offenders while subsection (7) of this section is the mandatory parole statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, § 17-2-201 (5)(a) is an exception to subsection (7) of this section by creating a specialized schedule for sex offenders who committed crimes prior to July 1, 1996. *Martin v. People*, 27 P.3d 846 (Colo. 2001).

Section 17-2-201 (5)(a.5) is a specific provision related to the parole of sex offenders while subsection (7) of this section is the mandatory parole statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, § 17-2-201 (5)(a.5) is an exception to subsection (7) of this section, which creates a specialized schedule for sex offenders who committed crimes between July 1, 1996, and July 1, 1998. *People v. Cooper*, 27 P.3d 348 (Colo. 2001).

Habitual offenders are subject to a period of discretionary parole rather than a period of statutory mandatory parole. The provisions of § 17-2-201 (5)(a) and § 17-2-213 irreconcilably conflict with the provisions of subsection (7) of this section and § 18-1-105 (1)(a)(V). Thus, the specific provision of § 17-2-201 (5)(a) and § 17-2-213 prevail over the general provisions of subsection (7) of this section and § 18-1-105 (1)(a)(V). *People v. Falls*, 58 P.3d 1140 (Colo. App. 2002).

Petition to review mandatory parole is ripe for judicial review even though the defendant has not completed period of incarceration. *People v. Wirsching*, 30 P.3d 227 (Colo. App. 2000).

An advisement that a defendant is subject to mandatory parole without disclosing the period of parole is not sufficient to meet the requirements of this section and may allow the defendant to withdraw his or her plea agreement. *People v. Wirsching*, 30 P.3d 227 (Colo. App. 2000).

17-22.5-403.5. Special needs parole. (1) Notwithstanding any provision of law to the contrary, a special needs offender, as defined in section 17-2-102 (7.5) (a), may be eligible for parole prior to or after the offender's parole eligibility date pursuant to this section if:

(a) The state board of parole determines, based on the special needs offender's condition and a medical evaluation, that he or she does not constitute a threat to public safety and is not likely to commit an offense; and

(b) The state board of parole approves a special needs parole plan that ensures appropriate supervision of and continuity of medical care for the special needs offender.

(2) This section shall apply to any inmate applying for parole on or after July 1, 2001,

regardless of when the inmate was sentenced. The provisions of this section shall not affect the length of the parole period to which a special needs offender would otherwise be subject.

(3) (a) The department is responsible for identifying inmates who meet the eligibility criteria for special needs parole and shall submit a referral to the state board of parole for all eligible inmates.

(b) The referral shall include:

(I) A summary of the inmate's medical or physical condition and the risk of reoffense that the inmate poses to society. In rendering an opinion regarding the inmate's level of risk of reoffense, the department may consider such factors as the inmate's medical or physical condition, the severity of any disability or incapacitation, risk assessment scores, the nature and severity of the offense for which the inmate is currently incarcerated, the inmate's criminal history, institutional conduct, and other relevant factors.

(II) The details of a special needs parole plan recommended by the department;

(III) A recommendation to the parole board that an offender be released or not be released as a special needs offender pursuant to the provisions of subsection (1) of this section. Prior to making any recommendation pursuant to this subparagraph (III), the department shall establish objective criteria on which to base a recommendation for parole pursuant to the provisions of this section; and

(IV) A victim impact statement or response from the district attorney that prosecuted the offender, if received pursuant to paragraph (c) of this subsection (3).

(c) (I) The department shall provide notification to any victim, as required under section 24-4.1-302.5, C.R.S. A victim shall have thirty days after receiving notification to submit a victim impact statement to the department. The department shall include any victim impact statement in the referral to the state board of parole.

(II) At the same time that the department completes the notification required by subparagraph (I) of this paragraph (c), the department shall notify the district attorney that prosecuted the offender if the offender is serving a sentence for a conviction of a crime of violence as described in section 18-1.3-406, C.R.S., or a sex offense as listed in section 16-22-102 (9) (j), (9) (k), (9) (l), (9) (n), (9) (o), (9) (p), (9) (q), (9) (r), or (9) (s), C.R.S. A district attorney shall have thirty days after receiving notification to submit a response to the department. The department shall include any district attorney response in the referral to the state board of parole.

(4) (a) The state board of parole shall consider an inmate for special needs parole upon referral by the department.

(b) The state board of parole shall make a determination of the risk of reoffense that the inmate poses after considering such factors as the inmate's medical or physical condition, the severity of any disability or incapacitation, the inmate's risk assessment scores, the nature and severity of the offense for which the inmate is currently incarcerated, the inmate's criminal history, the inmate's institutional conduct, and other relevant factors.

(c) The state board of parole may schedule a hearing on the application for special needs parole with the inmate present, or the board may review the application and issue a decision without a hearing, pursuant to section 17-2-201 (4) (f).

(d) The state board of parole shall make a determination of whether to grant special needs parole within thirty days after receiving the referral from the department. The board may delay the decision in order to request that the department modify the special needs parole plan.

(e) A denial of special needs parole by the state board of parole shall not affect an inmate's eligibility for any other form of parole or release under applicable law.

(5) The board may consider the application for special needs parole pursuant to the proceedings set forth in section 17-2-201 (4) (f) or 17-2-201 (9) (a). If the department recommends to the state board of parole that an offender be released to parole as a special needs offender pursuant to the provisions of subsection (1) of this section, the board may deny parole only by a majority vote of the board.

(6) The department shall not have any responsibility for the payment of medical care for any offender upon his or her release.

Source: L. 2000: Entire section added, p. 1495, § 2, effective July 1, 2001. **L. 2003:** IP(1) amended and (3) added, p. 1910, § 2, effective August 6. **L. 2011:** Entire section amended, (SB 11-241), ch. 200, p. 836, § 6, effective May 23. **L. 2012:** (3)(c)(II) amended, (HB 12-1310), ch. 268, p. 1401, § 22, effective June 7.

17-22.5-403.7. Parole eligibility - class 1 felony - juvenile offender convicted as adult. (1) As used in this section, "inmate" means a person:

(a) (I) Who is convicted as an adult of a class 1 felony following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S.; or

(II) Who is convicted as an adult of a class 1 felony following transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S.; and

(b) Who is sentenced to life imprisonment with the possibility of parole after serving a period of forty calendar years as provided in section 18-1.3-401 (4) (b), C.R.S.

(2) The governor may grant parole to an inmate prior to the inmate's parole eligibility date if, in the governor's opinion, extraordinary mitigating circumstances exist and the inmate's release from institutional custody is compatible with the safety and welfare of society.

(3) Upon application for parole by an inmate, the state board of parole, working in conjunction with the department and using the guidelines established pursuant to section 17-22.5-404, shall determine whether to grant parole. If the state board of parole determines that placing the inmate on parole is appropriate, the inmate shall remain in the legal custody of the department of corrections for the remainder of his or her life. If an application for parole is refused by the state board of parole, the state board of parole shall reconsider within five years thereafter whether the inmate should be granted parole. The state board of parole shall continue such reconsideration at least once every five years thereafter until the inmate is granted parole.

(4) (a) If the state board of parole grants parole pursuant to subsection (3) of this section, the division of adult parole shall provide parole supervision and assistance in securing employment, housing, and such other services as may affect the successful reintegration of the inmate into the community while recognizing the need for public safety.

(b) The conditions for parole for the inmate under this subsection (4) shall be established pursuant to section 17-22.5-404 by the state board of parole prior to the inmate's release from incarceration. Upon a determination that the conditions of parole have been violated in a parole revocation proceeding, the state board of parole shall:

(I) Continue the parole in effect;

(II) Modify the conditions of parole if circumstances then shown to exist require such modifications and set forth those circumstances in writing; or

(III) Revoke the parole and order the return of the inmate to a place of confinement designated by the executive director for any period of time remaining on the inmate's sentence to incarceration.

(c) An inmate who has been reincarcerated due to a parole revocation pursuant to this subsection (4) shall be eligible for parole at any time during the reincarceration.

(5) (a) If an inmate is subsequently reincarcerated pursuant to paragraph (b) of subsection (4) of this section, following reincarceration, the inmate may apply for parole and the state board of parole, working in conjunction with the department and using the guidelines established pursuant to section 17-22.5-404, shall determine whether to grant parole. If the state board of parole refuses the application for parole, the state board of parole shall reconsider within one year thereafter whether the inmate should be granted parole. The state board of parole shall continue such reconsideration each year thereafter, until the board grants the inmate parole.

(b) If the state board of parole grants parole to an inmate pursuant to paragraph (a) of this subsection (5), the provisions of subsection (4) of this section shall apply while the inmate is serving the remainder of the period of parole.

Source: L. 2006: Entire section added, p. 1053, § 5, effective May 25.

Cross references: For the legislative declaration contained in the 2006 act enacting this section, see section 1 of chapter 228, Session Laws of Colorado 2006.

17-22.5-404. Parole guidelines. (1) The general assembly hereby finds that:

(a) The risk of reoffense shall be the central consideration by the state board of parole in making decisions related to the timing and conditions of release on parole or revocation of parole;

(b) Research demonstrates that actuarial risk assessment tools can predict the likelihood or risk of reoffense with significantly greater accuracy than professional judgment alone. Evidence-based correctional practices prioritize the use of actuarial risk assessment tools to promote public safety. The best outcomes are derived from a combination of empirically based actuarial tools and clinical judgment.

(c) Although the state board of parole is made up of individuals, using structured decision-making unites the parole board members with a common philosophy and set of goals and purposes while retaining the authority of individual parole board members to make decisions that are appropriate for particular situations. Evidence-based correctional practices support the use of structured decision-making.

(d) Structured decision-making by the state board of parole provides for greater accountability, standards for evaluating outcomes, and transparency of decision-making that can be better communicated to victims, offenders, other criminal justice professionals, and the community; and

(e) An offender's likelihood of success may be increased by aligning the intensity and type of parole supervision, conditions of release, and services with assessed risk and need level.

(2) (a) The division of criminal justice in the department of public safety shall develop the Colorado risk assessment scale to be used by the state board of parole in considering inmates for release on parole. The risk assessment scale shall include criteria that statistically have been shown to be good predictors of the risk of reoffense. The division of criminal justice shall validate the Colorado risk assessment scale at least every five years or more often if the predictive accuracy, as determined by data collection and analysis, falls below an acceptable level of predictive accuracy as determined by the division of criminal justice, the state board of parole, and the division of adult parole in the department of corrections.

(b) The division of criminal justice, the department of corrections, and the state board of parole shall cooperate to develop parole board action forms consistent with this section that capture the rationale for decision-making that shall be published as official forms of the department of corrections. Victim identity and input shall be protected from display on the parole board action form or any parole hearing report that may become a part of an inmate record.

(c) The division of criminal justice, in cooperation with the department of corrections and the state board of parole, shall provide training on the use of the administrative release guideline instrument developed pursuant to section 17-22.5-107 (1) and the Colorado risk assessment scale to personnel of the department of corrections, the state board of parole, administrative hearing officers, and release hearing officers. The division shall conduct the training on a semiannual basis.

(d) The department of corrections, in cooperation with the state board of parole, shall provide training on the use of the administrative revocation guidelines developed pursuant to section 17-22.5-107 (2) to personnel of the department of corrections, the state board of parole, and administrative hearing officers. The department shall conduct the training semiannually.

(3) For a person sentenced for a class 2, class 3, class 4, class 5, or class 6 felony who is eligible for parole pursuant to section 17-22.5-403, or a person who is eligible for parole pursuant to section 17-22.5-403.7, the state board of parole may consider all applications for parole, as well as all persons to be supervised under any interstate compact. The state board of parole may parole any person who is sentenced or committed to a correctional facility when the board determines, by using, where available, evidence-based practices and the guidelines established by this section, that there is a reasonable probability that the person

will not violate the law while on parole and that the person's release from institutional custody is compatible with public safety and the welfare of society. The state board of parole shall first consider the risk of reoffense in every release decision it makes.

(4) (a) In considering offenders for parole, the state board of parole shall consider the totality of the circumstances, which include, but need not be limited to, the following factors:

(I) The testimony or written statement from the victim of the crime, or a relative of the victim, or a designee, pursuant to section 17-2-214;

(II) The actuarial risk of reoffense;

(III) The offender's assessed criminogenic need level;

(IV) The offender's program or treatment participation and progress;

(V) The offender's institutional conduct;

(VI) The adequacy of the offender's parole plan;

(VII) Whether the offender while under sentence has threatened or harassed the victim or the victim's family or has caused the victim or the victim's family to be threatened or harassed, either verbally or in writing;

(VIII) Aggravating or mitigating factors from the criminal case;

(IX) The testimony or written statement from a prospective parole sponsor, employer, or other person who would be available to assist the offender if released on parole;

(X) Whether the offender had previously absconded or escaped or attempted to abscond or escape while on community supervision; and

(XI) Whether the offender completed or worked toward completing a high school diploma, a general equivalency degree, or a college degree during his or her period of incarceration.

(b) The state board of parole shall use the Colorado risk assessment scale that is developed by the division of criminal justice in the department of public safety pursuant to paragraph (a) of subsection (2) of this section in considering inmates for release on parole.

(c) (I) Except as provided in subparagraph (II) of this paragraph (c), the state board of parole shall also use the administrative release guideline instrument developed pursuant to section 17-22.5-107 (1) in evaluating an application for parole.

(II) The administrative release guideline instrument shall not be used in considering those inmates classified as sex offenders with indeterminate sentences for whom the sex offender management board pursuant to section 18-1.3-1009, C.R.S., has established separate and distinct release guidelines. The sex offender management board in collaboration with the department of corrections, the judicial department, the division of criminal justice in the department of public safety, and the state board of parole shall develop a specific sex offender release guideline instrument for use by the state board of parole for those inmates classified as sex offenders with determinate sentences.

(5) (a) In conducting a parole revocation hearing, the state board of parole and the administrative hearing officer shall consider, where available, evidence-based practices and shall consider, but need not be limited to, the following factors:

(I) A determination by the state board of parole that a parolee committed a new crime while on parole, if applicable;

(II) The parolee's actuarial risk of reoffense;

(III) The seriousness of the technical violation, if applicable;

(IV) The parolee's frequency of technical violations, if applicable;

(V) The parolee's efforts to comply with a previous corrective action plan or other remediation plan required by the state board of parole or parole officer;

(VI) The imposition of intermediate sanctions by the parole officer in response to the technical violations that may form the basis of the complaint for revocation; and

(VII) Whether modification of parole conditions is appropriate and consistent with public safety in lieu of revocation.

(b) The state board of parole shall use the administrative revocation guidelines developed pursuant to section 17-22.5-107 (2), in evaluating complaints filed for parole revocation.

(c) The state board of parole or the administrative hearing officer shall not revoke parole for a technical violation unless the board or administrative hearing officer determines

on the record that appropriate intermediate sanctions have been utilized and have been ineffective or that the modification of conditions of parole or the imposition of intermediate sanctions is not appropriate or consistent with public safety and the welfare of society.

(6) (a) The state board of parole shall work in consultation with the division of criminal justice in the department of public safety and the department of corrections to develop and implement a process to collect and analyze data related to the basis for and the outcomes of the board's parole decisions. The process shall collect data related to the board's rationale for granting, revoking, or denying parole. Any information relating to victim identification or victim input that is identifiable to an individual defendant or case shall be maintained, but kept confidential and released only to other government agencies, pursuant to a nondisclosure agreement, for the purpose of analysis and reporting, pursuant to paragraph (c) of this subsection (6). When the board grants parole, the process shall also collect data related to whether the offender has previously recidivated, the type of reentry program given to the offender as a part of the offender's parole plan, and whether the offender recidivates while on parole.

(b) The state board of parole shall also determine whether a decision granting, revoking, or denying parole conformed with or departed from the administrative guidelines created pursuant to section 17-22.5-107 and, if the decision was a departure from the guidelines, the reason for the departure. The data collected pursuant to this paragraph (b) are subject to the same victim protections described in paragraph (a) of this subsection (6).

(c) The state board of parole shall provide the data collected pursuant to this subsection (6) to the division of criminal justice in the department of public safety for analysis. The division of criminal justice shall analyze the data received pursuant to this paragraph (c) and shall provide its analysis to the board. The board and the division of criminal justice shall use the data and analysis to identify specific factors that are important in the decision-making process.

(d) The division of criminal justice in the department of public safety shall provide the state board of parole with training regarding how to use the data obtained and analyzed pursuant to paragraph (c) of this subsection (6) to facilitate the board's future decision-making.

(e) (I) On or before November 1, 2011, and on or before November 1 each year thereafter, the state board of parole and the division of criminal justice in the department of public safety shall issue a report to the general assembly regarding outcomes of decisions by the state board of parole. The data shall be reported to the general assembly only in the aggregate.

(II) (Deleted by amendment, L. 2011, (SB 11-241), ch. 200, p. 838, § 7, effective May 23, 2011.)

(7) The department of corrections, the state board of parole, the division of adult parole, and the division of criminal justice in the department of public safety shall cooperate in implementing all aspects of this section.

(8) This section shall apply to any person to whom section 17-22.5-303.5, as it existed prior to May 18, 1991, would apply pursuant to the operation of section 17-22.5-406, because the provisions of such sections are substantially similar.

(9) For purposes of this section, "technical violation" means a violation of a condition of parole that is not a conviction for a new criminal offense or not determined by the state board of parole to be a commission of a new criminal offense.

Source: L. 90: Entire part added, p. 948, § 19, effective June 7. L. 91: (6) amended and (8) added, p. 334, § 1, effective May 18. L. 93: (2)(a)(VII) amended, p. 1634, § 16, effective July 1. L. 97: (2)(a)(I) and (3)(a)(V) amended, p. 1008, § 9, effective August 6. L. 98: (2)(a)(I) amended, p. 820, § 18, effective August 5. L. 99: (4.5) added, p. 61, § 5, effective July 1. L. 2000: (5), (6)(b), (6)(c), (6)(d), (6)(e), and (7) amended, p. 845, § 42, effective May 24. L. 2006: (1) amended, p. 1054, § 6, effective May 25. L. 2008: (2)(a)(VIII) and (2)(a)(IX) amended, p. 658, § 8, effective April 25. L. 2009: (6)(d) amended, (SB 09-135), ch. 329, p. 1754, § 1, effective August 5. L. 2010: Entire section R&RE, (HB 10-1374), ch. 261, p. 1182, § 6, effective May 25. L. 2011: (6)(e) amended, (SB 11-241), ch. 200, p. 838, § 7, effective May 23.

Cross references: For the legislative declaration contained in the 2006 act amending subsection (1), see section 1 of chapter 228, Session Laws of Colorado 2006.

ANNOTATION

Mandamus relief under C.R.C.P. 106 is available to challenge the parole board's actions if it has failed to exercise its statutory duties. Although plaintiff did not expressly seek mandamus relief pursuant to C.R.C.P. 106, the gravamen of his complaint was that the parole board's failure to consider any events or circum-

stances prior to plaintiff's incarceration was in direct violation of statutory guidelines for parole. Under these circumstances, the trial court had jurisdiction to address the merits of the complaint. *Fraser v. Colo. Bd. of Parole*, 931 P.2d 560 (Colo. App. 1996).

17-22.5-404.5. Presumption of parole - drug offenders - repeal. (1) There shall be a presumption, subject to the final discretion of the parole board, in favor of granting parole to an inmate who has reached his or her parole eligibility date and who:

(a) Is serving a sentence for which the controlling term of incarceration is based on a felony possession or use offense described in section 18-18-404, or section 18-18-405, C.R.S., as it existed prior to August 11, 2010;

(b) Has not incurred a class I code of penal discipline violation within the last twelve months or a class II code of penal discipline violation within the last three months;

(c) Is program-compliant;

(d) Was not convicted of, and has not previously been convicted of, a felony crime described in section 18-3-303, 18-3-305, 18-3-306, or 18-6-701; sections 18-7-402 to 18-7-407; or section 18-12-102 or 18-12-109, C.R.S.; or a felony crime listed in section 24-4.1-302 (1), C.R.S.; and

(e) Does not have an active felony or immigration detainer.

(2) Notwithstanding any provision of law to the contrary, an inmate who is eligible for the presumption in subsection (1) of this section shall have a parole release hearing within ninety days after becoming eligible for the presumption in subsection (1) of this section.

(3) If the parole board grants parole to an inmate pursuant to subsection (1) of this section, the parole board shall require as a condition of parole that the parolee participate in substance abuse treatment consistent with the assessed treatment need of the parolee.

(4) (a) The chairperson of the parole board shall provide a report to the judiciary committees of the house of representatives and the senate, or any successor committees, by January 30, 2012, and by each January 30 thereafter regarding the impact of this section on the department of corrections' population and public safety.

(b) This subsection (4) is repealed, effective February 1, 2016.

(5) Nothing in this section shall be construed to limit the discretion of the parole board in considering the statutory release guidelines in section 17-22.5-404 or the administrative release guidelines developed pursuant to section 17-22.5-107 (1) in making a decision regarding an inmate's application for release to parole.

Source: L. 2011: Entire section added, (HB 11-1064), ch. 234, p. 1009, § 1, effective May 27.

17-22.5-404.7. Presumption of parole - nonviolent offenders with ICE detainees. (1) There shall be a presumption, subject to the final discretion of the parole board, in favor of granting parole to an inmate who has reached his or her parole eligibility date and who:

(a) Has been assessed by the Colorado risk assessment scale developed pursuant to section 17-22.5-404 (2) (a), to be medium risk or below of reoffense;

(b) Is not serving a sentence for a felony crime described in section 18-3-303, 18-3-306, or 18-6-701, C.R.S.; sections 18-7-402 to 18-7-407, C.R.S.; or section 18-12-102 or 18-12-109, C.R.S.; section 18-17-104, C.R.S., or section 18-18-407, C.R.S.; or a felony crime listed in section 24-4.1-302 (1), C.R.S.; and

(c) Has an active detainer lodged by the United States immigration and customs enforcement agency.

(2) In determining whether to grant parole pursuant to provisions of subsection (1) of this section, the board shall consider the cost of incarceration to the state of Colorado in relation to the needs of further confinement of the inmate to achieve the purpose of the inmate's sentence.

(3) (a) The state board of parole may release an eligible inmate, pursuant to subsection (1) of this section, only to the custody of the United States immigration and customs enforcement agency or other law enforcement agency with authority to execute the detainer on behalf of the United States immigration and customs enforcement agency.

(b) If the United States immigration and customs enforcement agency withdraws the detainer or declines to take the inmate into custody, the state board of parole shall hold a recission hearing to reconsider the granting of parole to the inmate.

(c) If the United States immigration and customs enforcement agency issues an order of deportation for the inmate, the department of corrections shall submit a request to the state board of parole to discharge parole.

(d) A denial of parole by the state board of parole pursuant to this section shall not affect an inmate's eligibility for another form of parole or release applicable under law.

(4) The board may consider the application for parole pursuant to the proceedings set forth in section 17-2-201 (4) (f) or 17-2-201 (9) (a).

(5) For inmates who were parole eligible before May 23, 2011, the department shall notify the state board of parole of any of those inmates who meet the criteria listed in subsection (1) of this section, and the board shall either set a release hearing or conduct a release review within ninety days after May 23, 2011.

Source: L. 2011: Entire section added, (SB 11-241), ch. 200, p. 838, § 8, effective May 23.

17-22.5-405. Earned time - earned release time - achievement earned time.

(1) Earned time, not to exceed ten days for each month of incarceration or parole, may be deducted from the inmate's sentence upon a demonstration to the department by the inmate, which is certified by the inmate's case manager or community parole officer, that he or she has made consistent progress in the following categories as required by the department of corrections:

(a) Work and training, including attendance, promptness, performance, cooperation, care of materials, and safety;

(b) Group living, including housekeeping, personal hygiene, cooperation, social adjustment, and double bunking;

(c) Participation in counseling sessions and involvement in self-help groups;

(d) Progress toward the goals and programs established by the Colorado diagnostic program;

(e) For any inmates who have been paroled, compliance with the conditions of parole release;

(f) The offender has not harassed the victim either verbally or in writing;

(g) The inmate has made positive progress, in accordance with performance standards established by the department, in the literacy corrections program or the correctional education program established pursuant to article 32 of this title.

(1.5) (a) Earned time, not to exceed twelve days for each month of incarceration or parole, may be deducted from an inmate's sentence if the inmate:

(I) Is serving a sentence for a class 4, class 5, or class 6 felony;

(II) Has not incurred a class I code of penal discipline violation within the twenty-four months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twenty-four months or a class II code of penal discipline violation within the twelve months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twelve months;

(III) Is program-compliant; and

(IV) Was not convicted of, and has not previously been convicted of, a felony crime described in section 18-3-303, 18-3-305, 18-3-306, or 18-6-701, sections 18-7-402 to 18-7-407, or section 18-12-102 or 18-12-109, C.R.S., or a felony crime listed in section 24-4.1-302 (1), C.R.S.

(b) The earned time specified in paragraph (a) of this subsection (1.5) may be deducted based upon a demonstration to the department by the inmate, which is certified by the inmate's case manager or community parole officer, that he or she has made consistent progress in the categories described in subsection (1) of this section.

(c) Nothing in this subsection (1.5) shall preclude an inmate from receiving earned time pursuant to subsection (1) of this section if the inmate does not qualify for earned time pursuant to this subsection (1.5).

(2) The department shall develop objective standards for measuring consistent progress in the categories listed in subsection (1) of this section. Such standards shall be applied in all evaluations of inmates for the earned time authorized in this section.

(3) For each inmate sentenced to the custody of the department, or for each parolee, the department shall review the performance record of the inmate or parolee and may grant, withhold, withdraw, or restore, consistent with the provisions of this section, an earned time deduction from the sentence imposed. Such review shall be conducted annually while such person is incarcerated and semiannually while such person is on parole and shall vest upon being granted. However, any earned time granted to a parolee shall vest upon completion of any semiannual review unless an administrative hearing within the department determines that such parolee engaged in criminal activity during the time period for which such earned time was granted, in which case the earned time granted during such period may be withdrawn. In addition to any other sanctions, the executive director may refer to the district attorney all cases where the offender tests positive for the presence of drugs.

(3.5) In addition to the earned time deducted pursuant to subsection (1) of this section, an inmate working at a disaster site pursuant to section 17-24-124 shall be entitled to additional earned time in the amount of one day of earned time for every day spent at a disaster site.

(4) Notwithstanding any other provision of this section, earned time may not reduce the sentence of an inmate as defined in section 17-22.5-402 (1) by a period of time that is more than thirty percent of the sentence. This subsection (4) shall not apply to subsection (6) or subsection (9) of this section.

(5) (a) Notwithstanding subsections (1), (2), and (3) of this section, an offender who is sentenced and paroled for a felony offense other than a nonviolent felony committed on or after July 1, 1993, shall not be eligible to receive any earned time while the offender is on parole. An offender who is sentenced and paroled for a nonviolent felony offense committed on or after July 1, 1993, shall be eligible to receive any earned time while the offender is on parole.

(a.5) Notwithstanding the provisions of paragraph (a) of this subsection (5), an offender who is sentenced for a felony committed on or after July 1, 1993, and paroled on or after January 1, 2009, shall be eligible to receive any earned time while on parole or after reparole following a parole revocation.

(b) As used in this subsection (5), unless the context otherwise requires, a "nonviolent felony offense" means a felony offense other than a crime of violence as defined in section 18-1.3-406 (2), C.R.S., any of the felony offenses set forth in section 18-3-104, 18-4-203, or 18-4-301, C.R.S., or any felony offense committed against a child as set forth in articles 3, 6, and 7 of title 18, C.R.S.

(6) Earned release time shall be scheduled by the state board of parole and the time computation unit in the department of corrections for inmates convicted of class 4 and class 5 felonies up to sixty days prior to the mandatory release date and for inmates convicted of class 6 felonies up to thirty days prior to the mandatory release date for inmates who meet the following criteria:

(a) The inmate has not incurred a class I code of penal discipline violation within the twenty-four months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twenty-four months or a class II code of penal

discipline violation within the twelve months immediately preceding the time of crediting or during his or her entire term of incarceration if the term is less than twelve months;

(b) The inmate is program-compliant; and

(c) The inmate was not convicted of, and has not previously been convicted of, a felony crime described in section 18-3-303, 18-3-305, 18-3-306, or 18-6-701, sections 18-7-402 to 18-7-407, or section 18-12-102 or 18-12-109, C.R.S., or a felony crime listed in section 24-4.1-302 (1), C.R.S.

(7) Beginning in the fiscal year 2012-13, the general assembly may appropriate the savings generated by subsections (1.5) and (6) of this section to recidivism-reduction programs.

(8) Notwithstanding any provision of this section to the contrary, after his or her first ninety days in administrative segregation, a state inmate in administrative segregation shall be eligible to receive earned time if he or she meets the criteria required by this section or any modified criteria developed by the department to allow a state inmate to receive the maximum amount of earned time allowable for good behavior and participation in any programs available to the state inmate in administrative segregation.

(9) (a) Notwithstanding any provision of this section to the contrary, in addition to the earned time authorized in this section, an offender who successfully completes a milestone or phase of an educational, vocational, therapeutic, or reentry program, or who demonstrates exceptional conduct that promotes the safety of correctional staff, volunteers, contractors, or other persons under the supervision of the department of corrections, may be awarded as many as sixty days of achievement earned time per program milestone or phase or per instance of exceptional conduct, at the discretion of the executive director; except that an offender shall not be awarded more than one hundred twenty days of achievement earned time pursuant to this subsection (9).

(b) As used in this section, unless the context otherwise requires, "exceptional conduct" includes, but is not limited to:

(I) Saving or attempting to save the life of another person;

(II) Aiding in the prevention of serious bodily injury or loss of life;

(III) Providing significant assistance in the prevention of a major facility disruption;

(IV) Providing significant assistance in the solving of a cold case, as defined in section 24-4.1-302 (1.2), C.R.S.;

(V) Acting to prevent an escape; or

(VI) Providing direct assistance in a documented facility or community emergency.

Source: **L. 90:** Entire part added, p. 952, § 19, effective June 7. **L. 91:** (1)(g) amended, p. 1912, § 20, effective June 1. **L. 93:** (5) added, p. 1980, § 5, effective July 1. **L. 95:** (5) amended, p. 879, § 14, effective May 24. **L. 97:** (5)(b) amended, p. 1548, § 24, effective July 1. **L. 2001:** (3.5) added, p. 1452, § 2, effective June 5. **L. 2002:** (5)(a) and (5)(b) amended, p. 1507, § 165, effective October 1. **L. 2008:** IP(1) amended, p. 658, § 9, effective April 25; (5)(a.5) added, p. 1756, § 3, effective July 1. **L. 2009:** (1.5), (6), and (7) added and (4) amended, (HB 09-1351), ch. 359, p. 1866, § 1, effective June 1. **L. 2010:** (1.5)(a) and (6) amended, (HB 10-1374), ch. 261, p. 1181, § 5, effective May 25. **L. 2011:** (8) added, (SB 11-176), ch. 289, p. 1343, § 4, effective July 1. **L. 2012:** (4), (5)(a), and (5)(a.5) amended and (9) added, (HB 12-1223), ch. 213, p. 916, § 2, effective May 24.

Editor's note: Section 4 of chapter 213, Session Laws of Colorado 2012, provides that the act amending subsections (4), (5)(a), and (5)(a.5) and adding subsection (9) does not apply until at least ninety days after May 24, 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (5)(a) and (5)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in the 2012 act amending subsections (4), (5)(a), and (5)(a.5) and adding subsection (9), see section 1 of chapter 213, Session Laws of Colorado 2012.

ANNOTATION

Exclusion of felony theft from definition of “nonviolent felony offenses” in this section did not operate to deny defendant equal protection of the law. *People v. Gonzales*, 973 P.2d 732 (Colo. App. 1999).

An inmate does not have a vested right in earned time, so the inmate’s punishment is not increased by withholding earned time from the inmate for not participating in sex offender treatment. *Reeves v. Colo. Dept. of Corr.*, 155 P.3d 648 (Colo. App. 2007).

Earned time credit not available for pre-sentence confinement. *People v. Maestas*, 920 P.2d 875 (Colo. App. 1996).

Where prisoner was not in the custody of the department of corrections, but was instead held in a county jail awaiting sentencing, credit was not available under this section. *People v. Maestas*, 920 P.2d 875 (Colo. App. 1996).

Earned time credits are not required to be given when serving a concurrent sentence in a federal prison, but department was required to conduct a hearing pursuant to subsection (3). When state and federal sentences are running concurrently, even when defendant was in federal prison, defendant was in the custody of the department. *People v. Frank*, 30 P.3d 664 (Colo. App. 2000).

17-22.5-406. Applicability of part. (1) (a) This part 4 applies to all offenders sentenced for crimes committed on or after July 1, 1979.

(b) Notwithstanding paragraph (a) of this subsection (1), the amount of earned time which may be credited pursuant to this part 4 to any inmate incarcerated on or before July 1, 1990, shall not exceed the amount of earned time actually earned by such inmate pursuant to earned time provisions in effect prior to July 1, 1990.

(c) If the application of the provisions of this subsection (1) would result in the early discharge of any offender, the department shall refer such offender to the state board of parole which may, in its discretion, grant or deny parole using the guidelines established pursuant to section 17-22.5-404, discharge the offender or place such offender under conditional parole supervision. If the offender is placed on parole pursuant to this paragraph (c), the state board of parole may revoke the parole granted to such inmate for a period not to exceed the amount of earned time granted to the offender pursuant to this part 4.

(d) Nothing in this subsection (1) shall be construed as a mandate to the state board of parole to release any inmate.

(e) If any inmate incarcerated prior to June 7, 1990, has not accrued any earned time prior to such date, the provisions of law in effect at the time of such inmate’s sentencing shall apply to such inmate in determining such inmate’s discharge date.

(2) Notwithstanding subsection (1) of this section, no offender incarcerated on June 7, 1990, shall be released pursuant to the provisions of subsection (1) of this section unless the department of corrections makes a written certification that the offender has met the conditions of paragraph (a) of this subsection (2) and at least two additional of the following criteria:

(a) The offender has not used controlled substances, except pursuant to the prescription of a physician, for at least one year prior to such certification.

(b) The offender has engaged in a satisfactory participation in available educational programs during his incarceration.

(c) The offender has engaged in a satisfactory participation in any treatment programs indicated in his diagnostic evaluation.

(d) The offender has had no serious infractions of the penal code of discipline for at least two years.

(e) The offender has had an exemplary work record while being incarcerated under the custody of the department of corrections.

(3) This part 4 shall not apply to any offender who is presently incarcerated who does not meet the appropriate criteria stated in subsection (2) of this section. Any such offender’s sentence shall be governed by provisions in existence prior to June 7, 1990.

(4) Repealed.

Source: L. 90: Entire part added, p. 953, § 19, effective June 7. **L. 98:** (4) repealed, p. 727, § 11, effective May 18.

17-22.5-407. Genetic testing as condition of parole - repeal. (Repealed)

Source: **L. 2001:** Entire section added, p. 957, § 6, effective July 1. **L. 2002:** Entire section amended, p. 1153, § 10, effective July 1. **L. 2006:** (2) added by revision, pp. 1690, 1693, §§ 8, 17.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 2007. (See L. 2006, pp. 1690, 1693.)

ARTICLE 23**Inmates with Mental Illness or
a Developmental Disability - Transfer**

Editor's note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in article 23 of title 27.

(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

17-23-101. Transfer of inmates who have
a mental illness or a devel-
opmental disability.

17-23-102. Transfer of recovered inmate.
17-23-103. Transfer to department.

17-23-101. Transfer of inmates who have a mental illness or a developmental disability. (1) The executive director, in coordination with the executive director of the department of human services, is empowered to transfer an inmate who has a mental illness or developmental disability and cannot be safely confined in a correctional facility to an appropriate facility operated by the department of human services for observation and stabilization. The costs associated with care provided in the facility operated by the department of human services shall continue to be charged to the department of human services.

(2) (Deleted by amendment, L. 2000, p. 846, § 43, effective May 24, 2000.)

(3) Except when a person is serving a sentence to the department concurrently with a commitment to the department of human services, a person who is adjudged to have a mental illness by a court of competent jurisdiction shall not be transferred to any correctional facility, except upon a finding that the person is so dangerous that he or she cannot be safely confined in the Colorado mental health institute at Pueblo or Fort Logan. A hearing on the dangerousness of the patient shall be conducted pursuant to the provisions of section 17-23-103.

(4) (Deleted by amendment, L. 2000, p. 846, § 43, effective May 24, 2000.)

Source: **L. 77:** Entire title R&RE, p. 926, § 10, effective August 1. **L. 79:** (1), (2), and (4) amended, p. 697, § 59, effective July 1. **L. 91:** (1), (3), and (4) amended, p. 1143, § 7, effective May 18. **L. 94:** (1) amended, p. 604, § 9, effective July 1; (3) amended, p. 2652, § 129, effective July 1. **L. 2000:** Entire section amended, p. 846, § 43, effective May 24. **L. 2006:** (1) and (3) amended, p. 1398, § 46, effective August 7.

Editor's note: This section is similar to former § 27-23-101 as it existed prior to 1977.

Cross references: (1) For records required upon transfer, see § 17-1-108.

(2) For the legislative declaration contained in the 1994 act amending subsection (3), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Annotator's note. Since § 17-23-101 is similar to repealed § 27-23-101, and repealed CSA,

C. 105, § 27(2), relevant cases construing those provisions have been included in the annotations

to this section.

For exclusiveness of procedure outlined by this section, see *Parker v. People*, 108 Colo. 362, 117 P.2d 316 (1941).

Confinement of insane persons is constitutional. The state as *parens patriae* has general power and is under the general duty of caring for insane persons. The prerogative is a segment of police power. In the exercise of such power, insane persons may be restrained and confined both for the welfare of themselves and for the protection of the public, and if the exactions of due process are met, such restraint and confinement do not violate any constitutional right of the individual. *Pigg v. Patterson*, 370 F.2d 101 (10th Cir. 1966).

Whether in a federal or state penal system, the disposition of those adjudicated criminally irresponsible is a matter of administrative determination which the federal courts should not undertake to supervise. Sound and practical reasons readily occur in support of the state's designation of the penitentiary as the appropriate place of confinement for those criminally insane who demonstrate dangerous or violent tendencies. One who has been adjudicated in a court of law to be criminally irresponsible, and duly committed thereupon, has no vested right to any particular place of institutionalization. *Pigg v. Patterson*, 370 F.2d 101 (10th Cir. 1966).

The procedures for transfer among the Colorado correctional institutions are valid, are discretionary with the officials concerned, and give rise to no duty the breach of which is cognizable in a § 1983 action for a violation of the federal Civil Rights Act. *Coppinger v. Townsend*, 398 F.2d 392 (10th Cir. 1968).

Therefore, state district court judge, superintendent of state hospital, and staff psychiatrist held protected by governmental immunity, in § 1983 action involving revocation of probation and transfer to state penitentiary, those acts being discretionary. *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967).

No patient may be involuntarily transferred to the penitentiary except upon a finding that he is so dangerous that he cannot be safely confined in the state hospital. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

Subsection (3) authorizes involuntary transfer of the "dangerous", not the nondangerous, high escape risk or the patient allegedly in danger from others. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

17-23-102. Transfer of recovered inmate. When the superintendent of any institution or facility in which any person has been placed by transfer from a correctional facility, as provided in section 17-23-101, is of the opinion that said person is stabilized, it is the duty of said superintendent to give written notice of such recovery to the executive director who shall transfer said person to the place of former commitment for the purpose of serving out said person's sentence, if the same has not expired.

Subsection (3) draws a perfect classification, and it has not been contended that in practice it is drawn less perfectly. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

Therefore transfer and confinement in the penitentiary, in and of themselves, work no denial of equal protection even when subjected to strict scrutiny. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

The accusation that a patient is dangerous is not a criminal charge. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

Therefore a proceeding at which the dangerousness issue is determined is not a criminal proceeding. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

Patients at state hospital do not forfeit all constitutional rights. Just as the inmates of a prison do not forfeit all constitutional rights upon commitment, neither do the patients at the Colorado state hospital, although those rights retained may be somewhat restricted by the nature of the institutional environment. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

Psychiatric care provided in penitentiary must be equivalent to that provided at state hospital. The state must provide patients transferred to the state penitentiary with psychiatric care and treatment substantially equivalent to that provided patients confined at the state hospital. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

Or patients in penitentiary denied equal protection. Confinement of mental patients in the state penitentiary without psychiatric treatment substantially equivalent to that provided patients at the Colorado state hospital denies them equal protection of the laws. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

Dangerousness of patient does not provide rational basis for inferior treatment. Although the dangerousness of the patient may justify his transfer to, and incarceration in, the penitentiary, even when subjected to strict scrutiny, the classification does not provide a rational basis for inferior psychiatric treatment provided dangerous patients who are confined in the penitentiary. *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974).

An adjudication that an insane person has been restored to reason cannot be had in "habeas corpus" proceedings. *Pigg v. Tinsley*, 158 Colo. 160, 405 P.2d 687 (1965).

Applied in *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979); *People v. White*, 656 P.2d 690 (Colo. 1983).

Source: **L. 77:** Entire title R&RE, p. 926, § 10, effective August 1. **L. 79:** Entire section amended, p. 698, § 60, effective July 1. **L. 94:** Entire section amended, p. 604, § 10, effective July 1. **L. 2000:** Entire section amended, p. 847, § 44, effective May 24.

Editor's note: This section is similar to former § 27-23-102 as it existed prior to 1977.

17-23-103. Transfer to department. (1) A person alleged to be so dangerous that he cannot be safely confined in the Colorado mental health institute at Pueblo or Fort Logan shall be entitled to:

(a) Written notice of the facts upon which the allegation of dangerousness is based;
 (b) A hearing on the issue of his dangerousness before an impartial hearing body prior to transfer; however, if an emergency transfer for safety or security reasons is effected before a hearing can be had, the hearing shall be held within a reasonable time after such transfer;

(c) An opportunity to call witnesses and present evidence in his own behalf when permitting him to do so will not be unduly hazardous to institutional security or safety;

(d) A written statement by the hearing body as to the evidence relied on and the reasons for any finding that he is so dangerous that he cannot be safely confined in the Colorado mental health institute at Pueblo or Fort Logan and is recommended for transfer to a correctional facility in the department;

(e) Assistance of legal counsel provided by the state if the patient is indigent and the opportunity for assistance of legal counsel retained by the patient if he is not indigent.

(2) The department shall provide patients transferred to a correctional facility with psychiatric care and treatment substantially equivalent to that provided patients confined at the Colorado mental health institute at Pueblo or Fort Logan.

Source: **L. 77:** Entire title R&RE, p. 927, § 10, effective August 1. **L. 79:** (1)(d) and (2) amended, p. 698, § 61, effective July 1. **L. 91:** IP(1), (1)(d), and (2) amended, p. 1144, § 8, effective May 18.

Editor's note: This section is similar to former § 27-23-103 as it existed prior to 1977.

ARTICLE 24

Correctional Industries

Editor's note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in article 25 of title 27.

(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

Cross references: For other provisions concerning work by inmates, see § 17-20-117 and article 29 of this title.

17-24-101.	Short title.	17-24-106.5.	Interstate sales authorized. (Repealed)
17-24-102.	Legislative declaration.	17-24-106.6.	Surplus state property.
17-24-103.	Definitions.	17-24-107.	Records.
17-24-104.	Creation of division of correctional industries and advisory committee - enterprise status of division - duties of committee - sunset review of committee - rules.	17-24-108.	Disclosure of interests.
		17-24-109.	Required programs.
		17-24-109.5.	License plates - highway signs.
		17-24-109.8.	Pilot program - refuse derived fuel. (Repealed)
17-24-105.	Personnel.	17-24-110.	Financial payment incentives.
17-24-106.	General powers of the division.	17-24-111.	Purchasing requirement.
		17-24-112.	Pricing.
17-24-106.3.	Revenue bonds - authority - issuance - requirements - covenants.	17-24-113.	Business operations and budget.

17-24-114.	Provisions for offenders.	17-24-122.	Agreements for the employ-
17-24-115.	Rules and regulations.		ment of inmates by private
17-24-116.	Sole authority.		entities.
17-24-117.	Penalty. (Repealed)	17-24-123.	Clean-up of illegally disposed
17-24-118.	Treasurer and controller to		and abandoned waste tires -
	write off debt. (Repealed)		services to counties.
17-24-119.	Training and employment by	17-24-124.	Inmate disaster relief program
	organizations - account for		- legislative declaration.
	proceeds and wages.	17-24-125.	Correctional industries at non-
17-24-120.	Treasurer and controller to		state-owned facilities.
	write off amount owed state.	17-24-126.	Canteen, vending machine,
	(Repealed)		and library account created -
17-24-121.	Venture agreements.		receipts - disbursements.

17-24-101. Short title. This article shall be known and may be cited as the "Correc-tional Industries Act".

Source: L. 77: Entire title R&RE, p. 927, § 10, effective August 1.

Editor's note: This section is similar to former § 27-25-101 as it existed prior to 1977.

17-24-102. Legislative declaration. (1) The general assembly hereby finds and declares that, to the extent possible, all able-bodied offenders should be employed and that the means now provided for the employment of offenders are inadequate to allow a forty-hour-week work assignment for all able-bodied offenders and for correctional indus-tries programs to be operated on a financially profitable basis. Therefore, it is the intent of the general assembly in this article to:

(a) Create a division of correctional industries which is profit-oriented, which generates revenue for its operations and capital investment, which partly reimburses the general fund for the expense of correctional services, and which assumes responsibility for training offenders in general work habits, work skills, and specific training skills that increase their employment prospects when released;

(b) Develop, to the extent possible, industries that provide forty hours of work activity each week for all able-bodied offenders;

(c) Provide an environment for the operation of correctional industries that closely resembles the environment for the business operations of a private corporate entity;

(d) Make the division of correctional industries responsible for and accountable to the general assembly and to the governor for correctional industries programs in this state.

(2) It is the intent of the general assembly that the division of correctional industries assume all duties and functions for correctional industries.

Source: L. 77: Entire title R&RE, p. 927, § 10, effective August 1. L. 79: (2) amended, p. 698, § 62, effective July 1. L. 80: IP(1), (1)(a), and (1)(b) amended, p. 525, § 2, effective March 25.

Editor's note: This section is similar to former § 27-25-102 as it existed prior to 1977.

ANNOTATION

Applied in *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979).

17-24-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Able-bodied offender" means an offender in the custody of the department who is to participate in a work program or other productive activity authorized by this article and who is physically able to do so. The term does not include an offender who is participating

in a community corrections program, who is a part of the "blind count", or who is ill or unable to participate in a work program or other productive activity.

(2) "Director" means the director of the division of correctional industries.

(3) "Division" means the division of correctional industries created in section 17-24-104.

(4) "Programs" means the correctional industries programs provided and administered by the division but does not include educational services or other productive activities administered by the division of adult parole.

Source: L. 77: Entire title R&RE, p. 928, § 10, effective August 1. L. 80: Entire section R&RE, p. 526, § 3, effective March 25. L. 2000: (4) amended, p. 864, § 64, effective May 24.

17-24-104. Creation of division of correctional industries and advisory committee - enterprise status of division - duties of committee - sunset review of committee - rules.

(1) There is hereby created in the department of corrections the division of correctional industries, which shall be under the direction of the director of correctional industries, who shall be appointed by the executive director of the department of corrections pursuant to section 13 of article XII of the state constitution. The division shall constitute an enterprise for the purposes of section 20 of article X of the state constitution so long as it retains the authority to issue revenue bonds and receives less than ten percent of its total annual revenues in grants, as defined in section 24-77-102 (7), C.R.S., from all Colorado state and local governments combined. So long as it constitutes an enterprise pursuant to the provisions of this section, the division of correctional industries shall not be a district for purposes of section 20 of article X of the state constitution.

(2) (a) There is hereby created the correctional industries advisory committee, which shall consist of:

(I) The state treasurer for the duration of his term of office;

(II) Four members of the general assembly, two of whom shall be appointed by the speaker of the house of representatives and two of whom shall be appointed by the president of the senate. Of the legislative members appointed, one shall be a member of the minority party of the house of representatives and one shall be a member of the minority party of the senate. The legislative members shall be appointed in January at the beginning of the regular session held in odd-numbered years and shall serve through the legislative biennium.

(III) The director of the office of state planning and budgeting;

(IV) The executive director of the department of personnel;

(V) Two members from affected industries in the business community, who shall be appointed by the governor for terms of three years each;

(VI) Two members from organized labor, who shall be appointed by the governor for terms of three years each;

(VII) The executive director of the department of corrections; and

(VIII) A county sheriff appointed by the governor.

(b) Each member shall hold office for his term and until his successor is appointed and qualified. Any member shall be eligible for reappointment, but he shall not be eligible to serve more than two consecutive full terms. Members of the advisory committee shall receive no compensation for such services but may be reimbursed for their necessary expenses while serving as members of the board. Any vacancy shall be filled in the same manner as for an original appointment and shall be for the unexpired term. The chairman shall be elected by the voting members of the advisory committee from among the appointed members of the general assembly.

(c) Any member appointed by the governor may be removed by the governor and any member appointed by the speaker of the house of representatives or the president of the senate may be removed by the appropriate appointing officer for malfeasance in office, for failure to regularly attend meetings, or for any cause which renders said member incapable of or unable to discharge the duties of his office.

(d) Repealed.

(3) (a) Before any industry is established to utilize the services of prisoners as provided by this article, including but not limited to any industry in a nonstate-owned facility pursuant to section 17-24-125, the advisory committee shall consider the feasibility of establishing such industry and the effect of such establishment on similar industries already established in the state and shall make its recommendations thereon to the director. A majority of the members of the advisory committee at any meeting duly called by the chairman has full power to act upon and resolve any matter or question referred to it by the director.

(b) Repealed.

(4) Repealed.

(5) (a) The advisory committee shall consider the advisability of issuing any revenue bonds and make recommendations in the form of a resolution to the director. A majority of the members of the advisory committee at any meeting duly called by the chairman has full power to act upon and make such recommendations. Any resolution authorizing the issuance of bonds under the terms of this section shall include:

(I) The date of issuance of the bonds;

(II) The maturity date or dates during a period not to exceed thirty years from the date of issuance of the bonds;

(III) The interest rate or rates on, and the denomination or denominations of, the bonds;

(IV) The form of the bond, whether bearer or registered; and

(V) The medium of payment of the bonds and the place where the bonds will be paid.

(b) Any resolution authorizing the issuance of bonds under the terms of this section may:

(I) State that the bonds are to be issued in one or more series;

(II) State a rank or priority of the bonds; and

(III) Provide for redemption of the bonds prior to maturity, with or without premium.

(c) A resolution pertaining to issuance of bonds under this section may contain covenants as to:

(I) The purpose to which the proceeds of sale of the bonds may be applied and to the use and disposition thereof;

(II) Such matters as are customary in the issuance of revenue bonds including, without limitation, the issuance and lien position of other or additional bonds; and

(III) Books of account and the inspection and audit thereof.

(d) The committee may provide for preferential security for any bonds, both principal and interest, to be issued under this section to the extent deemed feasible and desirable by such committee over any bonds that may be issued thereafter.

(e) Upon issuance of a bond by the division pursuant to the provisions of section 17-24-106.3, any resolution made pursuant to the terms of this section shall be deemed a contract with the holders of the bonds, and the duties of the committee under such resolution shall be enforceable by any appropriate action in a court of competent jurisdiction.

(6) Repealed.

Source: L. 77: Entire title R&RE, p. 928, § 10, effective August 1. L. 83: (2)(a)(II) and (2)(b) amended and (2)(a)(VII) added, p. 688, § 1, effective May 25; (2)(a)(III) amended, p. 970, § 22, effective July 1, 1984. L. 86: (2)(d) and (4) added and (3) amended, p. 410, §§ 11, 12, effective March 26. L. 88: (3)(b) amended, p. 316, § 8, effective April 14; (2)(a)(V) R&RE, p. 703, § 1, effective July 1. L. 89: (2) and (4) RC&RE, p. 881, § 1, effective April 8. L. 90: (2)(d), (3)(b), and (4) repealed, p. 334, § 24, effective April 3. L. 94: (1) amended and (5) added, p. 313, § 1, effective March 22. L. 95: (2)(a)(IV) amended, p. 639, § 26, effective July 1. L. 98: (2)(a)(VII) and (3)(a) amended and (2)(a)(VIII) added, p. 426, § 2, effective April 21. L. 2006: (6) added, p. 826, § 1, effective May 4. L. 2011: (6) repealed, (HB 11-1301), ch. 297, p. 1424, § 17, effective August 10.

Editor's note: (1) This section is similar to former § 27-25-104 as it existed prior to 1977.

(2) Subsection (2)(d) provided for the repeal of subsection (2), effective July 1, 1988. (See L. 86, p. 410.) Subsection (4)(b) provided for the repeal of subsection (4), effective July 1, 1988. (See L. 86, p. 410.)

17-24-105. Personnel. (1) The director shall have considerable business operations experience, including the supervision and management of production operations.

(2) The director shall have the authority to determine the personnel needs and requirements of the programs and shall have the authority to hire all subordinate personnel pursuant to section 13 of article XII of the state constitution.

Source: L. 77: Entire title R&RE, p. 929, § 10, effective August 1.

17-24-106. General powers of the division. (1) In addition to any other powers granted to the division by this article, the division shall have the following powers:

(a) To provide programs which are profit-oriented, which generate revenue for their operation and capital investment, and which partly reimburse the general fund for the use of inmate labor for the expense of adult correctional services;

(b) To develop, to the extent possible, programs that provide forty hours of work activity each week for all able-bodied offenders;

(c) To develop programs that assume responsibility for training offenders in general work habits, general work skills, and specific training skills which increase the offenders' employment prospects when released;

(d) To acquire or purchase equipment, raw materials, supplies, office space, insurance, and services and to engage the supervisory personnel necessary to establish and maintain for the state programs at the state's correctional institutions pursuant to law;

(e) To utilize the labor services of prisoners in the manufacture or production of goods and services that are needed for the construction, operation, or maintenance of any office, department, institution, or agency supported in whole or in part by the state, any political subdivision of the state, or the federal government;

(f) (I) To sell all goods and services, including capital construction items, produced by the programs to agencies supported in whole or in part by the state, any political subdivision of the state, other states or their political subdivisions, or the federal government; or

(II) To sell such goods to lessors who have entered into lease-purchase agreements with any public entity enumerated in subparagraph (I) of this paragraph (f) pursuant to which such goods are leased to and used by such public entity;

(g) To adopt, have, and use a seal and to alter the same at its pleasure;

(h) To sue and be sued;

(i) To enter into any contract or agreement not inconsistent with this article or the laws of this state;

(j) To borrow money from the state treasury in an amount not to exceed three million dollars pursuant to section 24-75-203, C.R.S., for a period of time not to exceed ten years. All moneys borrowed, including principal and interest shall be repaid in nine equal annual installments, commencing after the first year. The three-million-dollar limit shall include any amounts loaned to correctional industries in supplemental appropriation bills passed prior to May 22, 1979.

(k) (I) To purchase, lease, trade, exchange, or otherwise acquire, maintain, and dispose of real property and personal property and any interest therein pursuant to law.

(II) to (IV) Repealed.

(V) As used in this paragraph (k), "real property" means land, including land under water, buildings, structures, fixtures, and improvements on land, any property appurtenant to or used in connection with land, and every estate, interest, privilege, easement, right-of-way, and other right in land, legal or equitable, including, without limiting the generality of the foregoing, rights-of-way, terms for years, and liens, charges, or encumbrances by way of judgment, mortgage, or otherwise, and the indebtedness secured by such liens. However, the term "real property" does not include leasehold interests.

(l) To accept grants or loans from the federal, the state, or any local government and to do all things necessary, not inconsistent with this article or any other laws of this state, in order to avail itself of such aid, assistance, and cooperation under any federal legislation;

(m) To enter into contracts, execute all instruments, and do all things necessary or convenient in the exercise of the powers granted in this article pursuant to law;

(n) To have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted in this article, which powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this article;

(o) To adopt rules and regulations pursuant to article 4 of title 24, C.R.S., consistent with the provisions of this article;

(p) To sell Colorado state flags produced by the programs to retailers in this state at a price as near to the prevailing wholesale market price and quality as is practical and to individuals at retail price; however, the division must supply the requirements of state agencies and political subdivisions of the state before selling such flags as provided in this paragraph (p). The price of flags to state agencies and political subdivisions of this state shall be determined pursuant to section 17-24-112.

(q) Repealed.

(r) To utilize the labor services of prisoners in order to receive, repair, and distribute surplus property pursuant to the powers and duties provided in part 4 of article 82 of title 24, C.R.S., and to use such labor services in order to receive, repair, sell, or otherwise dispose of surplus state property as provided in section 17-24-106.6;

(s) To authorize and issue revenue bonds pursuant to the provisions of section 17-24-106.3;

(t) To establish and operate a canteen for the use and benefit of the inmates of state correctional facilities and to operate vending machines for the use of visitors to such facilities.

(2) Repealed.

Source: **L. 77:** Entire title R&RE, p. 929, § 10, effective August 1. **L. 79:** (1)(j) amended, p. 707, § 1, effective May 22. **L. 80:** (1)(f) amended, p. 528, § 1, effective February 29; (1)(a) and (1)(b) amended, p. 526, § 4, effective March 25. **L. 81:** (1)(p) and (1)(q) added, p. 962, § 1, effective May 18. **L. 82:** (1)(j) amended, p. 623, § 16, effective April 2. **L. 83:** (1)(p) amended and (1)(q) repealed, p. 692, §§ 1, 2, effective March 3; (1)(f) amended, p. 690, § 1, effective April 29. **L. 86:** (2) added, p. 757, § 12, effective July 1; (1)(r) added, p. 753, § 1, effective July 1, 1987. **L. 92:** (1)(k) amended, p. 1062, § 1, effective June 1. **L. 94:** (1)(s) added, p. 315, § 2, effective March 22. **L. 96:** (1)(k)(III) amended, p. 1266, § 182, effective August 7. **L. 97:** (1)(j) amended, p. 78, § 1, effective March 24. **L. 98:** (1)(k)(II) to (1)(k)(IV) repealed, p. 728, § 12, effective May 18. **L. 2002:** (1)(r) amended, p. 220, § 2, effective April 3; (1)(t) added, p. 56, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 27-25-103 as it existed prior to 1977.

(2) Subsection (2)(b) provided for the repeal of subsection (2), effective July 1, 1988. (See L. 86, p. 757.)

Cross references: For the legislative declaration contained in the 1996 act amending this section, see section 1 of chapter 237, Session Laws of Colorado 1996.

17-24-106.3. Revenue bonds - authority - issuance - requirements - covenants.

(1) (a) Subject to the prior approval of the correctional industries advisory committee acting by resolution in accordance with the provisions of section 17-24-104 (5) and from both houses of the general assembly acting either by bill or joint resolution, the division may, in accordance with the requirements of subsection (2) of this section, authorize and issue revenue bonds in an amount not to exceed one million dollars in the aggregate for expenses of the division.

(b) All bonds issued by the division shall provide that:

(I) No holder of any such bond may compel the state or any subdivision thereof to exercise its appropriation or taxing power; and

(II) The bond does not constitute a debt of the state and is payable only from the net revenues allocated to the division for expenses as designated in such bond.

(2) Any bonds issued pursuant to the terms of this section may be sold at public or private sale. If bonds are to be sold at a public sale, the division shall advertise the sale in such manner as the general assembly authorizes by bill or joint resolution. All bonds issued pursuant to the terms of this section shall be sold at a price not less than the par value thereof, together with all accrued interest to the date of delivery.

(3) Notwithstanding any provisions of the law to the contrary, all bonds issued pursuant to this section are negotiable.

(4) Bonds issued under this section shall be valid and binding obligations, regardless of whether, prior to the delivery thereof and payment therefor, any or all of the persons whose signatures appear thereon have ceased to serve in their official capacities.

(5) (a) Except as otherwise provided in a resolution authorizing bonds pursuant to the provisions of section 17-24-104 (5), all bonds of the same issue under this section shall have a prior and paramount lien on the net revenues pledged therefor.

(b) Bonds of the same issue or series issued under this section shall be equally and ratably secured, without priority by reason of number, date, sale, execution, or delivery, by a lien on the net revenue pledged in accordance with the terms of the resolution authorizing the bonds.

Source: L. 94: Entire section added, p. 315, § 3, effective March 22.

17-24-106.5. Interstate sales authorized. (Repealed)

Source: L. 79: Entire section added, p. 709, § 1, effective May 22. **L. 80:** Entire section repealed, p. 528, § 2, effective February 29.

17-24-106.6. Surplus state property. (1) As used in this section, unless the context otherwise requires:

(a) (Deleted by amendment, L. 2002, p. 218, § 1, effective April 3, 2002.)

(b) "State agency" means this state or any department or other agency of the state, but not including the department of transportation or the Auraria higher education center established in article 70 of title 23, C.R.S.

(c) "Surplus state property" means any equipment and supplies no longer having any use to the state or any state agency.

(2) The director shall promulgate rules to be utilized by the division in governing:

(a) The sale or disposal of surplus state property by public auction, competitive sealed bidding, or daily warehouse sales; and

(b) (Deleted by amendment, L. 2002, p. 218, 1, effective April 3, 2002.)

(c) The circumstances under which a public employee may purchase surplus state property.

(d) (Deleted by amendment, L. 2011, (HB 11-1301), ch. 297, p. 1424, § 16, effective August 10, 2011.)

(2.1) (a) (Deleted by amendment, L. 2002, p. 218, § 1, effective April 3, 2002.)

(b) Repealed.

(c) (Deleted by amendment, L. 2002, p. 218, § 1, effective April 3, 2002.)

(3) Such rules shall include, but shall not be limited to:

(a) The preparation of a perpetual inventory of surplus state property collected by the division;

(a.5) A procedure to inform all state agencies of the availability of such surplus state property;

(b) (Deleted by amendment, L. 2002, p. 218, § 1, effective April 3, 2002.)

(c) Procedures coordinating, to the extent possible, the programs administered by the division under section 17-24-106 with the division's responsibility with respect to surplus state property;

(d) A procedure whereby surplus state property which is not sold or otherwise disposed of within six months after being received by the division shall be disposed of as soon as possible thereafter.

(4) Any moneys used to cover the administrative costs of the transfer of responsibilities with respect to surplus state property from the department of administration to the department of corrections shall be transmitted to the state treasurer, who shall credit the same to the surplus property fund, which fund is hereby created, and such fund shall be subject to appropriation by the general assembly for the purposes of this section.

(5) Any moneys in any accounts or funds administered by the department of administration that are derived from the administration of part 4 of article 82 of title 24, C.R.S., shall be transferred to the surplus property fund.

(6) The division may assess fees from the disposer or recipient of any surplus state property, which fees shall be limited to reasonable administrative costs of the division incurred in effecting the collection of surplus state property. All such fees shall be credited to the surplus property fund.

Source: L. 86: Entire section added, p. 753, § 2, effective July 1, 1987. L. 90: (2)(a) amended and (2.1) added, p. 961, § 1, effective June 9. L. 91: (1)(b) amended, p. 1058, § 13, effective July 1. L. 97: (2.1)(c) amended, p. 1009, § 10, effective August 6. L. 98: (5) amended, p. 820, § 19, effective August 5. L. 2002: Entire section amended, p. 218, § 1, effective April 3. L. 2005: (2)(a) and (6) amended and (2)(c) added, p. 33, § 1, effective August 8. L. 2006: (2)(c) amended and (2)(d) added, p. 826, § 2, effective May 4. L. 2011: (1)(b) and (2) amended, (HB 11-1301), ch. 297, p. 1424, § 16, effective August 10. L. 2012: (1)(b) amended, (HB 12-1081), ch. 210, p. 902, § 1, effective August 8.

Editor's note: Subsection (2.1)(b) provided for the repeal of subsection (2.1)(b), effective September 1, 1990. (See L. 90, p. 961.)

17-24-107. Records. The account of all moneys received by and disbursed on behalf of the division shall also be a public record. Any public record of the division shall be open for inspection by any citizen.

Source: L. 77: Entire title R&RE, p. 930, § 10, effective August 1.

17-24-108. Disclosure of interests. Any employee or any other agent or adviser of the division who has a direct or indirect interest in any contract or transaction with the division shall disclose this interest to the division. No such employee or other agent or adviser having such an interest shall participate on behalf of the division in the authorization of any such contract or transaction.

Source: L. 77: Entire title R&RE, p. 930, § 10, effective August 1.

17-24-109. Required programs. (1) The division shall establish programs which are responsible for physical plant and facility maintenance, vehicle maintenance, and food and laundry services for each of the state's correctional facilities, and providing license plates and highway signs for the state.

(2) All staff members, authorized full-time equivalent employees, capital equipment, and inventories currently used for physical plant maintenance and food and laundry services shall be resources dedicated to the establishment of the correctional industries program.

(3) All vocational training programs, personnel, inventories, and equipment shall be resources dedicated to the establishment of the correctional industries program.

(4) A portion of the real property at each correctional institution shall be designated by the executive director as an industry area, and all facilities and buildings within this area

shall be assigned to the division in cooperation with the division of adult parole. The responsibility for the maintenance and upkeep of these facilities, buildings, and grounds shall be vested in the division.

Source: **L. 77:** Entire title R&RE, p. 930, § 10, effective August 1. **L. 79:** (1) amended, p. 698, § 63, effective July 1. **L. 80:** (4) amended, p. 526, § 5, effective March 25. **L. 2000:** (4) amended, p. 864, § 65, effective May 24.

17-24-109.5. License plates - highway signs. (1) The division is authorized to purchase such equipment, machinery, and other materials as may be necessary to manufacture and deliver motor vehicle license plates, validating tabs or decals, road signs, markers, and metal badges used by any department and manufactured under the authority of this article. Each year the executive director of the department of revenue shall estimate the number of license plates and validating tabs or decals that will be required and the cost of manufacturing thereof for the year such estimate is made and shall certify such estimates to the joint budget committee of the general assembly.

(2) During the year such estimate is so made and certified by the executive director of the department of revenue from the sale of motor vehicle license plates and validating tabs or decals, the joint budget committee shall consider such estimate in making its budget recommendation for the division of correctional industries to the general assembly. Any amounts appropriated by the general assembly for the purposes of this section shall be used and expended by the division of correctional industries to purchase such equipment and machinery, including repairs thereof, sheet steel or aluminum, paints, enamels, and other materials and support services as may be necessary to manufacture and deliver as a finished product motor vehicle license plates required by the executive director of the department of revenue to be furnished under the motor vehicle laws of this state.

Source: **L. 78:** Entire section added, p. 359, § 1, effective May 2. **L. 87:** (2) amended, p. 663, § 2, effective July 1. **L. 88:** Entire section amended, p. 705, § 1, effective July 1, 1989. **L. 99:** (2) amended, p. 550, § 1, effective May 7.

17-24-109.8. Pilot program - refuse derived fuel. (Repealed)

Source: **L. 80:** Entire section added, p. 529, § 1, effective May 1.

Editor's note: Subsection (6) provided for the repeal of this section, effective December 31, 1980. (See L. 80, p. 529.)

17-24-110. Financial payment incentives. (1) The division shall establish a system of financial payments to serve as an incentive for more effective and efficient performance of its programs.

(2) The division shall be provided, from the diagnostic services unit of the division of adult parole, personnel testing services that perform a vocational assessment of work experience and training needs; from the superintendent of each correctional institution, offender labor services; and from the superintendent of each such institution, security services at the work site, in addition to perimeter and scheduled security, when the division and the superintendent determine such additional services are reasonably necessary to ensure the safety of the public, the staff, and the offenders.

(3) The division shall provide the superintendent at each correctional institution with physical plant operations and maintenance services, food services, and laundry services.

(4) The director and the director of the division of adult parole are authorized to negotiate resource allocations for the exchange of services set forth in this section, subject to the annual review by the joint budget committee and the governor and appropriation by the general assembly. Payment rates shall be negotiated and set before the exchange of any of the services.

Source: L. 77: Entire title R&RE, p. 930, § 10, effective August 1. **L. 2000:** (2) and (4) amended, p. 857, § 66, effective May 24.

17-24-111. Purchasing requirement. (1) (a) The director is hereby authorized to develop programs that produce goods and services, including capital construction items, which are used by agencies financed in whole or in part by the state, any political subdivision thereof, or the federal government and to develop programs that produce goods, including capital construction items, which are used by public entities involved in lease-purchase agreements as provided in section 17-24-106 (1) (f) (II). The director shall also develop programs to market goods and services to distributor networks, nonprofit organizations, private sector retailers, and the general public. The state and its institutions, agencies, and departments may purchase through the department of personnel or purchasing agency authorized by section 24-102-302 (2), C.R.S., such goods and services as are produced by the division, unless similar goods and services can be obtained at or below the amount established for small purchases which are exempt from the competitive sealed bidding requirements of the "Procurement Code" contained in part 2 of article 103 of title 24, C.R.S. Goods and services produced by the division shall be provided at a price comparable to the current market price for similar goods and services. State agencies may purchase goods and services from sources other than the division; except that office furniture and office systems shall be purchased from the division. Printing services shall be purchased from the division unless a state agency operates its own printing operation. If the division is not able to provide its goods or services at a price or level of quality which is comparable to that provided by the private sector or provide them in a timely manner, which price, level of quality, or timeliness is determined by the department of personnel, the department of personnel shall make a certification to that effect, and the state agency purchasing such goods or services shall not be required to purchase them from the division.

(b) Repealed.

(c) The financial and staff resources dedicated to said purchasing function in the affected agency shall be under the authority of the department of personnel during the period of suspension, and purchases made for the affected agency shall be in accordance with the requirements of this subsection (1).

(d) When a state agency issues an invitation for bids pursuant to section 24-103-202, C.R.S., for goods or services which are available from the division of correctional industries, as shown on the list provided by the division pursuant to paragraph (a) of subsection (2) of this section, the division of correctional industries shall be included on its list of prospective bidders.

(e) Repealed.

(f) The division of correctional industries shall have access to the purchasing records of the department of personnel and the records of purchasing agents of state agencies established pursuant to section 24-102-302, C.R.S.

(2) (a) Repealed.

(b) State agencies which have purchased goods and services available from the division of correctional industries, as shown on the list provided by the division pursuant to paragraph (a) of this subsection (2), shall, as a part of their annual budget requests to the joint budget committee of the general assembly, report on all such purchases and of the value of the goods and services actually purchased from the division of correctional industries, and the division of correctional industries shall, as a part of its annual budget request to the joint budget committee, report on the value of all goods and services sold to each state agency.

(c) and (d) Repealed.

(3) Repealed.

(4) To the extent the articles and products which are produced or manufactured by the division are not purchased pursuant to the provisions of subsection (1) of this section, said articles or products may be purchased from the division on the open market by any person at the then current prevailing market prices.

(5) Articles and products manufactured or produced by the division shall first be used in supplying the requirements of state agencies and secondly in supplying the political

subdivisions of the state which purchase the same. Only the surplus of such articles and products left after meeting the requirements of state agencies and their political subdivisions shall be made available for purchase by the general public.

(6) (a) Notwithstanding any provision of this section to the contrary, on and after July 1, 2012, a state institution of higher education or the Auraria higher education center created in article 70 of title 23, C.R.S., may, but is not required to, purchase goods and services from the division pursuant to this section. In purchasing furniture and office systems that exceed the amount established for small purchases that are exempt from the competitive sealed bidding requirements of the "Procurement Code" contained in part 2 of article 103 of title 24, C.R.S., a state institution of higher education or the Auraria higher education center shall request a bid from the division for the purchase, and the institution or the center shall consider the bid on a competitive basis.

(b) Nothing in paragraph (a) of this subsection (6) shall require a state institution of higher education or the Auraria higher education center to engage in competitive bidding for an item or items if the institution or the center chooses to use the division as the sole source supplier for the item or items.

Source: **L. 77:** Entire title R&RE, p. 931, § 10, effective August 1. **L. 81:** (1), (2), and (3) amended, p. 1285, § 2, effective January 1, 1982. **L. 83:** (1) amended, p. 690, § 2, effective April 29. **L. 84:** (1), (2), and (3) amended, p. 525, § 1, effective May 2. **L. 87:** (1)(e) repealed, p. 349, § 4, effective July 1; (2)(c) and (2)(d) added, p. 664, § 3, effective July 1. **L. 88:** (1)(a) and (2)(a) amended and (1)(b) and (3) repealed, pp. 703, 704, §§ 2, 3, effective July 1. **L. 95:** (1)(c) amended, p. 639, § 27, effective July 1. **L. 96:** (1)(a), (1)(c), (1)(f), and (2)(a) amended, p. 1514, § 44, effective June 1. **L. 98:** (2)(a) repealed, p. 728, § 13, effective May 18. **L. 2011:** (6) added, (HB 11-1301), ch. 297, p. 1424, § 18, effective August 10.

Editor's note: (1) This section is similar to former § 27-25-106 as it existed prior to 1977.

(2) Subsections (2)(c) and (2)(d) provided for the repeal of subsections (2)(c) and (2)(d), respectively, effective June 30, 1994. (See L. 87, p. 664.)

Cross references: For the authority of state agencies to contract with private enterprise for goods or services, see § 6-2-115.5.

17-24-112. Pricing. (1) The division shall fix and determine the prices at which all labor is performed and at which all goods and services produced are sold. Such prices for industry products shall be as near the prevailing market prices for similar goods and services and quality as is practical. Such prices, other than prices for agricultural products, shall not exceed the wholesale market prices for like articles and products in the case of sales to the state or its political subdivisions or the prevailing retail market prices for like articles and products in the case of sales to the general public.

(2) The division shall prepare catalogs containing the description of all goods and services produced, with the price of each item. Copies of such catalogs shall be sent by the division to all state agencies and shall be available for political subdivisions of the state and the federal government.

(3) The director shall ensure that the level of quality for goods and services produced is comparable to similar goods and services available from the private sector. The director shall determine if the quality of goods and services produced is approximately the same as the quality requested by the purchasing agencies and departments. The sale of such goods or services shall not give rise to any warranties, but, in the case of a sale to a state agency or political subdivision, if the quality of the goods or services is not approximately the same as that requested, the director shall refund the purchase price or replace the goods or services. In the case of a sale of surplus goods or services, no refund or replacement shall be made after ninety days from the date of the sale.

Source: **L. 77:** Entire title R&RE, p. 932, § 10, effective August 1.

Editor's note: This section is similar to former § 27-25-108 as it existed prior to 1977.

17-24-113. Business operations and budget. (1) The division is hereby authorized, within appropriations which may be at its disposal, to procure or cause to be procured and maintained all necessary materials, supplies, space, services, and equipment required for the proper operation of the division.

(2) The division shall require that the operation of industries be conducted on a thorough-going business basis, and the value of the labor and the amount of money received shall be accurately recorded, together with the number of work hours used in the production of correctional industries goods and services.

(3) Except as provided in section 17-24-126, all revenues collected by the division from the sale of industry goods and services and from the sale or disposal of surplus state property shall be transmitted to the state treasurer, who shall credit the same to a special revolving enterprise account designated as the correctional industries account. All interest derived from the deposit and investment of moneys in the correctional industries account shall be credited to said account. All moneys in said account shall be used for the purchase of requirements necessary for the production of industry goods and services, for the responsibilities set forth in section 17-24-106.6, and for all necessary personnel, in accordance with the annual appropriation by the general assembly; but such account shall not exceed the requirements of activities authorized by this article, as determined necessary by the director, and any excess, upon order of the director, shall be transferred to the general fund by the state treasurer.

(4) Except as provided in section 17-24-126, all acquisitions, purchases, and loan repayments of the division shall be payable out of the revenues derived from the sale of correctional industry goods and services authorized in this article and from the sale or disposal of surplus state property under section 17-24-106.6.

(5) The division is authorized to enter into a borrowing arrangement with the state treasurer or other organizations when initial money is needed for a new or expanded program, if the advisory committee has approved such an arrangement and such an arrangement is within the authorized appropriation for the division.

(6) The director shall make regular reports, including monthly operating statements and annual financial reports, to the governor, the joint budget committee, and the office of state planning and budgeting regarding the financial operation of the division.

(7) On January 1 of each year, the division shall submit a proposed annual budget as a part of the total budget of the department of corrections for the following fiscal year beginning July 1. The budget of the division shall be reviewed by the advisory committee. This proposed budget shall contain at least the following:

- (a) Repealed.
- (b) A statement of proposed industry products and services to be produced by the division during said fiscal year and their prices;
- (c) A statement of the past, current, and expected number of offenders employed in each program and at each institution;
- (d) A financial statement of past, current, and expected production levels, sales revenues, operating expenses, profits, and reversions to the general fund of the division;
- (e) A statement of the payment rates specified in section 17-24-110;
- (f) A statement of past, current, and expected staff personnel;
- (g) Capital requirements for equipment and facilities;
- (h) All budgetary schedules, forms, and other information required by the joint budget committee.

(8) The general assembly, upon recommendation of the joint budget committee, shall make appropriations based on the evaluation of the budget request that determines the production level and financial operation of the division.

Source: L. 77: Entire title R&RE, p. 932, § 10, effective August 1. L. 86: (3) and (4) amended, p. 754, § 3, effective July 1, 1987. L. 93: (7)(a) repealed, p. 29, § 1, effective March 18. L. 97: (3) amended, p. 78, § 2, effective March 24. L. 98: (3) amended, p. 368, § 2, effective September 1. L. 2002: (3) and (4) amended, p. 220, § 3, effective April 3; (3) and (4) amended, p. 56, § 2, effective July 1.

Editor's note: (1) This section is similar to former § 27-25-111 as it existed prior to 1977.

(2) Amendments to subsections (3) and (4) by House Bill 02-1171 and House Bill 02-1286 were harmonized.

17-24-114. Provisions for offenders. (1) The director shall make all offender work assignments within the division. Each such offender work assignment shall take into account the diagnostic services unit recommendation of employment training needs of the offender and the security classification of the offender as determined by the superintendent of each correctional institution.

(2) The director shall establish the rate of compensation for the offenders working. The director and the director of the division of adult parole shall have the authority to make rules and regulations regarding the method and time of compensation payments. A portion of such compensation shall be paid to the division of adult parole to defray the cost of operations for adult parole, and a portion of such compensation shall be paid to each offender in relation to the number of hours worked, type of work assignment, and quality of work performed. Payment rates shall be established on an annual basis after review by the joint budget committee and by appropriation of the general assembly. No offender shall be compensated if he is placed in administrative or punitive segregation or if he is able-bodied but refuses to participate in an available work program or other productive activity. The department will provide hygienic items to all inmates in administrative or punitive segregation.

(3) The division of adult parole is empowered to grant earned time allowances consistent with part 4 of article 22.5 of this title in relation to an offender's work performance and evaluation, as recommended by the director.

(4) The division has the power to establish rules and regulations governing the employment, conduct, and management of offenders while assigned to programs. All such rules and regulations pertaining to the payment, employment, conduct, and management of offenders shall be published and posted for offenders.

Source: L. 77: Entire title R&RE, p. 934, § 10, effective August 1. L. 78: (2) amended, p. 360, § 2, effective May 2. L. 80: (2) amended, p. 526, § 6, effective March 25. L. 90: (3) amended, p. 954, § 23, effective May 25. L. 96: (3) amended, p. 1149, § 8, effective June 1. L. 2000: (2) and (3) amended, p. 857, § 67, effective May 24.

17-24-115. Rules and regulations. Pursuant to article 4 of title 24, C.R.S., the director has the power to promulgate the rules and regulations which are deemed necessary for the implementation of this article.

Source: L. 77: Entire title R&RE, p. 934, § 10, effective August 1.

Editor's note: This section is similar to former § 27-25-110 as it existed prior to 1977.

ANNOTATION

In light of the rules concerning prison employment promulgated pursuant to this section, prisoners can claim no legitimate expecta-

tion of continued employment in their prison work assignments. *Rather v. Conte*, 849 P.2d 884 (Colo. App. 1992).

17-24-116. Sole authority. The division shall have sole authority for operating any programs within the adult correctional institutions of this state.

Source: L. 77: Entire title R&RE, p. 934, § 10, effective August 1.

17-24-117. Penalty. (Repealed)

Source: **L. 77:** Entire title R&RE, p. 934, § 10, effective August 1. **L. 93:** Entire section repealed, p. 2129, § 2, effective September 1.

Editor's note: This section was similar to former § 27-25-112 as it existed prior to 1977.

17-24-118. Treasurer and controller to write off debt. (Repealed)

Source: **L. 79:** Entire section added, p. 711, § 1, effective June 7.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 1980. (See L. 79, p. 711.)

17-24-119. Training and employment by organizations - account for proceeds and wages. (1) The division, after consultation with the respective superintendents of the correctional facilities and with the director of the division of adult parole, is authorized to contract with any corporation, association, labor organization, or private nonprofit organization or with any federal or state agency for the purpose of training or employing offenders who have been committed to the department of corrections or who have been assigned to a community correctional program.

(2) Proceeds and wages due an offender from the sale of products produced by the offender under a program authorized by subsection (1) of this section shall be held in an account maintained by the division and distributed periodically for:

(a) Compensation of the victim of the crime committed by the offender in an amount not to exceed forty percent of the offender's wages for expenses actually and reasonably incurred as a result of the injury to the person or property of the victim, including medical expenses, loss of earning power, and any other pecuniary loss directly resulting from the injury to the person or property or the death of the victim, which a court of competent jurisdiction determines to be reasonable and proper;

(b) Payment of such amounts for the support of the offender's dependents as is deemed appropriate by the division after consultation with the respective superintendents of the correctional facilities and with the director of the division of adult parole;

(c) Establishment of funds in trust for the offender upon his release; except that an amount consistent with the payment plan for existing correctional industries programs shall be allocated by the division to the offender for personal expenses while serving his sentence;

(d) Voluntary payment of such amounts to the victims assistance and law enforcement fund established in section 24-33.5-506, C.R.S., as is deemed appropriate by the division after consultation with the respective superintendents of the correctional facilities and with the director of the division of adult parole.

(3) A portion of said wages and proceeds in an amount determined by the division, but not to exceed twenty percent, may be used to defray the costs incident to the offender's confinement.

(4) The provisions of this section shall apply only to a program established pursuant to this section and not to other programs established pursuant to this article.

Source: **L. 81:** Entire section added, p. 963, § 1, effective May 27. **L. 88:** (1) amended, p. 1430, § 8, effective June 11. **L. 96:** (2)(d) added, p. 1149, § 9, effective June 1. **L. 2000:** (1), (2)(b), and (2)(d) amended, p. 857, § 68, effective May 24.

17-24-120. Treasurer and controller to write off amount owed state. (Repealed)

Source: **L. 82:** Entire section added, p. 310, § 1, effective March 25.

Editor's note: Subsection (2) provided for the repeal of this section, effective July 1, 1983. (See L. 82, p. 310.)

17-24-121. Venture agreements. (1) The department of corrections, working through the division, is authorized to enter into agreements with private persons for the utilization of inmate labor in the manufacture, processing, or assembly of components, finished goods, services, or product lines within facilities owned or leased by the department. Such agreements shall be subject to the prior review of the attorney general and the correctional industries advisory committee.

(2) The department is authorized to enter into agreements subject to state fiscal rules and the prior review of the attorney general which allow for shared financing by the division and the private contractor for the facility, equipment, raw materials, and operation of industries developed pursuant to the provisions of this section.

(3) Inmates producing goods and services under the terms of an agreement authorized by this section shall be paid on a scale to be determined by the executive director of the department in the best interests of the division.

(4) The division is authorized to market goods and services produced under a venture agreement to any office, department, institution, or agency supported in whole or in part by the state or any political subdivision thereof or to any other state, the federal government, any nonprofit organization, any private sector retailer, or the general public.

(5) The wages of an inmate working under an agreement entered into pursuant to this section with a private person shall be distributed under guidelines established by the executive director in order to offset the cost of imprisonment and incidental expenses, pay court-ordered restitution, make voluntary payments to the victims assistance and law enforcement fund established in section 24-33.5-506, C.R.S., pay the pro rata share of child support cost as established by the department of human services, and establish a savings account to assist the inmate upon release and to offset state costs at the time of release.

Source: **L. 87:** Entire section added, p. 664, § 4, effective July 1. **L. 94:** (5) amended, p. 1813, § 6, effective June 1. **L. 95:** Entire section RC&RE, p. 875, § 9, effective May 24. **L. 96:** (5) amended, p. 1149, § 10, effective June 1.

Editor's note: Prior to this section being recreated and reenacted in 1995, former subsection (6) provided for the repeal of this section, effective June 30, 1994. (See L. 87, p. 664.)

17-24-122. Agreements for the employment of inmates by private entities. (1) The department of corrections, working through the division, is authorized to enter into agreements with private persons or entities for the utilization of inmate labor in the manufacturing, processing, or assembly of components, finished goods, services, or product lines within facilities owned or leased by the department. Such agreements shall be subject to the prior review of the attorney general and the correctional industries advisory committee.

(2) The department is authorized to enter into agreements subject to state fiscal rules and the prior review of the attorney general which allow for financing by the private contractor for equipment, raw materials, training of workers, and operation of industries developed pursuant to the provisions of this section. In any such agreement, the department may provide for the recovery of the costs of providing facilities for the private contractor by requiring the payment of rent for such facilities.

(3) Agreements entered into pursuant to this section shall provide that any inmate assigned pursuant to section 17-24-114 (1) to work as inmate labor for a private person or entity which made such agreement pursuant to subsection (1) of this section shall be an employee of the private person or entity and, notwithstanding section 17-24-114 (2), such inmate shall be paid at least the federal minimum wage for the labor performed. Such wages shall be paid to the department of corrections and shall be held in trust for the inmate in a revenue-producing account until the inmate is paroled or discharged from custody. The provisions of section 8-40-301 (3), C.R.S., shall apply to any inmate employed by a private person or entity pursuant to this section.

(4) Out of the wages held in trust for an inmate pursuant to subsection (3) of this section, the department of corrections shall deduct up to fifty percent of such wages to be used to defray the costs incident to the inmate's confinement.

(5) Out of the wages held in trust for an inmate pursuant to subsection (3) of this section, and subsequent to the deduction made pursuant to subsection (4) of this section, the department of corrections shall deduct periodically for the following purposes and in the following order of priority:

(a) Compensation of the victim of the crime committed by the inmate for expenses actually and reasonably incurred as a result of the injury to the person or property of the victim, including medical expenses, loss of earning power, and any other pecuniary loss directly resulting from the injury to the person or property or the death of the victim, which a court of competent jurisdiction determines or has determined to be reasonable and proper;

(a.5) Voluntary payment of such amounts to the victims assistance and law enforcement fund established in section 24-33.5-506, C.R.S., as is deemed appropriate by the executive director of the department of corrections;

(b) Payment of such amounts for the support of the inmate's dependents as is deemed appropriate by the executive director of the department of corrections, taking into account any court orders for such support; and

(c) Payment of incidental expenses of the inmate while the inmate is still in custody.

(6) Any amounts of money which remain in trust for the inmate after the deductions made pursuant to this section shall be paid to the inmate upon parole or discharge from custody. The executive director of the department of corrections shall have the discretion to pay to the inmate any amounts of money which remain in trust for such inmate in installments over the period of one year from the date of parole or discharge. If an inmate dies prior to discharge from custody and the body goes unclaimed for more than five days, the amount remaining in trust may be used to defray any costs incurred by the state of Colorado in connection with the burial of such inmate and any amount remaining after burial costs have been paid or the body has been claimed shall be paid to the inmate's estate.

(7) Any agreement entered into pursuant to this section shall provide that appropriate security measures for a state correctional facility shall not be jeopardized due to any operations which result from such agreement.

(8) In making offender work assignments pursuant to section 17-24-114, there shall be a presumption that the most fit and able inmates shall be assigned by the director to a work assignment pursuant to this section.

Source: L. 93: Entire section added, p. 2127, § 1, effective September 1. **L. 95:** (1) amended, p. 1097, § 17, effective May 31. **L. 96:** (5)(a.5) added, p. 1150, § 11, effective June 1.

17-24-123. Clean-up of illegally disposed and abandoned waste tires - services to counties. (1) The general assembly finds that the clean-up, removal, and transportation of illegally dumped, stored, or abandoned waste tires is necessary and that inmate labor is one source of labor that should be used to correct these problems.

(2) The division is authorized to:

(a) Provide labor using supervised inmate crews to counties or private entities for the clean-up, loading, and any on-site processing of illegally dumped, stored, or abandoned waste tires prior to transporting such waste tires to a county- or state-approved recycling or disposal facility and to pay the personnel and operating costs necessary to do so;

(b) Contract with county and city and county sheriffs for the provision of supervised inmate crews to clean up illegally dumped, stored, or abandoned waste tires;

(c) Contract with private haulers for the moving of illegally dumped, stored, or abandoned waste tires to a county- or state-approved recycling or disposal facility and shall do so whenever feasible and cost-effective; and

(d) Pay any fees necessary for a county- or state-approved recycling or disposal facility to accept illegally dumped, stored, or abandoned waste tires.

(3) Any moneys received from contracts entered into pursuant to this section shall be credited to the correctional industries account described in section 17-24-113 (3).

Source: L. 96: Entire section added, p. 813, § 1, effective May 23.

17-24-124. Inmate disaster relief program - legislative declaration. (1) The general assembly finds that inmates housed in certain prison facilities throughout the state form a labor pool that could be safely utilized to fight forest fires, help with flood relief, and assist in the prevention of or clean up after other natural or man-made disasters.

(2) As used in this section, unless the context otherwise requires, "disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause or cause of human origin, but "disaster" does not include any hazardous substance incident, oil spill or other contamination, epidemic, air pollution, blight, drought, infestation, explosion, civil disturbance, or hostile military or paramilitary action.

(3) There is hereby established in the division the inmate disaster relief program, referred to in this section as the "program". The purpose of the program shall be to establish one or more inmate disaster relief crews composed of inmates from minimum restrictive, or minimum security facilities. An inmate shall receive an additional amount of earned time pursuant to section 17-22.5-405 in the amount of one day of earned time for every day spent at the site of a disaster. An inmate disaster relief crew may be utilized by the state or by local or federal governmental agencies that apply to the division for assistance.

(4) The executive director shall promulgate rules governing the program including but not limited to:

- (a) The inmates who are eligible to participate in the program;
- (b) Types of disasters to which an inmate disaster relief crew may be sent;
- (c) The security measures that are required to prevent escapes and protect the public;
- (d) The procedures that must be followed before an inmate disaster relief crew may be utilized;

(e) The fees that may be charged by the division for the provision of services by an inmate disaster relief crew; and

(f) The compensation that may be paid to inmates participating in the program.

(5) The division is authorized to purchase equipment and obtain necessary training for any inmate disaster relief crews.

(6) The department is authorized to solicit, accept, and expend grants, donations, gifts, and other moneys to defer the costs of equipping and training one or more inmate disaster relief crews. The program shall not be implemented or made available to other agencies until sufficient moneys are available from appropriations, grants, donations, gifts, and other moneys to cover the costs of equipping and training at least one inmate disaster relief crew.

Source: L. 98: Entire section added, p. 17, § 1, effective August 5. L. 2001: (3) and (6) amended, p. 1452, § 1, effective June 5.

17-24-125. Correctional industries at nonstate-owned facilities. (1) As used in this section, unless the context otherwise requires:

(a) "Inmate labor program" means a program operated at a nonstate-owned prison facility as a business or for profit utilizing in whole or in part labor of inmates, except that "inmate labor program" does not include a program that is operated by a local government or combination of local governments of this state as a nonprofit business within the jurisdiction boundaries of the local government or governments and whose operation has been reviewed and approved by the local government or local governments.

(b) "Nonstate-owned prison facility" means any private correctional facility or any jail or other detention facility operated by a political subdivision of the state that houses state prisoners or that houses inmates from another state whose incarceration in this state is approved pursuant to section 17-1-104.5; except that "nonstate-owned prison facility" shall not include a jail or other detention facility operated by a political subdivision of the state that only houses state prisoners pursuant to a contract under section 16-11-308.5 (2), C.R.S., or a facility in which a community corrections program is operated pursuant to article 27 of this title.

(2) (a) On and after March 1, 1999, all inmate labor programs operated at a nonstate-owned prison facility shall be approved by the division prior to commencing operations.

(b) Repealed.

(3) (a) On or before February 1, 1999, the division shall promulgate rules governing the approval required by subsection (2) of this section including but not limited to:

(I) Establishing a procedure for approving inmate labor programs that shall include review by the correctional industries advisory committee of a business plan for each inmate labor program;

(II) Establishing the duration of any approval and procedures for reapproval and revocation of any approval;

(III) Requiring all inmate labor programs to comply with all federal laws and regulations relating to the use of inmate labor;

(IV) Requiring that all goods or services be priced at prevailing market rates; except that goods or services sold to governmental or nonprofit entities may be priced at wholesale cost;

(V) Requiring that persons employed by a nonstate-owned prison facility shall not be involved in decisions involving the inmate labor program relating to persons or entities with whom the person has a conflict or potential conflict of interest;

(VI) Requiring that inmates be compensated as determined by rule promulgated by the department;

(VII) Requiring that all records pertaining to inmate labor programs shall be available for inspection and copying by representatives of the division to ensure compliance with this section and any rules promulgated thereunder; and

(VIII) Requiring nonstate-owned prison facilities to reimburse the division for any expenses incurred in certifying and monitoring the inmate labor programs.

(b) The rules promulgated pursuant to this subsection (3) shall be substantially similar to the rules governing programs at facilities operated by the department.

(4) (a) Each nonstate-owned prison facility operating an inmate labor program shall hold wages earned by a state prisoner in trust for the prisoner in a revenue-producing account until the prisoner is paroled or discharged from custody. Out of the wages held in trust for a state prisoner pursuant to the provisions of this paragraph (a), the nonstate-owned prison facility shall make disbursements pursuant to the provisions of section 17-24-122 (4) and (5). Section 17-24-122 (6) shall also apply to any wages held in trust for a state prisoner pursuant to this paragraph (a).

(b) Each nonstate-owned prison facility operating an inmate labor program shall hold and distribute wages earned by an inmate from a state other than Colorado pursuant to the statutes and rules of that state or the contract between that state and the prison facility.

Source: L. 98: Entire section added, p. 424, § 1, effective April 21.

Editor's note: Subsection (2)(b)(II) provided for the repeal of subsection (2)(b), effective January 1, 2000. (See L. 98, p. 424.)

17-24-126. Canteen, vending machine, and library account created - receipts - disbursements. (1) There is hereby created in the state treasury a special revolving enterprise account to be known as the canteen, vending machine, and library account. The account shall be used by the division to establish and operate a canteen for the use and benefit of the inmates of state correctional facilities and to operate vending machines for the use of visitors to state correctional facilities. The moneys in the account shall be continuously available to the division and are appropriated for the purposes set forth in subsection (3) of this section.

(2) The canteen and vending machines shall be managed by the division, and they shall not be operated in any manner for the personal profit of any employees of the division or any inmates of state correctional facilities.

(3) Items in the canteen shall be sold to inmates, and items in vending machines shall be sold to visitors, at prices set so that revenues from the sale are sufficient to fund all expenses of the canteen and vending machines, including the cost of services of employees of the canteen and the cost of servicing the vending machines, and to produce a reasonable profit. All revenues derived from the canteen and vending machines and interest derived

from the deposit and investment of moneys in the canteen, vending machine, and library account shall be credited to such account. Any profits arising from the operation of the canteen and vending machines shall be expended for the educational, recreational, and social benefit of the inmates and to supplement direct inmate needs.

(4) Article 8.5 of title 26, C.R.S., regarding vending facilities in state buildings, shall not apply to vending machines operated in visiting areas of any department facility.

(5) On July 1, 2002, the state treasurer shall transfer any moneys in the canteen, vending machine, and library fund created in section 17-20-127 to the canteen, vending machine, and library account.

Source: L. 2002: Entire section added, p. 57, § 3, effective July 1.

ARTICLE 25

Minimum Security Facilities

Editor's note: (1) This article was originally enacted in 1977 as part 2 of article 20 of title 27 but was incorporated later in 1977 into this title when all the provisions in title 27 relating to corrections were transferred to title 17. (See L. 77, p. 1377, § 1.)

(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

17-25-101.	Definitions.	17-25-103.	Placement limitations.
17-25-102.	Minimum security facility - limitations.		

17-25-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Department" means the department of corrections.

(2) "Minimum security facility" means a facility which is designed and operated to protect the public from least security risk inmates and is operated by the department for adult felony inmates committed to the custody of the executive director of the department and includes but is not limited to the Colorado correctional center at Golden, the Rifle correctional center at Rifle, and the Delta correctional center at Delta, but does not include any community corrections program as defined in section 17-27-102 (3).

Source: L. 77: Entire title R&RE, p. 934, § 10, effective August 1. **L. 79:** (2) amended, p. 699, § 64, effective July 1. **L. 93:** (2) amended, p. 54, § 17, effective July 1; (2) amended, p. 718, § 3, effective July 1.

Editor's note: Amendments to subsection (2) in House Bill 93-1190 and House Bill 93-1233 were harmonized.

17-25-102. Minimum security facility - limitations. (1) Except for correctional facilities located in Fremont county and Delta county, a permanent minimum security facility existing on July 14, 1989, including the Rifle correctional center, shall not exceed a capacity of one hundred ninety-two inmates.

(2) Notwithstanding the provisions of subsection (1) of this section, the Colorado correctional center shall not exceed a capacity of one hundred fifty inmates.

Source: L. 77: Entire title R&RE, p. 935, § 10, effective August 1. **L. 89, 1st Ex. Sess.:** Entire section R&RE, p. 20, § 6, effective July 1. **L. 95:** Entire section amended, p. 1282, § 20, effective June 5. **L. 96:** Entire section amended, p. 1150, § 13, effective June 1.

17-25-103. Placement limitations. No adult felony violent or sex offender shall be placed by the department in a minimum security facility located in any county without first having been placed in at least one more restrictive setting for not less than six months. Said

six-month time period shall include any time spent by the inmate in any diagnostic unit operated by the department. The six-month requirement may be waived only with the approval of the executive director.

Source: L. 77: Entire title R&RE, p. 935, § 10, effective August 1. **L. 2000:** Entire section amended, p. 848, § 45, effective May 24.

ARTICLE 26

Jails

Editor's note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in article 26 of title 27.

(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

Cross references: For reimbursement by the department of corrections of expenses incurred by a county or city and county to maintain a prisoner in a local jail, see § 17-1-112.

PART 1

GENERAL PROVISIONS

17-26-101.	Jail in each county.	17-26-122.	Guards - compensation.
17-26-102.	Keeper of jail - expenses.	17-26-123.	Federal prisoners - expense.
17-26-103.	Duties of keeper.	17-26-124.	Charges for foreign prisoners.
17-26-104.	Feeding prisoners.	17-26-125.	Account of moneys - report.
17-26-104.5.	Medical visits - charge to persons in custody - provider charges - state hospital in Pueblo.	17-26-126.	Commissioners to examine jail.
17-26-104.7.	Prohibition against the use of restraints on pregnant women in custody.	17-26-127.	Escape - duty of sheriff - expenses.
17-26-105.	Separation of prisoners.	17-26-128.	Employment of county prisoners. (Repealed)
17-26-106.	Male and female prisoners.	17-26-129.	Applicability of provisions.
17-26-107.	Prisoners to work.	17-26-130.	Jail - pilot project authorized. (Repealed)
17-26-108.	County to support spouse - when.	17-26-131.	Joint jail commission authorized. (Repealed)
17-26-109.	Deductions of time - good time - earned time.	17-26-132.	Joint jail commission - powers and duties. (Repealed)
17-26-110.	Forfeiture of good time.	17-26-133.	Contract provisions - approval by the division of criminal justice. (Repealed)
17-26-110.5.	Restriction of privileges because of lawsuit filed without justification.	17-26-134.	Jail inspection. (Repealed)
17-26-111.	Separate sentences continuous.	17-26-135.	Project shall comply with provisions pertaining to inter-governmental relationships. (Repealed)
17-26-112.	Sheriff to keep record.	17-26-136.	Termination of pilot project. (Repealed)
17-26-113.	Prisoners to work.	17-26-137.	County jail assistance fund.
17-26-114.	Work on highways - expenses.	17-26-138.	Benefits assistance - legislative declaration - demonstration grant program - repeal. (Repealed)
17-26-115.	Trusty prisoners - good time.	17-26-139.	County jail identification processing unit - personnel authority - repeal. (Repealed)
17-26-116.	Commitment - copy to sheriff - return endorsed.		
17-26-117.	Commitment box - successor.		
17-26-118.	Record - contents - inspection.		
17-26-118.5.	Prevention of erroneous payments to prisoners - identifying information reporting system.		
17-26-119.	Jail in another county - costs.		
17-26-120.	Keeping of fugitives - charges.		
17-26-121.	Juveniles - confinement - when.		

PART 2

REIMBURSEMENT OF COST OF CARE BY INMATES TO COUNTIES

17-26-201 to
17-26-208. (Repealed)

PART 1

GENERAL PROVISIONS

17-26-101. Jail in each county. There shall be maintained in each county in this state, at the expense of the county, a county jail for the detention, safekeeping, and confinement of persons and prisoners lawfully committed. Nothing in this article shall be construed to compel the erection of jails in counties having a population of less than two thousand or when the county owns a jail erected in any other place in the county.

Source: L. 77: Entire title R&RE, p. 935, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-101 as it existed prior to 1977.

17-26-102. Keeper of jail - expenses. The sheriff of the county, in person or by deputy appointed for that purpose, shall be the keeper of the county jail. He shall be responsible for the manner in which the same is kept. He shall see that the same is kept clean, safe, and wholesome. The expenses of keeping the jail in good order and repair and of lighting and warming that part thereof wherein prisoners are confined and the office in the jail shall be paid by the county wherein the jail is situated. Nothing in this section shall authorize the lighting or warming of that part of the jail occupied by the keeper thereof as his dwelling house.

Source: L. 77: Entire title R&RE, p. 935, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-102 as it existed prior to 1977.

Cross references: For the sheriff as custodian of the jail, see also § 30-10-511.

ANNOTATION

Annotator's note. Since § 17-26-102 is identical to repealed § 27-26-102, relevant cases construing that provision have been included in the annotations to this section.

General powers of county commissioners yield to special powers of sheriff in reference to jails. General powers conferred upon the board of county commissioners with respect to county property, when in conflict with the special, particular powers conferred upon the sheriff with reference to jails, must yield to the latter. *Richart v. Bd. of County Comm'rs*, 95 Colo. 153, 33 P.2d 971 (1934).

Hence, sheriff may determine use of particular rooms. It is for the sheriff to determine whether or not a particular room or some other place in the jail should be used for cleaning and conference purposes. The county commissioners have no authority to forbid the sheriff to occupy a vacant room as a living room. *Richart v. Bd. of County Comm'rs*, 95 Colo. 153, 33 P.2d 971 (1934).

For various powers and duties of sheriff as jailer, see *Richart v. Bd. of County Comm'rs*, 95 Colo. 153, 33 P.2d 971 (1934).

A jailer cannot perform satisfactorily the duties imposed upon him by law without living in the jail. To accomplish the best results, he

should be present night and day to control and guard the prisoners, repel attacks, prevent escapes and forcible jail deliveries, feed the prisoners, and minister to those that are sick and might need constant attention. *Richart v. Bd. of County Comm'rs*, 95 Colo. 153, 33 P.2d 971 (1934).

Therefore it is customary and proper for the jailer to live in the jail, and this custom is recognized by Colorado statutes. *Richart v. Bd. of County Comm'rs*, 95 Colo. 153, 33 P.2d 971 (1934).

However, there is no statute specifically requiring the jailer to live in the jail; but the instant section recognizes the existence and propriety of the custom. *Richart v. Bd. of County Comm'rs*, 95 Colo. 153, 33 P.2d 971 (1934).

This section does not authorize living quarters in the jail or a housing allowance in lieu thereof, either as partial compensation or salary for a sheriff jailer. *Van Cleave v. Bd. of County Comm'rs*, 33 Colo. App. 227, 518 P.2d 1371 (1973).

County may provide living quarters under certain circumstances. County is not prohibited from providing living quarters to a jailer where public purposes can be achieved thereby. *Van Cleave v. Bd. of County Comm'rs*, 33 Colo. App. 227, 518 P.2d 1371 (1973).

Elimination of housing allowance was constitutional. Because housing allowance paid to sheriff jailer was unauthorized and illegal, its elimination did not violate constitutional prohibitions against salary or compensation reduction during the term of office of a public official. But the decision holding such payments illegal and unauthorized would not be applied retroactively, and, therefore, a county could not recover for sums already paid to sheriff for such allowance. *Van Cleave v. Bd. of County Comm'rs*, 33 Colo. App. 227, 518 P.2d 1371 (1973).

The sheriff may perform the duties of keeper personally or by deputy. But there is no law which entitles him to special or extra compensation for such services. *Bd. of County*

Comm'rs v. Bransom, 4 Colo. App. 274, 35 P. 750 (1894).

Keeping jail in good order and repair is county expense. The expense of keeping the jail in good order and repair, and of lighting and warming the part where the prisoners are confined, must be paid by the county; but the liability of the county is on account of expense, and not of service. *Bd. of County Comm'rs v. Bransom*, 4 Colo. App. 274, 35 P. 750 (1894).

For action for damages for death of person confined in jail, see *People ex rel. Coover v. Guthner*, 105 Colo. 37, 94 P.2d 699 (1939).

Applied in *Tihonovich v. Williams*, 196 Colo. 144, 582 P.2d 1051 (1978).

17-26-103. Duties of keeper. The keepers of the several county jails and adult detention centers in this state shall receive and safely keep every person duly committed or placed pursuant to section 16-11-308.5, C.R.S., to such jail or adult detention center for safekeeping, examination, or trial or duly sentenced to imprisonment in such jail or adult detention center upon conviction for any contempt or misconduct or for any criminal offense, and they shall not without lawful authority let out of such jail, on bail or otherwise, any such person.

Source: **L. 77:** Entire title R&RE, p. 935, § 10, effective August 1. **L. 88:** Entire section amended, p. 677, § 3, effective July 1; entire section amended, p. 710, § 10, effective July 1. **L. 93:** Entire section amended, p. 407, § 5, effective April 19.

Editor's note: This section is similar to former § 27-26-103 as it existed prior to 1977.

Cross references: For use of physical force to maintain order and discipline, see § 18-1-703(1)(b).

17-26-104. Feeding prisoners. The sheriff of each county shall feed all the prisoners kept in confinement by him with good and sufficient food. The board of county commissioners of such county, at the expense of the county, shall furnish to such sheriff all the groceries, supplies, utensils, equipment, and assistants he requires to perform his duty of properly feeding such prisoners and shall also pay all the costs and expenses incurred therein.

Source: **L. 77:** Entire title R&RE, p. 936, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-104 as it existed prior to 1977.

ANNOTATION

Annotator's note. Since § 17-26-104 is identical to repealed § 27-26-104, a relevant case construing that provision has been included in the annotations to this section.

Violation of this section by failing to provide prisoners in isolation with food, while at the same time complying with this section by feeding other prisoners, is not a denial of equal protection of the law. Denial of equal protection of the laws involves more than discrimination or unequal treatment. *Ruark v. Schooley*, 211 F. Supp. 921 (D. Colo. 1962).

The fact that officials, while acting under color of state law, may violate this section, is not a basis for an action under federal civil rights act, unless the violations result in a deprivation of some right which the plaintiffs have under the federal constitution and laws. *Ruark v. Schooley*, 211 F. Supp. 921 (D. Colo. 1962).

Applied in *Tihonovich v. Williams*, 196 Colo. 144, 582 P.2d 1051 (1978).

17-26-104.5. Medical visits - charge to persons in custody - provider charges - state hospital in Pueblo. (1) A county jail may assess a medical treatment charge against any person who receives while being held in custody medical treatment performed by a physician, dentist, nurse, or licensed hospital or as a result of a sick call or for whom a prescription is filled. The county jail may assess any such medical treatment charge against the person's jail account. In addition, the county jail may assess a reasonable medical treatment charge for each visit by a person in custody to an institutional or noninstitutional physician, dentist, or optometrist; except that a medical treatment charge shall not be assessed for any visit required by the county jail during the intake process or an annual physical examination required by the county jail. In no case shall a person's inability to pay be the basis for not providing medical treatment equivalent to the community standard of care. Any medical treatment charge that remains unpaid shall constitute a cost of care that the person shall be ordered to pay pursuant to section 18-1.3-701, C.R.S., and that may be collected by the county pursuant to the provisions of section 16-11-101.6, C.R.S.

(1.3) A provider of medical care that receives any state money, including but not limited to providers that receive money from the medical assistance program established in articles 4, 5, and 6 of title 25.5, C.R.S., or the Colorado indigent care program established in part 1 of article 3 of title 25.5, C.R.S., shall charge a county for medical care provided to a person in custody in a county jail:

(a) At the same rate that the provider is reimbursed for such services by the medical assistance program; or

(b) If the provider is not reimbursed by the medical assistance program, at the highest rate that the provider is reimbursed in whole or in part with state moneys in any other program.

(1.5) (a) If economical, a county sheriff may transport a person held in custody in a county jail to the Colorado mental health institute at Pueblo for medical treatment. Within the bed and medical capacity of the facility, the Colorado mental health institute at Pueblo shall provide medical care to a person held in custody in a county jail. The county in which the person was held shall be responsible for the payment to the hospital for medical costs incurred by a person in custody, but, if such costs are not repaid to the county by the person in custody, such costs constitute a medical treatment charge that may be collected as provided for in subsection (1) of this section.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (1.5), the mental health institute at Pueblo shall charge a county the actual costs of the medical care provided to a person held in custody. The charges shall cover the full direct and indirect costs of the care provided as determined by generally accepted accounting principles. The general assembly shall include within the appropriation for the general medical division of the institute an amount equal to the estimated reimbursements to be received from counties pursuant to this paragraph (b).

(2) The provisions of this section shall apply to any person held in custody in a county jail regardless of whether the person is a juvenile, is being held prior to trial, or is in custody for conviction under a state statute or a county or municipal ordinance.

(3) When a person is held in custody in a county jail, the person shall be primarily responsible for the payment of the cost of medical care provided to the person for a self-inflicted injury or a condition that was preexisting prior to the person's arrest and shall be charged for the medical care by the provider of care. For purposes of this section, "preexisting condition" means an illness beginning or an injury sustained before a person is in the peaceable custody of the county's officers. This subsection (3) shall not apply to care required by the county jail pursuant to subsection (1) of this section, care paid for by other entities pursuant to section 17-26-120 or 17-26-124, care paid for by any other entity, or medical care provided by the Colorado mental health institute at Pueblo.

(4) A county may seek payment or reimbursement for any medical treatment costs from a person being held in custody and receiving such services, except as otherwise provided in subsection (1) of this section.

Source: **L. 97:** Entire section added, p. 191, § 1, effective April 1. **L. 2002:** (1) amended, p. 1507, § 166, effective October 1. **L. 2003:** Entire section amended, p. 1890, § 1, effective August 6; (1.3) and (1.5) added, p. 1694, § 3, effective August 6. **L. 2006:** IP(1.3) amended, p. 2005, § 59, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-26-104.7. Prohibition against the use of restraints on pregnant women in custody. (1) The staff of a county jail, in restraining a woman who is committed, detained, or confined to the county jail, shall use the least restrictive restraints necessary to ensure safety if the staff of the county jail have actual knowledge or a reasonable belief that the woman is pregnant. The requirement that staff use the least restrictive restraints necessary to ensure safety shall continue during postpartum recovery and transport to or from the county jail.

(2) (a) (I) The county jail staff or medical facility staff shall not use restraints of any kind on the woman during labor and delivery of the child; except that staff may use restraints if:

(A) The medical staff determine that restraints are medically necessary for safe childbirth;

(B) The county jail staff or medical staff determine that the woman presents an immediate and serious risk of harm to herself, to other patients, or to medical staff; or

(C) The sheriff or his or her designee determines that the woman poses a substantial risk of escape that cannot reasonably be reduced by the use of other existing means.

(II) Notwithstanding any provision of subparagraph (I) of this paragraph (a) to the contrary, under no circumstances shall staff use leg shackles or waist restraints on a woman during labor and delivery of the child, postpartum recovery while in a medical facility, or transport to or from a medical facility for childbirth.

(b) The county jail or medical facility staff authorizing the use of restraints on a pregnant woman during labor or delivery of the child shall make a written record of the use of the restraints, which record shall include, at a minimum, the type of restraint used, the circumstances that necessitated the use of the restraint, and the length of time the restraint was used. The sheriff shall retain the record for a minimum of five years and shall make the record available for public inspection with individually identifying information redacted from the record unless the woman who is the subject of the record gives prior written consent for the public release of the record. The written record of the use of restraint shall not constitute a medical record under state or federal law.

(3) Upon return to a county jail after childbirth, the woman shall be entitled to have a member of the county jail's or county's medical staff present during any strip search.

(4) When a woman's pregnancy is determined, the staff of a county jail shall inform a pregnant woman committed, detained, or confined in a county jail in writing in a language and in a manner understandable to the woman of the provisions of this section concerning the use of restraints and the presence of medical staff during a strip search.

(5) Each sheriff shall ensure that staff of the county jail receive adequate training concerning the provisions of this section.

Source: **L. 2010:** Entire section added, (SB 10-193), ch. 312, p. 1464, § 2, effective January 1, 2011.

17-26-105. Separation of prisoners. Persons committed on criminal process and detained for trial and persons committed for contempt or upon civil process shall be kept in rooms separate and distinct from those in which prisoners convicted and under sentence are confined. This section shall not apply to any county whose jail does not have sufficient room for such separate confinement.

Source: **L. 77:** Entire title R&RE, p. 936, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-105 as it existed prior to 1977.

ANNOTATION

For the distinction between “committed” and “convicted”, see *Hershey v. People*, 91 Colo. 113, 12 P.2d 345 (1932) (decided under repealed § 27-26-105).

17-26-106. Male and female prisoners. Male and female prisoners, except husband and wife, shall not be put or kept in the same room.

Source: L. 77: Entire title R&RE, p. 936, § 10, effective August 1.

Editor’s note: This section is similar to former § 27-26-106 as it existed prior to 1977.

17-26-107. Prisoners to work. (1) When any able-bodied prisoner is confined in the county jail of any county or city and county, having been convicted of a misdemeanor or of the violation of a municipal ordinance and being confined in punishment therefor, the sheriff of such county or the person having the duties of a sheriff of such city and county shall compel such prisoner to work eight hours of every working day. The provisions of this section shall not apply to any case where there are fewer than three prisoners so confined in said jail at any one time or to any prisoner physically unable to work. In counties and city and counties, it shall be discretionary with the sheriff or person having the duties of a sheriff to employ prisoners on the road serving sentences of sixty or fewer days. It is the duty of the sheriff of such county or the sheriff or person having the duties of a sheriff of such city and county, when no other work is available, to compel the prisoners to work upon the public roads, highways, or streets of such county or city and county. Employment as a jail trusty shall be sufficient to meet the requirements of this section.

(2) The county commissioners of the county or the governing body of the city and county, when informed by the sheriff or person having the duties of a sheriff that there are prisoners confined in the jail who may be put to work upon the roads, highways, or streets, if there is such work upon the roads, highways, or streets, shall provide for the payment of additional expenses of guarding such prisoners while performing such work. Such prisoners shall not be used for the purpose of building any bridge or structure of like character that requires the employment of skilled labor.

(3) (Deleted by amendment, L. 2000, p. 1120, § 1, effective August 2, 2000.)

Source: L. 77: Entire title R&RE, p. 936, § 10, effective August 1. **L. 2000:** Entire section amended, p. 1120, § 1, effective August 2.

Editor’s note: This section is similar to former § 27-26-107 as it existed prior to 1977.

ANNOTATION

The costs of maintaining and caring for those in the various institutions of the state, be they penal or medical, are recoverable. Only the manner of recovering the costs differs; able-bodied convicts are put to work, and the estates of the mentally deficient or criminally insane in public institutions are charged

with costs of care. *State v. Estate of Burnell*, 165 Colo. 205, 439 P.2d 38, appeal dismissed per curiam, 393 U.S. 13, 89 S. Ct. 46, 21 L. Ed.2d 13, reh’g denied, 393 U.S. 992, 89 S. Ct. 441, 21 L. Ed.2d 458 (1968) (decided under repealed § 27-26-107).

17-26-108. County to support spouse - when. When any able-bodied person is confined in the county jail, having been convicted of the nonsupport of his or her spouse or minor children, the county shall pay toward the support of such spouse or minor children not less than fifty cents nor more than one dollar per day for each day such person so works if such spouse or minor children would otherwise be a public charge.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1. **L. 79:** Entire section amended, p. 1636, § 29, effective July 19.

Editor's note: This section is similar to former § 27-26-108 as it existed prior to 1977.

Cross references: For commitment of husband for nonsupport, see § 14-6-101.

17-26-109. Deductions of time - good time - earned time. (1) Every person who is sentenced to and imprisoned in any county jail of this state or sentenced to pay a fine and costs or either or all thereof and who performs faithfully the duties assigned to him or her during his or her imprisonment therein is entitled to a deduction from the time of his or her sentence of two days in any thirty-day period. If any such person escapes or attempts to escape from the county jail, he or she shall forfeit all deduction from the time of his or her sentence which he or she may have been entitled to up to the time of the escape or attempt at escape, as provided for in this section.

(2) A person who is sentenced to and imprisoned in any county jail of this state or sentenced to pay a fine and costs or either or all thereof may be awarded earned time of up to three days in any thirty-day period at the discretion of the county sheriff for the successful completion of certain designated programs or educational activities, for outstanding progress in any assigned program or activity, or for unusual or extraordinary actions as determined by the county sheriff. Each county sheriff shall develop and implement an earned time program and schedule for use in his or her county jail in accordance with the expectations and standards of the community in which he or she serves. Earned time shall be in addition to good time as allowed in subsection (1) of this section and section 17-26-115.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1. L. 2009: Entire section amended, (HB 09-1263), ch. 105, p. 382, § 1, effective August 5.

Editor's note: This section is similar to former § 27-26-109 as it existed prior to 1977.

Cross references: For credit for presentence confinement, see § 18-1.3-405.

ANNOTATION

Annotator's note. Since § 17-26-109 is identical to repealed § 27-26-109, a relevant case construing that provision has been included in the annotations to this section.

Only payment of the judgment entitles a person, sentenced to jail under a body execution, to a release before expiration of the time of confinement fixed by the court. *Hershey v. People ex rel. Johnson*, 91 Colo. 113, 12 P.2d 345 (1932).

Therefore, the provisions of this section are not applicable to one confined under a body execution. *Hershey v. People ex rel. Johnson*, 91 Colo. 113, 12 P.2d 345 (1932).

No credit for presentence confinement. There is nothing in this article mandating the deduction of the period of presentence confinement from a sentence to a county jail. *Castro v. Dist. Court*, 656 P.2d 1283 (Colo. 1982).

Persons serving jail time as a condition of probation are eligible for good time credit under the provisions of this section and § 17-26-115. One who is imprisoned in the county jail, whether as a result of a sentence to imprisonment or a sentence to probation with a condition of imprisonment, cannot be denied the benefits of the good time statutes. *Faulkner v. Dist. Court*, 826 P.2d 1277 (Colo. 1992).

Court cannot deny benefits of this section. It is not within the power of the sentencing court to impose a sentence which denies to one imprisoned in the county jail the benefits of this section: the effect of this section is to proscribe the imposition of a "flat" time sentence which denies a defendant his statutory right to a reduction from the time of his sentence for good behavior. *Hemphill v. Dist. Court*, 197 Colo. 431, 593 P.2d 972 (1979).

17-26-110. Forfeiture of good time. In case any such person in the county jail is guilty of willful violation of any of the rules or regulations of the jail and is entitled to any

deduction from the time of his sentence by the provisions of section 17-26-109, he shall forfeit the right of such deduction, the violation to be determined by the sheriff of the county in which such jail is situated.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-110 as it existed prior to 1977.

17-26-110.5. Restriction of privileges because of lawsuit filed without justification.

(1) If any person is convicted of a crime and confined in any county jail and such person files a lawsuit against the county or against any county government official, officer, employee, or agent, the county may deny any of the privileges allowed to such person if, upon the motion of any party or the court itself, a state or federal court finds that the action, or any part thereof, lacked substantial justification, was baseless, or was malicious or that the action, or any part thereof, was interposed for harassment. As used in this section, "lacked substantial justification" has the same meaning as that provided for such term in section 13-17-102 (4), C.R.S.

(2) The county may deny privileges to a person pursuant to subsection (1) of this section for a period not to exceed one hundred twenty days for any such lawsuit.

(3) The county may not deny privileges to a person pursuant to the provisions of this section if the court determines the lawsuit was asserted by the person in a good faith attempt to establish a new theory of law in Colorado.

(4) The county may determine not to deny privileges to a person pursuant to the provisions of this section if, after filing the lawsuit, a voluntary dismissal of the action is filed within a reasonable time after the person filing the dismissal knew, or reasonably should have known, that he or she would not prevail in the action.

Source: L. 95: Entire section added, p. 301, § 2, effective July 1.

17-26-111. Separate sentences continuous. For the purpose of sections 17-26-109 to 17-26-115, when any such persons confined in the county jail are sentenced under several convictions, with separate sentences, they shall be construed as one continuous sentence.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-111 as it existed prior to 1977.

ANNOTATION

Those persons who come within the provisions of the law are those only who have been sentenced in criminal cases. *Hershey v. People*

ex rel. Johnson, 91 Colo. 113, 12 P.2d 345 (1932) (decided under repealed § 27-26-111).

17-26-112. Sheriff to keep record. It is the duty of the sheriff of each county to keep a record, in a book for that purpose, of all infractions of the prison rules and regulations, as may be prescribed by law or by him.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-112 as it existed prior to 1977.

17-26-113. Prisoners to work. All persons sentenced to and confined in the county jail under the laws of this state, except such as are precluded by the terms of the judgment, shall perform labors under such rules and regulations as may be prescribed by the county commissioners or sheriff of the county in which such jail is situated.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-113 as it existed prior to 1977.

ANNOTATION

This section is not applicable to one held under a body execution. *Hershey v. People ex rel. Johnson*, 91 Colo. 113, 12 P.2d 345 (1932) (decided under repealed § 27-26-113).

17-26-114. Work on highways - expenses. Upon the written request of a majority of the board of county commissioners of any county, the sheriff shall detail such persons in the county jail as in his judgment seems proper, not exceeding the number specified in said written request, to work upon such public roads and highways of such county or streets and alleys of any municipality within such county as are designated in said written request of said county commissioners. Such county shall furnish all tools and materials necessary in the performance of said work. No such work shall be done within the limits of a municipality without the consent of the proper authorities thereof, but, when such work is done within the limits of a municipality within such county, the municipality where said work is done shall pay all additional expenses of guarding such persons while performing said work and shall furnish all tools and necessary materials used in said work.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-114 as it existed prior to 1977.

17-26-115. Trusty prisoners - good time. Persons confined in the county jail, undergoing any sentence in accordance with law, who are engaged in work within or outside the walls of the jail, and who are designated by the sheriff as trusty prisoners, and who conduct themselves in accordance with the rules of the sheriff of the county and perform their work in a creditable manner, upon approval of the sheriff, may be granted such good time, in addition to that allowed in section 17-26-109, as the sheriff may order, not to exceed ten days in any thirty-day period.

Source: L. 77: Entire title R&RE, p. 937, § 10, effective August 1. **L. 2009:** Entire section amended, (HB 09-1263), ch. 105, p. 383, § 2, effective August 5.

Editor's note: This section is similar to former § 27-26-115 as it existed prior to 1977.

ANNOTATION

This section is not applicable to one held under a body execution. *Hershey v. People ex rel. Johnson*, 91 Colo. 113, 12 P.2d 345 (1932) (decided under repealed § 27-26-115).

Persons serving jail time as a condition of probation are eligible for good time credit under the provisions of this section and § 17-

26-109. One who is imprisoned in the county jail, whether as a result of a sentence to imprisonment or a sentence to probation with a condition of imprisonment, cannot be denied the benefits of the good time statutes. *Faulkner v. Dist. Court*, 826 P.2d 1277 (Colo. 1992).

17-26-116. Commitment - copy to sheriff - return endorsed. When a prisoner is committed to any jail by virtue of any process which the sheriff is required to return to the court from which it issued, it is the duty of the court, clerk, or officer issuing such process to issue the same in duplicate, and the sheriff shall keep one copy of the same, together with

a copy of his return thereto, endorsed thereon, which duplicate copy of such process retained by the sheriff shall be sufficient prima facie authority to retain such prisoner in custody.

Source: L. 77: Entire title R&RE, p. 938, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-116 as it existed prior to 1977.

17-26-117. Commitment box - successor. All instruments of every kind, or attested copies thereof duly certified, by which any person is committed to or liberated from the county jail shall be regularly endorsed and filed and kept in a suitable box in the jail by the sheriff, or by his deputy acting as jailer, and such box, together with its contents, shall be delivered to his successor in office.

Source: L. 77: Entire title R&RE, p. 938, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-117 as it existed prior to 1977.

17-26-118. Record - contents - inspection. It is the duty of the keeper of each county jail to keep in a book, provided by the county for that purpose, a daily record of the commitments and discharges of all persons delivered to his custody, which record shall exhibit the date of entrance, name, offense, term of sentence, fine, age, sex, citizenship, how and by whom committed, and when and by whom discharged. The record shall be open to inspection by the public at all reasonable hours and shall be delivered by the sheriff to his successor in office.

Source: L. 77: Entire title R&RE, p. 938, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-118 as it existed prior to 1977.

17-26-118.5. Prevention of erroneous payments to prisoners - identifying information reporting system. (1) In order to eliminate erroneous payments of benefits to persons confined in local jails in the state, county sheriffs, the department of human services, county departments of social services, and the department of labor and employment shall cooperatively develop a system for reporting identifying information about persons confined in local jails for a period exceeding thirty days to state and county agencies responsible for the administration of workers' compensation and public assistance benefits. Such a system shall be implemented on or before July 1, 2000, within existing appropriations.

(2) On and after the implementation date of the information reporting system developed pursuant to subsection (1) of this section, but in any event no later than July 1, 2000, each sheriff in the state shall periodically transmit identifying information about each person confined for a period exceeding thirty days in any local jail within the sheriff's jurisdiction to the department of human services, county departments of social services, and the department of labor and employment.

Source: L. 99: Entire section added, p. 552, § 1, effective August 4.

17-26-119. Jail in another county - costs. When there is no sufficient jail in any county wherein any criminal offense has been committed, any county or district judge, upon application of the sheriff, may order any person charged with any criminal offense and ordered to be committed to jail to be sent to the jail of the county nearest having a sufficient jail. The sheriff of such nearest county, on exhibit of the order of such judge, shall receive and keep in safe custody in the jail of his county the person ordered to be so committed. Such sheriff, upon the order of the district court thereof, shall redeliver such person when

demand, and all the expenses of keeping such person shall be paid by the county from which such person was sent. The board of county commissioners of the county from which any prisoner is sent, at the next regular meeting after receiving the bill for the expenses of such maintenance, safekeeping, and custody, shall audit and allow the claim and pay the same to the treasurer of the county in which such jail is situated for the use of such county.

Source: L. 77: Entire title R&RE, p. 938, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-119 as it existed prior to 1977.

17-26-120. Keeping of fugitives - charges. Any county jail may be used for the detention and safekeeping of any fugitive from justice from another state or territory, and in this case the county shall be entitled to compensation at the rate prescribed by the board of county commissioners. The rate so charged for the maintenance and safekeeping of such fugitive in custody shall be subject to the approval of the district judge, to be paid by the officer demanding the custody of such fugitive to the sheriff of the county and by him paid over to the treasurer of the county for the use of the county.

Source: L. 77: Entire title R&RE, p. 938, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-120 as it existed prior to 1977.

Cross references: For the authority of a person executing a governor's warrant to confine a prisoner in a county jail, see § 16-19-113.

17-26-121. Juveniles - confinement - when. No jail shall receive a juvenile prisoner for confinement unless the juvenile has been charged by the direct filing of an information in the district court or by indictment pursuant to section 19-2-517, C.R.S., or the juvenile has been ordered by the court to be held for criminal proceedings pursuant to section 19-2-518 (1), C.R.S.

Source: L. 77: Entire title R&RE, p. 939, § 10, effective August 1. L. 81: Entire section amended, p. 1042, § 3, effective July 1. L. 87: Entire section amended, p. 816, § 19, effective October 1. L. 90: Entire section amended, p. 1017, § 2, effective April 20. L. 96: Entire section amended, p. 1690, § 21, effective January 1, 1997.

Editor's note: This section is similar to former § 27-26-121 as it existed prior to 1977.

17-26-122. Guards - compensation. When the safekeeping and detention of persons lawfully committed to any jail in this state, in the opinion of the board of county commissioners, requires the employment of one or more guards, the board of county commissioners of the county where such jail is situated shall authorize the sheriff of such county to employ such guards at the expense of the county, at such reasonable compensation as the board shall allow, which guards shall be under the command of the keeper of the jail. Such guards shall be discharged from service when in the judgment of the board of county commissioners their services are not required.

Source: L. 77: Entire title R&RE, p. 939, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-122 as it existed prior to 1977.

ANNOTATION

Whenever in the opinion of the board of county commissioners the safekeeping of prisoners committed to jail requires guards,

the board is empowered to authorize the sheriff to employ them at the expense of the county, at such reasonable compensation as the

board shall allow. Bd. of County Comm'rs v. Bransom, 4 Colo. App. 274, 35 P. 750 (1894) (decided under repealed § 27-26-122).

17-26-123. Federal prisoners - expense. It is the duty of the keeper of each county jail to receive into the jail every person duly committed thereto for any offense against the United States, by any court or officer of the United States, and to confine every such person in the jail until he is duly discharged, the United States paying all the expenses of the confinement, safekeeping, and custody of such person, including the keeper's fees, at the rate established by the board of county commissioners of the county where such jail is situated.

Source: L. 77: Entire title R&RE, p. 939, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-123 as it existed prior to 1977.

17-26-124. Charges for foreign prisoners. It is the duty of the board of county commissioners of each county having a jail in this state to establish a rate of charges to be paid for the confinement, safekeeping, and maintenance of prisoners sent from other counties in this state, fugitives from justice, and persons committed by authority of the United States, which rate of charges may be altered, changed, or modified by the board of county commissioners of such county when in their judgment it seems best to do so. The rate so charged shall be subject to the approval of the district court of such county.

Source: L. 77: Entire title R&RE, p. 939, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-124 as it existed prior to 1977.

17-26-125. Account of moneys - report. It is the duty of the keeper of every jail within this state to keep an accurate account of all moneys received by him on account of the confinement, safekeeping, and maintenance of persons committed from other counties, fugitives from justice, and prisoners committed to the jail by authority of the United States, to report the same monthly to the board of county commissioners of the county wherein such jail is situated, and to pay over to the treasurer of such county monthly all such moneys for the use of such county.

Source: L. 77: Entire title R&RE, p. 939, § 10, effective August 1.

Editor's note: This section is similar to former § 27-26-125 as it existed prior to 1977.

17-26-126. Commissioners to examine jail. It is the duty of the board of county commissioners, as often as they deem necessary, but at least once annually, to make personal examination of the jail of its county, its sufficiency, and the management thereof and to correct all irregularities and improprieties therein found.

Source: L. 77: Entire title R&RE, p. 939, § 10, effective August 1. **L. 2008:** Entire section amended, p. 926, § 1, effective August 5.

Editor's note: This section is similar to former § 27-26-126 as it existed prior to 1977.

Cross references: For governmental immunity provisions relating to jails and the conditions thereof, see § 24-10-106 (1)(b).

ANNOTATION

Annotator's note. Since § 17-26-126 is identical to repealed § 27-26-126, a relevant case construing that provision has been included in the annotations to this section.

This section imposes a public official duty. It would seem clear that the county commissioners as to the performance of the duty imposed upon them by this section come within the class of public officers who are recognized by the authorities as subordinate governmental officers and administrative agents whose duty is owing primarily to the public collectively — to the body politic and not to any particular individual — who act for the public at large. *Miller v. Ouray Elec. Light & Power Co.*, 18 Colo. App. 131, 70 P. 447 (1902).

The commissioners are not individually liable thereunder to an action for damages for the death of a prisoner caused by the burning of the county jail, alleged to have been caused by their negligent failure to make such examination. *Miller v. Ouray Elec. Light & Power Co.*, 18 Colo. App. 131, 70 P. 447 (1902).

Complaint must allege knowledge of dangerous conditions existing. In an action against the individual commissioners of a county for the

wrongful death of a prisoner in a county jail caused by the burning of the jail, based on the failure of said commissioners to personally examine said jail, a complaint which fails to allege that said commissioners had knowledge or could by proper examination have had knowledge of the dangerous condition which caused the fire, and fails to allege in what respect the failure to make the examination contributed to cause the fire, is defective. *Miller v. Ouray Elec. Light & Power Co.*, 18 Colo. App. 131, 70 P. 447 (1902).

The words "and to correct all irregularities and improprieties therein found" impose no new obligation upon the county commissioners. *Miller v. Ouray Elec. Light & Power Co.*, 18 Colo. App. 131, 70 P. 447 (1902).

Commissioners and the sheriff are separately elected officials, and the board does not exercise managerial control over either the sheriff or the detention center and its staff. Moreover, this section does not impose a legal duty on the board to ensure an inmate's safety against assaults from other inmates, nor does it prescribe a civil remedy. *Terry v. Sullivan*, 58 P.3d 1098 (Colo. App. 2002).

17-26-127. Escape - duty of sheriff - expenses. In case of escape of any person lawfully committed to any jail of any county in this state, it is the duty of the sheriff of the county where such jail is situated to pursue and recapture such escaped person at the expense of the office of such sheriff. In case of any escape without any fault or negligence on the part of the keeper of the jail or the guards under such keeper's command, the board of county commissioners of the county where such jail is situated may audit and allow to the office of the sheriff the necessary expenses incurred in such recapture.

Source: L. 77: Entire title R&RE, p. 939, § 10, effective August 1. **L. 92:** Entire section amended, p. 401, § 10, effective June 3.

Editor's note: This section is similar to former § 27-26-127 as it existed prior to 1977.

ANNOTATION

For various powers and duties of sheriff as jailer, see *Richart v. Bd. of County Comm'rs*, 95

Colo. 153, 33 P.2d 971 (1934) (decided under repealed § 27-26-127).

17-26-128. Employment of county prisoners. (Repealed)

Source: L. 77: Entire title R&RE, p. 940, § 10, effective August 1. **L. 84:** (1.3) added, p. 498, § 3, effective April 5. **L. 87:** (1)(d), (1)(e), (4), and (6) amended and (1)(f), (1.1), (5)(b.3), and (11) added, pp. 666, 667, §§ 1-3, effective May 16. **L. 88:** (1.1) R&RE, p. 709, § 6, effective July 1. **L. 93:** (1)(e), (1)(f), and (1.1) amended and (1)(g) and (12) added, pp. 69, 70, §§ 1, 2, effective July 1. **L. 94:** (11) amended, p. 2041, § 22, effective July 1; (12) amended, p. 1050, § 6, effective July 1. **L. 96:** (1) and (2) amended, p. 121, § 1, effective July 1. **L. 2000:** (5) amended, p. 1048, § 11, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: (1) This section was similar to former § 27-26-128 as it existed prior to 1977.
(2) This section was relocated to § 18-1.3-106 in 2002.

Cross references: For the legislative declaration contained in the act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

17-26-129. Applicability of provisions. The provisions of sections 17-26-107 and 17-26-108 shall not be applicable to any prisoner who is employed or detained outside of the jail under the provisions of section 18-1.3-106, C.R.S.

Source: L. 77: Entire title R&RE, p. 941, § 10, effective August 1. L. 87: Entire section amended, p. 667, § 4, effective May 16. L. 2002: Entire section amended, p. 1507, § 167, effective October 1.

Editor's note: This section is similar to former § 27-26-129 as it existed prior to 1977.

Cross references: For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

17-26-130. Jail - pilot project authorized. (Repealed)

Source: L. 86: Entire section added, p. 759, § 1, effective April 24. L. 96: Entire section repealed, p. 556, § 6, effective April 24.

17-26-131. Joint jail commission authorized. (Repealed)

Source: L. 86: Entire section added, p. 759, § 1, effective April 24. L. 96: Entire section repealed, p. 557, § 7, effective April 24.

17-26-132. Joint jail commission - powers and duties. (Repealed)

Source: L. 86: Entire section added, p. 759, § 1, effective April 24. L. 96: Entire section repealed, p. 557, § 8, effective April 24.

17-26-133. Contract provisions - approval by the division of criminal justice. (Repealed)

Source: L. 86: Entire section added, p. 760, § 1, effective April 24. L. 96: Entire section repealed, p. 557, § 9, effective April 24.

17-26-134. Jail inspection. (Repealed)

Source: L. 86: Entire section added, p. 761, § 1, effective April 24. L. 96: Entire section repealed, p. 559, § 10, effective April 24.

17-26-135. Project shall comply with provisions pertaining to intergovernmental relationships. (Repealed)

Source: L. 86: Entire section added, p. 761, § 1, effective April 24. L. 96: Entire section repealed, p. 559, § 11, effective April 24.

17-26-136. Termination of pilot project. (Repealed)

Source: L. 86: Entire section added, p. 761, § 1, effective April 24. L. 96: Entire section repealed, p. 559, § 12, effective April 24.

17-26-137. County jail assistance fund. The moneys collected pursuant to section 16-3-503 (1), C.R.S., shall be transmitted to the state treasurer, who shall credit the same to the county jail assistance fund, which fund is hereby created and referred to in this section as the “fund”. The moneys in the fund shall be subject to annual appropriation by the general assembly to the department of corrections for allocation to counties for the maintenance and operation of county jails. Any moneys in the fund not expended for the purpose of this section may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund.

Source: L. 2008: Entire section added, p. 924, § 3, effective July 1.

Cross references: For the legislative declaration contained in the 2008 act enacting this section, see section 1 of chapter 248, Session Laws of Colorado 2008.

17-26-138. Benefits assistance - legislative declaration - demonstration grant program - repeal. (Repealed)

Source: L. 2008: Entire section added, p. 906, § 1, effective May 20. **L. 2009:** Entire section repealed, (SB 09-209), ch. 23, p. 109, § 1, effective March 18.

17-26-139. County jail identification processing unit - personnel authority - repeal. (Repealed)

Source: L. 2009: Entire section added, (SB 09-006), ch. 403, p. 2219, § 3, effective (see editor’s note).

Editor’s note: The revisor of statutes did not receive the notice specified in § 42-2-311 by July 1, 2012; therefore, this section is repealed as provided in subsection (2) of this section, effective July 1, 2012. (See L. 2009, p. 2219.)

Cross references: For the legislative declaration contained in the 2009 act adding this section, see section 1 of chapter 403, Session Laws of Colorado 2009.

PART 2

REIMBURSEMENT OF COST OF CARE BY INMATES TO COUNTIES

17-26-201 to 17-26-208. (Repealed)

Source: L. 94: Entire part repealed, p. 1362, § 6, effective July 1.

Editor’s note: This part 2 was added in 1989. For amendments to this part 2 prior to its repeal in 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

ARTICLE 26.5

Multijurisdictional Jails

17-26.5-101.	Multijurisdictional jails - authorized.	17-26.5-102.	Contracts for multijurisdictional jails - requirements.
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17-26.5-101. Multijurisdictional jails - authorized. The general assembly hereby authorizes any county, city and county, city, or the department of corrections of the state of Colorado to enter into a contract or contracts with each other in accordance with part 2 of article 1 of title 29, C.R.S., to design, locate, construct, and operate a multijurisdictional jail for the incarceration of county, city and county, city, or state prisoners. In the alternative, the described governmental entities may enter into the necessary contracts with a private contractor for the provision and operation of such jail.

Source: L. 90: Entire article added, p. 940, § 4, effective July 1.

17-26.5-102. Contracts for multijurisdictional jails - requirements. (1) Any contract or contracts for the creation of a multijurisdictional jail as described in section 17-26.5-101 shall contain the following requirements:

(a) An agreement regarding involvement by each of the governmental entities in the predesign planning, design, location, and construction of such a jail facility or involvement in any agreement to obtain a private contractor to provide a jail facility and the operation thereof;

(b) An agreement regarding involvement by each of the governmental entities in construction management and oversight for such a jail facility;

(c) An agreement regarding involvement by each of the governmental entities in financing the construction of such a jail facility;

(d) An agreement regarding involvement by each of the governmental entities in financing and providing for staffing and operation of such jail facility, which may provide for staffing and operation solely by any county, city and county, or city with financial assistance from the state department of corrections or any other governmental entity involved, or staffing and operation through a joint staffing and operation agreement between any county, city and county, or city and the state department of corrections, if the department is involved in the multijurisdictional jail facility;

(e) An agreement regarding involvement by each of the governmental entities in financing and providing for programs for such jail facility;

(f) An agreement regarding utilization of such jail facility by each of the governmental entities involved in the multijurisdictional jail facility. However, if the state department of corrections is involved in the facility, such agreement shall provide that a proportionate number of beds in the facility, equal to the proportionate percentage of the financing of the construction and operation of the facility which was provided by the state department of corrections bears to the entire cost of the construction and operation of the facility, shall be reserved for utilization by the state department of corrections if such beds are needed by the department. Any such beds so reserved shall be counted by the department as available beds when determining the number of beds available in the state correctional system.

Source: L. 90: Entire article added, p. 941, § 4, effective July 1.

Cross references: For the authority of the executive director of the department of corrections to enter into contracts or agreements concerning multijurisdictional jails, see section 6 of chapter 120, Session Laws of Colorado 1990.

Programs

ARTICLE 27

Community Corrections Programs

Editor's note: This title was repealed and reenacted in 1977, and this article was subsequently repealed and reenacted in 1993, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1993, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the

original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the title heading. Former C.R.S. section numbers prior to 1993 are shown in editor's notes following those sections that were relocated.

Cross references: For authority of the department of public safety to expand the use of community correctional facilities and programs, see section 12 of chapter 120, Session Laws of Colorado 1990.

Law reviews: For article, "Felony Sentencing in Colorado", see 18 Colo. Law. 1689 (1989).

17-27-101.	Legislative declaration.	17-27-105.5.	Community corrections pro- gram agents - duties - arrest powers.
17-27-102.	Definitions.		
17-27-103.	Community corrections boards - establishment - duties.	17-27-105.7.	Offenders held in community corrections programs - med- ical benefits application as- sistance - county of resi- dence - repeal. (Repealed)
17-27-103.5.	Statements relating to a tran- sitional referral to commu- nity corrections.	17-27-106.	Escape from custody from a community corrections pro- gram.
17-27-104.	Community corrections pro- grams operated by units of local government, state agencies, or nongovernmen- tal agencies.	17-27-107.	Administrative procedure act not to apply.
17-27-105.	Authority to place offenders in community corrections programs. (Repealed)	17-27-108.	Division of criminal justice of the department of public safety - duties - community corrections contracts.

17-27-101. Legislative declaration. The general assembly hereby declares that it is the purpose of this article to establish and maintain community corrections programs which provide the courts, the department of corrections, and the state board of parole with more flexibility and a broader range of correctional options for offenders under the jurisdiction of such entities. It is the further purpose of this article to increase public safety and promote community-based correctional programming through collaboration between the state of Colorado and local units of government. It is also the purpose of this article to give local units of government the authority to designate the programs, boards, and networks established under this article to address local criminal justice needs with resources other than those appropriated pursuant to this article.

Source: L. 93: Entire article R&RE, p. 708, § 1, effective July 1.

Editor's note: This section is similar to former § 17-27-101 as it existed prior to 1993.

ANNOTATION

Broader range of alternatives provided. By enacting the community corrections statute, the general assembly provided the sentencing judge with a broader range of alternatives and with a sentencing medium that is more severe than probation, but not as harsh as incarceration. *People ex rel. VanMeveren v. District Court*, 195 Colo. 34, 575 P.2d 4 (1978) (decided under repealed § 27-27-101).

No private tort remedy available. Although this article imposes duties on administrators of

community corrections facilities, those duties are owed directly to the relevant judicial or executive authorities. Members of the general public are incidental beneficiaries of the statute, but are owed no actionable duty by its specific terms. *Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc.*, 942 P.2d 1301 (Colo. App. 1997), *aff'd*, 962 P.2d 963 (Colo. 1998).

17-27-102. Definitions. As used in this article:

(1) "Administrative review process" means a sequence of actions that includes written notification to an offender of the decision to reject and terminate program placement, a brief explanation of the reason for the termination, instructions for the offender to request review

of the action of the community corrections board or community corrections program, and a method for the community corrections board or community corrections program to informally review the rejection and termination.

(2) "Community corrections board" means the governing body of any unit of local government, any combinations of such governing bodies for the purpose of this article, or any separate board created by any governing body or bodies pursuant to this article.

(3) "Community corrections program" means a community-based or community-oriented program that provides supervision of offenders pursuant to this article. Such program shall be operated by a unit of local government, the department, or any private individual, partnership, corporation, or association. Such program may provide residential or nonresidential services for offenders, monitoring of the activities of offenders, oversight of victim restitution and community service by offenders, programs and services to aid offenders in obtaining and holding regular employment, programs and services to aid offenders in enrolling in and maintaining academic courses, programs and services to aid offenders in participating in vocational training programs, programs and services to aid offenders in utilizing the resources of the community, meeting the personal and family needs of such offenders, programs and services to aid offenders in obtaining appropriate treatment for such offenders, programs and services to aid offenders in participating in whatever specialized programs exist within the community, day reporting programs, and such other services and programs as may be appropriate to aid in offender rehabilitation and public safety.

(3.5) "Community corrections program agent" or "agent" means a community parole officer who is an employee of the department and is a peace officer, as described in sections 16-2.5-101 and 16-2.5-136, C.R.S., with the powers and duties described in section 17-27-105.5.

(4) "Governing body" means the board or council of elected or appointed officials which is responsible for governing any unit of local government, such as a city council or a board of county commissioners.

(5) "Nongovernmental agency" means any private individual, partnership, corporation, or association.

(6) "Offender" means any person accused of or convicted of a felony or misdemeanor as defined by the laws of the state of Colorado.

(7) "Referring agency" means the agency which maintains legal jurisdiction over any offender referred to or placed in a community corrections program such as the sentencing court, the department of corrections, or the state board of parole.

(8) "Unit of local government" means any county, city and county, city, town, or service authority which may be established pursuant to section 17 of article XIV of the state constitution.

Source: **L. 93:** Entire article R&RE, p. 708, § 1, effective July 1. **L. 96:** (3) amended, p. 122, § 2, effective July 1. **L. 2000:** (3.5) added, p. 228, § 1, effective March 29. **L. 2003:** (3.5) amended, p. 1625, § 50, effective August 6. **L. 2008:** (3.5) amended, p. 658, § 10, effective April 25.

Editor's note: This section is similar to former § 17-27-102 as it existed prior to 1993.

ANNOTATION

This section does not exclude persons who have been convicted of two prior felonies from community correctional programs. *People ex rel. VanMeveren v. District Court*, 195 Colo. 34, 575 P.2d 4 (1978) (decided under repealed § 27-27-102).

Person convicted of felony menacing was a "nonviolent" offender since felony menacing is not a crime of violence as defined in § 16-

11-309. *People v. Patrick*, 683 P.2d 801 (Colo. App. 1983).

This section and § 17-27-103 entitle any person who is rejected after acceptance in a community corrections program to request an administrative hearing. However, the eight-year prison sentence imposed on a defendant without a previous administrative hearing would not be overturned where he failed to raise the

issue before the trial court and records in evidence showed sufficient grounds for defendant's termination from community corrections. *People v. Pauley*, 42 P.3d 57 (Colo. App. 2001).

Applied in *People v. Nix*, 45 Colo. App. 195, 610 P.2d 1088 (1980).

17-27-103. Community corrections boards - establishment - duties. (1) A community corrections board may be established by resolution or ordinance of a governing body, or a combination of governing bodies. Any community corrections board which is established may be advisory to the governing body or bodies which created such board or it may be functionally independent from the governing body or bodies. Pursuant to subsection (8) of this section, the governing body or bodies may delegate to the community corrections board the authority which such governing body or bodies have to approve or disapprove the establishment and operation of community corrections programs within the jurisdiction of such governing body or bodies. In addition, the governing body or bodies may delegate such other powers which the governing body or bodies possess to the community corrections board to accomplish the purposes of this article.

(2) A community corrections board shall have the authority to enter into contracts with the state of Colorado, receive grants from governmental and private sources, and receive court-authorized expense reimbursement related to community corrections programs. A community corrections board may designate a community corrections program or programs within the jurisdiction of such board to contract with the state of Colorado to provide services and supervision for offenders.

(3) A community corrections board may establish programs to be operated by a unit or units of local government, or an agency of state government, to accomplish the purposes of this article, or such board may contract with other units of local government, other community corrections boards, any agency of state government, or any community corrections program to provide supervision of and services for offenders.

(4) A community corrections board may establish and enforce standards for the operation of any community corrections program located within the physical boundaries of the jurisdiction of the governing body or bodies which created such board. The standards established by a community corrections board may exceed, but shall not conflict with, standards established for community corrections programs by the division of criminal justice of the department of public safety pursuant to section 17-27-108. The community corrections board shall, in coordination with state and local agencies, monitor community corrections programs within the jurisdiction of such board and oversee compliance with state and local standards. The community corrections board's oversight of the community corrections programs within the board's jurisdiction shall include the following:

(a) Making an assessment of the number of offenders who have escaped from custody as such term is described in section 17-27-106, which assessment shall be based on the reports prepared by the administrators of community corrections programs in accordance with section 17-27-104 (11);

(b) Determining compliance by community corrections programs with the recommendations made in audit reports prepared by the division of criminal justice in accordance with section 17-27-108.

(5) A community corrections board has the authority to accept or reject any offender referred for placement in a community corrections program under the jurisdiction of such board. The community corrections board shall provide, in writing, acceptance criteria and screening procedures to each referring agency.

(6) A community corrections board may establish conditions or guidelines for the conduct of offenders placed in any community corrections program operated within the physical boundaries of the jurisdiction of the governing body or bodies which created such board. Written copies of such conditions or guidelines shall be made available to offenders placed in community corrections programs under the jurisdiction of the community corrections board.

(7) A community corrections board has the authority to reject after acceptance the placement of any offender in a community corrections program within the jurisdiction of such board. If the referring agency does not provide an administrative review process

relating to such rejection after acceptance, the community corrections board shall provide an administrative review process for any offender who is rejected after acceptance by such board. The community corrections board shall provide written notification of the rejection after acceptance of any offender to the referring agency and the administrator of the community corrections program in which the offender is placed.

(8) A governing body shall approve or disapprove the establishment and operation of all community corrections programs within the jurisdiction of such governing body, but such authority may be delegated to the community corrections board created by such governing body.

(9) A community corrections board may serve in a planning and coordinating capacity by advising the governing body which created such board and consulting with officials of state criminal justice agencies to improve local community corrections services.

(10) A community corrections board, and each individual member of such board, shall be immune from any civil liability for the performance of the duties of such board or such individual member as specified in this article, if such person was acting in good faith within the scope of such person's respective capacity, makes a reasonable effort to obtain the facts of the matter as to which action was taken, and acts in the reasonable belief that the action taken by such person was warranted by the facts.

Source: L. 93: Entire article R&RE, p. 710, § 1, effective July 1. L. 95: (4) amended, p. 80, § 1, effective March 23.

ANNOTATION

Annotator's note. Since § 17-27-103 is similar to § 17-27-104 (3) as it existed prior to the 1993 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Corrections board has power to reject an offender initially accepted into one of its programs or facilities. A trial court is powerless to dismiss for lack of evidence the termination of an offender from a community corrections facility and to return the offender to such facility; the court's only option is to resentence the offender by adopting an alternative sentence. *People v. Akin*, 783 P.2d 267 (Colo. 1989).

A person's sentence to community corrections may be revoked before or after acceptance to a program for any reason or for no reason at all. *People v. Holt*, 874 P.2d 410 (Colo. App. 1994).

Under subsection (5), a community corrections sentence can be revoked for any reason or for no reason at all. *People v. Rodriguez*, 55 P.3d 173 (Colo. App. 2002).

The sentencing court, as the referring agency, may conduct the administrative review process if the community corrections

board or program has not done so. *Benz v. People*, 5 P.3d 311 (Colo. 2000).

This section and § 17-27-102 entitle any person who is rejected after acceptance in a community corrections program to an administrative hearing. However, the eight-year prison sentence imposed on a defendant without a previous administrative hearing would not be overturned where he failed to raise the issue before the trial court and records in evidence showed sufficient grounds for defendant's termination from community corrections. *People v. Pauley*, 42 P.3d 57 (Colo. App. 2001).

Upon termination from community corrections, an offender must be provided with: (1) Written or actual notice of rejection from community corrections and the reasons for rejection, and (2) an informal review of the facts underlying the rejection. *People v. Kitsmiller*, 74 P.3d 376 (Colo. App. 2002).

Informal review requires the trial court to either: (1) Review on the record the facts underlying the rejection, or (2) demonstrate a familiarity with those facts through documentation in the record regarding the rejection. *People v. Kitsmiller*, 74 P.3d 376 (Colo. App. 2002).

17-27-103.5. Statements relating to a transitional referral to community corrections. (1) Pursuant to the provisions of section 24-4.1-302.5 (1) (j.5), C.R.S., a victim shall have the right to provide a written victim impact statement and a separate oral statement to a community corrections board considering an offender's transitional referral to community corrections.

(2) (a) (I) A community corrections board shall allow, within the parameters set by the board, an offender who is under consideration for transitional placement in a community corrections program under the board's jurisdiction to provide a written statement to the

community corrections board concerning the offender's transition plan and community support and the appropriateness of placing the offender in a community corrections program.

(II) If an offender elects to submit a written statement to a community corrections board pursuant to subparagraph (I) of this paragraph (a), and the offender provides a written statement to the department pursuant to the procedures and time frame established by the department, the department shall include the statement with any referral to a community corrections board considering the offender's transitional referral to a community corrections program.

(b) A community corrections board may allow, within the parameters set by the board, an offender to designate a person other than the offender to submit a written statement or give an oral statement on the offender's behalf to a community corrections board considering the offender's transitional referral to a community corrections program.

(3) A community corrections board shall develop written policies and procedures consistent with the provisions of this section and section 24-4.1-302.5 (1) (j.5), C.R.S., that are available to the public concerning the parameters for written and oral statements by victims and the permissibility of and the parameters for a written or oral statement by a person designated by an offender.

(4) Nothing in this section shall be construed to require the department or a community corrections board to provide transportation or make arrangements for the appearance at a community corrections hearing of an offender or, if permitted by a community corrections board, the person designated by the offender pursuant to paragraph (b) of subsection (2) of this section to give an oral statement or to submit a written statement on the offender's behalf.

(5) The department shall not be required to provide notice to any person, other than a registered victim, of a community corrections board hearing relating to the offender.

Source: L. 2010: Entire section added, (SB 10-159), ch. 306, p. 1443, § 1, effective August 11.

17-27-104. Community corrections programs operated by units of local government, state agencies, or nongovernmental agencies. (1) Any unit of local government, or any state agency authorized by this article, may establish, maintain, and operate such community corrections programs as such unit or agency deems necessary to serve the needs of such unit of local government or state agency and offenders who are assigned to such programs by the department of corrections, placed in such programs by the state board of parole, or sentenced to such programs by the court.

(2) Pursuant to provisions of section 17-27-103, any nongovernmental agency may establish, maintain, and operate a community corrections program under a contract with the state of Colorado, a contract with a unit or units of local government, or a contract with other nongovernmental agencies for the purpose of providing services to offenders who are assigned to such programs by the department of corrections, placed in such programs by the state board of parole, or sentenced to such programs by the court.

(3) The administrators of any community corrections program established pursuant to this section shall have the authority to accept or reject any offender referred for placement in such program. Screening procedures shall be developed in cooperation with the community corrections board of the jurisdiction in which such community corrections program is located. Acceptance criteria and screening procedures shall be provided in writing by each community corrections program to each referring agency.

(4) (a) The administrators of each community corrections program established pursuant to this section shall establish conditions or guidelines for the conduct of offenders accepted and placed in such program. Such conditions or guidelines shall not conflict with any conditions or guidelines established pursuant to section 17-27-103 (6) by the community corrections board of the jurisdiction in which such community corrections program is located. Offenders accepted and placed in any community corrections program shall have access to written copies of such conditions or guidelines for the conduct of offenders upon placement in such program.

(b) One such condition shall be that an offender, upon being placed in a community corrections program, shall execute a limited power of attorney to the director, or the director's designee, of the community corrections program with which the offender is being placed. The limited power of attorney shall grant to the director or the director's designee the authority to dispose of moneys the offender has earned since being placed in the program and that have been left in accounts or on deposit with the community corrections program in the event that, after the offender is accepted by the community corrections program, the offender is rejected from such program due to escape. The moneys shall be disposed of for the following purposes and in the following order of priority:

(I) Payment of court-ordered restitution to the victim of the crime committed by the offender;

(II) Payment for the court-ordered support of the offender's dependents;

(III) Payment of fines, offender fees and surcharges, and other court-ordered financial obligations imposed as part of the offender's sentence; and

(IV) Any remaining funds shall be paid into the victims and witnesses assistance and law enforcement fund, established pursuant to section 24-4.2-103, C.R.S., in the judicial district in which the community corrections program is located.

(c) The director of the community corrections program, or the director's designee, shall maintain records of any disbursements of offenders' funds pursuant to this subsection (4).

(d) The limited power of attorney shall be valid until the offender's sentence to community corrections is discharged from community placement by the court.

(5) The administrators of each community corrections program established pursuant to this section shall have the authority to reject after acceptance and terminate the placement of any offender who violates conditions or guidelines established pursuant to subsection (4) of this section, or if any conditions of such offender's placement in the program are not satisfied. If the referring agency does not provide an administrative review process, the community corrections program shall provide an administrative review process for any offender who is rejected after acceptance. If the termination of placement of an offender is initiated by the community corrections program, the referring agency shall be notified immediately to arrange a transfer of custody for such offender. The community corrections program may be required by the referring agency to maintain temporary custody of the offender whose placement is being terminated for a reasonable period of time pending receipt of appropriate transfer orders from the referring agency unless the provisions of subsection (6) of this section apply.

(6) When the administrator of a community corrections program established pursuant to this section, or any other appropriate referring agency, has cause to believe that an offender placed in a community corrections program has violated any rule or condition of such offender's placement in such program, or cannot be safely housed in such program, the administrator or other appropriate authority shall notify the appropriate judicial or executive authority of the facts which are the basis of such administrator's belief. Such administrator may then execute a transfer order to any sheriff, undersheriff, deputy sheriff, police officer, or state patrol officer which authorizes such peace officer to transport the offender to the county jail in the county in which the community corrections program is located and the offender shall be confined in such jail pending a determination by the appropriate judicial or executive authority as to whether the offender should remain in community corrections or be removed therefrom. Such offender shall be confined without bond.

(7) The administrator of any community corrections program established pursuant to this section shall notify a referring agency immediately that an offender has been transferred to a county jail pursuant to subsection (6) of this section. Such notification shall contain the name of the offender and identify the rule or condition of placement violated, and describe such violation, or state the reason the offender cannot be safely housed in the community corrections program.

(8) Upon placement of an offender in a community corrections program, the administrator of the program shall notify local law enforcement agencies of the identity of each such offender.

(9) The administrator of any community corrections program shall document the number of days of residential and nonresidential time completed by each offender sentenced

directly to the community corrections program by the court and the time credits granted to such offender pursuant to section 18-1.3-301 (1) (i), C.R.S. If any such offender is rejected after acceptance by the community corrections board or the community corrections program, the program administrator shall provide a written summary of the residential days completed by such offender to the referring agency. If the offender is thereafter committed to the department of corrections, such summary shall be reported to the department of corrections to facilitate the calculation of any time credits pursuant to part 3 or part 4 of article 22.5 of this title.

(10) The administrator of any community corrections program shall enforce any order relating to the payment of restitution, court costs, fees, or community service which is ordered by the sentencing court. Such administrator shall establish a payment contract and schedule for each offender placed in the community corrections program.

(11) The administrator of each community corrections program shall report to the division of criminal justice and the community corrections board of the jurisdiction in which such program is located on the offenders who have escaped from custody as such term is described in section 17-27-106 (1). The division of criminal justice is authorized to prepare forms for these reports.

(12) The administrators of a community corrections program established pursuant to this section may implement a mental illness screening program to screen the persons accepted and placed in the community corrections program. If the administrators choose to implement a mental illness screening program, the administrators shall use the standardized screening instrument developed pursuant to section 16-11.9-102, C.R.S., and conduct the screening in accordance with procedures established pursuant to said section.

Source: **L. 93:** Entire article R&RE, p. 711, § 1, effective July 1. **L. 94:** (9) amended, p. 929, § 2, effective April 28. **L. 95:** (11) added, p. 81, § 2, effective March 23. **L. 96:** (4) amended, p. 132, § 1, effective July 1. **L. 2002:** (12) added, p. 574, § 2, effective May 24; (9) amended, p. 1508, § 168, effective October 1. **L. 2011:** (9) amended, (SB 11-254), ch. 274, p. 1237, § 2, effective June 2.

Editor's note: This section is similar to former §§ 17-27-103 and 17-27-104 as they existed prior to 1993.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (9), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 17-27-104 is similar to §§ 17-27-104, 17-27-106, 17-27-107, and 17-27-114 as they existed prior to the 1993 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

Section provides a statutory right to an "administrative review process" when an offender placed in a community corrections program is rejected after acceptance. *People v. Rogers*, 983 P.2d 121 (Colo. App. 1999), rev'd on other grounds, 9 P.3d 371 (Colo. 2000).

Section 17-27-103 authorizes the sentencing court, as the referring agency, to conduct the administrative review process if the community corrections board or program has not done so. *Benz v. People*, 5 P.3d 311 (Colo. 2000); *People v. Rogers*, 9 P.3d 371 (Colo. 2000).

Defendant's rights to due process were not violated where the administrative review requirements were satisfied. The defendant was

notified of the grounds for termination from the community corrections program and the trial court reviewed the information from the program. *People v. Benz*, 983 P.2d 117 (Colo. App. 1999), aff'd, 5 P.3d 311 (Colo. 2000).

Determination of whether offender shall remain in community corrections is a two-step process. First, the sentencing court determines whether a violation of a placement condition has occurred, and second, if the violation has occurred, whether the offender should remain in community corrections. *Wilson v. People*, 747 P.2d 638 (Colo. 1987).

While it is a better practice to continue the revocation hearing until after the trial on the new charge, there is no abuse of discretion by proceeding with the hearing before disposition of the criminal charge. *People v. Harrison*, 771 P.2d 23 (Colo. App. 1989), cert. granted, 785 P.2d 916 (Colo. 1989), cert. denied, 790 P.2d 843 (Colo. 1990).

Trial court is without jurisdiction to order

a defendant to make monthly restitution payments. Former § 17-27-107 (1), which relate to the requirements set forth in subsection (10) of this section, required that a defendant sentenced to the community corrections agree to the terms and conditions under a contract with the agency, and required that the contract conform with specified statutes concerning the establishment of and the manner and time of payment of restitution. The plain language of the former section required that the court establish the amount of restitution and, if a defendant is directly sentenced to community corrections, that community correction establish the terms and conditions of payment of restitution. *People v. Randolph*, 852 P.2d 1282 (Colo. App. 1992).

Under subsection (3), a community corrections sentence can be revoked for any reason or for no reason at all. *People v. Rodriguez*, 55 P.3d 173 (Colo. App. 2002).

Subsection (6) does not give rise to a private tort remedy. Although this article imposes duties on administrators of community corrections facilities, those duties are owed directly to the relevant judicial or executive authorities. Members of the general public are incidental beneficiaries of the statute, but are owed no actionable duty by its specific terms. *Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc.*, 942 P.2d 1301 (Colo. App. 1997), *aff'd*, 962 P.2d 963 (Colo. 1998).

Under subsection (9), at the time an offender is resentenced, the administrator of the community corrections program must provide to the sentencing court a written summary of the number of days the offender was a resident in that program. *People v. Lopez*, 961 P.2d 602 (Colo. App. 1998).

Applied in *People v. Nix*, 45 Colo. App 195, 610 P.2d 1088 (1980).

17-27-105. Authority to place offenders in community corrections programs. (Repealed)

Source: **L. 93:** Entire article R&RE, p. 713, § 1, effective July 1. **L. 94:** (1)(i) amended, p. 927, § 1, effective April 28; (3)(a) amended, p. 2595, § 2, effective June 3. **L. 95:** (2)(b) amended, p. 1276, § 13, effective June 5. **L. 96:** (1)(a) amended, p. 1690, § 22, effective January 1, 1997. **L. 97:** (2)(b) amended, p. 30, § 8, effective March 20. **L. 98:** (2)(b) amended, p. 318, § 2, effective July 1. **L. 99:** (1)(j) amended and (1)(k) added, p. 660, § 1, effective July 1. **L. 2000:** (3)(b) repealed, p. 230, § 3, effective March 29. **L. 2001:** (1)(k)(II) repealed, p. 527, § 1, effective May 22. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-301 in 2002.

Cross references: For the legislative declaration contained in the act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27-105.5. Community corrections program agents - duties - arrest powers. (1) For purposes of this section:

(a) "Director" means the director of the department's community corrections program and whose powers and duties include those of a community corrections program agent.

(b) "Offender" means an inmate assigned to residential and nonresidential community corrections programs as those programs are set forth in articles 27, 27.5, and 27.7 of this title and an offender who is in phase III of the youthful offender system as set forth in section 18-1.3-407, C.R.S.

(2) The executive director of the department of corrections shall designate staff of the department to maintain jurisdiction over all offenders placed in any community corrections program by order of the executive director or as a condition of parole. Such staff may include community corrections program agents and the director.

(3) Community corrections program agents are authorized to:

- (a) Supervise and habilitate offenders;
- (b) Investigate, detect, and prevent crime involving offenders;
- (c) Issue warrants for the arrest of offenders;
- (d) Arrest offenders;
- (e) Process reports or other official documents regarding offenders;
- (f) Coordinate with community corrections boards and community corrections programs;
- (g) Review offender supervision and treatment;

(h) Authorize offender transfers between residential and nonresidential phases of placement; and

(i) Carry out such other duties as the executive director directs.

(4) The director of community corrections or any community corrections program agent may arrest any offender when any offense under the laws of this state has been or is being committed by the offender in the presence of the director or the agent, the director or the agent has a warrant commanding that such offender be arrested, or the director or the agent has probable cause to believe:

(a) That a warrant for the offender's arrest has been issued in this state or another state for any criminal offense or for a violation of the department's administrative code of penal discipline, a supervision order, or other administrative order;

(b) That a crime has been committed and that the offender has committed such crime;

(c) That the offender has violated a condition of the administrative code of penal discipline;

(d) That the offender is leaving or is about to leave the state;

(e) That the offender will fail or refuse to appear at a hearing to answer charges for a violation of the department's code of penal discipline; or

(f) That the arrest of the offender is necessary to prevent physical harm to the offender or another person or to prevent the commission of a crime.

(5) If a community corrections program agent makes an arrest of an offender with or without a warrant, or the offender is otherwise arrested, the offender shall be held in a county jail or program pending action by the agent or the director of the community corrections program.

(6) A community corrections program agent shall seek out and arrest any fugitive from a correctional facility when called upon and assist other agencies in the apprehension of fugitives from jurisdictions throughout the state.

(7) Notwithstanding any other provision of this section, each agent, or the director acting as an agent, shall notify the local law enforcement agency when the agent is operating or intends to operate anywhere within the local law enforcement agency's jurisdiction and shall cooperate with such agency during the conduct of the investigation.

Source: L. 2000: Entire section added, p. 228, § 2, effective March 29. **L. 2002:** (1)(a) amended, p. 1508, § 169, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(a), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27-105.7. Offenders held in community corrections programs - medical benefits application assistance - county of residence - repeal. (Repealed)

Source: L. 2002: Entire section added, p. 807, § 2, effective July 1. **L. 2003:** (1)(a) and (4)(c) amended, p. 416, § 5, effective March 5. **L. 2005:** (1)(a) and (4)(c) amended, p. 4, § 8, effective January 1.

Editor's note: Subsection (5) provided for the repeal of this section, effective July 1, 2005. (See L. 2002, p. 807.)

17-27-106. Escape from custody from a community corrections program.
(1) (a) If an offender fails to remain within the extended limits of such offender's confinement or placement or fails to return within the time prescribed to any community corrections program to which such offender was assigned or transferred or if any offender who participates in a program established under the provisions of this article leaves such offender's place of employment or, having been ordered by the executive director of the department of corrections or the chief probation officer of the judicial district to return to the community corrections program, neglects or fails to do so, such offender shall be deemed to have escaped from custody and shall, upon conviction thereof, be punished as

provided in section 18-8-208, C.R.S., and all reductions in sentence authorized by part 2 of article 22.5 of this title shall be forfeited.

(b) (I) In addition to the forfeiture of all reductions in sentence authorized by part 2 of article 22.5 of this title, any person convicted of escape from custody from a community correction program in violation of paragraph (a) of this subsection (1) shall also forfeit all reductions in sentence authorized by section 18-1.3-301 (1) (i), C.R.S.

(II) Repealed.

(2) The division of criminal justice is hereby authorized to provide notice to appropriate law enforcement agencies and the sentencing court, if applicable, that there is probable cause to believe that an offender has escaped from custody.

Source: L. 93: Entire article R&RE, p. 716, § 1, effective July 1. L. 95: Entire section amended, p. 81, § 3, effective March 23. L. 99: (1) amended, p. 661, § 2, effective July 1. L. 2001: (1)(b)(II) repealed, p. 527, § 2, effective May 22. L. 2002: (1)(b)(I) amended, p. 1508, § 170, effective October 1.

Editor's note: (1) This section is similar to former § 17-27-108 as it existed prior to 1993.

(2) Subsection (1) was amended in House Bill 93-1190. Those amendments were superseded by the repeal and reenactment of the entire article in House Bill 93-1233. (See L. 93, p. 54.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(b)(I), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 17-27-106 is similar to § 17-27-108 as it existed prior to the 1993 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

Section applies to work release facilities.

This section covers both traditional penitentiary type institutions operated by the state department of corrections and less traditional correctional facilities such as work release facilities. *People v. Lucero*, 654 P.2d 835 (Colo. 1982).

The failure to return to a work release facility upon the expiration of a 10-hour pass is punishable as escape under § 18-8-208. *People v. Lucero*, 654 P.2d 835 (Colo. 1982).

Leaving a community corrections facility without authorization constitutes escape under § 18-8-208 because offender is still in custody and subject to the authority of the court. *People v. Brown*, 695 P.2d 776 (Colo. App. 1984).

Person who absconds from a non-residential community corrections placement com-

mits the crime of escape in violation of this section and § 18-8-208. By its plain language, the section applies to all types of community corrections placements, including non-residential community corrections programs. *People v. Forester*, 1 P.3d 758 (Colo. App. 2000).

A parolee may be convicted of escape even if there is a legal defect in the process of confinement. Such defects are to be challenged through appropriate legal means rather than through unauthorized departure from a custodial facility. *People v. Lanzieri*, 25 P.3d 1170 (Colo. 2001).

Delegating supervisory power to probation department and community corrections facility is not an unlawful delegation of the court's sentencing authority as the offender is still in custody and subject to authority of the court. *People v. Brown*, 695 P.2d 776 (Colo. App. 1984).

17-27-107. Administrative procedure act not to apply. The provisions of this article shall not be subject to the "State Administrative Procedure Act", article 4 of title 24, C.R.S.

Source: L. 93: Entire article R&RE, p. 717, § 1, effective July 1.

Editor's note: This section is similar to former § 17-27-112 as it existed in 1993.

17-27-108. Division of criminal justice of the department of public safety - duties - community corrections contracts. (1) The division of criminal justice of the department of public safety is authorized to administer and execute all contracts with units of local government, community corrections boards, or nongovernmental agencies for the provision of community corrections programs and services.

(2) (a) The division of criminal justice is authorized to establish standards for community corrections programs operated by units of local government or nongovernmental agencies. Such standards shall prescribe minimum levels of offender supervision and services, health and safety conditions of facilities, and other measures to ensure quality services. The standards shall be promulgated or revised after consultation with representatives of referring agencies, community corrections boards, and administrators of community corrections programs.

(b) (I) The division of criminal justice shall audit community corrections programs to determine levels of compliance with standards promulgated pursuant to paragraph (a) of this subsection (2). Such audits shall include an evaluation of compliance with the reporting requirements pursuant to section 17-27-104 (11).

(II) (A) Before July 1, 2003, such audits shall occur at least once in each three-year period, unless waived by the executive director of the department of public safety.

(B) On and after July 1, 2003, the division of criminal justice shall implement a schedule for auditing community corrections programs that is based on risk factors such that community corrections programs with low risk factors shall be audited less frequently than community corrections programs with higher risk factors. In no event shall such audits occur less frequently than at least once in each five-year period. Prior to July 1, 2003, the division of criminal justice shall create classifications of community corrections programs that are based on risk factors as those factors are established by standards of the division of criminal justice.

(III) Written reports of such audits shall be provided to the administrator of the program which is audited, the local community corrections board, and referring agencies. Such written reports shall include findings of noncompliance with contractual obligations, including the standards promulgated pursuant to paragraph (a) of this subsection (2), and shall identify those material findings that, if not corrected within a reasonable time, will result in a recommendation to terminate the contract to operate the program. As used in this subparagraph (III), "material findings" includes those findings related to:

- (A) Public safety, including but not limited to offender monitoring and rehabilitation;
- (B) Health and life safety pertaining to but not limited to staff and offenders;
- (C) Efficiency and effectiveness of programs' internal control systems;
- (D) Statutory compliance; and
- (E) Fiduciary duties and responsibilities.

(3) The division of criminal justice shall allocate appropriations for community corrections to local community corrections boards and community corrections programs in a manner which considers the distribution of offender populations and supports program availability proportionate to such distribution and projected need.

(4) Prior to April 1, 2003, and on and after July 1, 2006, the division of criminal justice may authorize up to five percent of community corrections appropriations to be spent by units of local government and community corrections boards in support of administrative costs incurred pursuant to this article. On and after April 1, 2003, through June 30, 2006, the division of criminal justice may authorize up to four percent of community corrections appropriations to be spent by units of local government and community corrections boards in support of administrative costs incurred pursuant to this article. Such moneys for administrative costs may be applied to support functions authorized in section 17-27-103, to supplement administrative expenses of community corrections programs which have contracted with or are under the jurisdiction of a unit of local government, or to support other direct or indirect costs of involvement in community corrections.

(5) The division of criminal justice is authorized to transfer up to ten percent of annual appropriations among or between line items for community corrections program services. Advance notice of such transfers shall be provided to the general assembly, the governor, the executive director of the department of corrections, and the chief justice of the supreme court.

(6) The division of criminal justice shall provide technical assistance to community corrections boards, community corrections programs, and referring agencies.

Source: **L. 93:** Entire article R&RE, p. 717, § 1, effective July 1. **L. 95:** (2) amended, p. 81, § 4, effective March 23. **L. 2002:** (2)(b)(II) amended, p. 103, § 1, effective March 26. **L. 2003:** (4) amended, p. 429, § 1, effective April 1.

Editor's note: This section is similar to former §§ 17-27-106 and 17-27-115 as they existed prior to 1993.

ARTICLE 27.1

Nongovernmental Facilities - Notice Requirements

17-27.1-101. Nongovernmental facilities
for offenders - registration -
notifications - penalties.

17-27.1-101. Nongovernmental facilities for offenders - registration - notifications - penalties. (1) (a) The general assembly finds that the transfer into Colorado of persons that have been convicted of or have agreed to a deferred judgment, deferred sentence, or deferred prosecution for a crime in another state who are required to participate in private treatment programs in this state is a matter of statewide and local concern.

(b) The general assembly further finds that although Colorado is a signatory to the "Interstate Compact for Adult Offender Supervision" established pursuant to part 28 of article 60 of title 24, C.R.S., more information concerning out-of-state offenders is necessary for the protection of the citizens of Colorado, and it may be necessary to further regulate programs that provide treatment and services to such persons.

(2) As used in this section, unless the context otherwise requires:

(a) (Deleted by amendment, L. 2011, (HB 11-1009), ch. 5, p. 9, § 1, effective March 1, 2011.)

(b) "Chief law enforcement official" means:

(I) If a facility of a private treatment program is located within a municipality, the chief of police of such municipality;

(II) If a facility of a private treatment program is located within a city and county, the manager of safety of such city and county or other person with such duties; and

(III) If a facility of a private treatment program is not located within a municipality or city and county, the county sheriff of the county where the facility is located.

(b.5) "Compact administrator" means the person appointed pursuant to the provisions of part 28 of article 60 of title 24, C.R.S., to be responsible for the administration of the interstate compact.

(c) "Interstate compact" means the "Interstate Compact for Adult Offender Supervision", part 28 of article 60 of title 24, C.R.S.

(d) "Private treatment program" means any residential or nonresidential program that provides services, treatment, rehabilitation, education, or criminal history-related treatment for supervised or unsupervised persons but does not include a private contract prison facility, a prison facility operated by a political subdivision of the state, a facility providing treatment for persons with mental illness or developmental disabilities, or a community corrections program established pursuant to article 27 of this title.

(e) "Sending state" shall have the same meaning as in the interstate compact.

(f) "Supervised person" means a person eighteen years of age or older who is adjudicated for or convicted of or has agreed to a deferred judgment, deferred sentence, or deferred prosecution for a crime in another state but is or will be under the supervision of a probation officer or community parole officer in Colorado pursuant to the interstate compact.

(g) "Supervising person" means the person in this state who is in charge of the overall administration of a private treatment program.

(h) "Unsupervised person" means a person eighteen years of age or older who, although not required to be under the jurisdiction of a probation officer or community parole

officer in Colorado, is adjudicated for or convicted of or has agreed to a deferred judgment, deferred sentence, or deferred prosecution for a crime outside of the state of Colorado and is directed to attend a private treatment program in Colorado by any court, department of corrections, state board of parole, probation department, parole division, adult diversion program, or any other similar entity or program in a state other than Colorado.

(3) (a) In order to ensure uniformity and consistency, the sending state shall be in compliance with the provisions of the interstate compact, or the compact administrator shall reject the placement of the supervised person pursuant to subsection (6) of this section.

(b) A sending state shall not permit travel of a supervised person who is a nonresident of this state to the state of Colorado without written notification from the compact administrator of acceptance of the supervised person into a private treatment program.

(c) Any request for placement of a nonresident of this state in a private treatment program from a sending state shall contain written justification as to why treatment in the state of Colorado is preferable or more beneficial than treatment in the sending state.

(4) No private treatment program in Colorado shall admit or accept a supervised or unsupervised person into the program unless the supervised or unsupervised person has signed a waiver that authorizes the release of confidential information.

(5) No private treatment program in Colorado shall admit or accept a supervised or unsupervised person into the program unless that program:

(a) Is registered with the compact administrator, and, if the person is a supervised person, the private treatment program is:

(I) Approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S., if the program provides alcohol or drug abuse treatment;

(II) Certified or approved by the sex offender management board, established in section 16-11.7-103, C.R.S., if the program provides sex offender treatment;

(III) Certified or approved by a domestic violence treatment board, established pursuant to part 8 of article 6 of title 18, C.R.S., if the program provides treatment for persons who were convicted of an act of domestic violence as defined in section 18-6-800.3, C.R.S., or of an act for which the underlying factual basis included an act of domestic violence; or

(IV) Licensed or certified by the division of adult parole in the department of corrections, the department of regulatory agencies, the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, the state board of nursing, or the Colorado medical board if the program provides treatment that requires such certification or licensure;

(b) If the person is unsupervised, has notified the compact administrator of the following information for each such unsupervised person:

(I) Name, date and place of birth, and social security number;

(II) Complete criminal history of the person as shown by a national criminal information check;

(III) Name and address of any court, department, board of parole, probation department, parole division, adult diversion program, or other similar entity or program having jurisdiction over the person; and

(IV) Terms and conditions under which the person is required or directed to attend the program; and

(c) (I) If the person is supervised and is a resident of the state of Colorado, has confirmed that the sending state has provided all information concerning the supervised person required by the interstate compact to the compact administrator; and

(II) If the person is supervised and is a nonresident of the state of Colorado, has confirmed that the compact administrator has accepted the person for placement in the private treatment program.

(6) (a) Pursuant to criteria established by the interstate compact, the compact administrator shall either accept or reject the placement of the supervised person in the private treatment program.

(b) For all unsupervised persons and for supervised persons that the compact administrator accepts for placement in a private treatment program, the compact administrator

shall immediately notify the appropriate chief law enforcement official and the director of the Colorado bureau of investigation.

(c) (Deleted by amendment, L. 2000, p. 232, § 1, effective July 1, 2000.)

(7) By written policy, a local law enforcement agency shall require a supervised or unsupervised person to physically appear at the local law enforcement agency for fingerprinting and photographing.

(8) (a) The private treatment program shall immediately notify the chief law enforcement official where the program is located and, if supervised, the person's probation or community parole officer whenever any person directed to appear in a facility operated by the program fails to appear or is absent without authority.

(b) The private treatment program shall notify the chief law enforcement official where the program is located and, if supervised, the person's probation or community parole officer at least seven days prior to the release of any person placed in such program.

(9) (a) Any private treatment program or supervising person that violates this section commits a misdemeanor. Upon a first conviction, the private treatment program or supervising person shall be punished by a fine of five hundred dollars. Upon a second conviction, a private treatment program or supervising person shall be punished by a fine of one thousand dollars. Upon a third or subsequent conviction, a private treatment program or supervising person shall be punished by a fine of five thousand dollars.

(b) Each failure to comply with a provision of this section by a private treatment program or supervising person relating to a different person constitutes a separate violation.

(10) (a) In addition to any other duties, the compact administrator may promulgate rules governing unsupervised persons including but not limited to their identification.

(b) (Deleted by amendment, L. 2000, p. 232, § 1, effective July 1, 2000.)

(11) Nothing in this section shall be deemed to prohibit any unit of local government, as defined in section 17-27-102 (8), from enacting ordinances and regulations concerning the licensing of private treatment programs located within their jurisdiction and providing for the punishment for the operation of unlicensed private treatment programs.

(12) (Deleted by amendment, L. 2000, p. 232, § 1, effective July 1, 2000.)

Source: L. 86: Entire article added, p. 765, § 1, effective July 1; entire section amended, p. 763, § 5, effective July 1. L. 93: (1) amended, p. 718, § 4, effective July 1. L. 95: (1) amended, p. 1098, § 18, effective May 31. L. 98: (2) amended, p. 820, § 20, effective August 5. L. 99: Entire section R&RE, p. 1172, § 1, effective June 2. L. 2000: (2)(d), (2)(f), (2)(g), (2)(h), (3), (5)(a), (5)(c), (6)(c), (10)(b), and (12) amended, p. 232, § 1, effective July 1. L. 2002: (5)(a)(I) amended, p. 666, § 12, effective May 28. L. 2006: (2)(d) amended, p. 1398, § 47, effective August 7. L. 2008: (2)(f), (2)(h), and (8) amended, p. 658, § 11, effective April 25. L. 2010: (5)(a)(I) amended, (SB 10-175), ch. 188, p. 784, § 26, effective April 29; (5)(a)(IV) amended, (HB 10-1260), ch. 403, p. 1987, § 76, effective July 1. L. 2011: (1)(b), (2)(a), (2)(c), (3)(a), (3)(b), IP(5)(a), IP(5)(b), (5)(c), (6)(a), (6)(b), and (10)(a) amended and (2)(b.5) added, (HB 11-1009), ch. 5, p. 9, § 1, effective March 1; (5)(a)(IV) amended, (HB 11-1303), ch. 264, p. 1156, § 30, effective August 10.

ARTICLE 27.5

Intensive Supervision Programs

Editor's note: (1) This article was repealed in 1986 and was subsequently recreated and reenacted in 1986, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1986, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 17-27.5-106 as it existed prior to 1986 provided for the repeal of this article, effective February 15, 1986. (see L. 1984, p. 534.)

17-27.5-101.	Authority to establish intensive supervision programs for parolees and community corrections offenders.	17-27.5-103.	grams.
		17-27.5-104.	Confinement in county jail.
		17-27.5-105.	Escape from custody.
17-27.5-102.	Minimum standards and criteria for the operation of intensive supervision pro-	17-27.5-106.	Duty to report. (Repealed)
			Authority of state board of parole to utilize intensive supervision programs.

17-27.5-101. Authority to establish intensive supervision programs for parolees and community corrections offenders. (1) (a) The department shall have the authority to establish and directly operate an intensive supervision program for any offender not having more than one hundred eighty days remaining until such offender's parole eligibility date and for any offender who successfully completes a regimented inmate discipline program pursuant to article 27.7 of this title.

(b) The department shall also be authorized to refer for placement to an intensive supervision program operated under the jurisdiction of units of local government under contract with and approved by the department:

(I) Any offender not having more than one hundred eighty days remaining until such offender's parole eligibility date and any offender who successfully completes a regimented inmate discipline program pursuant to article 27.7 of this title;

(II) Any offender who has met program objectives of a residential community corrections program and who has not more than one hundred eighty days remaining until such offender's parole eligibility date.

(c) The department shall have the authority to contract with community corrections programs and other providers for intensive supervision services subject to the approval of the affected unit of local government. In contracting for such programs, the department shall obtain the advice and consent of affected units of local government and shall consider the needs of the communities and offenders for successful reintegration into communities and the appropriate allocation of resources for effective correction of offenders.

(2) The department may place in an intensive supervision program authorized pursuant to subsection (1) of this section any offender who has been referred to a community corrections program pursuant to section 18-1.3-301 (2) (b), C.R.S., and approved for placement in the program pursuant to section 17-27-103 (5) or section 17-27-104 (3) if the placement will not increase the overall vacancy rate as of June 30, 1995, for the community corrections program.

Source: **L. 86:** Entire article RC&RE, p. 764, § 6, effective May 28. **L. 89:** Entire section R&RE, p. 883, § 1, effective July 1. **L. 91:** Entire section amended, p. 342, § 2, effective June 1. **L. 93:** Entire section amended, p. 44, § 1, effective July 1. **L. 95:** Entire section amended, p. 1276, § 14, effective June 5. **L. 96:** (1) amended, p. 842, § 1, effective May 23. **L. 98:** (1)(a) and (1)(b)(I) amended, p. 319, § 3, effective July 1. **L. 2002:** (2) amended, p. 1508, § 171, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27.5-102. Minimum standards and criteria for the operation of intensive supervision programs. (1) The department shall have the power to establish and enforce standards and criteria for administration of intensive supervision programs.

(2) The standards and criteria shall require that offenders in the program receive at least the minimum services consistent with public safety, including highly restricted activities, weekly face-to-face contact between the offender and the program staff, daily telephone contact between the offender and the program staff, a monitored curfew at the offender's place of residence at least once a month, employment visitation and monitoring at least twice each month, home visitation, drug and alcohol screening, treatment referrals and monitoring, assuring the payment of restitution, and community service in a manner that shall minimize any risk to the public.

(3) An offender as defined in section 17-27-102 (6) is eligible for an intensive supervision program only upon the recommendation of the department if such offender has not more than one hundred eighty days remaining until such offender's parole eligibility date or upon a transfer from a community corrections residential program under article 27 of this title if such offender has not more than one hundred eighty days remaining until such offender's parole eligibility date and if the local community corrections board finds that the correctional needs of such offender will be better served by such supervision. The local community corrections board has the authority to accept, reject, or reject after acceptance the participation of any offender in each and every intensive supervision program under this article. In selecting offenders for transfer to an intensive supervision program, the department and the local community corrections board shall consider, but shall not be limited to, the following factors:

- (a) The frequency, severity, and recency of disciplinary actions against the offender;
 - (b) The offender's escape history, if any;
 - (c) Whether the offender has functioned at a high level of responsibility in a community corrections program, if applicable;
 - (d) Whether the offender will have adequate means of support and suitable housing in the community; and
 - (e) The nature of the offense for which the offender has been incarcerated.
- (4) At least two weeks prior to placement of a nonparoled offender in an intensive supervision program, the executive director shall notify or cause to be notified the respective prosecuting attorney and the law enforcement agency of the affected unit of local government; and he shall have previously notified the affected corrections board.

Source: **L. 89:** Entire section added, p. 884, § 2, effective July 1. **L. 91:** IP(3) amended, p. 342, § 3, effective June 1. **L. 93:** IP(3) amended, p. 44, § 2, effective July 1; (3) amended, p. 719, § 5, effective July 1. **L. 96:** (1) amended, p. 843, § 2, effective May 23.

Editor's note: Amendments to subsection (3) in House Bill 93-1073 and House Bill 93-1233 were harmonized.

ANNOTATION

The department of corrections has the power to establish and enforce standards and criteria for intensive supervision programs that

include alcohol and drug screening. *People v. Whidden*, 56 P.3d 1201 (Colo. App. 2002), *aff'd* on other grounds, 78 P.3d 1092 (Colo. 2003).

17-27.5-103. Confinement in county jail. Where the community corrections administrator of an intensive supervision program has cause to believe that an offender placed in the program has violated any rule or condition of his or her placement or cannot be safely supervised in that program, the administrator shall certify to the supervising community parole officer the facts that are the basis for his or her belief and execute a transfer order to the sheriff of the county in which the program is being operated, who shall confine the offender in the county jail pending a determination by the supervising community parole officer as to whether or not the offender shall remain in the program.

Source: **L. 89:** Entire section added, p. 884, § 2, effective July 1. **L. 2008:** Entire section amended, p. 659, § 12, effective April 25.

17-27.5-104. Escape from custody. If an offender fails to remain within the extended limits on his confinement as established under the intensive supervision program, or, having been ordered by the parole board, the executive director, or the administrator of the program to return to the correctional institution, neglects or fails to do so, he shall be deemed to have escaped from custody and shall, upon conviction thereof, be punished as provided in section 18-8-208, C.R.S.

Source: **L. 89:** Entire section added, p. 885, § 2, effective July 1.

ANNOTATION

This section does not violate the separation of powers and nondelegation doctrines. The statute provides sufficient statutory standards and safeguards. *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004).

This section does not violate the clear expression requirement. The subject of this section is clearly expressed in the title and failure to remain within the extended limits of confinement is essential to the accomplishment of the title. *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004).

The phrase "extended limits on his confinement" is not unconstitutionally vague. *People v. Perea*, 74 P.3d 326 (Colo. App. 2002).

The phrase "extended limits on his confinement" refers to geographic and time limits placed on the offender beyond those placed by incarceration in a correctional facility. *People v. Perea*, 74 P.3d 326 (Colo. App. 2002).

Because defendant was specifically advised of his residential curfew and he acknowledged advisement of the contents of this residential curfew directive in writing, the directive constituted an extended limitation of defendant's confinement. *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001); *People v. Perea*, 74 P.3d 326 (Colo. App. 2002).

For purposes of escape, there is no conflict between the home detention statute and the intensive supervision program (ISP) statute. In an escape case, the court must make a factual

determination whether a defendant was placed in home detention or ISP based on the different elements of home detention and ISP. Home detention and ISP are mutually exclusive, therefore once the court determines whether the defendant was in home detention or on ISP there is no conflict. *People v. Smith*, 77 P.3d 751 (Colo. App. 2003); *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004).

The court did not err in instructing the jury under this section concerning custody or confinement where, taken together, the jury instructions, the information, and the parole mitimus signed by defendant indicate that he had sufficient notice that he could be liable for escape from custody. *People v. Taylor*, 74 P.3d 396 (Colo. App. 2002).

The court did not err when it instructed the jury on ISP escape without including the "extended limits" language of this section. *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004).

This section applies to all parolees and not just those on discretionary parole. Colorado cases do not distinguish between mandatory and discretionary parolees. *People v. Taylor*, 74 P.3d 396 (Colo. App. 2002).

Assignment of defendant to a therapeutic community providing drug and alcohol treatment, as a place of residence during intensive supervision parole, constitutes confinement. *People v. Taylor*, 74 P.3d 396 (Colo. App. 2002).

17-27.5-105. Duty to report. (Repealed)

Source: L. 89: Entire section added, p. 885, § 2, effective July 1. L. 96: Entire section amended, p. 843, § 3, effective May 23. L. 98: Entire section repealed, p. 729, § 14, effective May 18.

17-27.5-106. Authority of state board of parole to utilize intensive supervision programs. An offender who is granted parole or whose parole is modified may be required by the state board of parole, as a condition of such parole, to participate in an intensive supervision program as defined by this article; except that the offender shall not be subject to the authority of the local community corrections board under section 17-27.5-102 (3).

Source: L. 89: Entire section added, p. 885, § 2, effective July 1.

ANNOTATION

Section does not violate equal protection since statutory scheme is reasonably related to the legitimate governmental interest of supervising at-risk mandatory parolees. Parole board is given discretionary power, based on an

analysis of factors in § 17-27.5-102 (3), to determine who among the mandatory parolees shall participate in an intensive supervision program; factors provide guidance to parole board and statutory scheme recognizes that not all

mandatory parolees should be placed in an intensive supervision program. *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001).

mandatory and discretionary parole. *People v. Garcia*, 64 P.3d 857 (Colo. App. 2002); *People v. Perea*, 74 P.3d 326 (Colo. App. 2002).

The term "granted parole" includes both

ARTICLE 27.7

Regimented Inmate Discipline and Treatment Program

17-27.7-101.	Legislative declaration.	17-27.7-104.	Acceptance and completion of the program by an offender - reconsideration of sentence.
17-27.7-102.	Regimented inmate training programs - authorization - standards for operation.		
17-27.7-103.	Regimented inmate training program - eligibility of offenders.	17-27.7-105.	Evaluation of regimented inmate training program. (Repealed)

17-27.7-101. Legislative declaration. It is the intent of the general assembly that the program established pursuant to this article shall benefit the state by reducing prison overcrowding and shall benefit persons who have been convicted of offenses and placed in the custody of the department by promoting such person's personal development and self-discipline.

Source: L. 90: Entire article added, p. 963, § 1, effective June 7.

17-27.7-102. Regimented inmate training programs - authorization - standards for operation. (1) The department may develop and implement a regimented inmate training program. Any regimented inmate training program shall include, but shall not be limited to, the following aspects:

- (a) A military-styled intensive physical training and discipline program;
- (b) An educational and vocational assessment and training program emphasizing job seeking skills;
- (c) A health education program; and
- (d) A drug and alcohol education and treatment program which shall be structured as an integral part of the entire regimented inmate training program.

(2) The department may establish and enforce standards for the regimented inmate training program and each of the aspects thereof described in subsection (1) of this section.

(3) The regimented inmate training program shall be structured in such a manner that any offender who is assigned to the program by the executive director shall remain in the program for a period of ninety days, unless removed from the program and reassigned by the executive director for unsatisfactory performance. The executive director may authorize an extension of the program for any offender not to exceed thirty days when such extension will allow the offender to be considered for probation under rule 35b of the Colorado rules of criminal procedure.

Source: L. 90: Entire article added, p. 963, § 1, effective June 7.

17-27.7-103. Regimented inmate training program - eligibility of offenders. (1) The executive director may assign an inmate to a regimented inmate training program pursuant to section 17-40-102 (2). The executive director shall assign to a regimented inmate training program only those inmates who are nonviolent offenders thirty years of age or younger who are not serving a sentence, and have not served a previous sentence, in a correctional facility for an unlawful sexual behavior offense described in section 16-22-102 (9), C.R.S., a crime of violence described in section 18-1.3-406, C.R.S., an assault offense described in part 2 of article 3 of title 18, C.R.S., or a child abuse offense described in part 4 of article 6 of title 18, C.R.S., or who are not presently serving a sentence for a nonviolent

offense that was reduced from an unlawful sexual behavior offense described in section 16-22-102 (9), C.R.S., a crime of violence described in section 18-1.3-406, C.R.S., an assault offense described in part 2 of article 3 of title 18, C.R.S., or a child abuse offense described in part 4 of article 6 of title 18, C.R.S., as a result of a plea agreement or who are not aliens subject to a removal order. Any offender assigned to the program shall be free of any physical or mental defect which could jeopardize his or her ability to complete the program. The department may eliminate any offender from the program upon a determination by the department that a physical or mental defect will prevent full participation in the program by such offender. The department is absolved of liability for participation in the program.

(2) The executive director shall assign no more than one hundred offenders to the regimented inmate training program at any one time. No more than a maximum of four hundred offenders shall be assigned to the program in any one year. However, the executive director may assign offenders to the program to replace those offenders who fail to complete the program.

Source: **L. 90:** Entire article added, p. 964, § 1, effective June 7. **L. 92:** (1) amended, p. 254, § 1, effective March 16. **L. 2002:** (1) amended, p. 1508, § 172, effective October 1. **L. 2004:** (1) amended, p. 187, § 1, effective April 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Immunity provision is constitutional. Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

Specific immunity provision in subsection (1) of this section prevails over general waiver of immunity in § 24-10-106 (1)(b), which is both earlier and less specific. Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

Immunity also extends to the state and to employees of the department, since the legislative rationale for immunizing the department also supports an interpretation that would also

encompass these parties. Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

Although the executive director and not the sentencing court has the authority to assign a defendant to the regimented inmate training program (RITP), a trial court does not exceed its authority by making a recommendation to the department or simply by including on the mittimus a finding as to the defendant's eligibility for RITP. People v. Young, 894 P.2d 19 (Colo. App. 1994).

17-27.7-104. Acceptance and completion of the program by an offender - reconsideration of sentence. (1) The department, upon acceptance of an offender into the program, shall immediately notify the court of such acceptance.

(2) (a) If an offender successfully completes a regimented inmate training program, such offender, within sixty days of termination or completion of the program, shall automatically be referred to the sentencing court so that the offender may make a motion for reduction of sentence pursuant to rule 35b of the Colorado rules of criminal procedure.

(b) The department shall submit a report to the court concerning such offender's performance in the program. Such report may recommend that the offender be placed in a specialized probation or community corrections program. The court may not summarily deny the offender's motion without a complete consideration of all pertinent information provided by the offender, the offender's attorney, and the district attorney. The court may issue an order modifying the offender's sentence and placing the offender on probation or in a community corrections program.

(b.5) Notwithstanding the fact that the offender's case is on appeal, the sentencing court shall retain jurisdiction to consider and rule on motions for reconsideration filed pursuant to this subsection (2).

(c) (I) Any motion filed pursuant to paragraph (a) of this subsection (2) shall be given priority for consideration by the sentencing court. An offender who successfully completes the regimented inmate training program within twenty-eight months prior to such offender's

parole eligibility date shall be eligible for placement in a community corrections program operated pursuant to article 27 of this title.

(II) An offender placed in a community corrections program pursuant to subparagraph (I) of this paragraph (c) may be required to participate in a structured, transitional discipline program in such community corrections program for six months or until completion of the offender's sentence, whichever occurs first.

(III) Upon satisfactory completion of the community corrections program, an offender whose sentence has not been completely served may be required to participate in the intensive supervision program pursuant to section 17-27.5-102.

Source: **L. 90:** Entire article added, p. 964, § 1, effective June 7. **L. 95:** Entire section amended, p. 184, § 1, effective April 7. **L. 98:** (2)(c)(I) amended, p. 318, § 1, effective July 1. **L. 2007:** (2)(b.5) added, p. 557, § 3, effective April 16.

ANNOTATION

Defendant is required to file motion for reduction of sentence within 120 days after the date of successful completion of regimented inmate training program. This is because Crim. P. 35(b) provides a 120-day time limitation for the filing of a motion for reduction of sentence, and this section requires that a motion to reduce sentence must be brought pursuant to Crim. P. 35(b). *People v. Campbell*, 75 P.3d 1151 (Colo. App. 2003).

This section expressly incorporates the provisions of Crim. P. 35(b) as the framework for considering sentence reduction for any participant in the regimented inmate training program. Crim. P. 35(b) provides that the trial court "may, after considering the motion and supporting documents, if any, deny the motion without a hearing." Therefore, the plain language of the rule belies the claim that a hearing is required on a Crim. P. 35(b) motion. *People v. Morales-Uresti*, 934 P.2d 856 (Colo. App. 1996) (decided under law in effect prior to 1995 amendment).

Trial court gave complete consideration to defendant's Crim. P. 35(b) motion even though the record did not contain any information provided by defendant, his attorney, or the district attorney after defendant's acceptance into the regimented inmate training program. The court should not be precluded from ruling on defendant's motion simply because none of those entitled to provide additional information to the court chose to do so. *People v. Morales-Uresti*, 934 P.2d 856 (Colo. App. 1996) (decided under law in effect prior to 1995 amendment).

Resentencing of a successful regimented inmate training program participant is governed by the same statutory limits applicable to Crim. P. 35(b) resentencing. A Crim. P. 35(b) motion, and therefore a motion for reduc-

tion of sentence under this section, gives the court discretion to resentence the defendant to a lesser term within the statutory limits, but not to lower a mandatory minimum sentence imposed by law for a specific crime. *People v. Smith*, 971 P.2d 1056 (Colo. 1999).

Persons convicted of child abuse resulting in death are eligible for sentence modification upon successful completion of the regimented inmate training program, but the sentencing court's discretion is limited by the relevant mandatory sentencing limits. *People v. Smith*, 971 P.2d 1056 (Colo. 1999).

An offender who completes the boot camp program must be referred to the sentencing court after completing the program to reconsider sentencing, however, that does not mean the judge who imposed the sentence must consider the request to reduce the defendant's sentence. The request must merely be considered by a district court judge with the power to rule on such a motion. *People v. Banuelos-Landa*, 109 P.3d 1039 (Colo. App. 2004).

This section does not allow a court to reduce a sentence to less than the statutory minimum sentence for the crime committed. Thus the sentence of a person serving a mandatory minimum sentence for child abuse resulting in death could not be reduced pursuant to this section. *People v. Smith*, 971 P.2d 1056 (Colo. 1999).

District attorney not permitted to withdraw from plea agreement when sentence reduced pursuant to this section. Because the plea agreement did not foreclose the future possibility of a reduction in sentence, the court-ordered sentence reduction could not amount to a substantial and material breach of the agreement between the parties. *Keller v. People*, 29 P.3d 290 (Colo. 2000).

17-27.7-105. Evaluation of regimented inmate training program. (Repealed)

Source: **L. 90:** Entire article added, p. 964, § 1, effective June 7. **L. 96:** Entire section repealed, p. 1267, § 186, effective August 7.

Cross references: For the legislative declaration contained in the 1996 act repealing this section, see section 1 of chapter 237, Session Laws of Colorado 1996.

ARTICLE 27.8

Home Detention Programs

Law reviews: For article “1990 Criminal Law Legislative Update”, see 19 Colo. Law. 2049 (1990).

17-27.8-101.	Definitions.		operated by the judicial de-
17-27.8-102.	Authority of sentencing courts to utilize home detention programs. (Repealed)	17-27.8-105.	partment. Home detention program -
17-27.8-103.	Home detention program - contracted by department of public safety.		operated by the department of corrections for offenders who are paroled.
17-27.8-104.	Home detention program -	17-27.8-106.	Escape from custody.

- 17-27.8-101. Definitions.** As used in this article, unless the context otherwise requires:
- (1) “Home detention” means an alternative correctional sentence or term of probation supervision wherein a defendant convicted of any felony, other than a class 1 or violent felony, is allowed to serve his sentence or term of probation, or a portion thereof, within his home or other approved residence. Such sentence or term of probation shall require the offender to remain within his approved residence at all times except for approved employment, court-ordered activities, and medical needs.
- (2) “Offender” means any person who has been convicted of or who has received a deferred sentence for a felony, other than a class 1 or violent felony.

Source: **L. 90:** Entire article added, p. 967, § 1, effective July 1.

17-27.8-102. Authority of sentencing courts to utilize home detention programs. (Repealed)

Source: **L. 90:** Entire article added, p. 967, § 1, effective July 1. **L. 94:** (1)(d) added, p. 2041, § 23, effective July 1. **L. 95:** (1)(d) amended, p. 569, § 8, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor’s note: In 2002, this section was relocated to § 18-1.3-105.

Cross references: For the legislative declaration contained in the act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27.8-103. Home detention program - contracted by department of public safety.

- (1) The division of criminal justice of the department of public safety is hereby authorized to contract with private entities to develop, administer, and operate home detention programs which may be utilized by any sentencing judge pursuant to section 18-1.3-105 (1), C.R.S.
- (2) Any home detention program developed pursuant to subsection (1) of this section shall include each of the following components:
- (a) Supervision of the offender by personal monitoring by a home detention officer employed by the entity operating the home detention program;

(b) Supervision of the offender through monitoring by electronic devices which are capable of detecting and reporting the offender's presence or absence at such offender's approved residence, place of employment, or other court-approved activity; and

(c) Access for the offender to attend any court-ordered counseling, substance abuse treatment, vocational rehabilitation or training, or education.

Source: L. 90: Entire article added, p. 968, § 1, effective July 1. **L. 2002:** (1) amended, p. 1509, § 173, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27.8-104. Home detention program - operated by the judicial department.

(1) The judicial department is hereby authorized to develop, administer, and operate a home detention program which may be utilized by any sentencing judge pursuant to section 18-1.3-105 (1), C.R.S., or to contract with the division of criminal justice of the department of public safety for the utilization of home detention programs contracted for by that division.

(2) Any home detention program developed pursuant to subsection (1) of this section shall include each of the following components:

(a) Supervision of the offender by personal monitoring by a probation officer employed by the judicial department, or a home detention officer employed by a private entity operating a home detention program;

(b) Supervision of the offender through monitoring by electronic devices which are capable of detecting and reporting the offender's presence or absence at such offender's approved residence, place of employment, or other court-approved activity; and

(c) Access for the offender to attend any court-ordered counseling, substance abuse treatment, vocational rehabilitation or training, or education.

Source: L. 90: Entire article added, p. 969, § 1, effective July 1. **L. 93:** (1) amended, p. 1776, § 37, effective June 6. **L. 2002:** (1) amended, p. 1509, § 174, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27.8-105. Home detention program - operated by the department of corrections for offenders who are paroled. The department of corrections is hereby authorized to develop, administer, and operate a home detention program or to contract with the division of criminal justice of the department of public safety pursuant to section 17-27.8-103 for a home detention program which may be utilized by the state board of parole for an offender as a condition of parole or modified parole.

Source: L. 90: Entire article added, p. 969, § 1, effective July 1.

17-27.8-106. Escape from custody. If an offender fails to remain within the extended limits of a home detention program as ordered by a sentencing judge, he shall be deemed to have escaped from custody and shall, upon conviction thereof, be punished as provided in section 18-8-208, C.R.S. An offender on parole who fails to remain within the limits of a home detention program shall be deemed to be in violation of parole pursuant to section 17-2-103 (1) (e).

Source: L. 90: Entire article added, p. 969, § 1, effective July 1.

ANNOTATION

For purposes of escape, there is no conflict between the home detention statute and the intensive supervision program (ISP) statute. In an escape case, the court must make a factual determination whether a defendant was placed in home detention or ISP based on the different elements of home detention and ISP. Home de-

tention and ISP are mutually exclusive, therefore once the court determines whether the defendant was in home detention or on ISP there is no conflict. *People v. Smith*, 77 P.3d 751 (Colo. App. 2003); *People v. Sa’ra*, 117 P.3d 51 (Colo. App. 2004).

ARTICLE 27.9

**Specialized Restitution and
Community Service Programs**

17-27.9-101.	Legislative declaration. (Repealed)	17-27.9-104.	service program. (Repealed) Contracts with providers - amounts - loans.
17-27.9-102.	Specialized restitution and community service programs - contract with treatment providers - division of criminal justice.	17-27.9-105.	Evaluation of specialized restitution and community service programs.
17-27.9-103.	Offenders who may be sentenced to the specialized restitution and community	17-27.9-106.	Executive director of department - authority to accept funds - cash fund created.

17-27.9-101. Legislative declaration. (Repealed)

Source: **L. 92:** Entire article added, p. 262, § 2, effective July 1. **L. 93:** Entire section amended, p. 1172, § 1, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor’s note: In 2002, this section was relocated to § 18-1.3-302.

Cross references: For the legislative declaration contained in the act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27.9-102. Specialized restitution and community service programs - contract with treatment providers - division of criminal justice. (1) The director of the division of criminal justice of the department of public safety may, pursuant to section 17-27-108, contract with one or more public or private providers or community corrections boards, as defined in section 17-27-102 (2), who operate restitution and community service facilities, to provide specialized restitution and community service programs that meet the requirements of this section. As used in this article, such providers shall be referred to as “providers”. The provision of any substance abuse treatment shall be by an entity approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, pursuant to article 80 of title 27, C.R.S.

(2) Any contract entered into for a specialized restitution and community service program pursuant to this section shall meet the following criteria:

- (a) The goals of the program shall include, but shall not be limited to:
 - (I) A level of supervision for each offender appropriate to ensure public safety;
 - (II) The reimbursement to the victim and to society for the damage caused by the offender’s crime through restitution and community service performed by the offender;
 - (III) The reduction of any substance abuse by any offender placed in the program, with the ultimate goal of abstinence from the use of drugs or alcohol by each such offender;
 - (IV) The reduction of recidivism by offenders who have completed the program;
 - (V) The development of employment skills and the attainment of meaningful employment by any offender placed in the program;

(VI) The use of peer support and accountability for any offender placed in the program, and the continuation of services and ongoing participation in the program to maintain the offender's progress;

(VII) The enhancement of the educational skills of any offender placed in the program, including the enhancement of self-care and self-sufficiency capabilities.

(b) (I) The program shall consist of three phases as follows:

(A) The first phase shall be intensive residential treatment;

(B) The second phase shall consist of residential treatment in conjunction with gradual reentry into the community;

(C) The third phase shall consist of nonresidential treatment.

(II) The first and second phases may continue for up to nine months, and the third phase may continue for up to twelve months or longer if restitution and community service have not been completed. The degree of supervision during the third phase shall be designed to decrease in intensity as the offender responds to the program and becomes substantially reestablished in the community.

(III) Victim restitution and community service shall be a primary emphasis in the second and third phases.

Source: L. 92: Entire article added, p. 263, § 2, effective July 1. L. 93: (1) amended, p. 720, § 6, effective July 1. L. 94: (1) amended, p. 2653, § 131, effective July 1. L. 2010: (1) amended, (SB 10-175), ch. 188, p. 784, § 27, effective April 29.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1), see section 1 of chapter 345, Session Laws of Colorado 1994.

17-27.9-103. Offenders who may be sentenced to the specialized restitution and community service program. (Repealed)

Source: L. 92: Entire article added, p. 264, § 2, effective July 1. L. 93: (1) amended and (4) added, p. 1173, § 2, effective July 1; (2)(b) amended, p. 720, § 7, effective July 1. L. 2002: Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: In 2002, this section was relocated to § 18-1.3-302.

Cross references: For the legislative declaration contained in the act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

17-27.9-104. Contracts with providers - amounts - loans. (1) Any provider who contracts with the executive director of the department of public safety to provide specialized restitution and community service programs pursuant to section 17-27.9-102 shall be reimbursed on a per diem rate for residential supervision and a monthly rate for nonresidential supervision which rate shall be the final rate proposed by the provider during the competitive bidding process.

(2) Any offender who has the ability to pay all or any part of the cost of the offender's treatment and room and board pursuant to this article through assets or through any employment during the second or third phase of the program shall be ordered to make such payments to the provider. Any moneys collected by the provider pursuant to this subsection (2) shall be used to offset payments made to the provider pursuant to subsection (1) of this section. The amount of any such payments shall be set by the probation department after considering the offender's expenses for family support, victim restitution, and other living expenses.

(3) Any provider who contracts with the executive director of the department of public safety to provide specialized restitution and community service programs pursuant to section 17-27.9-102 may use the payments which such provider receives pursuant to this section to match federal or private grants in order to fund the provision of additional

specialized restitution and community service programs, so long as matching such grants does not cause a reduction in the available bed space and so long as matching such grants does not bind the general assembly to fund such programs in future years.

Source: **L. 92:** Entire article added, p. 265, § 2, effective July 1. **L. 93:** (1) amended and (3) added, p. 1174, § 3, effective July 1.

17-27.9-105. Evaluation of specialized restitution and community service programs. (1) The director of the division of criminal justice shall conduct annual evaluations of each specialized restitution and community service program under which services are provided pursuant to this article. Evaluations shall include the consideration of the physical facility for each program, the financial operation of each program, and the effectiveness of each program in meeting the goals and requirements set forth in this article. The division of criminal justice shall develop specific evaluation criteria for each specialized restitution and community service program throughout the state after consultation with the local corrections board in the community where such program is located. Any provider that fails to meet the evaluation criteria within a reasonable time shall be subject to the termination of any contract entered into with such provider pursuant to this article.

(2) Repealed.

Source: **L. 92:** Entire article added, p. 265, § 2, effective July 1. **L. 96:** (2) repealed, p. 1267, § 185, effective August 7.

Cross references: For the legislative declaration contained in the 1996 act repealing subsection (2), see section 1 of chapter 237, Session Laws of Colorado 1996.

17-27.9-106. Executive director of department - authority to accept funds - cash fund created. The executive director of the department of public safety is hereby authorized to accept any grants or donations from any private or public source for the purpose of administering specialized restitution and community service programs pursuant to this article. Any such grants or donations shall be transmitted to the state treasurer, who shall credit the same to the specialized restitution and community service cash fund, which fund is hereby created. The moneys in the fund shall be subject to annual appropriation by the general assembly and, in accordance with section 24-36-114, C.R.S., all interest derived from the deposit and investment of this fund shall be credited to the general fund.

Source: **L. 92:** Entire article added, p. 266, § 2, effective July 1.

ARTICLE 28

Restitution to Victims of Crime

Editor's note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in article 28 of title 27.

(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

Cross references: For administrative proceedings to compensate victims of crime, see article 4.1 of title 24; for restitution to victims as a condition of probation, see § 18-1.3-205; for restitution as a condition of parole, see § 17-2-201 (5) (c); for restitution to victims of theft, see § 18-4-401; for restitution by delinquent children under the "Colorado Children's Code", see § 19-2-918; for charges for bad checks received as a restitution payment ordered as a condition of a plea agreement, see § 16-7-304; for charges for bad checks received as a restitution payment ordered as a condition of a deferred prosecution, see § 16-7-404.

17-28-101.	Legislative declaration.	17-28-103.	Victim-offender conferences -
17-28-102.	Establishment of restitution programs.		pilot program.

17-28-101. Legislative declaration. (1) The general assembly finds and declares that:

- (a) The number of victims of crime increases daily;
- (b) These victims suffer undue hardship by virtue of physical, mental, and emotional injury or loss of property;
- (c) Persons found guilty of causing such suffering are under a moral and legal obligation to make adequate restitution and restoration to those injured by their conduct;
- (d) Restitution and restoration provided by criminal offenders to their victims may be instruments of rehabilitation for offenders and may contribute to the healing and improved emotional well-being of their victims.

(2) The purpose of this article is to encourage the establishment of programs to provide for restitution to and restoration of victims of crime by offenders who are sentenced, or who have been released on parole, or who are being held in local correctional and detention facilities. It is the intent of the general assembly that restitution be utilized wherever feasible to restore losses to the victims of crime and to aid the offender in reintegration as a productive member of society. It is also the purpose of this article to promote establishment of victim-offender conferences in the institutions under the control of the department of corrections, using restorative justice practices as defined in section 18-1-901 (3) (o.5), C.R.S.

Source: L. 77: Entire title R&RE, p. 947, § 10, effective August 1. L. 2011: Entire section amended, (HB 11-1032), ch. 296, p. 1400, § 2, effective August 10.

Editor's note: This section is similar to former § 27-28-101 as it existed prior to 1977.

17-28-102. Establishment of restitution programs. The department shall, as a means of assisting in the rehabilitation of persons committed to its care, including persons placed in community correctional facilities or programs, establish programs and procedures whereby such persons may contribute toward restitution of those persons injured as a consequence of their criminal acts.

Source: L. 77: Entire title R&RE, p. 947, § 10, effective August 1. L. 87: Entire section amended, p. 1826, § 6, effective August 27. L. 96: Entire section amended, p. 1266, § 184, effective August 7.

Editor's note: This section is similar to former § 27-28-102 as it existed prior to 1977.

Cross references: For the legislative declaration contained in the 1996 act amending this section, see section 1 of chapter 237, Session Laws of Colorado 1996.

17-28-103. Victim-offender conferences - pilot program. The department is authorized to establish a pilot program, when funds become available, in its correctional facilities to facilitate victim-initiated victim-offender conferences whereby a victim of a crime may request a facilitated conference with the offender who committed the crime, if the offender is in the custody of the department. After such a pilot program is established, the department may establish policies and procedures for the victim-offender conferences using volunteers to facilitate the conferences. The volunteers shall complete the department's volunteer and facility-specific training programs and complete high-risk victim-offender training and victim advocacy training. The department shall not compensate or reimburse a volunteer or victim for any expenses nor otherwise incur any additional expenses to establish or operate the victim-offender conferences pilot program. If a pilot program is available, and subsequent to the victim's or the victim representative's request, the department shall arrange such a conference only after determining that the conference would be safe and only if the

offender agrees to participate. The purposes of the conference shall be to enable the victim to meet the offender, to obtain answers to questions only the offender can answer, to assist the victim in healing from the impact of the crime, and to promote a sense of remorse and acceptance of responsibility by the offender that may contribute to his or her rehabilitation.

Source: L. 2011: Entire section added, (HB 11-1032), ch. 296, p. 1401, § 3, effective August 10.

ARTICLE 29
Physical Labor by Inmates

Cross references: For other provisions concerning work by inmates, see §17-20-117 and article 24 of this title.

17-29-101.	Legislative declaration.	17-29-105.	Minimum security off-
17-29-102.	Definitions.		grounds work programs -
17-29-103.	Executive director to establish		authorized.
	work program.		
17-29-104.	Offenders in work program.		
	(Repealed)		

17-29-101. Legislative declaration. The general assembly hereby finds and declares that the people of this state would benefit from a program to reclaim and maintain the land and resources of public entities within this state; that the executive director has custody over inmates, both male and female, who could be utilized as a labor force in such a program; that such a program would reinforce the rehabilitation of such inmates, provide work skills, and instill a work ethic in the inmates, thereby facilitating their readjustment to society; and that work assignments involving physical labor will assist the executive director and the wardens in the management of correctional facilities under their supervision. To these ends, it is the purpose of this article to create within the department physical labor work programs, including an intensive labor work program for all inmates sentenced to the department, including repeat offenders and parole violators as well as those inmates who demonstrate behavior inconsistent with the rules of the department or any of its facilities, which utilize the physical labor of inmates. The executive director or the executive director’s designee may appoint facility wardens, responsible for the administration of correctional facilities, to perform the duties and functions set forth in this article.

Source: L. 81: Entire article added, p. 965, § 1, effective June 10. L. 97: Entire section amended, p. 28, § 5, effective March 20. L. 2000: Entire section amended, p. 848, § 46, effective May 24.

17-29-102. Definitions. As used in this article, unless the context otherwise requires:

- (1) “Able-bodied offender” has the same meaning as set forth in section 17-24-103 (1).
- (2) “Work program” means a work program established pursuant to the provisions of this article.

Source: L. 81: Entire article added, p. 965, § 1, effective June 10.

17-29-103. Executive director to establish work program. (1) The executive director may establish an intensive labor work program at all facilities, utilizing the physical labor of able-bodied offenders, which will be directed toward the reclamation and maintenance of land and resources, including but not limited to those of any federal, state, or local governmental agency or nonprofit agency within this state, and which will be administered by the various wardens responsible for the administration of any correctional facility. Such intensive labor work program shall be operated on an incentive basis so that

an offender assigned to the intensive labor work program who demonstrates that he or she is willing to modify his or her behavioral patterns, to cooperate in his or her rehabilitation, and to learn both a work ethic and a job skill becomes eligible for reassignment from the intensive labor work program.

(2) Immediately after the evaluation and diagnosis required by section 16-11-308 (2), C.R.S., and initial placement at a correctional facility, every able-bodied offender may, by departmental classification action, be assigned to and shall participate in the intensive labor work program for a period of not less than thirty days; except that the executive director or the wardens responsible for the administration of correctional facilities may waive or delay an offender's initial assignment to the intensive labor work program for the good of the department. Offenders assigned to the intensive labor work program will be compensated at a rate set in accordance with the regulations of the department concerning offender pay, including but not limited to provisions concerning deductions and reimbursement for care claims.

(3) The executive director is specifically authorized to assign such other able-bodied offenders whose behavior is inconsistent with the rules established by the executive director or the executive director's designee to the intensive labor work program for such periods of time as may best serve the offenders and assist the executive director in the management of correctional facilities under the supervision of the executive director. Eligibility for reassignment from the intensive labor work program to such educational or vocational work programs as are consistent with the diagnosis and evaluation conducted pursuant to article 40 of this title will be determined by departmental classification action after reviewing the offender's willingness to modify behavioral patterns, to commit to cooperating in rehabilitation, and to learn both a work ethic and a job skill. Offenders assigned to the intensive labor work program pursuant to this section will also be compensated at a rate set in accordance with the regulations concerning offender pay promulgated by the department.

(4) The executive director shall establish rules to implement this article.

Source: L. 81: Entire article added, p. 966, § 1, effective June 10. L. 97: Entire section amended, p. 28, § 6, effective March 20. L. 2000: (1) and (2) amended, p. 848, § 47, effective May 24.

17-29-104. Offenders in work program. (Repealed)

Source: L. 81: Entire article added, p. 966, § 1, effective June 10. L. 95: Entire section repealed, p. 876, § 10, effective July 1.

17-29-105. Minimum security off-grounds work programs - authorized. (1) The executive director may establish an off-grounds work program for any appropriate minimum and minimum-restrictive inmates. The purpose of the program is to provide employment opportunities for such inmates, to reinforce the rehabilitation of such inmates, and to provide inmates with the necessary skills and appropriate work ethics in reentering the work force and their communities. Under the program, inmates may be assigned to appropriate work assignments requested by any federal, state, or local governmental agency or nonprofit agency. Appropriate work assignments shall be determined by the executive director. Requests from agencies and agency agreements with the department shall comply with criteria established by the executive director pursuant to section 17-20-115; except that such criteria may include but is not limited to the following requirements:

(a) That a requesting agency outline in detail any work to be performed by inmates, the period of time for completing the project, and the respective responsibilities of the requesting agency and the department of corrections in connection with the project agreement;

(b) That a requesting agency provide any necessary materials, equipment, and transportation or defray operational costs of state vehicles;

(c) That appropriate security be provided at all times. In connection with this requirement, agencies may contract with the department of corrections for the department to provide such security.

(d) That a requesting agency ensure that any person who supervises an inmate in connection with a work project be trained by department of corrections personnel to supervise correctional inmates. Such training may be provided by department of corrections personnel.

(e) That the number of inmates supervised by one person not exceed ten;

(f) That a requesting agency comply with any reporting requirements established by the executive director in connection with an off-grounds work project and the inmates participating in such project;

(g) That an inmate receive security clearance to leave a correctional facility by the classification officer or committee and receive approval from the executive director;

(h) That inmates be compensated in accordance with the provisions of this title and with the Colorado department of corrections inmate pay regulation, including, but not limited to, provisions with respect to deductions and reimbursement for care claims.

(2) No project shall be undertaken or agreement made for any project that results in any personal benefit or profit for a private individual as opposed to the public.

(3) The executive director may appoint one or more designees to perform the duties and functions set forth in this section.

Source: L. 95: Entire section added, p. 876, § 11, effective July 1. L. 2000: IP(1) amended, p. 849, § 48, effective May 24.

ARTICLE 30

Interdepartmental Cooperation Concerning Offenders

17-30-101. Interdepartmental cooperation concerning offenders. (Repealed)

17-30-101. Interdepartmental cooperation concerning offenders. (Repealed)

Source: L. 90: Entire article added, p. 978, § 1, effective May 8. L. 95: (1) repealed, p. 1098, § 19, effective May 31. L. 99: (2) repealed, p. 623, § 19, effective August 4.

ARTICLE 30.5

Interdepartmental Agreements to Consolidate Parole and Probation Offices

17-30.5-101. (Repealed)

Source: L. 2000: Entire article repealed, p. 849, § 49, effective May 24.

Editor's note: This article was added in 1991. For amendments to this article prior to its repeal in 2000, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

ARTICLE 31

Volunteerism in the Juvenile and Adult Criminal Justice System

17-31-101. Legislative declaration.
17-31-102. Definitions.
17-31-103. Volunteers - rehabilitation and

17-31-104. transition - programs.
Right to visit offenders.

17-31-101. Legislative declaration. The general assembly hereby finds it necessary to provide for and encourage the implementation of programs within the state's correctional facilities, the probation division of the judicial department, the parole division within the department of corrections, the division of youth corrections within the department of human services, and the department of public safety that enable volunteers to effectively assist with the rehabilitation and transition of adult and juvenile offenders. The general assembly further finds that the maximum use of volunteers should be encouraged to complement the regular staffs of such adult and juvenile corrections, parole, and probation divisions and that volunteers should be encouraged to participate in existing programs for adult and juvenile offenders in those divisions. The general assembly finds that such volunteers should be allowed, where practical and within the safety and security requirements of the applicable institution or program, to meet with and freely communicate with offenders to assist with the rehabilitation and transition of such offenders, in order to establish support groups and systems outside of the correctional facility.

Source: **L. 90:** Entire article added, p. 980, § 1, effective May 14. **L. 94:** Entire section amended, p. 2653, § 132, effective July 1. **L. 2008:** Entire section amended, p. 1104, § 6, effective July 1.

Cross references: For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

17-31-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Approved volunteer organization" means an organization which has screened and trained volunteers for working with adult and juvenile offenders in correctional facilities and in parole and probation programs of the judicial department, the department of corrections, the department of human services, and the department of public safety prior to January 1, 1990, or pursuant to guidelines for training volunteers established by either the executive director of the department of corrections, the executive director of the department of human services, the executive director of the department of public safety, or the chief justice of the supreme court. Such guidelines shall address the issues of liability, supervision, support, and training of volunteers.

(2) "Division" means the division or department directing or administering any public or private correctional institution or detention facility in which offenders are housed or treated, any probation program within each judicial district, or any juvenile or adult parole program, including but not limited to, the judicial department, the department of public safety and the division of criminal justice therein, the department of corrections and the division of adult parole therein, and the department of human services and the division of youth corrections therein.

(3) "Institution" means any of the following:

- (a) A correctional facility, as that term is defined in section 17-1-102 (1.7);
- (b) A community corrections program, as that term is defined in section 17-27-102 (3);
- (c) A halfway house, as that term is defined in section 19-1-103 (62), C.R.S.;
- (d) A diagnostic and evaluation center, as that term is defined in section 19-1-103 (41), C.R.S.;

(e) A receiving center, as that term is defined in section 19-1-103 (90), C.R.S.;

(f) A diagnostic center, as that term is defined in section 17-40-101 (1.5);

(g) Any jail operated by a county or a city and county;

(h) A minimum security facility, as that term is defined in section 17-25-101 (2).

(4) "Offender" means any person who has been convicted of or who has received a deferred sentence for a felony or misdemeanor who is under the authority of an agency.

(5) "Volunteer" means any person who has completed the training from an approved volunteer organization and gives his services without any express or implied promise of remuneration.

Source: **L. 90:** Entire article added, p. 980, § 1, effective May 14. **L. 93:** (3)(b) amended, p. 720, § 8, effective July 1. **L. 94:** (1) and (2) amended, p. 2653, § 133,

effective July 1. **L. 96:** (3)(c) to (3)(e) amended, p. 1691, § 23, effective January 1, 1997. **L. 2000:** (2) amended, p. 858, § 69, effective May 24. **L. 2008:** (2) amended, p. 1104, § 7, effective July 1.

Cross references: For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994.

17-31-103. Volunteers - rehabilitation and transition - programs. (1) Each division shall facilitate, where practicable, the use of volunteers to assist and participate in the development and implementation of programs for the rehabilitation and transition of and growth of support groups and systems for adult and juvenile offenders in the following institutions and programs:

- (a) Any correctional facility or county or city and county jail;
- (b) Any community correctional facility or program operated pursuant to article 27 of this title;
- (c) The adult parole program of the division of adult parole within the department;
- (d) The juvenile parole program of the division of youth corrections within the department of human services;
- (e) Any intensive supervision program operated by the department or operated by a local government under contract with the department pursuant to section 17-27.5-101;
- (f) Any work release or education release program pursuant to section 18-1.3-207, C.R.S.;
- (g) Any intensive supervision probation program, established by the judicial department pursuant to section 18-1.3-208, C.R.S.;
- (h) Any adjunct probation services program pursuant to section 16-11-214, C.R.S.;
- (i) The juvenile diversion program established and administered by the division of criminal justice of the department of public safety.
- (j) (Deleted by amendment, L. 92, p. 2174, § 25, effective June 2, 1992.)
- (2) Each division may implement programs in addition to those set forth in subsection (1) of this section which utilize volunteers to assist in such division with such division's parole, probation, or other offender rehabilitation functions.

Source: **L. 90:** Entire article added, p. 981, § 1, effective May 14. **L. 92:** (1)(j) amended, p. 2174, § 25, effective June 2. **L. 94:** (1)(d) amended, p. 2654, § 134, effective July 1. **L. 96:** (1)(e) amended, p. 843, § 4, effective May 23. **L. 2000:** (1)(c) amended, pp. 849, 858, §§ 50, 70, effective May 24. **L. 2002:** (1)(f) and (1)(g) amended, p. 1509, § 175, effective October 1. **L. 2008:** (1)(d) amended, p. 1104, § 8, effective July 1.

Editor's note: Amendments to subsection (1)(c) by sections 50 and 70 of House Bill 00-1133 were harmonized.

Cross references: For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsections (1)(f) and (1)(g), see section 1 of chapter 318, Session Laws of Colorado 2002.

17-31-104. Right to visit offenders. (1) A volunteer who has completed minimum training from an approved volunteer organization may visit any offender or offenders to whom such volunteer has been assigned at any institution and in any program utilizing volunteers as set forth in section 17-31-103, subject to reasonable times and for purposes within such guidelines as may be prescribed by the division of adult parole within the department, if such volunteer presents no security risk to such institution or program and has received basic training in volunteer services. Nothing in this section shall restrict the right of a warden of any facility or program from denying access to a facility or program to a volunteer seeking to visit any offender or offenders.

(2) The rights set forth and recognized under subsection (1) of this section are subject to the right of any offender to refuse such visitation.

Source: L. 90: Entire article added, p. 981, § 1, effective May 14. **L. 94:** (1) amended, p. 604, § 11, effective July 1. **L. 2000:** (1) amended, pp. 849, 858, §§ 51, 71, effective May 24.

Editor's note: Amendments to subsection (1) by sections 51 and 71 of House Bill 00-1133 were harmonized.

ARTICLE 32

Correctional Education Program

17-32-101.	Short title.		and objectives - performance objectives - evaluation - transfers of custody - reports.
17-32-102.	Legislative declaration.		
17-32-103.	Definitions.		
17-32-104.	Division of correctional education - advisory board to the division. (Repealed)	17-32-106.	Powers and duties of the program.
17-32-105.	Development of correctional education program - goals	17-32-107.	Correctional education program fund.

17-32-101. Short title. This article shall be known and may be cited as the "Correctional Education Program Act of 1990".

Source: L. 90: Entire article added, p. 971, § 1, effective July 1.

17-32-102. Legislative declaration. (1) The general assembly hereby finds and declares that illiteracy is a problem in today's society and a particular problem among persons in correctional facilities.

(2) The general assembly further finds and declares that:

(a) Illiteracy and cognitive and vocational deficiencies among persons in the custody of the department contribute to their inability to successfully reintegrate into society upon their release from custody and the likelihood of their return to criminal activity; and

(b) Research demonstrates a clear relationship between employment of such persons and a reduction in their recidivism.

(3) It is therefore the intent of the general assembly in enacting this article to:

(a) Develop and implement a comprehensive competency-based educational and vocational program to combat illiteracy and develop marketable employment skills among persons in correctional facilities so they can become productive members of society when they are reintegrated into society; and

(b) Ensure that state funding is provided to educational and vocational programs that meet performance objectives, provide market-relevant training, and are proven to increase the likelihood that persons who are released from a correctional facility will successfully reintegrate into society.

Source: L. 90: Entire article added, p. 971, § 1, effective July 1. **L. 2000:** Entire section amended, p. 850, § 52, effective May 24. **L. 2010:** Entire section amended, (HB 10-1112), ch. 57, p. 205, § 1, effective August 11.

17-32-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Correctional education program" means the comprehensive competency-based educational and vocational program for persons in the custody of the department developed and implemented pursuant to the provisions of this article in order to ensure that each such person reaches maximum proficiency and readiness for reintegration into society.

(2) and (3) Repealed.

Source: L. 90: Entire article added, p. 971, § 1, effective July 1. **L. 2000:** (2) and (3) repealed, p. 850, § 53, effective May 24. **L. 2010:** (1) amended, (HB 10-1112), ch. 57, p. 206, § 2, effective August 11.

17-32-104. Division of correctional education - advisory board to the division. (Repealed)

Source: **L. 90:** Entire article added, p. 972, § 1, effective July 1. **L. 94:** (2)(e) repealed, p. 630, § 3, effective April 14. **L. 2000:** Entire section repealed, p. 850, § 54, effective May 24.

17-32-105. Development of correctional education program - goals and objectives - performance objectives - evaluation - transfers of custody - reports. (1) On and after July 1, 1990, the correctional education program shall have responsibility for the provision of educational services to persons in correctional facilities under the control of the department and for the development and implementation of a comprehensive competency-based educational and vocational program, which program shall conform to the goals and objectives outlined in this subsection (1). The correctional education program may be implemented in phases with the goals and objectives implemented in all facilities in the order specified in this subsection (1); except that the goal and objective stated in paragraph (a) of this subsection (1) shall be implemented in all correctional facilities no later than July 1, 1991, and the entire program shall be completely implemented in all correctional facilities no later than July 1, 1992. The program shall continue to operate instructional services currently offered in correctional facilities until such services are incorporated in or replaced by instructional services offered under the correctional education program. The correctional education program shall encompass the following goals and objectives:

(a) First, to ensure that every inmate in a correctional facility shall receive appropriate academic services mandated by federal or state statutes, regulations, or orders;

(b) Second, to ensure that every person in a correctional facility who has an expectation of release from custody within five years and lacks basic and functional literacy skills receive adult basic education instruction in accordance with the provisions of subsection (3) of this section;

(c) Third, to provide every person in a correctional facility who has an expectation of release from custody within five years with the opportunity to achieve functional literacy, specifically the ability to read and write the English language and the ability to perform routine mathematical functions prior to his or her release;

(d) Fourth, to provide every person in a correctional facility who has an expectation of release from custody within five years and who has demonstrated the intellectual capacity with the opportunity to obtain the equivalent of a high school education. A person who wishes to receive a standard high school diploma shall meet the graduation requirements established by the school district where he or she was last enrolled or pass an equivalency examination. To be eligible to receive credit for completion of a course required for the receipt of a high school diploma, a person shall have satisfied the requirements for such course established by the school district where he or she was last enrolled.

(e) Fifth, to ensure that every person in a correctional facility who has an expectation of release from custody within five years has an opportunity to acquire at least entry-level marketable vocational skills in one or more occupational fields for which there is a demonstrable demand in the economy of this state;

(f) Sixth, to ensure that every person in a correctional facility be released possessing life management skills which will allow him to function successfully in a free society;

(g) Seventh, to provide every person in a correctional facility who demonstrates college-level aptitudes with the opportunity to participate in college-level academic programs that may be offered within the correctional facility. Unless financial assistance for costs of the programs is provided through programs described in subsection (4) of this section or through private or federally funded grants or scholarships, costs associated with the college-level academic programs shall be borne entirely by the person participating in the program.

(2) The correctional education program developed pursuant to subsection (1) of this section shall provide that training in the fundamentals of personal health be an integral part of all instructional services offered in such program. Such training shall include instruction in personal hygiene, general health, and substance abuse education. The program shall also

provide courses of instruction in the evening in order to accommodate those persons in work programs.

(3) (a) Except as otherwise provided in paragraph (b) of this subsection (3), any person in a correctional facility who lacks basic and functional literacy skills, as determined through the use of a literacy test approved by the state board of education, shall be required to complete sequential course work sufficient to allow the inmate to pass a competency test or the test of general education development or both. If a composite test score of functional literacy is not attained, the program may require the inmate to continue to receive adult basic education instruction.

(b) A person in a correctional facility who lacks basic and functional literacy skills shall be required to attend adult basic education instruction unless such person:

- (I) Is serving a life sentence or is under sentence of death;
- (II) Is specifically exempted by the program from participation for security or health reasons;
- (III) Is housed at a community correctional facility;
- (IV) Is determined, through testing, to have attained a functional literacy level;
- (V) Is, because of a disability, at a maximum level of proficiency;
- (VI) Refuses, in writing, to participate in adult basic education instruction; or
- (VII) Fails to make "positive progress" after a minimum of twenty hours.

(4) This section shall not affect the eligibility of any person for educational training programs, vocational programs, or other programs expressly created under federal or state statutes, regulations, or orders.

(5) On or before December 31, 2010, the department shall develop a plan for each educational or vocational program offered pursuant to this article to meet the following performance objectives:

(a) The department is encouraged to use a vocational skills assessment to determine the vocational needs of each offender who is eligible to participate in a vocational program. To the extent practicable, the department shall assign each such offender to a vocational program based on this assessment.

(b) The program shall use a curriculum or a set of training practices that is:

(I) Approved by the department of education created in section 24-1-115, C.R.S., or the state board for community colleges and occupational education created in section 23-60-104, C.R.S.; or

(II) Described as part of an agreement or contract entered into pursuant to section 17-32-106 (1) (b).

(c) The program shall provide offenders training and competency in marketable skills that are relevant and likely to be in demand in the workplace as determined by data provided to the department by the department of labor and employment pursuant to subsection (6) of this section.

(6) On or before October 1, 2010, and on or before October 1 of each year thereafter, the department of labor and employment created in section 24-1-121, C.R.S., shall provide the department with data on current market trends and labor needs in Colorado to assist the department in providing educational and vocational programs that satisfy the performance objective described in paragraph (c) of subsection (5) of this section.

(7) When considering an offender for transfer, the department shall take the offender's enrollment in an educational or vocational program into consideration unless the offender is granted parole or is placed into a community corrections program pursuant to article 27 of this title. If the department transfers an offender enrolled in an educational or vocational program to another facility, the department is encouraged to give the offender priority for placement in a comparable educational or vocational program if such a program exists at the facility.

(8) The department shall annually report the following information concerning educational and vocational programs offered pursuant to this article:

(a) A list of the specific programs offered at each state-operated facility and private prison that houses offenders on behalf of the department;

(b) The number of instructors and the number of instructor vacancies, by program and facility;

- (c) The annual capacity of each program;
- (d) The annual enrollment of each program, including the number of offenders who were placed on a waiting list for the program and the average length of time spent on the waiting list by each such offender;
- (e) The number of offenders who successfully completed each program in the previous fiscal year;
- (f) The number of offenders who enrolled in each program but failed to successfully complete the program in the previous fiscal year, including for each such offender the reason for the offender's noncompletion;
- (g) The percentage of parolees who are employed full-time, employed part-time, or unemployed at the end of the previous fiscal year;
- (h) A summary of the results of any program evaluations or cost-benefit analyses performed by the department; and
- (i) The total amount of state and federal funding allocated by the department during the most recently completed fiscal year for vocational and educational programs, including information concerning the allocation of each source of funding and the amount of funding received by each program.

Source: **L. 90:** Entire article added, p. 973, § 1, effective July 1. **L. 93:** (3)(b)(V) amended, p. 1634, § 17, effective July 1. **L. 2000:** IP(1), (1)(a), (3)(a), and (3)(b)(II) amended, pp. 850, 859, §§ 55, 72, effective May 24. **L. 2009:** (1)(g) amended, (HB 09-1264), ch. 117, p. 494, § 1, effective August 5. **L. 2010:** IP(1), (1)(b), (1)(c), (1)(d), (1)(e), and (4) amended and (5), (6), (7), and (8) added, (HB 10-1112), ch. 57, p. 206, § 3, effective August 11. **L. 2011:** (5)(c) amended, (HB 11-1303), ch. 264, p. 1157, § 31, effective August 10.

17-32-106. Powers and duties of the program. (1) In connection with the development and implementation of the correctional education program, the program shall have the following powers and duties:

- (a) To promulgate rules and regulations necessary to implement the correctional education program;
- (b) To enter into agreements and contracts with school districts, charter schools, nonpublic schools, community colleges, junior colleges, state colleges and universities, trade unions, private occupational schools, private businesses, the department of labor and employment created in section 24-1-121, C.R.S., state and local government agencies, and private agencies as may be deemed appropriate for the purpose of providing instructional services necessary to implement the correctional education program. Agreements and contracts for the provision of instructional services shall expressly state the educational goals and objectives of the program and the specific requirements for instructional services.
- (c) To submit a budget request for the correctional education program for inclusion in the budget request for the department as a separate line item. Such line item shall be the department's total budget request for correctional education funding from the general fund and shall replace or include any such previous request for instructional or educational funding. Such budget request shall itemize the amount of the budget to be funded from the general fund of the state and the amount to be funded from moneys in the correctional education program fund created in section 17-32-107. No other funds from the general assembly shall be allocated to the department for any education program.
- (d) To accept moneys from the federal government as well as contributions, grants, gifts, bequests, and donations from individuals, private organizations, and foundations and do all things necessary, not inconsistent with this article or any other laws of this state, in order to avail itself of such federal moneys under any federal legislation. All moneys accepted by the program shall be transmitted to the state treasurer for credit to the correctional education program fund.
- (e) To enter into agreements with state agencies, as appropriate, in order to receive any funding or moneys available for correctional education;

(f) To expend moneys appropriated to the program by the general assembly, including moneys in the correctional education program fund, for the purpose of implementing the correctional education program;

(g) Repealed.

(h) To enter into negotiations with the department of human services for the purpose of coordinating and offering education services to juveniles in the custody of that department. The executive directors of the departments of corrections and human services shall each submit a proposed plan to the governor and general assembly, no later than January 1, 1992, for integrating such juveniles into the correctional education program.

(i) To exercise any other powers or perform any other duties that are consistent with the purposes for which the program was created and that are reasonably necessary for the fulfillment of the program's responsibilities under this article.

Source: **L. 90:** Entire article added, p. 975, § 1, effective July 1. **L. 94:** (1)(h) amended, p. 2654, § 135, effective July 1. **L. 96:** (1)(g) repealed, p. 1266, § 183, effective August 7. **L. 2000:** IP(1), (1)(d), (1)(f), and (1)(i) amended, p. 851, § 56, effective May 24. **L. 2010:** (1)(b) amended, (HB 10-1112), ch. 57, p. 208, § 4, effective August 11.

Cross references: For the legislative declaration contained in the 1994 act amending this section, see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 1996 act amending this section, see section 1 of chapter 237, Session Laws of Colorado 1996.

17-32-107. Correctional education program fund. There is hereby created in the state treasury the correctional education program fund, which shall be administered by the program and that shall consist of all moneys received by the program from the federal government and from contributions, grants, gifts, bequests, and donations from individuals, private organizations, and foundations. The moneys in the fund shall be subject to annual appropriation by the general assembly to the program for the purpose of developing and implementing a correctional education program. Any moneys not appropriated or not expended at the end of the fiscal year shall remain in the fund and shall not be transferred to or revert to the general fund of the state. Any interest earned on the investment or deposit of moneys in the fund shall remain in the fund and shall not be credited to the general fund of the state.

Source: **L. 90:** Entire article added, p. 976, § 1, effective July 1. **L. 2000:** Entire section amended, p. 851, § 57, effective May 24.

ARTICLE 33

Reentry Program

17-33-101. Colorado reentry program.

17-33-101. Colorado reentry program. (1) The department of corrections shall administer appropriate programs for offenders prior to and after release to assist offenders with reentry into society based upon the assessed need as determined by the director of the department of corrections and suitability of individual offenders for such services. The department of corrections shall administer the reentry programs in collaboration with the division of adult parole in the department of corrections and the youthful offender system in the department of corrections.

(2) The department of corrections shall design the reentry program to reduce the possibility of the offender returning to prison, to assist the offender in rehabilitation, and to provide the offender with life management skills that allow him or her to function successfully in society.

Source: **L. 2004:** Entire article added, p. 448, § 1, effective April 13.

DIAGNOSTIC PROGRAMS**ARTICLE 40****Colorado Diagnostic Program**

Editor's note: (1) Prior to the repeal and reenactment of this title in 1977, the substantive provisions of this article were contained in article 40 of title 27.

(2) For additional historical information concerning the repeal and reenactment of this title, see the editor's note at the beginning of this title.

17-40-101.	Definitions.	17-40-105.	Appointment of personnel to the program.
17-40-102.	Program established.	17-40-106.	Responsibilities of the superintendent.
17-40-103.	Examination of offenders - report.	17-40-107.	Transfer of prisoners for examination - assignment.
17-40-104.	Responsibility to the program of court imposing sentence.		

17-40-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Correctional institution" means the correctional facilities at Canon City, the correctional facilities at Buena Vista, or any other institution established for the rehabilitation of male or female offenders.

(1.5) "Diagnostic center" means the diagnostic center located within the city and county of Denver.

(2) "Diagnostic services" means diagnostic examination and evaluation programs, including medical and dental evaluations, psychological testing, and academic and vocational assessment. "Diagnostic services" also includes identification of special needs, such as protective custody, services for persons who have mental illness or developmental disabilities, and special arrangements for those deemed potentially disruptive to institutional safety and operation.

(3) (Deleted by amendment, L. 94, p. 605, § 12, effective July 1, 1994.)

(4) "Superintendent" means the administrative head of the diagnostic center.

Source: L. 77: Entire title R&RE, p. 947, § 10, effective August 1. **L. 78:** (1.5) added and (4) amended, p. 357, § 3, effective April 27. **L. 79:** (1), (1.5), and (4) amended, p. 699, § 67, effective July 1. **L. 86:** (1.5) and (2) amended, p. 767, § 1, effective May 8. **L. 94:** (1.5), (3), and (4) amended, p. 605, § 12, effective July 1. **L. 2006:** (2) amended, p. 1399, § 48, effective August 7.

Editor's note: This section is similar to former § 27-40-101 as it existed prior to 1977.

17-40-102. Program established. (1) There is hereby established the Colorado diagnostic program, referred to in this article as the "program".

(2) The primary function and purpose of the program shall be to provide a diagnostic examination and evaluation of all offenders sentenced by the courts of this state, so that each such offender may be assigned to a correctional institution or a program established pursuant to article 27.7 of this title which has the type of security and, to the extent possible, appropriate programs of education, employment, and treatment available, which are designed to accomplish maximum rehabilitation of such offender and to prepare an offender for placement into as productive an employment as possible following imprisonment.

Source: L. 77: Entire title R&RE, p. 948, § 10, effective August 1. **L. 78:** (2) amended, p. 357, § 4, effective April 27. **L. 90:** (2) amended, p. 965, § 2, effective June 7.

Editor's note: This section is similar to former § 27-40-102 as it existed prior to 1977.

ANNOTATION

Section does not mandate that a particular classification be given, and accordingly does not confer a liberty interest. Klein v. Pyle, 767 F. Supp. 215 (D. Colo. 1991).

Applied in Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979); People ex rel. Gallagher v. District Court, 632 P.2d 1009 (Colo. 1981).

17-40-103. Examination of offenders - report. (1) As soon as possible after July 1, 1974, each offender entering the diagnostic center shall receive appropriate diagnostic services, and each offender's treatment and employment needs shall be identified. Information provided pursuant to section 17-40-104 shall be considered in structuring the rehabilitation program. An offender shall be assigned to the assessment program for a period not to exceed sixty days; except that an offender may be held for an additional thirty days upon approval of the executive director. Upon completion of the recommended rehabilitation report, it shall be transmitted by the superintendent to the executive director, who, within fifteen days, shall cause the offender to be:

(a) Assigned to a correctional institution or to a program established pursuant to article 27.7 of this title, unless otherwise prohibited by law, based upon the examination and study of the offender; or

(b) Upon order of the court, returned to the court for the purpose of granting probation or other modification of sentence.

(2) A copy of the recommended rehabilitation report shall be shown and explained to the offender upon request; except that the executive director may withhold any information he deems to be detrimental to the rehabilitation of the offender.

(3) Nothing in this section shall be construed to restrict or deny the power of the court to grant an application for postconviction review pursuant to section 18-1-410, C.R.S.

Source: L. 77: Entire title R&RE, p. 948, § 10, effective August 1. L. 78: IP(1) amended, p. 357, § 5, effective April 27. L. 90: (1)(a) amended, p. 965, § 3, effective June 7. L. 94: IP(1) amended, p. 605, § 13, effective July 1. L. 97: IP(1) amended, p. 27, § 4, effective March 20.

Editor's note: This section is similar to former § 27-40-103 as it existed prior to 1977.

Cross references: For the requirement that sentenced persons be confined in the diagnostic center, see § 16-11-308 (2).

ANNOTATION

The legislative intent of this section is to give the executive director of the department of corrections ultimate responsibility for placing of inmates in particular facilities. Thus, the court could recommend sentencing to an out-of-state facility, but it could not order such placement. People v. Brack, 821 P.2d 928 (Colo. App. 1991).

Diagnostic evaluation report may be used for possible reconsideration of sentence. People v. District Court, 636 P.2d 689 (Colo. 1981).

Applied in Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979).

17-40-104. Responsibility to the program of court imposing sentence. Before or at the same time any offender is transported to the diagnostic center, the sentencing court shall transmit to the superintendent of the program any available presentence report, offense report, or diagnostic or clinical information and any recommendation the court may deem appropriate.

Source: L. 77: Entire title R&RE, p. 948, § 10, effective August 1. L. 78: Entire section amended, p. 357, § 6, effective April 27. L. 79: Entire section amended, p. 700, § 68, effective July 1. L. 94: Entire section amended, p. 605, § 14, effective July 1.

Editor's note: This section is similar to former § 27-40-104 as it existed prior to 1977.

ANNOTATION

By its plain terms, this section makes no reference to information that must be reflected on the mittimus. Thus, in sentencing an offender directly to the department of corrections, a court is not required to include informa-

tion concerning good time credit on the mittimus. Therefore, the court's failure to do so, even when the defendant has waived the presentence report, is not error. *People v. Fitzgerald*, 973 P.2d 708 (Colo. App. 1998).

17-40-105. Appointment of personnel to the program. Subject to the provisions of section 13 of article XII of the state constitution, the executive director shall appoint the superintendent. The superintendent shall appoint such supervisors, psychiatrists, psychologists, social workers, correctional specialists, and other officers and employees as are deemed necessary. No inmate of any correctional institution shall be appointed to any task directly involved with the diagnostic services provided by the program. This shall not prohibit tasks performed by inmates in custodial capacities and food service duties and similar tasks approved by the executive director.

Source: **L. 77:** Entire title R&RE, p. 948, § 10, effective August 1. **L. 78:** Entire section amended, p. 358, § 7, effective April 27. **L. 94:** Entire section amended, p. 606, § 15, effective July 1.

Editor's note: This section is similar to former § 27-40-105 as it existed prior to 1977.

17-40-106. Responsibilities of the superintendent. (1) The superintendent shall be responsible for the administration of diagnostic services and the supervision of the employees of the program.

(2) The superintendent shall be responsible for the management, control, regulation, and operation of the physical facilities and for the reception, discipline, and confinement of all offenders.

(3) The superintendent or superintendent's designee shall separate all offenders in the diagnostic program from the offenders in the correctional institution.

(4) (a) The superintendent may implement a mental illness screening program to screen offenders entering the diagnostic center. If the superintendent chooses to implement a mental illness screening program, the superintendent shall use the standardized screening instrument developed pursuant to section 16-11.9-102, C.R.S., and conduct the screening in accordance with procedures established pursuant to said section.

(b) Prior to implementation of a mental illness screening program pursuant to this subsection (4), if implementation of the program would require an increase in appropriations, the superintendent shall submit to the joint budget committee a request for funding in the amount necessary to implement the mental illness screening program. If implementation of the mental illness screening program would require an increase in appropriations, implementation of the program shall be conditional upon approval of the funding request.

Source: **L. 77:** Entire title R&RE, p. 949, § 10, effective August 1. **L. 78:** (2) and (3) amended, p. 358, § 8, effective April 27. **L. 94:** (1) and (3) amended, p. 606, § 16, effective July 1. **L. 2002:** (4) added, p. 574, § 3, effective May 24.

Editor's note: This section is similar to former § 27-40-106 as it existed prior to 1977.

17-40-107. Transfer of prisoners for examination - assignment. The executive director may transfer any offender to the program for study and examination and, upon completion thereof, shall cause the offender to be assigned pursuant to this article.

Source: **L. 77:** Entire title R&RE, p. 949, § 10, effective August 1.

Editor's note: This section is similar to former § 27-40-107 as it existed prior to 1977.

ARTICLE 41**Colorado Prerelease Program****17-41-101 to 17-41-104. (Repealed)**

Editor's note: (1) Section 17-41-104 provided for the repeal of this article, effective July 1, 1984. (See L. 81, p. 968.)

(2) This article was added in 1981. For amendments to this article prior to its repeal in 1984, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

MISCELLANEOUS PROVISIONS**ARTICLE 42****Miscellaneous Provisions**

- 17-42-101. Freedom of worship.
17-42-102. American Indians - freedom
of worship.

17-42-101. Freedom of worship. (1) All persons who are confined to a correctional facility as defined in section 17-1-102 shall have the right to worship according to the dictates of their consciences, and such persons shall be afforded a reasonable opportunity to freely exercise their religious beliefs without fear of retaliation or discrimination for the free exercise thereof. The practice of religion by any particular sect may not be curtailed or prohibited unless such practices threaten the reasonable security interests of the correctional facility.

(2) Upon the request of any inmate, and to the extent practicable and consistent with reasonable security considerations, religious facilities shall be made available in a nondiscriminatory manner. Services shall be held and advice and ministration given within the buildings or grounds of the correctional facility where the inmate is confined. Attendance at any services so provided shall be voluntary.

(3) The department shall permit access to objects of a religious nature where possession of such objects would not unduly burden the reasonable security interests of the correctional facility. Prison officials shall accord appropriate respect for sacred objects. When the reasonable security interests of the correctional facility necessitate the inspection of any sacred object, such inspection shall be done visually.

(4) In order to provide for and attend to the spiritual needs of inmates, the department shall permit inmates to consult with and receive spiritual advice and ministration from a spiritual leader.

(5) This section shall not require the department of corrections to construct additional facilities, remodel or reconfigure existing structures, or hire additional employees to meet the directives of this section.

Source: L. 92: Entire article added, p. 250, § 1, effective May 26.

17-42-102. American Indians - freedom of worship. (1) The general assembly hereby finds, determines, and declares that American Indian religions and religious beliefs pre-date the creation of the United States constitution; however, understanding of and respect for American Indian religious practices is not widespread among non-indigenous persons. The general assembly further finds that serious problems in the practice of religious freedom persist for the American Indian and particularly for American Indians who are incarcerated. Therefore, in order to protect this most basic freedom for American Indians who are incarcerated, traditional religious and ceremonial practices of American Indians

should be permitted in correctional facilities to the extent that such practices do not impinge on the reasonable security interests of the correctional facilities to which such Indians are confined.

(2) American Indians who are confined to a correctional facility as defined in section 17-1-102 and who practice an American Indian religion as defined in subsection (5) of this section shall have access on a regular basis to the following:

- (a) American Indian traditional spiritual leaders;
- (b) Items and materials utilized in religious ceremonies; and
- (c) American Indian religious facilities.

(3) Access of American Indians to spiritual leaders, religious items and materials, and religious facilities shall be comparable to access to clergy, religious items and materials, and religious facilities which is afforded to inmates who practice Judeo-Christian religions.

(4) The provisions of this section shall not be construed as requiring prison authorities to permit or prohibit access to peyote or American Indian religious sites.

(5) For purposes of this section:

(a) "American Indian" means an individual of aboriginal ancestry who is a member of an Indian tribe. "American Indian" includes any individual who is an Alaska native or any individual who is a native Hawaiian.

(b) "American Indian religion" means any religion which is practiced by American Indians and the origin and interpretation of which is from a traditional American Indian culture or community.

(c) "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska native village as defined in the "Alaska Native Claims Settlement Act", federal Public Law 92-203, as amended, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the state of Hawaii.

Source: L. 92: Entire article added, p. 251, § 1, effective May 26.

Editor's note: Subsections (5)(b), (5)(c), and (5)(d), as enacted by Senate Bill 92-197, were relettered on revision in 2004 to conform with statutory alphabetization format.

TITLE 18
CRIMINAL CODE

$$4 - 2x_1 + 4$$

$$= 8 - 2x_1 + 4$$

TITLE 18

CRIMINAL CODE

Editor's note: This title was numbered as chapter 40, C.R.S. 1963. The substantive provisions of this title were repealed and reenacted in 1971, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this title prior to 1971, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. For a detailed comparison of this title, see the comparative tables located in the back of the index.

- Art. 1. Provisions Applicable to Offenses Generally, 18-1-101 to 18-1-1109.
- Art. 1.3. Sentencing in Criminal Cases, 18-1.3-101 to 18-1.3-1407.
- Art. 1.4. Class 1 Felonies Committed on or after July 1, 1995, and Prior to July 12, 2002, 18-1.4-101 and 18-1.4-102.
- Art. 1.5. Criminal Justice Commission (Repealed).
- Art. 1.7. Treatment of Persons with Mental Illness Involved in the Criminal Justice System (Repealed).
- Art. 1.8. Interagency Task Force on Trafficking in Persons (Repealed).
- Art. 1.9. Continuing Examination of the Treatment of Persons with Mental Illness Who are Involved in the Justice System, 18-1.9-101 to 18-1.9-107.
- Art. 2. Inchoate Offenses, 18-2-101 to 18-2-401.
- Art. 3. Offenses Against the Person, 18-3-101 to 18-3-602.
- Art. 3.5. Unlawful Termination of Pregnancy, 18-3.5-101 and 18-3.5-102.
- Art. 4. Offenses Against Property, 18-4-101 to 18-4-802.
- Art. 5. Offenses Involving Fraud, 18-5-101 to 18-5-905.
- Art. 5.5. Computer Crime, 18-5.5-101 and 18-5.5-102.
- Art. 6. Offenses Involving the Family Relations, 18-6-101 to 18-6-805.
- Art. 6.5. Wrongs to At-risk Adults, 18-6.5-101 to 18-6.5-107.
- Art. 7. Offenses Relating to Morals, 18-7-101 to 18-7-801.
- Art. 8. Offenses - Governmental Operations, 18-8-101 to 18-8-804.
- Art. 9. Offenses Against Public Peace, Order, and Decency, 18-9-101 to 18-9-313.
- Art. 10. Gambling, 18-10-101 to 18-10-108.
- Art. 11. Offenses Involving Disloyalty, 18-11-101 to 18-11-205.
- Art. 12. Offenses Relating to Firearms and Weapons, 18-12-101 to 18-12-216.
- Art. 13. Miscellaneous Offenses, 18-13-101 to 18-13-130.
- Art. 14. Hotel Facility Rates: Posting - Notice, 18-14-101 to 18-14-104.
- Art. 15. Offenses - Making, Financing, or Collection of Loans, 18-15-101 to 18-15-109.
- Art. 16. Purchasers of Valuable Articles, 18-16-101 to 18-16-110.
- Art. 17. Colorado Organized Crime Control Act, 18-17-101 to 18-17-109.
- Art. 18. Uniform Controlled Substances Act of 1992, 18-18-101 to 18-18-605.
- Art. 18.5. Methamphetamine Abuse Prevention, Intervention, and Treatment and the Response of the Criminal Justice System, 18-18.5-101 to 18-18.5-106.
- Art. 19. Drug Offender Surcharge, 18-19-101 to 18-19-104.
- Art. 20. Offenses Related to Limited Gaming, 18-20-101 to 18-20-115.
- Art. 21. Sex Offender Surcharge, 18-21-101 to 18-21-103.
- Art. 22. Juvenile Offender Surcharge, 18-22-101 to 18-22-103.
- Art. 23. Gang Recruitment Act, 18-23-101 and 18-23-102.
- Art. 24. Crimes Against Children Surcharge, 18-24-101 to 18-24-103.

ARTICLE 1

Provisions Applicable to
Offenses Generally

Law reviews: For article, "Criminal Law", which discusses Tenth Circuit decisions relating to criminal law, see 61 Den. L.J. 255 (1984); for article, "Criminal Law", which discusses Tenth Circuit decisions dealing with criminal law, see 62 Den. U. L. Rev. 125 (1985); for a discussion of Tenth Circuit decisions dealing with criminal law, see 66 Den. U. L. Rev. 711 (1989) and 67 Den. U. L. Rev. 691 (1990); for article, "Felony Sentencing in Colorado", see 18 Colo. Law. 1689 (1989); for article, "1990 Criminal Law Legislative Update", see 19 Colo. Law. 2049 (1990).

PART 1

PURPOSE AND SCOPE OF CODE -
CLASSIFICATION OF OFFENSES

- 18-1-101. Citation of title 18.
- 18-1-102. Purpose of code, statutory construction.
- 18-1-102.5. Purposes of code with respect to sentencing.
- 18-1-103. Scope and application of code.
- 18-1-104. "Offense" defined - offenses classified - common-law crimes abolished.
- 18-1-105. Felonies classified - presumptive penalties. (Repealed)
- 18-1-106. Misdemeanors classified - penalties. (Repealed)
- 18-1-107. Petty offenses classified - penalties. (Repealed)
- 18-1-108. Offenses not classified. (Repealed)
- 18-1-109. Penalty not fixed by statute - punishment. (Repealed)
- 18-1-110. Payment and collection of fines for class 1, 2, or 3 misdemeanors and class 1 or 2 petty offenses - release from incarceration. (Repealed)

PART 2

JURISDICTION AND PLACE OF TRIAL

- 18-1-201. State jurisdiction.
- 18-1-202. Place of trial.

PART 3

WHEN PROSECUTION BARRED BY
FORMER PROCEEDINGS

- 18-1-301. Second trial barred by former prosecution for same offense.
- 18-1-302. Second trial barred by former prosecution for different offense.
- 18-1-303. Second trial barred by prosecution in another jurisdiction.
- 18-1-304. Former prosecution not a bar.

PART 4

RIGHTS OF DEFENDANT

- 18-1-401. Purpose.
- 18-1-402. Presumption of innocence.
- 18-1-403. Legal assistance and supporting services.
- 18-1-404. Preliminary hearing or waiver - dispositional hearing.
- 18-1-405. Speedy trial.
- 18-1-406. Right to jury trial.
- 18-1-407. Affirmative defense.
- 18-1-408. Prosecution of multiple counts for same act.
- 18-1-409. Appellate review of sentence for a felony.
- 18-1-409.5. Appellate review of sentence not within the presumptive range. (Repealed)
- 18-1-410. Postconviction remedy.
- 18-1-411. Postconviction testing of DNA - definitions.
- 18-1-412. Procedure for application for DNA testing - appointment of counsel.
- 18-1-413. Content of application for DNA testing.
- 18-1-414. Preservation of evidence.
- 18-1-415. Testing - payment.
- 18-1-416. Results of the DNA test.
- 18-1-417. Ineffective assistance of counsel claims - waiver of confidentiality.

PART 5

PRINCIPLES OF CRIMINAL CULPABILITY

- 18-1-501. Definitions.
- 18-1-502. Requirements for criminal liability in general and for offenses of strict liability and of mental culpability.
- 18-1-503. Construction of statutes with respect to culpability requirements.
- 18-1-503.5. Principles of criminal culpability.
- 18-1-504. Effect of ignorance or mistake upon culpability.

18-1-505. Consent.

PART 8

PART 6

RESPONSIBILITY

PARTIES TO OFFENSES -
ACCOUNTABILITY

18-1-601. Liability based upon behavior.
 18-1-602. Behavior of another.
 18-1-603. Complicity.
 18-1-604. Exemptions from liability
 based upon behavior of another.

18-1-801. Insufficient age.
 18-1-802. Insanity.
 18-1-803. Impaired mental condition.
 18-1-804. Intoxication.
 18-1-805. Responsibility - affirmative defense.

PART 9

DEFINITIONS

18-1-605. Liability based on behavior of
 another - no defense.
 18-1-606. Criminal liability of business
 entities.
 18-1-607. Criminal liability of an individual
 for corporate conduct.

18-1-901. Definitions.

PART 10

ORDERS AND PROCEEDINGS AGAINST
DEFENDANT

18-1-1001. Protection order against defendant.
 18-1-1002. Criminal contempt proceedings
 - notice to district attorney.

PART 11

JUSTIFICATION AND EXEMPTIONS
FROM CRIMINAL RESPONSIBILITY

PRESERVATION OF DNA EVIDENCE

18-1-701. Execution of public duty.
 18-1-702. Choice of evils.
 18-1-703. Use of physical force - special
 relationships.
 18-1-704. Use of physical force in defense
 of a person.
 18-1-704.5. Use of deadly physical force
 against an intruder.
 18-1-705. Use of physical force in defense
 of premises.
 18-1-706. Use of physical force in defense
 of property.
 18-1-707. Use of physical force in making
 an arrest or in preventing an escape.
 18-1-708. Duress.
 18-1-709. Entrapment.
 18-1-710. Affirmative defense.
 18-1-711. Immunity for persons who suffer
 or report an emergency drug or alcohol overdose
 event - definitions.

18-1-1101. Definitions.
 18-1-1102. Scope.
 18-1-1103. Duty to preserve DNA evidence.
 18-1-1104. Manner and location of preservation
 of DNA evidence.
 18-1-1105. Law enforcement agency request
 for permission to dispose of evidence - procedures.
 18-1-1106. Defendant request for disposition
 of or waiver of preservation of DNA evidence -
 procedures.
 18-1-1107. Victim request for disposition
 of DNA evidence - procedures.
 18-1-1108. Notice - form and sufficiency.
 18-1-1109. Court data collection - DNA
 evidence cases - repeal. (Repealed)

PART 1

PURPOSE AND SCOPE OF CODE -
CLASSIFICATION OF OFFENSES

18-1-101. Citation of title 18. (1) This title shall be known and may be cited as the "Colorado Criminal Code"; within this title, the "Colorado Criminal Code" is sometimes referred to as "this code".

(2) The portion of any section, subsection, paragraph, or subparagraph contained in this code which precedes a list of examples, requirements, conditions, or other items may be referred to and cited as the "introductory portion" of the section, subsection, paragraph, or subparagraph.

Source: L. 71: R&RE, p. 388, § 1. C.R.S. 1963: § 40-1-101.

ANNOTATION

Caption "criminal code" complies with constitutional requirements concerning titles. The caption "criminal code" is broad enough to embrace every offense against the law that can be classified as a misdemeanor or felony as well as criminal pleading and practice, and fully complies with the constitutional requirements concerning titles to legislation. *Heller v. People*, 2 Colo. App. 459, 31 P. 773 (1892) (decided under G.S. § 1616).

Although a child under the age of 10 cannot be found guilty of a crime, such a child can commit a crime. Therefore, an adult can be found guilty of contributing to the delinquency of a minor where the minor is under the age of 10. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

18-1-102. Purpose of code, statutory construction. (1) This code shall be construed in such manner as to promote maximum fulfillment of its general purposes, namely:

(a) To define offenses, to define adequately the act and mental state which constitute each offense, to place limitations upon the condemnation of conduct as criminal when it is without fault, and to give fair warning to all persons concerning the nature of the conduct prohibited and the penalties authorized upon conviction;

(b) To forbid the commission of offenses and to prevent their occurrence through the deterrent influence of the sentences authorized; to provide for the rehabilitation of those convicted and their punishment when required in the interests of public protection;

(c) To differentiate on reasonable grounds between serious and minor offenses, and prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities as between individual offenders;

(d) To prevent arbitrary or oppressive treatment of persons accused or convicted of offenses and to identify certain minimum standards for criminal justice which, within the concept of due process of law, have the stature of substantive rights of persons accused of crime;

(e) To promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.

Source: L. 71: R&RE, p. 388, § 1. C.R.S. 1963: § 40-1-102. L. 2011: (1)(e) added, (HB 11-1032), ch. 296, p. 1401, § 4, effective August 10.

ANNOTATION

Law reviews. For case note, "Interjurisdictional Merger of Sentences: The Need for an Interstate Compact", see 49 U. Colo. L. Rev. 473 (1978). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Construction. Criminal statutes are to be construed strictly in favor of the accused. *People v. Roybal*, 618 P.2d 1121 (Colo. 1980); *People v. Russell*, 703 P.2d 620 (Colo. App. 1985).

Sentencing court should tailor the sentence to the defendant, keeping in mind past record, potential for rehabilitation, and protection of the public as well. *People v. Alvarez*, 187 Colo. 290, 530 P.2d 506 (1975).

Sentencing discretion reposes in court. It is the court, and not the probation department, in whom sentencing discretion is reposed. *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979).

Sentencing involves an exercise in judicial discretion and, accordingly, a sentencing judge has wide latitude in arriving at a final decision. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

The trial court has wide discretion in sentencing and, absent a finding of abuse of discretion, an appellate court will not substitute its judgment for that of the trial judge. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

The trial court has broad discretion in sentencing one convicted of a felony. All relevant factors may be considered to determine which alternative is most appropriate to meet the sentencing goals and policies of deterrence, punishment, rehabilitation, and protection of the public. Absent a finding of an abuse of discretion, an appellate court will not substitute its judgment on appeal. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Record must clearly justify action of sentencing judge where a sentence is imposed for an extended term. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Considerations in appellate review of sentence. In an appellate review of a sentence, a claim of excessiveness generally requires a consideration of the nature of the offense, the character of the offender, and the public interest in safety and deterrence. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

When an offender has committed offenses in a number of different jurisdictions, the sentence imposed should "promote maximum fulfillment" of the legislative directives in the sentencing statutes. *People v. Lewis*, 193 Colo. 203, 564 P.2d 111 (1977).

Applied in *People v. Wilson*, 43 Colo. App. 68, 599 P.2d 970 (1979); *People v. Martinez*, 628 P.2d 608 (Colo. 1981).

18-1-102.5. Purposes of code with respect to sentencing. (1) The purposes of this code with respect to sentencing are:

(a) To punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;

(b) To assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences;

(c) To prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses;

(d) To promote rehabilitation by encouraging correctional programs that elicit the voluntary cooperation and participation of convicted offenders;

(e) To select a sentence, a sentence length, and a level of supervision that addresses the offender's individual characteristics and reduces the potential that the offender will engage in criminal conduct after completing his or her sentence; and

(f) To promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.

Source: L. 79: Entire section added, p. 668, § 15, effective July 1. **L. 2011:** (1)(c) and (1)(d) amended and (1)(e) added, (HB 11-1180), ch. 96, p. 282, § 1, effective August 10; (1)(c) and (1)(d) amended and (1)(f) added, (HB 11-1032), ch. 296, p. 1402, § 5, effective August 10.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For comment, "Criminal Sentencing in Colorado: Ripe for Reform", see 65 U. Colo. L. Rev. 685 (1994).

Sentencing is a discretionary decision which requires weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and society's interest in safety and deterrence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentencing, by its very nature, is a discretionary act that is not subject to scientific precision. *Flower v. People*, 658 P.2d 266 (Colo. 1983).

A judge has wide latitude in reaching his decision on a particular sentence. *People v. Martinez*, 628 P.2d 608 (Colo. 1981).

Sentencing is a complex process which requires the exercise of the sound discretion of the sentencing judge. *People v. Beland*, 631 P.2d 1130 (Colo. 1981).

The discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Some of the more common factors to be considered in sentencing are: The gravity of the offense in terms of harm to person or property or in terms of the culpability requirement of the law; the defendant's history of prior criminal conduct; the degree of danger the defendant might present to the community if released forthwith; the likelihood of future criminality in the absence of corrective incarceration or treatment; the prospects for rehabilitation under some less drastic sentencing alternative, such as probation; and the likelihood of depreciating the seriousness of the offense were a less drastic sentencing alternative chosen. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980); *People v. Reed*, 43 P.3d 644 (Colo. 2001).

Judge's sentencing discretion limited by general assembly. Although a judge has broad

discretion in tailoring a sentence to accommodate various factors, the sentence must be consistent with legislatively imposed limits and constraints. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

In order to achieve the purposes of sentencing, the general assembly has required the sentencing court to consider and weigh, prior to the imposition of the sentence, the nature and elements of the offense, the character and record of the offender, and all aggravating or mitigating circumstances surrounding the offense and the offender, including those specifically found by the court to be extraordinary. *People v. Manley*, 707 P.2d 1021 (Colo. App. 1985).

Purposes of sentencing are to punish a defendant in relation to the seriousness of the offense, to assure fair and consistent treatment of all convicted offenders, to deter others likely to commit similar offenses, and to promote the defendant's rehabilitation. *People v. Reed*, 43 P.3d 644 (Colo. 2001).

Sentencing decision should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Proper and fair sentence is one that can be reasonably explained. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentence must bear some proportionality to severity of offense for which it is imposed, notwithstanding the need for public protection. *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People v. Piro*, 701 P.2d 878 (Colo. App. 1985).

Three considerations of concern to judge when setting sentence are the need to protect society at large and deter potential offenders, to punish the convicted offender, and to rehabilitate him. *People v. Bravo*, 630 P.2d 612 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

Defendant's behavior deemed relevant factor. A defendant's behavior during judicial proceedings and while in custody may well become relevant facts for the court to consider as part of the factors it weighs in sentencing. *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981).

Judge must consider rehabilitation needs of individual defendant. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

While rehabilitation is a preferred goal, it is only one factor which must be considered in tailoring a sentence to each individual case. *People v. Jordan*, 630 P.2d 613 (Colo. 1981).

Sentence must be supported by reasons in record. Hereafter in felony convictions involving the imposition of a sentence to a correctional facility the sentencing judge must state on the record the basic reasons for the imposition of sentence. The statement need not be lengthy, but

should include the primary factual considerations bearing on the judge's sentencing decision. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Particularly where sentence involves restrictive form of deprivation. Requirement that sentencing judge state on the record the basic reasons for imposing a sentence is particularly essential in those cases where the sentence involves a very restrictive form of deprivation, such as a term of confinement to a correctional facility. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Failure to state reasons creates obstacle to appellate review. The failure of a sentencing judge to state on the record the basic reasons for the selection of a particular sentence creates a burdensome obstacle to effective and meaningful appellate review of sentences. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Factors in appellate review of extended term of confinement. In evaluating the propriety or intrinsic fairness of an extended term of confinement, an appellate court focuses on the nature of the offense, the character of the offender and the public interest and determines whether the record establishes a clear justification for the sentence imposed. *People v. Scott*, 630 P.2d 615 (Colo. 1981).

No vacation or modification unless abuse of discretion. On review, an appellate court may not vacate or modify a sentence imposed by a trial court unless it appears that the trial judge clearly abused his discretion in imposing the sentence. *People v. Beland*, 631 P.2d 1130 (Colo. 1981).

Although judiciary has exclusive authority to impose sentences, such sentences must be within the limits determined by the general assembly which has the exclusive authority to define crimes and impose punishment. *People v. Schwartz*, 823 P.2d 1386 (Colo. App. 1991).

No abuse of discretion. In light of the facts and the nature of the crimes, the trial court did not abuse its discretion in imposing consecutive sentences for aggravated robbery and second degree kidnapping. *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

Trial court did not abuse its discretion in imposing a sentence of twice the maximum presumptive range. The sentence was appropriate because the defendant had committed an especially vicious attack in violation of a restraining order, and the court gave due consideration to the defendant's rehabilitative potential and employment history. *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002).

Because the sentence imposed was within the range required by law and was based on appropriate considerations supported by the record, trial court did not abuse its discretion in imposing an aggravated sentence. *People v. Martinez*, 179 P.3d 23 (Colo. App. 2007).

The trial court did not abuse its discretion in sentencing a defendant convicted of second degree murder, theft, and attempted theft to imprisonment for 45 years despite the fact the defendant tested positive for the human immunodeficiency virus (HIV). *People v. Baca*, 852 P.2d 1302 (Colo. App. 1992).

Applied in *People v. Wylie*, 44 Colo. App. 38, 605 P.2d 494 (1980); *People v. Hostetter*, 44 Colo. App. 44, 606 P.2d 80 (1980); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Phillips*, 652 P.2d 575 (Colo. 1982); *People v. Turman*, 659 P.2d 1368 (Colo. 1983); *Rocha v. People*, 713 P.2d 350 (Colo. 1986).

18-1-103. Scope and application of code. (1) Except as otherwise expressly provided by sections 18-1.3-402 and 18-1.3-504, or unless the context otherwise requires, the provisions of this code govern the construction of and punishment for any offense defined in any statute of this state, whether in this title or elsewhere, and which is committed on or after July 1, 1972, as well as the construction and application of any defense to a prosecution for such an offense.

(2) Except as otherwise provided by section 18-1-410, the provisions of this code do not apply to or govern the construction of, prosecution for, and punishment for any offense committed prior to July 1, 1972, or the construction and application of any defense to a prosecution for such an offense. Such an offense shall be tried and disposed of according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted. All pending actions shall proceed to final disposition in the same manner as if this code had not been enacted.

(3) The provisions of this code do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action for any conduct which this code makes punishable; and the civil injury is not merged in the offense.

Source: **L. 71:** R&RE, p. 389, § 1. **C.R.S. 1963:** § 40-1-103. **L. 73:** p. 533, § 1. **L. 95:** (3) amended, p. 16, § 8, effective March 9. **L. 2002:** (1) amended, p. 1509, § 176, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

The only purpose of this section was to ensure that the substantive crime definitions and penalty provisions in the repealed chapter 40 of Colorado Revised Statutes 1963, rather than those in this title, would continue in force as to crimes committed prior to July 1, 1972. *People v. Montera*, 195 Colo. 118, 575 P.2d 1294 (1978).

The provisions of this section are not jurisdictional in nature, therefore, the protections of this section may be waived by entry of a voluntary and knowing plea of guilty. *People v. Sandreschi*, 849 P.2d 873 (Colo. App. 1992).

The reference in subsection (2) to "this code" must be read to refer only to the "Colorado Criminal Code" of which it is a part. *People v. Montera*, 195 Colo. 118, 575 P.2d 1294 (1978).

Application of subsection (2). Subsection (2) applies only to the criminal code, and not to the code of criminal procedure. *People v. Loger*, 188 Colo. 291, 535 P.2d 210 (1975).

1 U.S.C. § 109 nullifies abatement of indictments and prosecutions for acts committed under former code. Because subsection (2)

does not obviate prosecutions for illegal activities occurring before July 1, 1972, 1 U.S.C. § 109 operates to nullify any abatement of an indictment and subsequent prosecution for criminal acts committed under the former criminal code. *United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973), cert. dismissed, 416 U.S. 917, 94 S. Ct. 1625, 40 L. Ed.2d 286, cert. denied, 416 U.S. 936, 94 S. Ct. 1934, 40 L. Ed.2d 286 (1974).

Section 18-1-405 not applicable to offense committed prior to July 1, 1972. The speedy trial provision of § 18-1-405 does not apply to an action where the alleged offense was committed prior to July 1, 1972. *People v. Reliford*, 186 Colo. 6, 525 P.2d 467 (1974).

Nor § 18-1-409. Since the offense for which the defendant was sentenced was committed prior to July 1, 1972, the right of appeal under § 18-1-409 is not available to him. *People v. Knight*, 185 Colo. 364, 525 P.2d 425 (1974).

Preemption of municipal ordinance by code. Where state assault statute was repealed when criminal code took effect on July 1, 1972, and defendant was charged with violation of

municipal assault ordinance occurring on July 7, 1972, municipal assault ordinance was not preempted, on July 7, by state assault ordinance; however, it could be argued that municipal assault ordinance was preempted by assault provisions of criminal code. *City of Lakewood v. District Court*, 181 Colo. 69, 506 P.2d 1228 (1973).

Where defense requested instruction defining "intentionally" in terms of new statute which became effective July 1, 1972, but offense

had occurred prior to that time, trial court did not err in refusing such request. *People v. Crawford*, 191 Colo. 504, 553 P.2d 827 (1976).

Body execution statute unconstitutional under fourteenth amendment. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987).

Applied in *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976); *Barreras v. People*, 636 P.2d 686 (Colo. App. 1981).

18-1-104. "Offense" defined - offenses classified - common-law crimes abolished.

(1) The terms "offense" and "crime" are synonymous and mean a violation of, or conduct defined by, any state statute for which a fine or imprisonment may be imposed.

(2) Each offense falls into one of eleven classes. There are six classes of felonies as defined in section 18-1.3-401, three classes of misdemeanors as defined in section 18-1.3-501, and two classes of petty offenses as defined in section 18-1.3-503.

(3) Common-law crimes are abolished and no conduct shall constitute an offense unless it is described as an offense in this code or in another statute of this state, but this provision does not affect the power of a court to punish for contempt, or to employ any sanction authorized by law for the enforcement of an order lawfully entered, or a civil judgment or decree; nor does it affect the use of case law as an interpretive aid in the construction of the provisions of this code.

Source: L. 71: R&RE, p. 389, § 1. C.R.S. 1963: § 40-1-104. L. 89: (2) amended, p. 829, § 39, effective July 1. L. 2002: (2) amended, p. 1510, § 177, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 18-1-104 is similar to former § 40-1-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common-law rule. Colorado has statutorily adopted the common-law rule that a crime consisted of the union of an act and intent. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

Courts are not precluded from reliance upon the common law in amplification of sections of the criminal code. *People v. Berry*, 703 P.2d 613 (Colo. App. 1985).

The common law may be used in aid of the meaning to be given statutory language, when such language is not defined in the statute. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Where a statute does not define a crime, but merely gives to it its common-law name or designation, resort must be had to the common law to ascertain what acts constitute the crime in question. *Thompson v. People*, 181 Colo. 194, 510 P.2d 311 (1973).

When the general assembly defines a crime and sets forth the intent necessary to commit the crime, the courts cannot alter the elements or substitute a different animus or intent. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

The definition of a crime is the same as that of a misdemeanor, each consisting of a violation of a public law. *Hoffman v. People*, 72 Colo. 552, 212 P. 848 (1923).

"Crime" includes all grades of public offenses, which at the common law are often classified as treason, felony, and misdemeanor. *Hoffman v. People*, 72 Colo. 552, 212 P. 848 (1923).

The violation of a municipal ordinance does not come within the definition of this section and is neither a crime nor a misdemeanor. *City of Greeley v. Hamman*, 12 Colo. 94, 20 P. 1 (1888).

Violation of a no-contact order issued by a municipal court pursuant to authority in §§ 14-4-101 to 14-4-105, is a crime under § 18-6-803.5. *People v. Rhorer*, 967 P.2d 147 (Colo. 1998).

Contempt of court. Although the general assembly in 1971 abolished all common law crimes in Colorado, it reserved to the courts the power to punish contempt by enacting this section. *People v. Barron*, 677 P.2d 1370 (Colo. 1984).

The power to define criminal conduct and to establish the legal components of criminal

liability is vested with the general assembly.
Rowe v. People, 856 P.2d 486 (Colo. 1993).

In addition to establishing the essential components of criminal liability, it is within the prerogative of the general assembly to establish affirmative defenses based on principles of justification or excuse. Rowe v. People, 856 P.2d 486 (Colo. 1993).

Within constitutional limitations, the general assembly also may restrict an affirmative defense to a particular crime. Rowe v. People, 856 P.2d 486 (Colo. 1993).

Applied in People v. Swanson, 638 P.2d 45 (Colo. 1981); City of Greenwood Vill. v. Fleming, 643 P.2d 511 (Colo. 1982).

18-1-105. Felonies classified - presumptive penalties. (Repealed)

Source: L. 71: R&RE, p. 390, § 1. C.R.S. 1963: § 40-1-105. L. 72: p. 267, § 4. L. 73: p. 531, § 83. L. 74: (1) and (2) amended, p. 409, §§ 26, 27, effective April 11; (3) and (4) added, p. 251, § 3, effective January 1, 1975. L. 76: (1) amended, p. 548, § 7, effective July 1. L. 77: Entire section R&RE, p. 867, § 15, effective July 1, 1979. L. 79: (1), (6), and (7) R&RE and (1)(c) amended, pp. 669, 700, §§ 16, 69, effective July 1. L. 81: (1)(b), (1)(c), and (7) amended and (8) and (9) added, pp. 969, 970, 972, 986, §§ 1, 1, 1, 2, effective July 1. L. 82: (8) repealed, p. 312, § 3, effective July 1. L. 84: (1)(a) amended, p. 513, § 5, effective July 1. L. 85: (9)(d) added, p. 675, § 4, effective June 7; (1)(a)(II), (2), and (4) amended and (1)(a)(III), (1)(a)(IV), (9)(a)(VI), and (9)(e) added, pp. 622, 652, 655, 667, 675, §§ 5, 7, 1, 3, effective July 1. L. 86: (9)(a)(VII), (9)(a)(VIII), and (9)(f) added, p. 769, §§ 1, 2, effective July 1. L. 87: (9)(a)(IV.5) added, p. 606, § 9, effective April 16. L. 88: (1)(a)(III), IP(9)(a), (9)(d)(I), and (9)(e)(I) amended, (1)(b)(IV), (1)(b)(VI) to (1)(b)(VIII), and (10) added, and (1)(b)(V) added and amended, pp. 680, 681, 716, 711, 1439 §§ 3, 5, 2, 4, 14, 44, effective July 1. L. 89: (1)(a)(III)(A), (1)(a)(IV), (1)(b)(I), (2), and (9)(a)(V) amended and (1)(b)(V) to (1)(b)(VIII) repealed, pp. 829, 861, §§ 40, 156, effective July 1. L. 90: (11) added, p. 989, § 1, effective April 16; (9)(a)(IV), (9)(a)(IV.5), (9)(a)(VI), and (9)(a)(VII) repealed and (9.5) added, p. 955, §§ 27, 25, effective June 7. L. 91: (4) and (10) amended, p. 404, §§ 5, 6, effective June 6. L. 92: (11) repealed, p. 393, § 25, effective July 1. L. 93: (1)(a)(IV), (1)(c), and (10) amended and (1)(a)(V) and (9.7) added, pp. 1983, 54, 1730, 1981, §§ 8, 19, 12, 7, 9, effective July 1. L. 95: (1)(a)(V)(D) amended, p. 879, § 15, effective May 24; (4) amended, p. 1293, § 3, effective July 1. L. 96: (1)(a)(III)(A) and (1)(b)(II) amended and (1)(a)(III)(E) added, p. 1841, § 4, effective July 1; (9)(a)(III) amended, p. 736, § 7, effective July 1. L. 97: (9)(a)(IX), (9.5)(a.5), (9.5)(c.5), and (9.5)(c.7) added, p. 1546, §§ 17, 18, effective July 1; (1)(b)(IV) amended, p. 1009, § 11, effective August 6. L. 98: (1)(a)(V)(C) amended, p. 399, § 6, effective April 21; (1)(a)(VI) added, p. 1447, § 38, effective July 1; (9)(g) added, p. 1264, § 1, effective July 1; (1)(a)(V)(C), (1)(a)(V)(D), (1)(c), and (9)(e)(I) amended and (1)(a)(V)(C.3), (1)(a)(V)(C.5), (1)(b)(II.5), (9)(e.5), and (9.7)(c) added, pp. 1289, 1290, §§ 4, 5, 6, 7, effective November 1. L. 99: (9.5)(a) amended and (9.7)(b)(XIII) added, pp. 800, 794, §§ 22, 3, effective July 1. L. 2000: IP(9.7)(b), (9.7)(b)(I), (9.7)(b)(II), and (9.7)(b)(III) amended, p. 702, § 25, effective July 1; (1)(a)(III)(A.5) added, p. 1107, § 3, effective August 2; (12) added, p. 1049, § 12, effective September 1. L. 2001: (13) added, p. 1009, § 1, effective July 1. L. 2002: (1)(a)(V)(C) and (1)(a)(V)(C.3) amended and (1)(a)(V)(C.7) added, p. 124, § 1, effective March 26; (1)(a)(V)(C.7) amended, p. 1192, § 41, effective July 1; (9)(e.5) amended, p. 758, § 3, effective July 1; (1)(a)(V)(C.7) amended and entire section repealed, pp. 1566, 1463, §§ 387, 3, effective October 1. L. 2002, 3rd Ex. Sess.: (4) amended, p. 15, § 7, effective July 12.

Editor's note: This section was relocated to § 18-1.3-401 in 2002.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(a)(V)(C.7) and repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-106. Misdemeanors classified - penalties. (Repealed)

Source: L. 71: R&RE, p. 390, § 1. C.R.S. 1963: § 40-1-106. L. 79: Entire section amended, p. 700, § 70, effective July 1. L. 87: Entire section amended, p. 626, § 1,

effective April 1. **L. 88:** (1) amended and (1.5) added, p. 717, § 3, effective July 1. **L. 89:** (1.5)(a) amended, p. 1643, § 4, effective June 5. **L. 93:** (1) amended and (3) added, pp. 55, 1984, §§ 20, 10, effective July 1. **L. 97:** (3)(b) amended, p. 1539, § 1, effective July 1; (1.5) amended, p. 1009, § 12, effective August 6. **L. 98:** IP(3)(b) amended and (3)(b)(V) added, p. 1231, § 1, effective July 1. **L. 99:** (3)(b)(1.5) added, p. 347, § 3, effective July 1. **L. 2000:** (3)(b)(1.5) and (3)(b)(II) amended, p. 703, § 26, effective July 1; (4) added, p. 1108, § 4, effective August 2; (5) added, p. 1049, § 13, effective September 1. **L. 2001:** (3)(b)(III) and (3)(b)(V) amended and (3)(b)(VI) added, p. 568, § 3, effective May 29; (6) added, p. 1010, § 2, effective July 1. **L. 2002:** (3)(b)(VI) amended, p. 1186, § 21, effective July 1; entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-501 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-107. Petty offenses classified - penalties. (Repealed)

Source: **L. 71:** R&RE, p. 390, § 1. **C.R.S. 1963:** § 40-1-107. **L. 73:** p. 499, § 5. **L. 79:** Entire section amended, p. 700, § 71, effective July 1. **L. 81:** Entire section amended, p. 2025, § 17, July 14. **L. 93:** Entire section amended, p. 55, § 21, effective July 1. **L. 2000:** Entire section amended, p. 1049, § 14, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-503 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-108. Offenses not classified. (Repealed)

Source: **L. 71:** R&RE, p. 391, § 1. **C.R.S. 1963:** § 40-1-108. **L. 76, Ex. Sess.:** 10, § 1. **L. 79:** Entire section amended, p. 671, § 21, effective July 1. **L. 93:** Entire section amended, p. 1985, § 11, effective July 1. **L. 2000:** Entire section amended, p. 1050, § 15, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-504 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-109. Penalty not fixed by statute - punishment. (Repealed)

Source: **L. 72:** p. 268, § 5. **C.R.S. 1963:** § 40-1-109. **L. 79:** Entire section amended, p. 701, § 72, effective July 1. **L. 85:** Entire section amended, p. 657, § 6, effective July 1. **L. 93:** Entire section amended, p. 1985, § 12, effective July 1. **L. 2000:** Entire section amended, p. 1050, § 16, effective September 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-505 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-1-110. Payment and collection of fines for class 1, 2, or 3 misdemeanors and class 1 or 2 petty offenses - release from incarceration. (Repealed)

Source: **L. 89:** Entire section added, p. 886, § 1, effective April 6. **L. 97:** (3) amended, p. 1571, § 5, effective July 1. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-506 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 2

JURISDICTION AND PLACE OF TRIAL

18-1-201. State jurisdiction. (1) A person is subject to prosecution in this state for an offense which he commits, by his own conduct or that of another for which he is legally accountable, if:

(a) The conduct constitutes an offense and is committed either wholly or partly within the state; or

(b) The conduct outside the state constitutes an attempt, as defined by this code, to commit an offense within the state; or

(c) The conduct outside the state constitutes a conspiracy to commit an offense within the state, and an act in furtherance of the conspiracy occurs in the state; or

(d) The conduct within the state constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense prohibited under the laws of this state and such other jurisdiction.

(2) An offense is committed partly within this state if conduct occurs in this state which is an element of an offense or if the result of conduct in this state is such an element. In homicide, the "result" is either the physical contact which causes death or the death itself; and if the body of a criminal homicide victim is found within the state, the death is presumed to have occurred within the state.

(3) Whether an offender is in or outside of the state is immaterial to the commission of an offense based on an omission to perform a duty imposed by the law of this state.

Source: L. 71: R&RE, p. 391, § 1. C.R.S. 1963: § 40-1-201.

ANNOTATION

By this section, Colorado has modified the common-law rule of limited territorial jurisdiction by enlarging its power to prosecute crimes that may originate outside the state. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975); *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984).

Jurisdiction not limited by district. Criminal jurisdiction over felony offenses committed in Colorado extends to all the district courts of Colorado. *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995).

Criminal jurisdiction over felonies committed in Colorado generally extends to all district courts of the state. *People v. Burgess*, 946 P.2d 565 (Colo. App. 1997); *People v. Brown*, 70 P.3d 489 (Colo. App. 2002); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006).

Issue of sovereign jurisdiction a legal question for the trial court. Where determination of jurisdiction depends upon a resolution of disputed facts, the issue must be submitted to the jury with an appropriate instruction, regardless of whether raised by defendant. However, no plain error results from a failure to submit the issue to the jury if the uncontested facts overwhelmingly support jurisdiction. *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984).

Larceny may be prosecuted at place goods stolen or brought. Larceny is considered a continuing crime and every asportation considered a new taking; thus larceny could be prosecuted not only at the place where the goods were stolen, but also wherever the goods were subsequently brought. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Theft committed partly within state. Where there was evidence presented that defendant exercised control over stolen chain saws in Colorado without authorization, the offense of theft was "committed partly within this state" as contemplated by subsection (2), and, therefore, in accordance with subsection (1)(a) defendant "is subject to prosecution in this state" for that offense. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Delivery of goods not "conduct" for purposes of subsection (2). *People v. Tinkle*, 714 P.2d 919 (Colo. App. 1985).

An omission to act in accordance with a custody decree is sufficient to confer jurisdiction on charges of second degree kidnapping. *People v. Haynie*, 826 P.2d 371 (Colo. App. 1991).

Defendant's alleged expatriation under the Expatriation Act of 1868 does not remove per-

sonal jurisdiction from a state court in a criminal prosecution where the offense was committed in that state. *People v. Jones*, 140 P.3d 325 (Colo. App. 2006).

Applied in *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Rice*, 40 Colo. App. 357, 579 P.2d 647 (1978).

18-1-202. Place of trial. (1) Except as otherwise provided by law, criminal actions shall be tried in the county where the offense was committed, or in any other county where an act in furtherance of the offense occurred.

(2) If a person committing an offense upon the person of another is in one county and his victim is in another county at the time of the commission of an act constituting an element of the offense, the offense is committed and trial may be had in either of said counties.

(3) In a case involving the death of a person, the offense is committed and the offender may be tried in any county in which the cause of death is inflicted, or in which death occurs, or in which the body of the deceased or any part of such body is found.

(4) Theft of property is committed and the offender may be tried in any county in which he exercised control over the property.

(5) If the commission of an offense commenced outside the state is consummated within this state, the offense is committed and the offender shall be tried in the county where the offense is consummated.

(6) If an offense is committed in or upon any automobile, trailer, railroad car, aircraft, or other vehicle of transportation passing within or over this state, the offense is deemed to have been committed and the offender may be tried in any county through or over which the vehicle of transportation passed.

(7) (a) When multiple crimes are based upon the same act or series of acts arising from the same criminal episode and are committed in several counties, the offender may be tried in any county in which any one of the individual crimes could have been tried, regardless of whether or not the counties are in the same judicial district.

(b) (I) For purposes of this subsection (7), when a person commits one of the offenses listed in subparagraph (II) of this paragraph (b) on two or more occasions within a six-month period, it may be considered part of the same criminal episode. Nothing in this subsection (7) shall bar prosecution of an offense that could have been joined in another prosecution.

(II) The provisions of subparagraph (I) of this paragraph (b) shall apply to the following offenses:

- (A) Theft, as defined in section 18-4-401;
- (B) Theft of rental property, as defined in section 18-4-402;
- (C) Theft by receiving, as defined in section 18-4-410;
- (D) Criminal mischief, as defined in section 18-4-501;
- (E) Fraud by check, as defined in section 18-5-205;
- (F) Defrauding a secured creditor or debtor, as defined in section 18-5-206;
- (G) Failure to pay over assigned accounts, as defined in section 18-5-502;
- (H) Concealment or removal of secured property, as defined in section 18-5-504;
- (I) Failure to pay over proceeds, as defined in section 18-5-505;
- (J) Unauthorized use of a financial transaction device, as defined in section 18-5-702;
- (K) Computer crime, as defined in section 18-5-5-102;
- (L) Procuring food or accommodation with intent to defraud, as defined in section 12-44-102, C.R.S.;
- (M) Trafficking in food stamps, as defined in section 26-2-306, C.R.S.;
- (N) Unlawful use of a patient personal needs trust fund, as defined in section 25.5-6-206, C.R.S.;
- (O) Criminal tampering with a motor vehicle, as defined in section 42-5-103, C.R.S.;
- (P) Theft of motor vehicle parts, as defined in section 42-5-104, C.R.S.;
- (Q) Theft in connection with assistive technology, as described in section 6-1-409, C.R.S.;
- (R) Theft of farm products, as defined in section 12-16-118, C.R.S.;

(S) Fraud in connection with obtaining public assistance, as described in section 26-1-127, C.R.S.;

(T) Fraud in connection with obtaining food stamps, as described in section 26-2-305, C.R.S.;

(U) An offense described in part 1 of article 5 of this title;

(V) Forgery, as defined in sections 18-5-102 and 18-5-104; and

(W) Identity theft, as defined in section 18-5-902.

(c) (I) For an indictment or information that includes an offense described in article 5 of this title, the offender may be tried in a county where the offense occurred, in a county where an act in furtherance of the offense occurred, or in a county where a bank, savings and loan, credit union, or government agency processed a document or transaction related to the offense.

(II) For the purpose of this section, “processed” means to physically handle a document or to make a written or electronic entry in a permanent or temporary record of the transaction, whether the entry is made manually or through automated means.

(8) An inchoate offense is committed and the offender may be tried in any county in which any act which is an element of the offense, including formation of the agreement in conspiracy, is committed.

(9) When a person in one county solicits, abets, agrees, aids, or attempts to aid another in the planning or commission of an offense in another county, the offense is committed and the offender may be tried for the offense in either county, or in any other county in which the principal offense could be tried.

(10) When an offense is committed on the boundary line between two counties, or so close thereto as to be difficult to readily ascertain in which county the offense occurred, the offense is committed and the offender may be tried for the offense in either county.

(11) Proof of the county in which the offense occurred or which county is the proper place for trial pursuant to this section shall not constitute an element of any offense and need not be proven by the prosecution at trial unless required by the statute defining the offense. Any challenge to the place of trial pursuant to this section shall be made by motion in writing no later than twenty-one days after arraignment, except for good cause shown. The court shall determine any such issue prior to the commencement of the trial and the selection of a jury. If the court finds that trial is not proper in the county in which the charges were filed, the court shall transfer the case to a court of appropriate jurisdiction in the proper county. Failure to challenge the place of trial as provided in this subsection (11) shall constitute a waiver of any objection to the place of trial. Pursuant to section 16-12-102 (2), C.R.S., the prosecution may file an interlocutory appeal of a decision transferring the case to another county.

(12) If a person commits the offense of failure to register as a sex offender as provided in section 18-3-412.5, the offense is committed and the offender may be tried in the county in which the offender was released from incarceration for commission of the offense requiring registration, in the county in which the offender resides, in the county in which the offender completed his or her last registration, or in the county in which the offender is apprehended.

(13) If a person commits identity theft as described in section 18-5-902, identity theft is committed and the offender may be tried in any county where a prohibited act was committed, in any county where an act in furtherance of the offense was committed, or in any county where the victim resides during all or part of the offense. For purposes of this subsection (13), a business entity resides in any county in which it maintains a physical location.

Source: **L. 71:** R&RE, p. 391, § 1. **C.R.S. 1963:** § 40-1-202. **L. 84:** (10) added, p. 536, § 4, effective July 1. **L. 87:** (7) amended, p. 606, § 10, effective April 16. **L. 92:** (3) amended and (11) added, p. 402, § 12, effective June 3. **L. 95:** (12) added, p. 469, § 17, effective July 1. **L. 98:** (7) amended, p. 793, § 2, effective July 1. **L. 2002:** (12) amended, p. 1181, § 4, effective July 1. **L. 2003:** (7)(b)(II) amended and (7)(c) added, p. 976, § 15, effective April 17; (7)(b)(II)(S) and (7)(b)(II)(T) amended and (7)(b)(II)(V) added, p. 1019, § 1, effective April 17. **L. 2004:** (7)(c)(I) amended, p. 1738, § 3, effective July 1.

L. 2006: (7)(b)(II)(N) amended, p. 2005, § 60, effective July 1; (7)(b)(II)(W) and (13) added, p. 1317, §§ 2, 1, effective July 1. **L. 2011:** (12) amended, (SB 11-007), ch. 107, p. 335, § 1, effective August 10; (12) amended, (HB 11-1278), ch. 224, p. 964, § 8, effective August 10. **L. 2012:** (11) amended, (SB 12-175), ch. 208, p. 862, § 101, effective July 1.

Editor's note: (1) Amendments to subsection (7)(b)(II) by Senate Bill 03-147 and House Bill 03-1020 were harmonized.

(2) Subsection (7)(b)(II)(V) was originally numbered as (7)(b)(II)(U) in House Bill 03-1020 but has been renumbered on revision for ease of location.

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (11) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For similar provisions concerning the place of trial, see Crim. P. 18; for change of venue, see part 1 of article 6 of title 16; for the place of trial of an action for violation of a custody order, see § 18-3-304 (4).

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961).

Venue provisions are solely for the benefit of the defendant and may be waived. People v. Taylor, 732 P.2d 1172 (Colo. 1987); People v. Rice, 579 P.2d 647 (Colo. App. 1978); People v. Joseph, 920 P.2d 850 (Colo. App. 1995).

Entry of plea forecloses objection. Once the accused subjects himself or herself to the authority of the court by offering a guilty plea, any further objection to venue is deemed waived. Vigil v. People, 310 P.2d 552 (Colo. 1957); People v. Joseph, 920 P.2d 850 (Colo. App. 1995).

The propriety of venue is a matter of law and fact, not discretion. Therefore, a court must take evidence and make specific findings when it severs counts that are not triable under the court's jurisdiction. People v. Reed, 132 P.3d 347 (Colo. 2006).

Authority of district attorney is a technical matter subject to waiver. Just as a defendant may waive objections to venue, he or she may also waive any objection to the authority of the district attorney to bring a criminal charge. People v. Joseph, 920 P.2d 850 (Colo. App. 1995).

Larceny may be prosecuted where goods stolen or brought. Larceny is considered a continuing crime and every asportation considered a new taking; thus larceny could be prosecuted not only at the place where the goods were stolen, but also wherever the goods were subsequently brought. People v. Martinez, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Out-of-state theft. The Colorado courts have jurisdiction over the offense of theft which originated in the state of New Mexico. People v.

Martinez, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Theft committed partly in state. Where there was evidence presented that defendant exercised control over stolen chain saws in Colorado without authorization, the offense of theft was "committed partly within this state" as contemplated by § 18-1-201(2), and, therefore, in accordance with § 18-1-201(1)(a) defendant "is subject to prosecution in this state" for that offense. People v. Martinez, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Under subsection (9), drug transaction crime starting in one county and completed in an adjacent county may be tried in either county even though almost all of the transaction occurred in the adjacent county. People v. Ray, 109 P.3d 996 (Colo. App. 2004).

Crime committed on highway. Under the provisions of this section where a criminal offense is committed on a public highway between two counties the trial may be had in either county. Stone v. People, 71 Colo. 162, 204 P. 897 (1922) (decided under R.S. 08, § 1908).

Where the "cause of death" is administered in one city when a defendant causes a bomb to be placed in the airplane, out of his custody and beyond his control, with the intent and for the purpose of causing the death of a passenger on the plane, the death is undoubtedly the result of defendant's unlawful act, and this having occurred in the city the venue is there properly laid pursuant to this section, and the trial court there unquestionably has jurisdiction. Graham v. People, 134 Colo. 290, 302 P.2d 737 (1956) (decided under §§ 39-9-1 and 40-2-12, CRS 53).

Venue in a kidnapping case may be either in the county in which the offense was committed or in any county through which the person kidnapped was taken or kept while under confinement or restraint. Claxton v. People, 164 Colo. 283, 434 P.2d 407 (1967) (decided under § 40-2-47, C.R.S. 1963).

Where an accused is charged with multiple crimes arising from the same criminal episode and which were committed in several counties, charges can be filed in any county in which any of the individual charges could be filed so long as such offenses were committed within the same judicial district since this section does not broaden the authority of the district attorney to file charges based on crimes committed outside the judicial district. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987); *People v. Cortez*, 737 P.2d 810 (Colo. 1987).

This section does not limit the situs of a crime to the county in which the offense is committed but also includes any county where an act in furtherance of the offense occurred. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987); *People v. Bobo*, 897 P.2d 909 (Colo. App. 1995); *People v. Joseph*, 920 P.2d 850 (Colo. App. 1995); *People v. Shackley*, 248 P.3d 1204 (Colo. 2011).

Although some evidence against defendant was seized in a different county, there was a reasonable inference that the seized evidence was used to commit the crimes that were alleged to have been committed in the county where the

trial occurred; therefore, venue was proper. *People v. Richardson*, 181 P.3d 340 (Colo. App. 2007).

Filing or preparing tax returns in one county is not an act “in furtherance of the offense” of criminal impersonation. Change of venue to county where work was performed was proper. *People v. Nevarez-Zambrano*, 222 P.3d 329 (Colo. 2010).

Under subsection (11), the prosecution is not required to prove venue as an element of the offense. Therefore, an erroneous allegation of venue does not constitute reversible error. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

Applied in *People v. Gould*, 193 Colo. 176, 563 P.2d 945 (1977); *People v. Donahue*, 41 Colo. App. 70, 578 P.2d 671 (1978); *People v. Rice*, 40 Colo. App. 357, 579 P.2d 647 (1978); *People v. Beck*, 42 Colo. App. 69, 593 P.2d 371 (1979); *People v. Freeman*, 668 P.2d 1371 (Colo. 1983); *People v. Cortez*, 703 P.2d 648 (Colo. App. 1985), *aff’d*, 737 P.2d 810 (Colo. 1987); *People v. Felgar*, 58 P.3d 1122 (Colo. App. 2002).

PART 3

WHEN PROSECUTION BARRED BY FORMER PROCEEDINGS

Cross references: For constitutional provisions concerning double jeopardy, see § 18 of art. II, Colo. Const.

Law reviews: For article, “Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986”, which discusses cases relating to double jeopardy, see 15 Colo. Law. 1572 (1986).

18-1-301. Second trial barred by former prosecution for same offense. (1) If a prosecution is for a violation of the same provision of law and is based upon the same facts as a former prosecution, it is barred by the former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense even though the conviction is subsequently set aside.

(b) The former prosecution was terminated by a final order or judgment for the defendant that has not been set aside, reversed, or vacated, and that necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction that has not been reversed or vacated, a verdict of guilty that has not been set aside and that is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two instances, failure to enter judgment must be for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as otherwise provided in subsection (2) of this section, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the jury is sworn if the case is tried by a jury or after the first prosecution witness is sworn if trial is by court following waiver of jury trial.

(2) Termination is not improper under any of the following circumstances:

(a) The defendant consents to the termination or waives his right to object to the termination. The defendant is deemed to have waived all objections to a termination of the trial unless his objections to the order of termination are made of record at the time of the entry thereof.

(b) The trial court finds that:

(I) The termination is necessary because it is physically impossible to proceed with the trial in conformity with the law; or

(II) There is a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law; or

(III) Prejudicial conduct has occurred in or outside the courtroom making it unjust either to the defendant or to the state to proceed with the trial; or

(IV) The jury is unable to agree upon a verdict; or

(V) False statements of a juror on voir dire prevent a fair trial.

Source: L. 71: R&RE, p. 396, § 1. C.R.S. 1963: § 40-1-401.

ANNOTATION

Jeopardy does not attach if an information is insufficient in form and substance to sustain a conviction. *People v. Garner*, 187 Colo. 294, 530 P.2d 496 (1975).

Jeopardy attaches upon guilty plea. Jeopardy attaches to a county court prosecution when the defendant enters a plea of guilty. *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Jeopardy attaches upon court's acceptance of a plea of guilty, and the attachment of jeopardy is what triggers the statutory bar of subsection (2) of § 18-1-408. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

Jeopardy attaches after first prosecution witness is sworn in, so, because no witnesses had yet been sworn in in the habitual criminal proceeding when the trial court dismissed the charges, jeopardy was not considered to have attached. *People v. Barnum*, 217 P.3d 908 (Colo. App. 2009).

Compulsory joinder broader than "same offense" principle or collateral estoppel. The compulsory joinder requirement of subsection (2) of § 18-1-408 is broader than both the "same offense" principle of double jeopardy as codified in this section and the collateral estoppel effect of a prior determination of an ultimate fact as outlined in § 18-1-302. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Protection from reprosecution where proceedings improperly terminated. Where defendants had completed a full trial and all

charges had been submitted to the jury, and the jury returned a verdict on only one of the numerous charges, dismissal of the jury without further instruction or deliberation on the remaining charges is an improper termination of the proceedings, and the defendants are protected from reprosecution on those charges. *Ortiz v. District Court*, 626 P.2d 642 (Colo. 1981).

Where trial judge, despite objections of defense attorney, erroneously declared a mistrial sua sponte because a key staff member resigned, the docket was crowded, and the trial ran longer than was anticipated, second trial was barred by double jeopardy. The court's reasons for declaring a mistrial were not substantial enough to warrant a finding of "manifest necessity". *People v. Berreth*, 13 P.3d 1214 (Colo. 2000).

Where the court gave defendant a choice between a mistrial and a continuance, defendant's response that he did not request either was sufficient to preserve his objection. *Paul v. People*, 105 P.3d 628 (Colo. 2005).

Trial court did in fact declare a mistrial based on jury deadlock. Although the trial court did not expressly declare a mistrial at the time the jury returned the unsigned verdict form, the record showed that the court and the parties understood that a mistrial had been declared. *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

Applied in *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975); *People v. Hoinville*, 191 Colo. 357, 553 P.2d 777 (1976).

18-1-302. Second trial barred by former prosecution for different offense. (1) Although a prosecution is for a violation of a different provision of law than a former prosecution or is based on different facts, it is barred by the former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal or a conviction as defined in section 18-1-301 (1) (a) and (1) (c) and the subsequent prosecution is for:

(I) Any offense of which the defendant could have been convicted under the allegation of the complaint, information, or indictment of the first prosecution; or

(II) The same conduct, unless the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of the offenses is intended to prevent a substantially different harm or evil or the second offense was not consummated when the former trial began.

(b) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and that necessarily required a determination inconsistent with a fact that must be established for conviction of the second offense.

(c) The former prosecution was improperly terminated, as improper termination is defined in section 18-1-301 (1) (d) and (2), and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

Source: L. 71: R&RE, p. 397, § 1. C.R.S. 1963: § 40-1-402.

ANNOTATION

This section must be read to deal with multiple prosecutions in the same jurisdiction since § 18-1-303 sets out the circumstances in which a second trial in Colorado is barred by a former prosecution in another jurisdiction. Clearly, this section cannot be construed to bar separate prosecutions for different state and federal offenses arising out of the same series of transactions, for such trials could not be held in the same court. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

The test of double jeopardy as to different offenses is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable. Conviction and sentences for two distinct offenses did not put appellees twice in jeopardy where the Colorado statutes separately define the offenses of burglary and assault with intent to rob. Burglary is a crime against property; it is the unlawful entering of a dwelling house or building with the intent to commit larceny or other felony. Assault with intent to rob is a crime directed against a person; it is an unlawful attempt coupled with a present ability to commit a violent injury on the person, with the specific intent to commit robbery. The offenses were separate and independent and the imposition of two consecutive sentences were within the law and did not constitute a violation of any federally protected right. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), aff'd per curiam, 389 F.2d 1003 (10th Cir. 1967).

Collateral estoppel is an integral part of the concept of double jeopardy. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Simply stated, collateral estoppel bars re-litigation between the same parties of issues

actually determined at a previous trial. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Subsection (1)(a)(II) is designed to protect a defendant from having to relitigate an issue of ultimate fact once it has been determined by a valid and final judgment. When a previous judgment was based on a general verdict, a court is required to examine the record, taking into account the pleadings, evidence, charge, and other relevant matters, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose. *People v. Matheson*, 671 P.2d 968 (Colo. App. 1983).

This section protects a defendant from having to relitigate a factual issue once it has been determined by a valid and final judgment. The doctrine of collateral estoppel generally precludes a later trial if a rational fact-finder could not have grounded its earlier verdict upon an issue other than that upon which a later conviction would necessarily be based. *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

Collateral estoppel and invalidity of dual sovereignty in Colorado barred trial. Where defendant was tried in a municipal court for reckless and careless driving in violation of that municipality's traffic code, he could not later be tried in district court for feloniously inflicting bodily injury while under the influence of intoxicating liquor by operating and driving a motor vehicle in a reckless, negligent, or careless manner, in violation of the state code, because of the doctrine of collateral estoppel, and because dual sovereignty is no longer valid in Colorado. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Compulsory joinder broader than "same offense" principle or collateral estoppel. The compulsory joinder requirement of § 18-1-408

(2) is broader than both the "same offense" principle of double jeopardy as codified in § 18-1-301 and the collateral estoppel effect of a prior determination of an ultimate fact as outlined in this section. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

This statutory prohibition against a later prosecution does not apply if the offense in the later prosecution necessarily requires proof of a fact not required by the former prosecution and the law defining each offense is intended to prevent a substantially different

harm or evil. *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

Effect of acquittal upon lesser included offense. It is the character of the evidence which must control in determining whether the lesser included offense of assault with intent to commit rape can stand alone or fall on acquittal of forcible rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Applied in *People v. Williams*, 651 P.2d 899 (Colo. 1982); *People v. Garcia*, 698 P.2d 801 (Colo. 1985).

18-1-303. Second trial barred by prosecution in another jurisdiction. (1) If conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States, or another state, or of a municipality, a prosecution in any other of these jurisdictions is a bar to a subsequent prosecution in this state under either of the following circumstances:

(a) The first prosecution resulted in a conviction or an acquittal as defined in section 18-1-301 (1) (a) and (1) (c), and the subsequent prosecution is based on the same conduct, unless:

(I) The offense for which the defendant was formerly convicted or acquitted requires proof of a fact not required by the offense for which he is subsequently prosecuted and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or

(II) The second offense was not consummated when the former trial began.

(b) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and that necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is subsequently prosecuted.

Source: L. 71: R&RE, p. 397, § 1. C.R.S. 1963: § 40-1-403.

ANNOTATION

Dual sovereignty no longer viable in Colorado. In early cases the courts recognized the concept of dual sovereignty for the purposes of prosecution and punishment of an accused in both a state and municipal court for the same act. The concept of dual sovereignty is no longer viable in Colorado. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Subsection (1)(a) specifically defines the capacity of the state to prosecute when there has been a previous prosecution in a municipality. *People v. Talarico*, 192 Colo. 445, 560 P.2d 90 (1977).

Effect of previous prosecution in municipal court. Where defendant was tried in a municipal court for reckless and careless driving in violation of that municipality's traffic code, he could not later be tried in district court for feloniously inflicting bodily injury while under the influence of intoxicating liquor by operating and driving a motor vehicle in a reckless, negligent, or careless manner, in violation of the state code, because of the doctrine of collateral estoppel, and because dual sovereignty is no longer valid in

Colorado. *People v. Horvat*, 186 Colo. 202, 527 P.2d 47 (1974).

Where defendant struck one man and also allegedly hit another man, and the assault on the first man resulted in the filing of charges for the violation of two municipal ordinances, to which the defendant pleaded guilty, and where the district attorney filed a felony complaint in the Denver county court and charged the defendant with first-degree assault and second-degree burglary, and the felony assault charge predicated on the acts which allegedly caused the injuries to the second man was dismissed by the county court judge, and the district attorney then filed a direct information in the district court, charging the defendant with first-degree assault, this section did not justify dismissal of the felony assault charge against the defendant. *People v. Mendoza*, 190 Colo. 519, 549 P.2d 766 (1976).

Jeopardy does not attach when a charge is dismissed on grounds unrelated to a defendant's criminal liability. Where, prior to the commencement of trial, a federal charge was dismissed on the basis of a finding of incompe-

tency to stand trial, jeopardy did not attach; consequently, state prosecution did not amount to "subsequent prosecution". Chatfield v. Colo. Court of Appeals, 775 P.2d 1168 (Colo. 1989).

A complete defense to a subsequent state prosecution is provided by this section; it does not function to deprive a district court of jurisdiction over a defendant or a charged offense. Chatfield v. Colo. Court of Appeals, 775 P.2d 1168 (Colo. 1989).

Prosecution by Indian tribal court bars a subsequent Colorado prosecution where the requirements of this section are met. People v. Morgan, 785 P.2d 1294 (Colo. 1990).

Exception in this section for previously tried offenses which require proof of different facts than the subsequently tried offense does not include facts required to establish jurisdiction and venue or facts concerning the dates of the conduct. People v. Morgan, 785 P.2d 1294 (Colo. 1990).

Federal acquittal or conviction based on same conduct is a bar to state prosecution unless federal action requires proof of a fact not required by state offense. People v. Esch, 786 P.2d 462 (Colo. App. 1989).

Defendant's federal prosecution under the Racketeer Influenced and Corrupt Organizations Act (RICO) and subsequent state conviction for first degree murder for the same incident do not constitute double jeopardy. The RICO conviction required proof of facts not necessary for the state murder conviction, and the two laws seek to prohibit substantially different evils. People v. Gladney, 250 P.3d 762 (Colo. App. 2010).

Applied in People v. Hines, 194 Colo. 284, 572 P.2d 467 (1977); Blum v. County Court, 631 P.2d 1191 (Colo. App. 1981).

18-1-304. Former prosecution not a bar. (1) A former prosecution is not a bar within the meaning of sections 18-1-301 to 18-1-303, if the former prosecution:

(a) Was before a court that lacked jurisdiction over the defendant or the offense; or
(b) Was procured by the defendant without the knowledge of the appropriate prosecuting official and with the intent to avoid the sentence that otherwise might be imposed; or

(c) Resulted in a judgment of conviction that was set aside, reversed, or vacated upon appeal or in any other subsequent judicial proceeding.

Source: L. 71: R&RE, p. 398, § 1. C.R.S. 1963: § 40-1-404.

PART 4

RIGHTS OF DEFENDANT

18-1-401. Purpose. It is the intent of this part 4 to confer upon every person accused of an offense the benefits arising from said part 4 as a matter of substantive right, in implementation of minimum standards of criminal justice within the concept of due process of law.

Source: L. 71: R&RE, p. 398, § 1. C.R.S. 1963: § 40-1-501.

ANNOTATION

Applied in People v. Aragon, 665 P.2d 137 (Colo. App. 1982); People v. Germany, 674 P.2d 345 (Colo. 1983).

18-1-402. Presumption of innocence. Every person is presumed innocent until proved guilty. No person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt.

Source: L. 71: R&RE, p. 398, § 1. C.R.S. 1963: § 40-1-502.

ANNOTATION

- I. General Consideration.
- II. Presumption of Innocence.
- III. Proof Beyond Reasonable Doubt.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963).

Annotator's note. Since § 18-1-402 is similar to former § 40-2-20 C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The policy of the government is to punish only those who violate the law and to protect the innocent in all cases. Criminal prosecutions are not to be regarded or conducted as contests between individuals respecting civil rights, wherein advantages not reaching the merits may be gained by one party over another. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Legislature's competence to establish culpability and justification not impaired. Constitutional mandate requiring the prosecution to establish all essential elements of a crime beyond a reasonable doubt does not impair the legislature's competence to establish the statutory constituents of criminal culpability for various offenses and to formulate particular rules of justification or excuse for acts that otherwise might be criminally punishable. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Accused presumed innocent until guilt proved beyond reasonable doubt. The prosecution in a criminal case must establish the guilt of the accused by proof beyond a reasonable doubt, and until the prosecution meets that burden, the accused is presumed to be innocent. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973); *Vega v. People*, 893 P.2d 107 (Colo. 1995).

Section provides foundation of criminal justice system. The presumption of innocence, coupled with proof of each element of the charge beyond a reasonable doubt, provides the foundation for a system of criminal justice. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

Component parts of due process of law. Proof beyond a reasonable doubt and presumption of innocence are principles of law applicable to criminal cases which have been so universally accepted and applied as to have become component parts of the term "due process of law". *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

The presumption of innocence has meaning independent of the concept of proof beyond a reasonable doubt which relates to the

burden of proof. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

Combining in one instruction the instructions on presumption of innocence, burden of proof, and reasonable doubt did not amount to an abuse of discretion, where no prejudice has been shown. *People v. Sharpe*, 183 Colo. 64, 514 P.2d 1138 (1973).

II. PRESUMPTION OF INNOCENCE.

Purpose of presumption of innocence. The presumption of innocence was developed for the purpose of guarding against the conviction of an innocent person. It was not developed for the purpose of aiding the guilty to escape punishment. It is nevertheless perfectly plain that the presumption, together with the related rule on the burden of proof, in guarding against the conviction of an innocent person, may in some cases prevent the conviction of a person who is actually guilty. Thus, where the prosecution is unable to muster evidence sufficient to overcome the presumption, there will be an acquittal, even though the defendant is actually guilty. This is a calculated risk which society is willing to take. It does so because it regards the acquittal of guilty persons less objectionable than the conviction of innocent persons. The implication that society is just as anxious to convict the guilty as it is to acquit the innocent is false; otherwise there would be no presumption of innocence. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Presumption of guilt raised by implications of defendant's prior criminality held prejudicial error. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely defendant would commit another. *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

A presumption of guilt should not be generated against an accused by showing that he committed a crime indicative that he is a depraved person who likely would commit the crime for which he is being tried. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Prosecution's closing argument misstating the presumption of innocence was erroneous. Prosecution's statements in closing argument that defendant "sits here in front of you a guilty man" and that the presumption of innocence "we had when we started this case is gone" were flawed because a defendant retains a presumption of innocence throughout the trial process. The presumption remains until after a jury returns a guilty verdict. *People v. McBride*, 228 P.3d 216 (Colo. App. 2009).

Failure to instruct on the presumption of innocence constitutes a denial of due process of law and deprived defendant of his constitutional right to a fair trial. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

Failure to instruct the jury as to the presumption of innocence is plain error. *People v. Aragon*, 665 P.2d 137 (Colo. App. 1982).

Instruction on the presumption of innocence is salutary, in that it guarantees that the defendant's liberty will not be lost precipitously and that the state will be put to the proper test in securing a conviction in a criminal case. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

Instruction on presumption of innocence held inappropriate. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971); *Brown v. People*, 177 Colo. 397, 494 P.2d 587 (1972); *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Recommended instruction on the presumption of innocence should read: "The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt." *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Instruction was not erroneous. *Zamora v. People*, 175 Colo. 340, 487 P.2d 1116 (1971).

Submitting erroneous instruction requires reversal only if objected to. Submitting to the jury an erroneous instruction on the presumption of innocence would ordinarily require reversal, but only if the defendant objected to the instruction. *People v. Simmons*, 182 Colo. 350, 513 P.2d 193 (1973).

III. PROOF BEYOND REASONABLE DOUBT.

Law reviews. For comment on *Jones v. People* (146 Colo. 40, 360 P.2d 686 (1961)), see 34 Rocky Mt. L. Rev. 243 (1962).

The reasonable doubt which authorizes an acquittal is as to the defendant's guilt, not his innocence. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Prosecution bears initial burden of proof. Before the accused can be convicted of murder, or called upon to produce evidence in justification or mitigation of such an offense, the prosecution must make out such a case as will, under the law, sustain a verdict of guilty. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886).

Burden extends to all essential elements of crime. It is axiomatic that the burden of proof rests upon the prosecution throughout the trial to prove beyond a reasonable doubt the existence of all essential elements necessary to constitute

the offense charged. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Prosecutor must establish fair account of transaction. The policy of the law, as evinced by the presumption of innocence and the doctrine of reasonable doubt, would require the public prosecutor to introduce such proof as will give a fair account of the transaction. This being done, it devolves upon the defendant to produce in evidence such matters of mitigation, justification or excuse, if any such exist, as may tend to explain his action and show the necessity thereof; otherwise a verdict of guilty must necessarily be returned against him. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

He cannot be compelled to search for and put in evidence all the facts connected with the transaction, or exculpatory facts in the prisoner's favor. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

All matters showing justification or excuse must be considered in favor of accused. When the circumstances surrounding the commission of the homicide are produced in evidence by the state, all matters, if any, which go to justify or excuse the killing must be considered in favor of the defendant; and if sufficient to manifest that the accused was justified or excused in committing the homicide, he is not bound to prove it by affirmative evidence in his own behalf. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886).

As to all facts in evidence properly constituting part of the *res gestae*, they are to be considered by the jury, in passing upon the question of guilt or innocence, without discrimination as to the rules of evidence, whether introduced by the prosecutor or the defendant. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

The rule relating to the *res gestae* applies to all defenses which traverse the averments of the indictment and go to the essence of the guilt charged against the accused. Within this class may be mentioned self-defense, provocation, heat of blood, and, generally, all matters growing out of the *res gestae* which go to justify, extenuate or excuse the crime charged, including the defense of alibi. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

The burden is never on the defendant to show that he did not commit the crime. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Defendant's only burden is to raise a reasonable doubt in the minds of the jury as to his guilt from all the evidence of the case. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Burden on accused to raise reasonable doubt of sanity. While up to the point of establishing an unjustifiable homicide the prosecution carries the burden of proof beyond a reasonable doubt, sanity is presumed. He who relies upon

its absence must then produce evidence which will at least raise a reasonable doubt of its existence. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

The killing having been established, the defendant had the burden of proving the effect of his mental condition as a mitigating circumstance in the perpetration of the killing. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961); *Jones v. People*, 155 Colo. 148, 393 P.2d 366 (1964).

Burden of establishing defendant's capacity to form specific criminal intent. Once some evidence from either the prosecution or the defense raises the issue of impaired mental condition, the burden devolves upon the prosecution to establish beyond a reasonable doubt the defendant's capacity to form the specific intent required for the offense as well as the defendant's guilt as to all essential elements of the crime charged against him. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

The accused is not required by this section to prove circumstances of mitigation or excuse beyond a reasonable doubt, or to the extent of satisfactorily establishing his defense. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886); *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Nor by a preponderance of evidence. When the killing is proved the burden does not devolve on the accused to show anything to the satisfaction of the jury by a fair preponderance of the evidence. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

In a substantial number of cases insanity is the only defense relied upon and as a practical matter the accused could be deprived of essential and time-honored safeguards and could be required to establish his innocence by a preponderance of the evidence, if provisions requiring proof of sanity by a preponderance of the evidence were upheld. *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968).

Defense need only raise reasonable doubt of guilt. The accused is only required to prove excuse or mitigation as any other facts are required to be proved; and if the matters relied on

be supported by such proof are such as would produce a reasonable doubt in the minds of the jury as to the guilt of the prisoner, when the whole evidence concerning the transaction comes to be considered by the jury, the rule of law is that there must be an acquittal. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1886); *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

The accused has the burden of showing circumstances of mitigation or circumstances that justify or excuse the homicide. If the showing be sufficiently strong to create a reasonable doubt of the guilt of the accused as to any grade of offense included in the indictment, the accused is entitled to the benefit thereof. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

It is not incumbent upon the defendant to prove anything to the satisfaction of the jury; rather, it is sufficient if he, by any evidence in the case, succeeds in raising a reasonable doubt in the minds of the jury of the truth of any essential element of the charge against him. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Due process of law requires prosecution to establish all essential elements of crime beyond a reasonable doubt. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Prejudice inevitable when instruction reduces prosecution's obligation of proof. Prejudice to the defendant is inevitable when the court instructs the jury in such a way as to reduce the prosecution's obligations to prove each element of its case beyond a reasonable doubt. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

Instruction on reasonable doubt held fair statement of its legal meaning. *People v. Focht*, 180 Colo. 259, 504 P.2d 1096 (1972).

Instructions held erroneous. Any instruction, whatever its language, which in effect imposes upon the defendant the burden of affirmatively showing that no crime has been committed constitutes reversible error, since it clearly deprives him of the benefit of a reasonable doubt as to his guilt which may arise from all the evidence. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

18-1-403. Legal assistance and supporting services. Except as provided in section 16-5-501, C.R.S., all indigent persons who are charged with or held for the commission of a crime are entitled to legal representation and supporting services at state expense, to the extent and in the manner provided for in articles 1 and 2 of title 21, C.R.S.

Source: L. 71: R&RE, p. 398, § 1. **C.R.S. 1963:** § 40-1-503. **L. 81:** Entire section amended, p. 928, § 2, September 1. **L. 96:** Entire section amended, p. 1016, § 4, effective May 23.

Cross references: For other provisions concerning legal counsel for the indigent, see § 16 of art. II, Colo. Const., and Crim. P. 44.

ANNOTATION

Law reviews. For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to the right to counsel, see 15 Colo. Law. 1578 (1986).

Annotator's note. For other annotations concerning legal counsel for the indigent, see § 16 of art. II, Colo. Const., and Crim. P. 44.

Implementation of ABA standards. The general assembly, in adopting this section, was endeavoring to meet and implement the ABA standards for criminal justice relating to providing defense services. *Brown v. District Court*, 189 Colo. 469, 541 P.2d 1248 (1975).

For the right of defendant to have counsel appointed for appeal, see *In re Griffin*, 152 Colo. 347, 382 P.2d 202 (1963).

Motion within discretion of court. The granting or denial of a motion to provide supporting services to counsel for an indigent defendant in a criminal prosecution is a matter within the sound discretion of the trial court. *Brown v. District Court*, 189 Colo. 469, 541 P.2d 1248 (1975); *People v. Marquiz*, 685 P.2d 242 (Colo. App. 1984), *aff'd*, 726 P.2d 1105 (Colo.

1986); *People v. Tafoya*, 703 P.2d 663 (Colo. App. 1985).

Must demonstrate need for appointment of expert witness. Having failed to demonstrate any particularized and reasonable need for the appointment of investigatory, expert, or other defense services, defendant was not entitled to the appointment of expert witnesses. *Brown v. District Court*, 189 Colo. 469, 541 P.2d 1248 (1975).

Defendant entitled to have his expert take fingerprints from a plastic bag containing cocaine seized from his car, however, he was not entitled to require the state to conduct such fingerprint analysis. *People v. Roy*, 948 P.2d 99 (Colo. App. 1977).

Trial court did not abuse its discretion in failing to provide, at state expense, a private interpreter to translate out-of-court discussions between defendant and his attorney where legal representation was supplied by a pro bono attorney rather than a public defender. *People v. Cardenas*, 62 P.3d 621 (Colo. 2002).

Applied in Bd. of County Comm'rs v. Buck, 168 Colo. 499, 452 P.2d 6 (1969).

18-1-404. Preliminary hearing or waiver - dispositional hearing. (1) Every person accused of a class 1, 2, or 3 felony by direct information or felony complaint has the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information has been committed by the defendant. In addition, only those persons accused of a class 4, 5, or 6 felony by direct information or felony complaint which felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406, or is a sexual offense under part 4 of article 3 of this title, shall have the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information or felony complaint was committed by the defendant. The procedure to be followed in asserting the right to a preliminary hearing, and the time within which demand therefor must be made, as well as the time within which the hearing, if demanded, shall be had, shall be as provided by rule of the supreme court of the state of Colorado. A failure to observe and substantially comply with such rule is a waiver of the right to a preliminary hearing.

(2) (a) No person accused of a class 4, 5, or 6 felony by direct information or felony complaint, except those which require mandatory sentencing or which are crimes of violence as defined in section 18-1.3-406, or which are sexual offenses under part 4 of article 3 of this title, shall have the right to demand or receive a preliminary hearing; except that such person shall participate in a dispositional hearing for the purposes of case evaluation and potential resolution.

(b) Any defendant accused of a class 4, 5, or 6 felony who is not otherwise entitled to a preliminary hearing pursuant to paragraph (a) of this subsection (2), may demand and shall receive a preliminary hearing within a reasonable time pursuant to subsection (1) of this section, if the defendant is in custody; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing.

Source: L. 71: R&RE, p. 398, § 1. C.R.S. 1963: § 40-1-504. L. 98: Entire section amended, p. 1272, § 2, effective July 1. L. 2002: (1) and (2)(a) amended, p. 1510, § 178, effective October 1.

Cross references: (1) For the rule of the supreme court on preliminary hearings, see Crim. P. 5. (2) For the legislative declaration contained in the 2002 act amending subsections (1) and (2)(a), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Primary purpose of the preliminary hearing is to determine whether probable cause exists to support the prosecution's charge that the accused committed a specific crime. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

The preliminary hearing is held for the limited purpose of determining if probable cause exists to believe that the crime or crimes charged were committed by the defendant. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Although a preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

The preliminary hearing was created as a screening device to afford the defendant an opportunity to challenge the sufficiency of the prosecution's evidence to establish probable cause before an impartial judge. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Prosecution not required to lay out all witnesses and evidence. A preliminary hearing is a screening device and does not require that the prosecution lay out for inspection and for full examination all witnesses and evidence. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Judge must draw all reasonable inferences favorable to the prosecution at a preliminary hearing. *People ex rel. Russel v. Hall*, 620 P.2d 34 (Colo. 1980).

A trial court commits reversible error when it resolved the inferences arising from conflicting testimony in a preliminary hearing in the defendant's favor. *People v. Williams*, 628 P.2d 1011 (Colo. 1981).

Standard of review in determining if probable cause had been established requires that the evidence be sufficient to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief that the defendant may have committed the crimes charged. *People ex rel. Russel v. Hall*, 620 P.2d 34 (Colo. 1980).

18-1-405. Speedy trial. (1) Except as otherwise provided in this section, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act

The standards for determining probable cause at a preliminary hearing are: (1) Probable cause is established when the evidence is sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged; (2) the evidence presented must be viewed in the light most favorable to the prosecution; (3) if testimony conflicts, the trial court must draw an inference for the prosecution; and (4) the preliminary hearing is a screening device and not a trial. *People v. Williams*, 628 P.2d 1011 (Colo. 1981).

Hearsay evidence and other evidence, which would be incompetent if offered at the time of trial, may be the bulk of evidence at a preliminary hearing. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Hearsay evidence, which would otherwise be inadmissible at the trial, may be considered for purposes of establishing probable cause. *People v. Williams*, 628 P.2d 1011 (Colo. 1981).

Admissibility of confessions and evidence not resolved as required at trial. The admissibility of a confession at a preliminary hearing, which is alleged to be involuntary or the admissibility of evidence that may have been seized in violation of amendment 4 of the U.S. Const. need not be resolved on the same basis that would be required when such motion is properly before the trial court or at the time of the trial. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

Waiver admits evidence sufficient to establish probable cause. If the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

Right to hearing may not be restored once waived. Under the Colorado rules of criminal procedure and the statutes of this state, a district court is not vested with the power to restore a defendant's statutory right to a preliminary hearing once the defendant had waived that right in county court bind-over proceedings. *People ex rel. Farina v. District Court*, 184 Colo. 406, 521 P.2d 778 (1974).

or series of acts arising out of the same criminal episode.

(2) If trial results in conviction which is reversed on appeal, any new trial must be commenced within six months after the date of the receipt by the trial court of the mandate from the appellate court.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six-month period from the date upon which the continuance was granted.

(3.5) If a trial date has been fixed by the court and the defendant fails to make an appearance in person on the trial date, the period within which the trial shall be had is extended for an additional six-month period from the date of the defendant's next appearance.

(4) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (1) of this section, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance or unless the defendant without making an appearance before the court in person or by his counsel files a dated written waiver of his rights to a speedy trial pursuant to this section and files an agreement to the continuance signed by the defendant. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(5) To be entitled to a dismissal under subsection (1) of this section, the defendant must move for dismissal prior to the commencement of his trial and prior to any pretrial motions which are set for hearing immediately before the trial or prior to the entry of a plea of guilty to the charge or an included offense. Failure to so move is a waiver of the defendant's rights under this section.

(5.1) If a trial date is offered by the court to a defendant who is represented by counsel and neither the defendant nor his counsel expressly objects to the offered date as being beyond the time within which such trial shall be had pursuant to this section, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provisions of this section.

(6) In computing the time within which a defendant shall be brought to trial as provided in subsection (1) of this section, the following periods of time shall be excluded:

(a) Any period during which the defendant is incompetent to stand trial, or is unable to appear by reason of illness or physical disability, or is under observation or examination at any time after the issue of the defendant's mental condition, insanity, incompetency, or impaired mental condition is raised;

(b) The period of delay caused by an interlocutory appeal whether commenced by the defendant or by the prosecution;

(c) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;

(d) The period of delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the state for trial;

(e) The period of delay caused by any mistrial, not to exceed three months for each mistrial;

(f) The period of any delay caused at the instance of the defendant;

(g) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if:

(I) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that this evidence will be available at the later date; or

(II) The continuance is granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and additional time is justified because of

exceptional circumstances of the case and the court enters specific findings with respect to the justification;

(h) The period of delay between the new date set for trial following the expiration of the time periods excluded by paragraphs (a), (b), (c), (d), and (f) of this subsection (6), not to exceed three months;

(i) The period of delay between the filing of a motion pursuant to section 18-1-202 (11) and any decision by the court regarding such motion, and if such decision by the court transfers the case to another county, the period of delay until the first appearance of all the parties in a court of appropriate jurisdiction in the county to which the case has been transferred, and in such event the provisions of subsection (7) of this section shall apply.

(7) If a trial date has been fixed by the court and the case is subsequently transferred to a court in another county, the period within which trial must be had is extended for an additional three months from the date of the first appearance of all of the parties in a court of appropriate jurisdiction in the county to which the case has been transferred.

Source: L. 71: R&RE, p. 398, § 1. C.R.S. 1963: § 40-1-505. L. 79: (2) amended, p. 725, § 1, effective October 1. L. 85: (4) and (5) amended and (5.1) and (6)(h) added, pp. 622, 623, § 6, 7, effective July 1. L. 87: (3.5) added, p. 606, § 11, effective April 16. L. 88: (3.5) amended, p. 664, § 4, effective July 1. L. 92: (6) amended and (7) added, p. 402, § 13, effective June 3. L. 94: (6)(a) amended, p. 1716, § 4, effective July 1. L. 99: (6)(a) amended, p. 404, § 7, effective July 1.

ANNOTATION

- I. General Consideration.
- II. Scope of Right to Speedy Trial.
- III. Enforcement of Right.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Right of a Federal Prisoner to a Speedy Trial on a State Charge", see 12 Rocky Mt. L. Rev. 214 (1940). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to speedy trials, see 15 Colo. Law. 1595 and 1617 (1986). For article, "Justice Delayed is Justice Denied", see 21 Colo. Law. 2195 (1992). For article, "The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part I", see 31 Colo. Law. 115 (July 2002). For article, "The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part II", see 31 Colo. Law. 59 (August 2002).

Annotator's note. (1) For other annotations concerning speedy trials, see § 16 of art. II, Colo. Const., and Crim. P. 48.

(2) Since § 18-1-405 is similar to former § 39-7-12, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of section. It is not the purpose of this section to enable the guilty to escape, but to prevent unnecessary delays on the part of the prosecution. This section was intended to give effect to that provision of our bill of rights which

guarantees one accused of a criminal offense a speedy trial. *Henwood v. People*, 57 Colo. 544, 143 P. 373 (1914).

This section is not concerned with the crime, nor with the punishment therefor, but is intended to prevent any unreasonable detention of an accused preliminary to his trial. The accomplishment of this purpose does not require final action on the criminal charge. *People v. Henwood*, 65 Colo. 566, 179 P. 874 (1919).

The fundamental right of an accused to a speedy trial arises from § 16 of art. II, Colo. Const. This section must be regarded as having been enacted for the purpose of rendering the constitutional guaranty effective and providing a method of securing the right declared. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938), overruled on other grounds in *Watson v. People*, 700 P.2d 544 (Colo. 1985).

This section is intended to implement the constitutional right to a speedy trial by requiring dismissal of the case whenever the defendant is not tried within the six-month period and the delay does not qualify for one of the express exclusionary categories set out in the statute. *People v. Deason*, 670 P.2d 792 (Colo. 1983); *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

The obvious purpose of both the rule of criminal procedure and this section is to prevent dillydallying on the part of the district attorney or the court in a criminal proceeding. *People v. Bates*, 155 Colo. 277, 394 P.2d 134 (1964).

The right to a speedy trial is not only for the benefit of the accused, but also for the protection of the public. It is essential that an early deter-

mination of guilt be made, so that the innocent may be exonerated and the guilty punished. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971); *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Intent of this section is to prevent unnecessary prosecutorial and judicial delays. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

The speedy trial provisions are designed to foster more effective prisoner treatment and rehabilitation by eliminating, as expeditiously as possible, the uncertainties surrounding outstanding criminal charges. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

An accused person's right to a speedy trial is ultimately grounded on the federal and state constitutions, and statutes relating to speedy trial are intended to render these constitutional guarantees more effective. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

The right of an accused to a speedy trial is an important civil right, and when the constitutional mandate is invoked the matter should receive careful consideration by the courts. *Ex parte Russo*, 104 Colo. 91, 88 P.2d 953 (1939).

Section guarantees speedy trial. Under this section and under § 16 of art. II, Colo. Const., a defendant in a criminal action is entitled to a speedy trial, and, generally speaking, he may not be held without trial for a period beyond that fixed by law. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938).

It does not limit the constitutional right of an accused person to have a speedy public trial. *Hicks v. People*, 148 Colo. 26, 364 P.2d 877 (1961).

Trial in violation of defendant's speedy trial rights not permitted. A court would be proceeding without jurisdiction if it was to try a criminal defendant in violation of his rights under the Colorado speedy trial statute and the rules of the Colorado supreme court. *Hampton v. District Court*, 199 Colo. 104, 605 P.2d 54 (1980).

Court's practice of postponing arraignment until all pretrial matters are concluded thwarts purpose of this section and Crim. P. 48(b). *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

Meaning of subsection (1). The phrase "brought to trial on the issues raised by the . . . information", as used in this section, refers to a trial which resolves the ultimate guilt or innocence of the accused as to the charges filed against him and not a sanity trial, even when the defendant pleads not guilty by reason of insanity. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Subsection (2) is ambiguous because it is silent on the remedy if a new trial does not occur within six months. In order to effectuate

the intent of the statute, the dismissal remedy from subsection (1) must be imported into subsection (2). In addition, it is necessary to import the provisions of subsection (6) into subsection (2) in order to avoid an absurd result. *People v. Mosley*, __ P.3d __ (Colo. App. 2011).

An accused is "brought to trial" when the court calls the case for trial and the attorneys are ready to proceed. *People v. Peltz*, 697 P.2d 766 (Colo. App. 1984), *aff'd*, 728 P.2d 1271 (Colo. 1986).

Commencement of a sanity trial is not the functional equivalent of a trial on the merits for purposes of satisfying the state's speedy trial obligation. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Section applies in juvenile proceedings. Trial courts are bound by the statutory and constitutional speedy trial requirements in juvenile as well as adult proceedings; fundamental fairness requires no less. *P.V. v. District Court*, 199 Colo. 357, 609 P.2d 110 (1980); *People in Interest of T.F.B.*, 199 Colo. 474, 610 P.2d 501 (1980).

Burden of compliance with time requirements is on prosecution and trial court. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978); *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

If trial court fails to cause such record to be made, dismissal of charges is required, even after jury has returned verdict of guilty. *People v. Scales*, 745 P.2d 259 (Colo. App. 1987), *rev'd* on other grounds, 763 P.2d 1045 (Colo. 1988).

It is duty of both prosecutor and trial judge to secure and protect defendant's right to speedy trial. *People v. Chavez*, 779 P.2d 375 (Colo. 1989); *Fisher v. County Court*, 796 P.2d 65 (Colo. App. 1990).

Even where defendant moves for change of venue. Where the defendant successfully moved for a change of venue, and the case was delayed because the trial judge did not designate a new venue and set a date or trial, such delay is attributable to the state since it is the responsibility of the district attorney and the trial court to cause the case to be brought to trial within the prescribed time limits. *People v. Colantonio*, 196 Colo. 242, 583 P.2d 919 (1978).

Burden of compliance with speedy trial statute includes making a record sufficient for an appellate court to determine statutory compliance. *Marquez v. District Court*, 200 Colo. 55, 613 P.2d 1302 (1980).

The constitutional right to a speedy trial derived from the federal and Colorado constitutions, is distinct from the statutory speedy trial right and the determination as to one does not necessarily dispose of the other. *People v. Harris*, 914 P.2d 425 (Colo. App. 1995).

This statutory language is mandatory and leaves no room for court discretion. Its preface

confines exceptions only to those delineated in the statute. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975).

The language of this section is mandatory and leaves no discretion for a court to fashion exceptions to the six-month rule apart from those delineated in the statute. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

The language of this section is mandatory unless the period of delay fits within or can be inferred from one of its exclusionary provisions. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

If defendant is not tried within six months of entering plea of not guilty, and defendant has not waived speedy trial rights and no extensions or exclusions are allowable, charges must be dismissed. *Tongish v. Arapahoe County Court*, 775 P.2d 63 (Colo. App. 1989).

If no statutory exception or constitutional right justifies a delay and the defendant has taken no action to either cause or consent to a delay, noncompliance with the speedy trial requirements of this section must result in dismissal of the charges against the defendant. *People v. Arledge*, 938 P.2d 160 (Colo. 1997).

This section and Crim. P. 48(b) clarify and simplify the parameters of the constitutional right to a speedy trial. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975); *People v. Cisneros*, 193 Colo. 141, 563 P.2d 355 (1977); *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

This section and Crim. P. 48(b) were designed to render the federal and state constitutional rights to a speedy trial more effective. *Sweet v. Myers*, 200 Colo. 50, 612 P.2d 75 (1980); *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982).

Crim. P. 48(b) was designed to substantially conform to this section. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975).

Since Crim. P. 48(b) is the procedural counterpart to the speedy trial statute and is virtually identical to this section, the resolution of a speedy trial issue is the same whether the analysis proceeds from the statute or the rule. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

Effect of Crim. P. 48(b). Trial within the time period prescribed by Crim. P. 48(b) does not preclude raising the defendant's right to a speedy public trial as embodied in § 16 of art. II, Colo. Const. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966).

For the applicability of Crim. P. 48(b), see *Rhodus v. People*, 160 Colo. 407, 418 P.2d 42 (1966); *Ferguson v. People*, 160 Colo. 389, 417 P.2d 768 (1966); *Lucero v. People*, 161 Colo. 568, 423 P.2d 577 (1967); *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969); *Lucero v. People*, 173 Colo. 94, 476 P.2d 257 (1970).

Right to a speedy trial has been formulated to force the prosecution to try a defendant promptly in compliance with the statutes, rules, and constitutional requirements of each case.

People ex rel. Coca v. District Court, 187 Colo. 280, 530 P.2d 958 (1975).

Right to speedy trial attaches with filing of a formal charge. *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

Where determination that delays in bringing defendant to trial involved resolutions of fact questions, the district attorney could not appeal such determinations. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Section parallels C.M.C.R. 248(b). This section, also enacted as Crim. P. 48(b), is the parallel rule to C.M.C.R. 248(b). *Bachicha v. Municipal Court*, 41 Colo. App. 198, 581 P.2d 746 (1978).

Subsection (5.1) does not apply to acts committed before July 1, 1985, but which continue thereafter. *People v. Newton*, 764 P.2d 1182 (Colo. 1988).

This section, and not the Uniform Mandatory Disposition of Detainers Act (UMDDA), §§ 16-14-101 to 16-14-108, applies to the retrial of charges on convictions overturned on appeal. The UMDDA applies only to untried charges, and the charges against this defendant, while still pending, were not untried. *People v. Campbell*, 885 P.2d 327 (Colo. App. 1994).

Applied in *People v. Flowers*, 190 Colo. 453, 548 P.2d 918 (1976); *People v. Reliford*, 39 Colo. App. 474, 568 P.2d 496 (1977); *People v. Trujillo*, 41 Colo. App. 223, 586 P.2d 235 (1978); *People v. Gonzales*, 198 Colo. 546, 603 P.2d 139 (1979); *People v. Peek*, 199 Colo. 3, 604 P.2d 23 (1979); *People v. Boos*, 199 Colo. 15, 604 P.2d 272 (1979); *People ex rel. Freed v. County Court*, 42 Colo. App. 272, 592 P.2d 1355 (1979); *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *People v. Small*, 631 P.2d 148 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People in Interest of D.M.*, 650 P.2d 1350 (Colo. App. 1982); *People v. Olds*, 656 P.2d 705 (Colo. 1983); *People v. Ashton*, 661 P.2d 291 (Colo. App. 1982); *People v. Harding*, 671 P.2d 975 (Colo. App. 1983); *People v. Jones*, 677 P.2d 383 (Colo. App. 1983); *Snyder v. Moss*, 703 P.2d 1311 (Colo. App. 1985); *People v. Mascarenas*, 706 P.2d 404 (Colo. 1985); *People v. Goodpaster*, 742 P.2d 965 (Colo. App. 1987).

II. SCOPE OF RIGHT TO SPEEDY TRIAL.

Incarceration of defendant outside state did not make him unavailable for purposes of speedy trial considerations, unless the prosecution can show that despite diligent efforts defendant's presence could not be secured. *Watson v. People*, 700 P.2d 544 (Colo. 1985); *People v. Byrne*, 762 P.2d 674 (Colo. 1988).

Diligent efforts found lacking. See *People v. Byrne*, 762 P.2d 674 (Colo. 1988).

Trial within required period not preclusion of assertion of right. A defendant is not precluded from asserting his constitutional right to a speedy trial simply because the trial was held within the required statutory period; the defendant, however, has the burden of proving that his constitutional speedy trial right has been denied. *Gelfand v. People*, 196 Colo. 487, 586 P.2d 1331 (1978).

A defendant is entitled to be tried within six months of the entry of a plea of not guilty. *People v. Slender Wrap, Inc.*, 36 Colo. App. 11, 536 P.2d 850 (1975).

Speedy trial is calculated separately for each criminal complaint. When charges in a complaint are properly dismissed within the speedy trial period without prejudice, they are a nullity. If defendant is arraigned under new charges, even if they are identical to the dismissed charges, the speedy trial period begins anew. *Huang v. County Court of Douglas County*, 98 P.3d 924 (Colo. App. 2003).

When charges are dismissed without prejudice within the speedy trial period and defendant is later charged with the same or similar counts, the speedy trial clock begins anew unless the district attorney dismissed the charges and refiled them to avoid a speedy trial violation. When the court dismissed the original charges against defendant when victim did not show up for trial within the speedy trial period against the wishes of the prosecution and defendant did not object, there is no basis to claim district attorney sought dismissal of the original charges to avoid a speedy trial violation. *People v. Walker*, 252 P.3d 551 (Colo. App. 2011).

Court and prosecutor's joint responsibility to avoid useless delays. It is the joint responsibility of the district attorney and the trial court to assiduously avoid any occasion for a useless and unnecessary delay in the trial of a criminal case. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Ad hoc balancing test used to determine whether right to speedy trial has been denied. *People v. Spencer*, 182 Colo. 189, 512 P.2d 260 (1973); *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

The test includes four factors: The length of the delay, the reason for the delay, the defendant's assertion or demand for a speedy trial, and the prejudice to the defendant. *People v. Spencer*, 182 Colo. 189, 512 P.2d 260 (1973); *People v. Chavez*, 779 P.2d 375 (Colo. 1989); *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Statutory speedy trial period held to exclude period of time reasonably necessary to reset the case for trial after issuance of remittitur following appeal of case on constitutional grounds. *People in Interest of N.P.*, 768 P.2d 707 (Colo. 1989) (decided under law in effect prior to 1985 amendment).

Speedy trial statute tolled with regard to all counts of the charging document when the people file an original proceeding seeking reinstatement of one or more counts of a multi-count charging document. *People v. Beyette*, 711 P.2d 1263 (Colo. 1986).

Time taken to complete appeal is excluded from six-month speedy trial period, but only the time of defendant's absence and a reasonable time to reschedule the hearing may be excluded. *People ex rel. Gallagher v. District Court*, 933 P.2d 583 (Colo. 1997).

The six-month speedy trial period for commencing a new trial after initial conviction was reversed on appeal was tolled while defendant's C.A.R. 21 proceeding was being considered by the supreme court; therefore, the period of delay caused by the C.A.R. 21 proceeding is excluded from the six-month speedy trial period. *People v. Powell*, 917 P.2d 298 (Colo. App. 1995).

Appeal of trial court's ruling that death penalty statute was unconstitutional, although not technically "interlocutory," was not improperly filed and ultimately was accepted and decided by the Colorado Supreme Court pursuant to C.A.R. 21. Therefore, speedy trial period was tolled during the pendency of the appeal. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Stay of proceedings pending appeal is one means, but not the exclusive means, for tolling of the speedy trial period to occur. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997).

Right guaranteed although defendant is out on bail or parole. Under former provision, the lapse of the prescribed time after the issuance of a *capias* and arrest of the defendant without an application to postpone or delay the trial entitles him to his discharge, notwithstanding the fact that he has been out on bail. *Van Buren v. People*, 7 Colo. App. 136, 42 P. 599 (1895).

The fact that the accused during almost the whole time of the delay was at large upon bail does not divest him of his right to the speedy trial guaranteed by the constitution and the provisions of this section. *Ex parte Miller*, 66 Colo. 261, 180 P. 749 (1919).

The parole status of a federal prisoner is without effect on the conduct of officials charged with the prosecution of an indictment against the prisoner for the violation of a state law. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938), overruled in *Watson v. People*, 700 P.2d 544 (Colo. 1985).

The fact that defendant was at large under bond manifestly does not divest him of the right to that speedy trial which is guaranteed by § 16 of art. II, Colo. Const. *Hicks v. People*, 148 Colo. 26, 364 P.2d 877 (1961).

The right to a speedy trial is not dissipated by the fact that the defendant is granted bail.

Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

Section cannot be invoked where defendant has not been apprehended. One charged with a criminal offense may not invoke the provisions of this section concerning speedy trials where he has not been apprehended, and committed for trial. *Ex parte Russo*, 104 Colo. 91, 88 P.2d 953 (1939).

Or where delay caused by defendant. One charged with a criminal offense may not successfully invoke his right to a speedy trial where the delay of which he complains was occasioned by his avoidance of arrest, it appearing that the prosecution proceeded reasonably as to time after defendant was apprehended. *Ex parte Russo*, 104 Colo. 91, 88 P.2d 953 (1939).

A person is not entitled to be discharged if he requested a postponement of his trial or otherwise caused the delay. *People v. Bates*, 155 Colo. 277, 394 P.2d 134 (1964).

The record does not disclose that defendant was in anywise denied the speedy public trial guaranteed him by the constitution where at least certain delays in getting to trial were of his own making. *Lucero v. People*, 161 Colo. 568, 423 P.2d 577 (1967).

Both § 18-1-405 and Crim. P. 48 exclude delay which is caused by, agreed to, or created at the instance of the defendant. *Saiz v. District Court*, 189 Colo. 555, 542 P.2d 1293 (1975).

Because sufficient time for trial preparation is a necessary requirement for the effective assistance of counsel, and the substitution of counsel was made at the instance of defendant, continuing the trial date outside the speedy trial deadline was not a violation of his statutory right to a speedy trial. *People v. Brewster*, 240 P.3d 291 (Colo. App. 2009).

In the absence of a showing of bad faith on the part of the prosecutor in endorsing a witness on the day of the trial, the delay resulting from the defendant's tactical decision to seek a continuance as a result of the late endorsement is chargeable to her. *People v. Steele*, 193 Colo. 187, 563 P.2d 6 (1977).

Both competency examinations requested by defense counsel for the benefit of the defendant and scheduling delays to accommodate defense counsel are attributable to the defendant. *Jones v. People*, 711 P.2d 1270 (Colo. 1986).

Where defendant held in another jurisdiction pending extradition to a foreign state makes no effort to disclose his whereabouts to prosecuting authorities in a county in which charges are pending against him, and where such authorities are unaware of the pending extradition proceedings, the period of delay until the defendant returns to the state is attributable to the defendant and must be excluded from the applicable six-month speedy trial period. *People v. Moye*, 635 P.2d 194 (Colo. 1981).

When a defendant fails to make a scheduled bond appearance before the trial court, the six-month speedy trial period is tolled until he makes himself available to the court, even where some of the time he is unavailable due to being incarcerated in another jurisdiction. *People v. Moye*, 635 P.2d 194 (Colo. 1981).

The provisions of this section cannot be used to the advantage of a defendant who violates his bond, fails to appear at the trial, and absconds from the state. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Six-month period was tolled during period of time that defendant was being processed in federal system, at which time defendant was unable to appear on scheduled trial date in state trial; defendant's failure to appear for trial on the state charges could only be attributed to defendant and, therefore, constituted a waiver of his right to speedy trial. *People v. Marquez*, 739 P.2d 917 (Colo. App. 1987).

Defendant's speedy trial time was tolled by his voluntary request for speedy disposition of detainer filed against him by authorities in another state, and by his subsequent removal to that state, where defendant's actions precluded Colorado authorities from objecting to his removal. *People v. Yellen*, 739 P.2d 1384 (Colo. 1987).

Subsection (6) includes any delays agreed to by defendant or requested by his attorney. Scheduling delays to accommodate defense counsel are attributable to the defendant. *People v. Hamer*, 689 P.2d 1147 (Colo. App. 1984); *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

Defendant's speedy trial rights were not violated when, in response to the testimony of defendant's mental health expert during a suppression hearing that defendant's statements were involuntary because of a mental disorder, prosecution requested, and was granted, three month continuance in order to arrange for expert testimony and analyze the alleged mental disorder. *People v. Whalin*, 885 P.2d 293 (Colo. App. 1994).

The time necessary to determine the People's appeal after the trial court granted the defendant's motion to dismiss certain charges was chargeable to the defendant and therefore excluded from the speedy trial computations. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

A motion by the defendant's attorney for a continuance, made in open court with the consent of the defendant, is a request for a continuance, governed by subsection (3), rather than a mere delay, governed by subsection (6). In the absence of a showing of bad faith on the part of the prosecution in the late disclosure of evidence bearing on the credibility of one of its prospective witnesses, the legal consequence of defense counsel's request for a continuance was to extend the period within

which the trial could be commenced for an additional six months from the date of the continuance. *People v. Duncan*, 31 P.3d 874 (Colo. 2001).

Delay caused by briefing and determining defendant's motion to dismiss properly charged to defendant. *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

Delay due to substitution of counsel. Continuances made necessary because of the substitution of counsel may, depending upon the particular circumstances of the case, be chargeable to the defendant. *People v. Scales*, 763 P.2d 1045 (Colo. 1988).

Substitution was appropriate when caused by defendant's refusal to cooperate with defense attorney and continuance resulting therefrom was properly charged to the defendant. *People v. Scales*, 763 P.2d 1045 (Colo. 1988).

Trial court's ruling, which disqualified defendant's former attorneys for ethical conflict and which caused need for continuance so that new attorney could prepare, did not deprive defendant of speedy trial rights, where defendant agreed to continuance. *People v. Lewis*, 739 P.2d 861 (Colo. App. 1987); *People v. Monroe*, 907 P.2d 690 (Colo. App. 1995).

Determination that delay was caused by substitution of counsel not supported by record and not properly chargeable to defendant. Defendant's actions did not require a substitution of counsel, he was not counseled by the court on a need for a continuance and he expressed no understanding of such a need, and the court did not attempt to find other counsel who could meet the deadline. *People ex rel. Gallagher v. District Court*, 933 P.2d 583 (Colo. 1997).

Substitution may cause defendant to be tried after speedy trial date. Delay may be charged to defendant if court finds the defendant will not receive effective assistance of counsel without a postponement. *People ex rel. Gallagher v. District Court*, 933 P.2d 583 (Colo. 1997).

Continuance to allow third attorney to prepare for trial was properly chargeable to defendant where defendant had engaged in a pattern of noncooperation with his attorneys and failure to continue the trial date would have given the defendant a claim of ineffective assistance of counsel. The fact that the trial court delayed in appointing the third attorney due to a competency evaluation of the defendant in another case did not change this result. *People v. Rocha*, 872 P.2d 1285 (Colo. App. 1993).

Where defendant requested a continuance because of the unavailability of his fingerprint expert, the delay was attributable to the defendant and it does not make the granting of an earlier continuance an abuse of discretion. *People v. Madsen*, 743 P.2d 437 (Colo. App. 1987).

Charges not dismissed where defendant's expressed understanding of computation of time period differs from statute. Where defendant's expressed understanding was that the six-month period of the speedy trial statute would commence to run at the end of defendant's continuance, the failure to try defendant within six months of the granting of the continuance does not entitle him to dismissal of charges. *Baca v. District Court*, 198 Colo. 486, 603 P.2d 940 (1979).

Delays analyzed to ascertain what part due to defendant. In computing the time chargeable to a defendant in connection with speedy trial determinations, any prolonged lapse of time which causes a trial date to be extended should be carefully analyzed by the trial court to ascertain what part, if any, was due to delays at the request of or for the benefit of the defendant, and the time involved in such delays is properly chargeable to a defendant. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Period of delay was excluded from the speedy trial period under the provisions of subsection (6)(c). The trial court did not abuse its discretion in refusing to grant a severance, therefore the continuance granted to the codefendant was chargeable to the defendant, and the defendant was not denied his right to a speedy trial. *People v. Backus*, 952 P.2d 846 (Colo. App. 1998); *People v. Reynolds*, 159 P.3d 684 (Colo. App. 2006).

Defendants' delay in asserting their right to a speedy trial is entitled to strong evidentiary weight in determining whether the defendants were denied their constitutional right to a speedy trial. *People v. Spencer*, 182 Colo. 189, 512 P.2d 260 (1973).

Delay caused by extradition attributable to prosecution. Delay initiated by the issuance of the governor's arrest warrant and subsequent extradition to another state is attributable to the people. *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

Delay caused by defendant's waiver of extradition not attributable to defendant. Delay in bringing defendant to trial which is caused by defendant's waiver of extradition to another state is not attributable to the defendant within the meaning of this section. *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

Motion for continuance of arraignment date containing waiver. Where petitioner moved to continue his arraignment date and his written motion contained a statement to the effect that "the Defendant waives his right to a speedy trial", this statement was intended only as a waiver of the right to challenge any speedy trial violation caused by the request for a continuance of the arraignment date and was not effective with respect to any subsequently occurring statutory speedy trial violation. *Sweet v. Myers*, 200 Colo. 50, 612 P.2d 75 (1980).

Section not invoked where grant of new trial extends original limitation. Where defendant's first trial was completed before the expiration of the period fixed by statute, and a new trial was thereafter granted, the new trial may be set beyond such period. *Ferguson v. People*, 160 Colo. 389, 417 P.2d 768 (1966).

Or where defendant moves for separate trial. Where a trial is not had as required by this section, but practically every continuance is made with the express consent of a defendant's counsel, and where a defendant moves for a separate trial, such motion being filed, heard and denied after the expiration of such period, the defendant cannot avail himself of the benefits of the statute. *Gallegos v. People*, 139 Colo. 166, 337 P.2d 961 (1959), overruled in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Or where delay caused by detention by another sovereign power. The constitutional right of one charged with the commission of a crime to a speedy trial is not violated by failure of the state to put him on trial while he is in the custody of the United States serving a sentence for violation of federal laws, and in such circumstances there is no obligation imposed upon the prosecuting authorities of the state to apply to the federal government for a return of such prisoner to the state for trial on the state charge. *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762 (1938), overruled in *Watson v. People*, 700 P.2d 544 (Colo. 1985).

But not where defendant is incarcerated by same sovereign. A sovereign may not deny an accused person a speedy trial in a court also of that sovereign by reason of the circumstance that the accused is incarcerated in a penal institution of that sovereign under a prior conviction and sentence of that sovereign. *Rader v. People*, 138 Colo. 397, 334 P.2d 437 (1959).

Prosecutor had duty to obtain defendant's presence. Where the district attorney was aware that the defendant was being held in custody in another county concerning a different charge, the district attorney had the burden of obtaining the presence of the defendant and delay due to defendant's absence is not chargeable to defendant for purposes of computing speedy trial requirements. *People v. Murphy*, 183 Colo. 106, 515 P.2d 107 (1973).

Chronic trial congestion does not excuse the respondents' failure to bring petitioners to trial within the six-month time limit imposed by this section. *Carr v. District Court*, 190 Colo. 125, 543 P.2d 1253 (1975).

Docket congestion merely factor to consider. Although it is clear that docket congestion would not warrant a retrial later than the three-month maximum period for delay caused by a mistrial, it is a factor in determining the reasonableness of the delay within the statutory and procedural time periods of subsection (6)(e) and

Crim. P. 48(b)(6)(V). *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

Delay due to congested docket not caused by defendant. Neither the trial court's decision to conduct a hearing, nor the court's congested docket when the hearing date arrived, produce delays that were "caused at the instance of the defendant." *People v. Bell*, 669 P.2d 1381 (Colo. 1983).

When a trial court continues a case due to docket congestion, but makes a reasonable effort to reschedule within the speedy trial period, and defense counsel's scheduling conflict does not permit a new date within the speedy trial deadline, the resulting delay is attributable to defendant. The period of delay is excludable from time calculations for purposes of the applicable speedy trial provision. *Hills v. Westminster Mun. Court*, 245 P.3d 947 (Colo. 2011).

When the defendant pleads "not guilty by reason of insanity" and is thus entitled to a separate trial on the sanity issue, he must be brought to trial on that issue within six months from the date of entry of the plea or defendant's last continuance under subsection (3). *People v. Haines*, 37 Colo. App. 302, 549 P.2d 786 (1976).

Once the sanity trial is ended and the defendant is found to be sane, he must then be brought to trial on the other issues of the crime charged within the statutory six months from the judgment in the sanity trial. *People v. Haines*, 37 Colo. App. 302, 549 P.2d 786 (1976).

Period from time of commitment until filing of final psychiatric report excludable. When a defendant pleads not guilty by reason of insanity, the period from the time of commitment until the filing of the final psychiatric report, if filed within a reasonable time, is excludable for purposes of the six-month period. *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

Commitment to institution not necessary for exclusion of time for psychiatric reports. The defendant need not be committed to an institution for examination before a reasonable time can be excluded from the speedy trial computation for filing of psychiatric reports. *People v. Brown*, 44 Colo. App. 397, 622 P.2d 573 (1980).

Defendant confined to mental institution. When a defendant is confined to a mental institution or hospital for observation or examination prior to a determination of mental competency, he cannot complain of a denial of his constitutional right to a speedy trial because of the delay occasioned by that confinement. *People v. Jones*, 677 P.2d 383 (Colo. App. 1983), *aff'd in part, rev'd in part* on other grounds, 711 P.2d 1270 (Colo. 1986).

For an example of the computation of six-month period where defendant pleads not guilty by reason of insanity, see *Sanchez v.*

District Court, 200 Colo. 33, 612 P.2d 519 (1980).

Exclusions from six-month period. Subsection (6)(a) excludes from the six-month term in which a trial must commence only that period of delay required for the sanity examination and the filing of a timely report with the court. *People v. Deason*, 670 P.2d 792 (Colo. 1983).

The period excluded from speedy trial computation under subsection (6) does not end upon the filing of a report that a defendant is competent to proceed, but rather when the court makes a determination that the defendant is restored to competency. *People v. Harris*, 914 P.2d 425 (Colo. App. 1995).

Defendants not denied right. Where the record reflects that the defendants made no demand for a speedy trial until 14 months expired and showed no prejudice as a result of the delay and that the delay occurred to permit the defendants to obtain expert testimony and prepare for trial, and moreover, the defendants were free on bond at all times prior to trial, the defendants were not denied their constitutional right to a speedy trial. *People v. Spencer*, 182 Colo. 189, 512 P.2d 260 (1973).

Because criminal proceedings are suspended during the entire time a defendant is incompetent and may not resume until a judicial determination is made that the defendant has been restored to competency, there is no basis upon which to find that the period in which a defendant is "incompetent" under subsection (6) ends in any manner other than in accord with the procedures of the former §16-8-113. *People v. Harris*, 914 P.2d 425 (Colo. App. 1995).

Court retains jurisdiction to correct erroneous judgment. In a criminal proceeding where the trial court has jurisdiction of the person of the defendant and of the subject matter and has entered an erroneous judgment, such court retains jurisdiction to correct, modify, or alter such erroneous judgment notwithstanding expiration of the term of court at which the erroneous judgment was pronounced. Under former provision, the fact that there had been a considerable lapse of time and that many terms of court had intervened was held to be immaterial. *Villalon v. People*, 145 Colo. 327, 358 P.2d 1018 (1961).

For the effect of refile of information as result of change in circumstances, see *Schiffner v. People*, 173 Colo. 123, 476 P.2d 756 (1970).

Delay chargeable to defendant. In computing the time within which a defendant must be brought to trial, in order for the delay to be charged to the defendant, it must be attributable to affirmative action on defendant's part, or to defendant's express consent to the delay, or to other affirmative conduct evidencing such consent. *Tasset v. Yeager*, 195 Colo. 190, 576 P.2d 558 (1978).

Any delays resulting from a defendant's attempt to meet the conditions of a plea bargain, such as the time allocable to defendant's efforts to qualify for a deferred judgment, should be charged to the defendant. *People v. Luevano*, 670 P.2d 1 (Colo. 1983).

Defendant's attempt to effect plea bargain by applying for probation attributable to defendant and tolls running of speedy trial period under subsection (6)(f). *People v. Madsen*, 707 P.2d 344 (Colo. 1985).

Delay not attributable to defendant where a continuance is granted to prosecution as a sanction against the defense for his failure to disclose any defenses other than his not guilty plea, and for his failure to identify his intent to cross-examine the prosecution's witnesses. *People v. Castro*, 835 P.2d 561 (Colo. App. 1992).

Or where trial judge instituted reconsideration of a recusal motion, previously denied, and judge recused himself three days prior to trial. At this point, the judge could not require the defendant to waive speedy trial and no part of the subsequent delay was chargeable to the defendant. *People v. Arledge*, 938 P.2d 160 (Colo. 1997).

Key to interpreting subsection (6)(f) is to determine whether the defendant caused the delay. If the delay is caused by, agreed to, or created at the instance of the defendant, it will be excluded from the speedy-trial calculation made by the court. *People v. Bell*, 669 P.2d 1381 (Colo. 1983).

"Material evidence" for purposes of subsection (6)(g)(I) means evidence that has a logical connection with consequential facts. The prosecution has the burden of proving the evidence is material. In order to satisfy that burden, the prosecution must provide the court with enough specificity and information on the record to show that the unavailable evidence is material to the prosecution's case. The court had sufficient information to exercise its independent judgment to determine that the evidence was material. *People v. Roberts*, 146 P.3d 589 (Colo. 2006).

No evidence of a lack of due diligence under subsection (6)(g)(I) where prosecution had prior knowledge of the victim's pregnancy and did not obtain a subpoena. The prosecution asserted to the trial court that, when the trial was originally scheduled, it was anticipated that the victim would have delivered her baby and been available for trial. The trial court did not abuse its discretion in finding that the extension of the victim's pregnancy beyond her original expected due date was the cause of her nonappearance. *People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002).

Appeal tolls speedy trial period. The period of time necessary to go through the appellate process, where the appeal stems from a dismissal upon the defendant's motion, tolls the statu-

tory speedy trial period. *People v. Jamerson*, 198 Colo. 92, 596 P.2d 764 (1979); *People v. Daley*, 97 P.3d 295 (Colo. App. 2004).

Delay caused by interlocutory appeal excluded. This section and Crim. P. 48 exclude from the computation of the time in which a defendant shall be brought to trial the period of delay caused by an interlocutory appeal. *People v. Medina*, 40 Colo. App. 490, 583 P.2d 293 (1978).

"Interlocutory appeal" construed. An original proceeding initiated in good faith by either the defense or the prosecution constitutes an "interlocutory appeal" for purposes of the speedy trial statute. *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *People v. Beyette*, 711 P.2d 1263 (Colo. 1986).

Prosecution's appeal of a trial court's partial dismissal at a preliminary hearing of a multi-count information is an interlocutory appeal that tolls the running of the speedy trial period. *People v. Gallegos*, 946 P.2d 946 (Colo. 1997).

Appeal of disqualification of district attorney did not have a substantial effect on prosecution's case where special prosecutor was appointed. As such, appeal of the disqualification was not an interlocutory appeal. *People v. Witty*, 36 P.3d 69 (Colo. App. 2000).

Even a second interlocutory appeal, if initiated in good faith, tolls the statute regardless of the fact that it is later dismissed. *People v. Morgan*, 681 P.2d 970, (Colo. App. 1984), cert. denied, 469 U.S. 881, 105 S. Ct. 248, 83 L. Ed. 2d 185 (1984).

New trial order pursuant to motion treated as reversal on appeal. A new trial order pursuant to a new trial motion is similar to a reversal on appeal for purposes of the speedy trial provisions. *People v. Jamerson*, 196 Colo. 63, 580 P.2d 805 (1978); *People v. Jamerson*, 198 Colo. 92, 596 P.2d 764 (1979).

Measurement of six-month period upon filing of amended complaint. When the prosecution files an amended complaint charging new material after the defendant's initial guilty plea, the period of time for dismissal under the speedy trial provisions is measured from the second guilty plea unless the prosecution has shown bad faith in amending the complaint. If the amended complaint does not charge new material, the time period is measured from the original guilty plea. *Amon v. People*, 198 Colo. 172, 597 P.2d 569 (1979).

Period of delay caused by mistrial not includable. The computation of the six-month period allowed for in this section and Crim. P. 48(b)(1) shall not include any period of delay caused by a mistrial, and the extension provided following a mistrial is part of the period of delay caused thereby. *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

Three-month exclusion from period following mistrial. Subsection (6)(e) and Crim. P.

48(b)(6)(V) grant the prosecution a three-month exclusion in which to retry a case after a mistrial, provided that the delays are reasonable. *People v. Pipkin*, 655 P.2d 1360 (Colo. 1982); *Mason v. People*, 932 P.2d 1377 (Colo. 1997).

The general assembly intended to grant no more than three months as an exclusion from the speedy trial period, which is one-half of the statutory speedy trial period, following a mistrial. *People v. Pipkin*, 655 P.2d 1360 (Colo. 1982).

Mistrials due to prosecutor's actions not treated differently. Neither Crim. P. 48(b)(6)(V) nor subsection (6)(e) treats mistrials due to the prosecutor's actions differently than mistrials due to other reasons. *People v. Erickson*, 194 Colo. 557, 574 P.2d 504 (1978).

Prosecutor must request additional time upon change of venue. When a change of venue is granted after arraignment, it is incumbent upon the prosecuting attorney to make a motion to obtain additional time to bring the defendant to trial because of the exceptional circumstances of the case. *People v. Colantonio*, 196 Colo. 242, 583 P.2d 919 (1978).

District attorney's motion for continuance insufficient basis for justifying delay. Where the record indicated that the respondent court granted the district attorney's motion to continue the July 30, 1979, trial date solely on the basis of the district attorney's written motion which contained only the unsupported allegation that a material witness would be unavailable for trial on July 30, 1979, and there was no showing of due diligence or that the witness would be available at a later trial date, the delay between July 30, 1979, and November 1, 1979, was not properly excludable from the statutory speedy trial period under subsection (6)(g)(I), and where defendant had plead not guilty on April 20, 1979, the petitioner was entitled to a dismissal of the charges against him under subsection (1). *Sweet v. Myers*, 200 Colo. 50, 612 P.2d 75 (1980).

Forfeiture action under Colorado public nuisance statute is civil in nature and therefore is not subject to constitutional or statutory speedy trial provisions applicable to criminal prosecutions. *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

Where defendant is present when trial date is set and does not object to the setting of a trial date beyond the time required by statute, an extension of the statutory deadline to the date actually set for trial results. *People v. Velarde*, 790 P.2d 903 (Colo. App. 1989).

Defendant was not denied right to speedy trial where he was counseled at length by trial court and appeared to have understood the need for a continuance caused by substitution of counsel and where neither the prosecution nor the judiciary was responsible for the delay. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993).

III. ENFORCEMENT OF RIGHT.

Defendant must enter a plea before he may take advantage of the restriction of this section and Crim. P. 48(b)(1). *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Six-month limitation runs from date plea entered. The six-month limitation of both this section and Crim. P. 48(b)(1) runs from the date that defendant's plea is entered. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976).

A defendant must be brought to trial within six months from the date of the entry of a plea of not guilty, except as otherwise provided by subsection (6)(a). *Sanchez v. District Court*, 200 Colo. 33, 612 P.2d 519 (1980).

Rule that defendant must be brought to trial within six months from the date of the entry of a plea of not guilty equally applies where a defendant pleads not guilty by reason of insanity. *Sanchez v. District Court*, 200 Colo. 33, 612 P.2d 519 (1980).

Computation of six-month time provision found in *People v. Hampton*, 696 P.2d 765 (Colo. 1985).

The special time limitations of § 24-60-501 prevail, when conflicts arise, over the more general criminal procedure provisions of this section and Crim. P. 48. *Simakis v. District Court*, 194 Colo. 436, 577 P.2d 3 (1978).

"Uniform Mandatory Disposition of Detainers Act" controls over general speedy trial provisions. The "Uniform Mandatory Disposition of Detainers Act" is a special statute designed to foster more effective prisoner treatment and rehabilitation; thus, when there is a conflict with the general speedy trial provisions, § 16-14-101 et seq., this section, § 24-60-501 et seq., and Crim. P. 48, the provisions of the uniform act control. *People v. Swazo*, 199 Colo. 486, 610 P.2d 1072 (1980).

Policies of this section same as §§ 16-14-101 to 16-14-108. The policies underlying this section and Crim. P. 48 are the same as those relative to the "Uniform Mandatory Disposition of Detainers Act", §§ 16-14-101 to 16-14-108. *People v. Lopez*, 41 Colo. App. 206, 587 P.2d 792 (1978).

The six-month period commences upon the arraignment for the last information. *People v. Dunhill*, 40 Colo. App. 137, 570 P.2d 1097 (1977); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988).

It is the shared responsibility of the trial court and the prosecution to schedule the suppression hearing for a date within the six-month speedy trial period so that, if the motion were granted, a new trial could commence within the six-month period. *People v. Zedack*, 93 P.3d 629 (Colo. App. 2004).

The length of delay "caused by any mistrial" must be calculated to include the days on which the aborted trial or trials were in progress.

People v. Erickson, 194 Colo. 557, 574 P.2d 504 (1978).

The entire period of delay caused by a mistrial is to be "excluded" from the computation of the time within which a defendant must be tried. *People v. Thimmes*, 643 P.2d 778 (Colo. App. 1981).

Delay excluded may be longer than period of absence. The excludable period of delay resulting from defendant's absence, may, in some cases, be longer than merely the period of defendant's absence. *People v. Alward*, 654 P.2d 327 (Colo. App. 1982), cert. dismissed, 677 P.2d 948 (Colo. 1984).

Factors authorized a continuance and thereby extended the speedy trial time where a period of delay was attributable to the inability of the prosecution, despite its exercise of due diligence, to obtain the victim's presence for trial and prosecution demonstrated the victim would be available to testify at a later date. *People v. Grenemyer*, 827 P.2d 603 (Colo. App. 1992).

Defendant's right to speedy trial not violated where defendant asked for a continuance to review evidence produced by the prosecution concerning the credibility of a prospective witness and there was no indication of bad faith by the prosecution in producing the evidence just prior to trial. The legal consequence of the defendant's request for a continuance was to extend the period within which trial could be commenced for an additional six months from the date of the continuance, as provided in subsection (3). *People v. Duncan*, 31 P.3d 874 (Colo. 2001).

Speedy trial right not violated where trial court did not abuse its discretion in finding prosecutors had acted with due diligence in seeking to obtain presence of out-of-state witnesses for trial and a continuance was warranted. *People v. Wolfe*, 9 P.3d 1137 (Colo. App. 1999).

The speedy trial statute is not violated in a case where there is no evidence a sheriff acted in bad faith in violating a segregation order that resulted in a delay of the defendant's criminal proceedings and a defendant's waiver of a statutory speedy trial right. *People v. McMurtry*, 101 P.3d 1098 (Colo. App. 2003), rev'd on other grounds, 122 P.3d 237 (Colo. 2005).

The intent of the general assembly was to exclude a reasonable time period from the speedy trial period following the absence or unavailability of the defendant when the delays are such that might reasonably result from the defendant's absence. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Six-month period includes a reasonable period of time in which to reschedule and prepare for trial a case that has been postponed from its original trial date due to the voluntary absence

of the defendant. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Factors to be considered in determining whether the trial delay is reasonable include the difficulty in locating witnesses, the problem of overcrowded dockets, and the potential abuse of the speedy trial period by defendants who attempt to run time off the speedy trial period before absconding from the state. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Defendant's motion for severance shortly before trial constitutes an exceptional circumstance allowing consideration of docket congestion in determining the reasonable period of delay that tolls statute. *People v. Runningbear*, 753 P.2d 764 (Colo. 1988).

In order to determine if the defendant was entitled to have the charges against him dismissed for violating his rights to a speedy trial, the court must determine whether there was a delay that should be attributable to the defendant's absence and whether the trial delay caused by such absence was reasonable. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Whether jeopardy has attached is irrelevant. If the court is forced to dismiss the jurors or prospective jurors and reschedule the trial, whether jeopardy has yet attached is irrelevant in computing the length of delay excluded due to mistrial. *People v. Erickson*, 194 Colo. 557, 574 P.2d 504 (1978).

Effect of escape on running of six-month rule. The defendant was not denied a speedy trial under this section, as his escape stopped the running of the six-month rule, and that the time did not again commence to run until the district attorney had actual knowledge of his return to custody. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

Exclusion of period fairly attributable to defendant's voluntary unavailability. Subsection (6)(d) contemplates an exclusion from the speedy trial period not only for the time of the defendant's actual absence or unavailability but also for any additional period of delay that may be fairly attributable to the defendant as a result of his voluntary unavailability. *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People v. Milton*, 732 P.2d 1199 (Colo. 1987).

In determining what delay can be attributable to the absence or unavailability of the defendant, each case must be viewed individually, and the determination is dependent upon the facts of the specific case. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Such delay may include the time required to reschedule the defendant's trial. *People v. Gray*, 710 P.2d 1149 (Colo. App. 1985).

Defendant has burden to prove he has been denied speedy trial. *People v. Chavez*, 779 P.2d 375 (Colo. 1989).

Accused must move for dismissal or discharge. To properly raise the question the ac-

cused may apply for his discharge or for dismissal for lack of a speedy trial. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

In accordance with the express language of subsection (5), defendant waived his right to a speedy trial by failing to move for dismissal of charges prior to entering a guilty plea. This did not, however, automatically waive the defendant's constitutional right to a speedy trial. *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993).

The objection that the defendant has not had a speedy trial must itself be speedily raised when the case is moved for trial. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

Failure to move for dismissal prior to beginning of trial is a waiver of the statutory right to speedy trial. *People v. Drake*, 748 P.2d 1237 (Colo. 1988).

A juvenile's failure to request dismissal on speedy trial grounds before the beginning of the adjudicatory trial will result in the waiver of the juvenile's speedy trial rights under this section. *People ex rel. J.M.N.*, 39 P.3d 1261 (Colo. App. 2001).

Defendant's attorney did not object to the trial date on speedy trial grounds until the date of trial. The defendant waived his ability to claim that his right to a speedy trial had been violated. *People of City of Aurora v. Allen*, 885 P.2d 207 (Colo. 1994).

Right to speedy trial may be waived. The defendant's failure to object to the date set for pre-trial motions hearing constituted his consent to the trial schedule that was offered, subject only to the condition that the actual trial commence within a reasonable time thereafter. A defendant cannot stand mute and allow a trial schedule to be adopted without registering his complaint that such schedule violates his speedy trial rights. *People v. Atkins*, 885 P.2d 243 (Colo. App. 1994); *People v. Franco*, 74 P.3d 357 (Colo. App. 2002).

Subsection (5) does not require the defendant to demand his right at the earliest possible time. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

Subsection (5) merely requires that the defendant make such a demand prior to the commencement of his trial, which, in most cases, would certainly be after the trial setting. *Harrington v. District Court*, 192 Colo. 351, 559 P.2d 225 (1977).

Defendant's failure to demand dismissal prior to trial pursuant to alleged denial of speedy trial rights normally waives any speedy trial objection after conviction. *People v. Marquez*, 739 P.2d 917 (Colo. App. 1987).

Effect of the failure of the prosecution and the trial court to comply with the speedy trial statute requires the dismissal of the charges against the defendant with prejudice. *People v. Martin*, 732 P.2d 1210 (Colo. 1987).

Upon refusal of discharge, accused may apply for habeas corpus. Where a person is entitled to discharge under this section, but such discharge is denied him in the district court, he may at once apply for the writ of habeas corpus. Ex parte Miller, 66 Colo. 261, 180 P. 749 (1919).

Right to speedy trial may be waived. The right to a speedy trial, both under this section and § 16 of art. II, Colo. Const., may certainly be waived. Keller v. People, 153 Colo. 590, 387 P.2d 421 (1963).

Defendant can waive his constitutional and statutory right to a speedy trial by his failure to make a timely objection. People v. O'Donnell, 184 Colo. 104, 518 P.2d 945 (1974).

Failure to object before trial is waiver. A defendant who has gone to trial without objection cannot by motion obtain his discharge on the ground that he was not tried within the time prescribed by this section. Heller v. People, 2 Colo. App. 459, 31 P. 773 (1892).

The failure to object in the trial court to the first trial being held and the subsequent request for a continuance by the defendant constitutes a waiver of the statutory and constitutional right to a discharge. Keller v. People, 153 Colo. 590, 387 P.2d 421 (1963).

The statutory right to a speedy trial can be waived, and it is waived by failure to make objection at the trial. Valdez v. People, 174 Colo. 268, 483 P.2d 1333 (1971).

Counsel's sending waiver form to defendant not waiver. An agreement by defense counsel to send a waiver form to the defendant cannot be interpreted as a waiver of defendant's right to a speedy trial. People v. Bell, 669 P.2d 1381 (Colo. 1983).

Written waiver not essential. The fact that the defendant did not execute a written waiver of her right to a speedy trial as required in the deferred prosecution statute and as she agreed to do in open court does not inure to her benefit. People v. Ybarra, 190 Colo. 409, 547 P.2d 925 (1976).

But affirmative conduct is. An express consent to the delay or other affirmative conduct evidencing such consent must be shown. Harrington v. District Court, 192 Colo. 351, 559 P.2d 225 (1976); People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978); People v. Wimer, 43 Colo. App. 237, 604 P.2d 1183 (1979).

An express waiver or other affirmative conduct evidencing such a waiver must be shown. People v. Gallegos, 192 Colo. 450, 560 P.2d 93 (1977); Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977).

Mere silence by a defense counsel at a trial setting shall not be construed as a waiver of the defendant's statutory right to a speedy trial. Harrington v. District Court, 38 Colo. 360, 559 P.2d 225 (1977); Rance v. County Court, 193

Colo. 220, 564 P.2d 422 (1977); People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978).

This section does not state that defendant's failure to object to a trial setting beyond the six-month period should be viewed as a delay attributable to the defendant. In fact, subsection (5) mandates that the only affirmative action required on the part of the defendant be that he move for a dismissal prior to trial. Harrington v. District Court, 192 Colo. 351, 559 P.2d 225 (1977).

Failure of each defendant to interpose any objection to a trial setting in county court beyond the six-month speedy trial period did not waive his right to a speedy trial. Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977).

Request for a pretrial conference in criminal case, without more, does not constitute waiver of speedy trial right nor a delay caused at defendant's instance to be excluded from speedy trial calculations. Rodman v. County Court, 694 P.2d 871 (Colo. App. 1984).

Waiver by defense attorney's setting trial date. Where a trial date is set at the request of the defendant's attorney to accommodate his schedule, the defendant waives any speedy trial claims as to this trial date. People v. Fetty, 650 P.2d 541 (Colo. 1982).

When defense counsel insists he could not try the case prior to expiration of the six-month speedy trial period, this is tantamount to a request for a continuance. People v. Chavez, 650 P.2d 1310 (Colo. App. 1982).

When a defendant's attorney participates in a trial date setting which is within six months of the plea entered on that day, regardless of an earlier plea, the defendant thereby acquiesces to subsection (6)(f) and the prosecution thus meets its burden of demonstrating compliance with the speedy trial statute. People v. Rogers, 706 P.2d 1288 (Colo. App. 1985).

To establish a waiver the record must demonstrate that defense counsel had notice of the trial date and had adequate opportunity to object. People v. Franco, 74 P.3d 357 (Colo. App. 2002).

Nothing in subsection (5.1) precludes an off-the-record trial setting, nor does the subsection specify that the defendant or defense counsel must be present. People v. Franco, 74 P.3d 357 (Colo. App. 2002).

A guilty plea waives a defendant's right to claim the improper denial of his or her statutory right to a speedy trial. People v. McMurtry, 122 P.3d 237 (Colo. 2005).

By entering an unconditional, voluntary guilty plea, a defendant waives the right to assert, either on appeal or by collateral attack, a violation of the statutory right to speedy trial. People v. Owen, 122 P.3d 1006 (Colo. App. 2005).

Defendant's attorney, without defendant's personal consent, may obtain a continuance of a trial setting subject to the discretion of the trial court and the continuance will extend the speedy trial deadline an additional six months from the granting of the continuance. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Defendant's motion to dismiss, because defense counsel was unable to proceed on the scheduled trial date within the speedy trial period, was considered tantamount to a request for a continuance in order to protect the defendant's sixth amendment right to counsel. *People v. Wilson*, 972 P.2d 701 (Colo. App. 1998).

Compliance with speedy trial requirements is jurisdictional. Failure to comply with the requirements of the speedy trial act is jurisdictional in the sense that defendant may request mandatory dismissal of the charges upon expiration of the allotted time. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Failure to comply not automatic deprivation of jurisdiction. However, failure to bring defendant to trial within the allotted time does not automatically deprive the trial court of jurisdiction because defendant's failure to demand dismissal prior to trial waives any speedy trial objection. *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

Relief in nature of prohibition under C.A.R. 21, is appropriate remedy when a district court is proceeding without jurisdiction to try a defendant in violation of his right to a speedy trial. *Marquez v. District court*, 200 Colo. 55, 613 P.2d 1302 (1980).

Whether a speedy trial has been afforded is a judicial question. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966).

Exclusions and extensions applied concomitantly. Nothing prevents a court from applying concomitantly the exclusionary provisions of subsection (6) and the rule governing extensions in subsection (3) when it makes a speedy trial determination. *People v. Luevano*, 670 P.2d 1 (Colo. 1983).

Entry of negotiated plea which is later withdrawn tantamount to continuance. Where defendant enters negotiated plea which he later withdraws following the court's rejection of the plea agreement, it is appropriate to view such plea as a continuance requested by the defendant under subsection (3). *People v. Madsen*, 707 P.2d 344 (Colo. 1985).

The fact that defendant was allowed to withdraw his plea because the plea bargain could not be implemented is irrelevant for speedy trial analysis. *People v. Cass*, 68 P.3d 537 (Colo. App. 2002).

A speedy public trial is a relative concept in that the circumstances of each case determine whether or not it has been afforded. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966);

Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969).

Speedy public trial does not mean trial immediately after the accused is apprehended and indicted, but public trial consistent with the court's business. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

Defendants have the burden of proof that an expeditious trial was denied them. *Casias v. People*, 160 Colo. 152, 415 P.2d 344 (1966); *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

A motion for discharge or for dismissal for want of due prosecution of a charge of crime must be sustained by the accused; he has the burden of showing that he was not afforded a speedy trial. *Jaramillo v. District Court*, 174 Colo. 561, 484 P.2d 1219 (1971).

The burden is upon the defendant to establish that he has been denied a speedy trial in violation of the statute or rule or that his constitutional right to a speedy trial requires dismissal. *Saiz v. District Court*, 189 Colo. 555, 542 P.2d 1293 (1975).

Prima facie showing of violation shifts burden of proof to prosecution. Where a defendant has shown a prima facie violation of this section with no evidence in the record to the contrary, the burden of showing compliance with the time requirements of the rule and statute rests with the trial court and the prosecution. *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979).

Dismissal of charges. The people cannot indiscriminately dismiss and refile charges in order to avoid the mandate of this section and Crim. P. 48(b)(1). However, to be entitled to dismissal on these grounds, the defendant must affirmatively establish the existence of such a course of action on the part of the prosecution. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988); *People v. Kraemer*, 795 P.2d 1371 (Colo. App. 1990).

Charges in an original information properly dismissed without prejudice within the speedy trial limits for that case become a nullity; upon defendant's arraignment under a subsequent information, speedy trial period begins anew. *People v. Kraemer*, 795 P.2d 1371 (Colo. App. 1990).

The speedy trial period is calculated separately for each criminal complaint brought against a defendant, and, generally, if the charges in a summons and complaint are properly dismissed without prejudice, that case becomes a nullity, and a new speedy trial period begins if and when the accused enters a plea to subsequently filed charges, unless the defendant can establish that the prosecution acted in bad faith to circumvent the speedy trial limits. *Peo-*

ple in Interest of C.O., 870 P.2d 1266 (Colo. App. 1994).

Where original case was properly dismissed without prejudice by the county court, the speedy trial period started anew in the juvenile case, and the juvenile waived his right to speedy trial by not objecting when the juvenile trial was scheduled outside the speedy trial limits. *People in Interest of C.O.*, 870 P.2d 1266 (Colo. App. 1994).

Dismissing a claim in an earlier case for the legitimate purpose of joinder does not support a conclusion that prosecutor was indiscriminately dismissing and refileing charges in order to avoid the speedy trial mandate. *People v. Kraemer*, 795 P.2d 1371 (Colo. App. 1990).

Finding of good cause for denial of motion for severance is specifically required by subsection (6)(c). Although court properly denied motion for severance on evidentiary grounds, under § 16-7-101, it was an abuse of discretion to deny motion for severance on speedy trial grounds under this section where court made no finding of good cause why severance should not be granted. *People v. Hernandez*, 829 P.2d 392 (Colo. App. 1991).

Insufficient proof. The burden of establishing that the prosecution indiscriminately dismissed and refiled charges in order to avoid the mandate of this section and Crim. P. 48(b)(1) is not satisfied by proof only that the district attorney sought and obtained a subsequent indictment for different offenses arising from the same transaction. *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988).

Dismissal of charges sufficient to protect defendant's rights. Where defendant's trial took place within six months of defendant's plea of not guilty to the charges in the second indictment, and while the trial was not held until more than six months after defendant's plea to the charges of the original indictment, those charges were dismissed by the trial court, such dismissal was sufficient to protect defendant's rights under this section and Crim. P. 48(b)(1). *People v. Wilkinson*, 37 Colo. App. 531, 555 P.2d 1167 (1976); *Meehan v. County Court, Jefferson Co.*, 762 P.2d 725 (Colo. App. 1988).

Defendant waived right to speedy trial. Although the first trial which resulted in a mistrial took place beyond the period fixed by statute, the defendant waived any right to discharge he may have had under this section by going to trial without objection. Such an objection is a prerequisite to his claim for discharge under this section and under § 16 of art. II, Colo. Const., guaranteeing a speedy trial. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963); *Keller v.*

Tinsley, 335 F.2d 144 (10th Cir.), cert. denied, 379 U.S. 938, 85 S. Ct. 342, 13 L. Ed. 2d 348 (1964).

Agreement by defendant and defense counsel at hearing within six-month period that defendant was responsible for 20 days of delay in bringing case to trial deemed express consent to a 19-day delay in the trial and waiver of any speedy trial claims. *People v. Barnes*, 636 P.2d 1323 (Colo. App. 1981).

Defendant expressly waived the requirements concerning trial within period fixed by statute. Under such circumstances, this section is not applicable. *Wilson v. People*, 156 Colo. 243, 398 P.2d 35 (1965).

Defendant's failure to object to the trial date or to seek an earlier trial date, and his request for a continuance, all operated to waive his constitutional and statutory rights to discharge because he was not brought to trial within the time limits set by this section. *Adargo v. People*, 159 Colo. 321, 411 P.2d 245 (1966); *Adargo v. Patterson*, 371 F.2d 822 (10th Cir. 1967).

Where the record does not disclose any objection to delay made by defendant at the time of trial and further and where defendant's motion for postconviction relief under Crim. P. 35(b) does not set forth any facts showing that the delay was in any manner oppressive or arbitrary nor that he was in any way deprived of any defense or that any witness was unavailable, the court is not required to hold an evidentiary hearing. *Valdez v. People*, 174 Colo. 268, 483 P.2d 1333 (1971).

Motion for discharge not waived. *Rude v. People*, 44 Colo. 384, 99 P. 317 (1909).

Delay justified discharge. In re Garvey, 7 Colo. 502, 4 P. 758 (1884); *Rude v. People*, 44 Colo. 384, 99 P. 317 (1909); *Ex parte Miller*, 66 Colo. 261, 180 P. 749 (1919).

Duty of court to dismiss if dismissal required because right denied. If the constitution, the statutes, the rules, or the case law requires dismissal of a prosecution because of a denial to right of a speedy trial, it is the duty of the trial court to order that the case be dismissed. *People ex rel. Coca v. District Court*, 187 Colo. 280, 530 P.2d 958 (1975).

Section does not apply to an action where the alleged offense was committed prior to July 1, 1972. *People v. Reliford*, 186 Colo. 6, 525 P.2d 467 (1974).

Defendant cannot be required to pursue his C.A.R. 21 proceeding in a separate action only at the expense of his right to a speedy trial. *People v. Rosidivito*, 940 P.2d 1038 (Colo. App. 1996).

Test in subsection (6)(g)(I) applied in *People v. Koolbeck*, 703 P.2d 673 (Colo. App. 1985).

18-1-406. Right to jury trial. (1) Except as otherwise provided in subsection (7) of this section, every person accused of a felony has the right to be tried by a jury of twelve

whose verdict shall be unanimous. In matters involving misdemeanors, the accused is entitled to be tried by a jury of six. In matters involving “petty offenses”, the accused has the right to be tried by a jury under the terms and conditions of section 16-10-109, C.R.S.

(2) Except as to class 1 felonies, the person accused of a felony or misdemeanor may waive a trial by jury by express written instrument filed of record or by announcement in open court appearing of record.

(3) A defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of the trial.

(4) Except as to class 1 felonies, the defendant in any felony or misdemeanor case may, with the approval of the court, elect, at any time before the swearing in of the jury, or after the swearing in of the jury and before verdict, with the agreement of the district attorney and the approval of the court, to be tried by a number of jurors less than the number to which he would otherwise be entitled.

(5) Upon request of the defendant in advance of the commencement of the trial, the defendant shall be furnished with a list of prospective jurors who will be subject to call in the trial.

(6) Either the district attorney or the defendant may challenge the array on the ground that there has been a material departure from the requirements of the law governing the selection of jurors, but such challenge shall be made in writing setting forth the particular grounds upon which it is based and shall be filed prior to the swearing in of the jury selected to try the case.

(7) Except as to class 1 felonies, with respect to a twelve-person jury, if the court excuses a juror for just cause after the jury has retired to consider its verdict, the court in its discretion may allow the remaining eleven jurors to return the jury’s verdict.

Source: **L. 71:** R&RE, p. 400, § 1. **C.R.S. 1963:** § 40-1-506. **L. 72:** p. 268, § 6. **L. 86:** (1) amended, p. 769, § 3, effective July 1. **L. 91:** (4) amended, p. 405, § 7, effective June 6. **L. 94:** (1) amended and (7) added, p. 1716, § 5, effective July 1.

Cross references: For similar provisions concerning the right to trial by jury, see Crim. P. 23.

ANNOTATION

Law reviews. For article, “Criminal Procedure”, which discusses a Tenth Circuit decision dealing with the right to a jury trial, see 62 Den. U. L. Rev. 1982 (1985).

Annotator’s note. For other annotations concerning the right to trial by jury, see § 23 of art. II, Colo. Const., and Crim. P. 23.

Although there is a statutory right to a unanimous verdict in criminal cases in Colorado, the state constitution does not explicitly guarantee the right to a unanimous verdict. Nevertheless, there are some cases in which the jury may return a general verdict of guilty when instructed on alternative theories of principal and complicitor liability and in which the state constitution has provided a criminal defendant the right to a unanimous jury verdict. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

Subsection (1) of this section and Crim. P. 23, which provide for six jurors in misdemeanor cases, are constitutional under § 23 of art. II of the Colorado Constitution. *People v. Rodriguez*, 112 P.3d 693 (Colo. 2005).

Jury to have at least six persons. One accused of a noncapital felony or class 1 misdemeanor who elects, pursuant to subsection (4), to be tried by a jury of less than 12 persons may not be tried by a jury of less than six persons. *People ex rel. Hunter v. District Court*, 634 P.2d 44 (Colo. 1981); *People v. Byerley*, 635 P.2d 542 (Colo. 1981).

Right to waive trial by jury is substantive in nature. *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

Even though subsection (2) fails to provide a procedure for waiving a jury trial in class 1 felonies, because the criminal defendant has a substantive right to waive a jury trial, the lack of a waiver procedure does not prohibit the waiver right of the criminal defendant. *People v. Cisneros*, 720 P.2d 982 (Colo. App. 1986).

Requirement of § 16-8-105 (2) that prosecution consent to waiver of jury in sanity trial applied to trial of defendant prosecuted for second degree murder rather than this subsequently enacted general statute which does not refer to

prosecutor's consent to waiver of jury trial. *People v. District Court*, 731 P.2d 720 (Colo. 1987).

Colorado constitution does not afford criminal defendants the right to waive jury and be tried by the court. *People v. District Court*, 843 P.2d 6 (Colo. 1992); *People v. District Court*, 953 P.2d 184 (Colo. 1998).

A court exceeds its jurisdiction if it allows a defendant to waive his or her right to a jury trial over the objection of the district attorney based on defendant's claim that his due process rights would be violated by testifying and that he would be subject to impeachment about his past criminal convictions and his ties to drug use. It is not a due process violation to be subject to impeachment about prior criminal convictions; the choice to testify or not is part of adversarial trial process and does not create an unfair trial for the defendant. *People v. McKeel*, 246 P.3d 638 (Colo. 2010).

In construing the provisions of subsection (2) with § 16-10-101, requiring the prosecution to consent to waiver of jury trial, due process compels conclusion that prosecution alone cannot compel trial by jury where defendant may not receive a fair trial. *People v. District Court*, 843 P.2d 6 (Colo. 1992).

The right to a 12-person jury is purely statutory. The sixth and fourteenth Amendments to the U.S. Constitution guarantee the right to trial by jury, but do not, nor does the Colorado Constitution, guarantee the right to a 12-person jury. *People v. Chavez*, 791 P.2d 1210 (Colo. App. 1990).

Constitutional right to a jury of 12 lies only with felony cases and does not extend to misdemeanor cases. A defendant in a misdemeanor case does not have a constitutional right under art. II, § 23, of the Colorado Constitution to demand a 12-person jury. *People v. Rodriguez*, 112 P.3d 693 (Colo. 2005).

The statutory right to a 12-person jury could be waived by counsel's statements. The requirement that a defendant must make a written or oral "announcement" of his intention to waive a jury does not extend to a reduction in the number of jurors. *People v. Chavez*, 791 P.2d 1210 (Colo. App. 1990).

Allotment of right to select mode of trial made in unequivocal terms. When the general assembly has allotted to one party only, such as the accused in a criminal proceeding, the right to

select the appropriate mode of trial, it has done so in unequivocal terms. *S.A.S. v. District Court*, 623 P.2d 58 (Colo. 1981).

Subsection (2) and Crim. P. 23(a)(5) are not reconcilable and directly conflict with each other because the rule provides an additional requirement not present in subsection (2), that the prosecutor's consent must be obtained as a condition before a defendant's oral request to waive his right to a jury trial may be allowed. *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

Subsection (2) controls over Crim. P. 23(a)(5). *Garcia v. People*, 200 Colo. 413, 615 P.2d 698 (1980).

Defendants voluntarily waived jury. Where, when the jury was assembled in the courtroom ready for trial, defendants' counsel orally announced that defendants had decided to waive their right to a jury trial, and the court inquired of each defendant if that was their desire and both indicated in the affirmative, and as a further precaution, the court then insisted that a written waiver of jury trial be prepared and be signed by each defendant and their counsel, which was done, it will be presumed that defendants understandingly, voluntarily, and deliberately decided to waive the jury. *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Waiver precludes defendant's complaint that judge rules on evidence and renders verdict. Where the defendant voluntarily and with advice of counsel waived a jury trial, defendant in such circumstances cannot be heard to complain when he creates a situation which necessarily makes the trial judge both the one who decides the admissibility of evidence and the one who renders the verdict. *People v. Thompson*, 182 Colo. 198, 511 P.2d 909 (1973).

Judge attempted to use office to force defendant to waive right. When the trial judge couples his intervention into plea negotiations with threats of a longer sentence if the defendant goes to trial and is found guilty, he has attempted to use his office to force the defendant to waive his right to a jury trial or be penalized for exercising this constitutionally guaranteed right. *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973).

Applied in *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981).

18-1-407. Affirmative defense. (1) "Affirmative defense" means that unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue.

(2) If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.

Cross references: For the affirmative defense of impaired mental condition, see §§ 16-8-103.5 and 18-1-803; for other provisions concerning affirmative defenses generally, see §§18-1-710 and 18-1-805; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 through 15 of this title.

ANNOTATION

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Choice of Evils in Colorado", see 18 Colo. Law. 1117 (1989). For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995).

Choice of evils is affirmative defense covered by this section. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

As is impaired mental condition. The issue of responsibility due to an impaired mental condition is an affirmative defense. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Duress is affirmative defense. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

Justification is recognized as an affirmative defense to the charge of speeding but the defendant must present credible evidence as to the specific threat of injury and the lack of a reasonable alternative other than commission of the offense. *People v. Dover*, 790 P.2d 834 (Colo. 1990).

Heat of passion is affirmative defense. *People v. Harris*, 797 P.2d 816 (Colo. App. 1990).

The defense of alibi is not an affirmative defense and therefore no special instructions are necessary to inform the jury of the prosecution's burden to prove a defendant alleged to have committed an offense did commit that offense. *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989).

Because the defendant's tendered instruction improperly suggested that alibi was an affirmative defense, the trial court properly refused to give the tendered instruction based on *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989); however, the question of whether the trial court properly refused the instruction does not resolve the issue of whether the trial court erred in failing to provide a theory of the case instruction. *People v. Nunez*, 841 P.2d 261 (Colo. 1992).

Court, not jury, must determine whether affirmative defense is raised. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990).

When an exception is included in a statutory section defining the elements of the offense, it is usually the burden of the prosecution to prove the exception does not apply. However, when an exception is found in a separate clause or is clearly disconnected from the

definition of the offense, it is the defendant's burden to claim it as an affirmative defense. *People v. Reed*, 932 P.2d 842 (Colo. App. 1996).

When an affirmative defense is raised by the defendant, the prosecution must prove each element of the crime beyond a reasonable doubt in addition to disproving beyond a reasonable doubt the affirmative defense. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990); *Vega v. People*, 893 P.2d 107 (Colo. 1995).

Jury instruction which is in conflict with the legislative intent of this section should not be used. *People v. Rex*, 689 P.2d 669 (Colo. App. 1984).

Instructions containing erroneous statements of law which improperly relegated to the jury the function of determining whether an affirmative defense was an issue in a case and which had the effect of relieving the prosecution of its burden of proof were at odds with standard jury instructions on affirmative defenses. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991).

Insanity is an affirmative defense to a crime. Once any credible evidence of insanity is introduced the prosecution bears the burden of proving the defendant's sanity beyond a reasonable doubt. *People v. Serravo*, 823 P.2d 128 (Colo. 1992).

By the plain meaning of subsection (2), only when some credible evidence supports an affirmative defense is the prosecution required to disprove it as though it were another element of the defense. In the absence of express statutory language to the contrary, the threshold determination as to whether some credible evidence exists to support an affirmative defense is a matter of law for the court to decide. *People v. Hill*, 934 P.2d 821 (Colo. 1997).

Under subsection (2), a defendant has not "raised the issue" of the affirmative defense of insanity, in the sense that it has become an issue for consideration by the factfinder, until the court determines credible evidence on that issue has been presented. *People v. Hill*, 934 P.2d 821 (Colo. 1997).

Lawful possession of marihuana under § 18-18-406 (10) is an affirmative defense to charges of unlawful possession with intent to distribute marihuana and unlawful possession of eight or more ounces of marihuana. The provision provides a legal justification to what would otherwise be criminally culpable behavior. *People v. Reed*, 932 P.2d 842 (Colo. App. 1996).

To present an affirmative defense for abandonment to the jury, defendant must present

“some credible evidence” on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O’Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

Applied in *People v. Villa*, 43 Colo. App. 284, 605 P.2d 481 (1979); *People v. Taggart*, 621 P.2d 1375 (Colo. 1981)(justified physical force for disciplinary purposes as affirmative defense in child abuse prosecution); *People v. Traubert*, 625 P.2d 991 (Colo. 1981)(renunciation and

abandonment as affirmative defense in prosecution for attempted second degree burglary); *People v. Smith*, 623 P.2d 404 (Colo. 1981); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983); *People v. Quintana*, 665 P.2d 605 (Colo. 1983); *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983); *People v. Huckleberry*, 738 P.2d 17 (Colo. App. 1986).

18-1-408. Prosecution of multiple counts for same act. (1) When any conduct of a defendant establishes the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not be convicted of more than one offense if:

(a) One offense is included in the other, as defined in subsection (5) of this section; or
(b) One offense consists only of an attempt to commit the other; or
(c) Inconsistent findings of fact are required to establish the commission of the offenses; or

(d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) The offense is defined as a continuing course of conduct and the defendant’s course of conduct was uninterrupted, unless the law provides that specific periods or instances of such conduct constitute separate offenses.

(2) If the several offenses are actually known to the district attorney at the time of commencing the prosecution and were committed within the district attorney’s judicial district, all such offenses upon which the district attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution; except that, if at the time jeopardy attaches with respect to the first prosecution against the defendant the defendant or counsel for the defendant actually knows of additional pending prosecutions that this subsection (2) requires the district attorney to charge and the defendant or counsel for the defendant fails to object to the prosecution’s failure to join the charges, the defendant waives any claim pursuant to this subsection (2) that a subsequent prosecution is prohibited.

(3) When two or more offenses are charged as required by subsection (2) of this section and they are supported by identical evidence, the court upon application of the defendant may require the state, at the conclusion of all the evidence, to elect the count upon which the issues shall be tried. If more than one guilty verdict is returned as to any defendant in a prosecution where multiple counts are tried as required by subsection (2) of this section, the sentences imposed shall run concurrently; except that, where multiple victims are involved, the court may, within its discretion, impose consecutive sentences.

(4) When a defendant is charged with two or more offenses based on the same act or series of acts arising from the same criminal episode, the court, on application of either the defendant or the district attorney, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(5) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

(6) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(7) If the same conduct is defined as criminal in different enactments or in different sections of this code, the offender may be prosecuted under any one or all of the sections or enactments subject to the limitations provided by this section. It is immaterial to the prosecution that one of the enactments or sections characterizes the crime as of lesser degree than another, or provides a lesser penalty than another, or was enacted by the general assembly at a later date than another unless the later section or enactment specifically repeals the earlier.

(8) Without the consent of the prosecution, no jury shall be instructed to return a guilty verdict on a lesser offense if any juror remains convinced by the facts and law that the defendant is guilty of a greater offense submitted for the jury's consideration, the retrial of which would be barred by conviction of the lesser offense.

Source: **L. 71:** R&RE, p. 400, § 1. **C.R.S. 1963:** § 40-1-508. **L. 85:** (3) amended, p. 661, § 1, effective July 1. **L. 94:** (2) amended, p. 1049, § 2, effective July 1. **L. 2000:** (8) added, p. 452, § 6, effective April 24.

Cross references: For the sentencing of a defendant convicted of multiple crimes of violence arising out of the same incident, see § 18-1.3-406 (1)(a).

ANNOTATION

- I. General Consideration.
- II. Joinder and Election of Offenses.
 - A. In General.
 - B. Illustrative Cases.
- III. Lesser Included Offenses.
 - A. In General.
 - B. Legal Standard.
 - C. Jury Instructions.
 - D. Finding of Lesser Included Offenses.
 - E. Find Not Lesser Included Offense.

I. GENERAL CONSIDERATION.

Law reviews. For article, "By Leave of Court First Had", see 8 Dicta 14 (June 1931). For note, "Larceny, Embezzlement, and False Pretenses in Colorado — A Need for Consolidation", see 23 Rocky Mt. L. Rev. 446 (1951). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with the failure to instruct or lessen included offense, see 62 Den. U. L. Rev. 191 (1985). For comment, "Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course", see 66 U. Colo. L. Rev. 523 (1995). For article, "Lesser Included and Nonincluded Offenses and Jury Instructions", see 25 Colo. Law. 35 (June 1996).

Annotator's note. Since § 18-1-408 is similar to former § 39-3-4, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Constitutional limitations. Insofar as this section is concerned, a defendant may be prosecuted for each offense that he allegedly com-

mits, with certain well-defined limitations. The limitations are primarily those embodied within the constitutional concepts of double jeopardy, amendment V, U.S. Const., and § 18 of art. II, Colo. Const., impermissible joinder, and the doctrine of collateral estoppel. *People v. Pinyan*, 190 Colo. 304, 546 P.2d 488 (1976).

This section does not conflict with the double jeopardy clause of the United States Constitution. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Notions of double jeopardy were the underpinnings of this statute. *People v. District Court*, 183 Colo. 101, 515 P.2d 101 (1973).

A defendant's double jeopardy rights are not violated when the court sentences a defendant to consecutive sentences based on separate incidents involving the same victim. *People v. Shepard*, 98 P.3d 905 (Colo. App. 2004).

This section does not apply to municipal code violations. The compulsory joinder bar has no application when the initial prosecution is in a municipal court for a municipal ordinance violation and the later prosecution is in a state court for state offenses based on different conduct but arising out of the same criminal episode as the ordinance violation. *People v. Wright*, 742 P.2d 316 (Colo. 1987); *Priday v. People*, 742 P.2d 321 (Colo. 1987).

As long as the criminal episode which is the basis for the municipal code violations and the state offenses gives rise to separate offenses, each of which requires proof of a fact which the other does not, the constitutional prohibition against double jeopardy is not violated. *People v. Wright*, 742 P.2d 316 (Colo. 1987).

Compulsory joinder provisions extend further than constitutional guarantee against

double jeopardy. Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); Corr v. District Court, 661 P.2d 668 (Colo. 1983); People v. Taylor, 732 P.2d 1172 (Colo. 1987).

Statutory language of this section clearly recognizes that a district attorney's authority to initiate a criminal prosecution is limited to crimes committed within the geographical district served by the district attorney. People v. Taylor, 732 P.2d 1172 (Colo. 1987).

Term "judicial district", as used in this section, means that the offenses must have been committed within the same judicial district in which the accused has previously been subjected to a completed prosecution. People v. Taylor, 732 P.2d 1172 (Colo. 1987).

More than one felony conviction may be based upon same occurrence without running afoul of either federal or state double jeopardy prohibitions. People v. Opson, 632 P.2d 602 (Colo. App. 1980).

A defendant may be convicted for multiple offenses arising out of a single transaction if the defendant has violated more than one statute. People v. Martinez, 640 P.2d 255 (Colo. App. 1981).

That conduct may give rise to more than one offense is irrelevant so long as the offenses have not merged for purposes of double jeopardy. People v. Miller, 199 Colo. 32, 604 P.2d 36 (1979).

A single transaction that violates two criminal statutes may generally be prosecuted under either. People v. Fowler, 183 Colo. 300, 516 P.2d 428 (1973).

Subsection (3) requires the trial court to impose concurrent sentences, if two or more charged offenses arise from the same criminal episode. People v. Montanez, 944 P.2d 529 (Colo. App. 1996).

A court must impose concurrent sentences on crimes that are based upon identical evidence. The evidence supporting the attempted sexual assault was not identical to evidence for kidnapping, therefore, the court had discretion to impose consecutive sentences for the two crimes. People v. McAfee, 160 P.3d 277 (Colo. App. 2007).

Trial court did not err in determining that the prosecution was not required to elect between two counts of first degree burglary since each of the two counts consisted of different elements that were proved by evidence of different conduct, there were multiple victims, and, even if two counts were supported by identical evidence, defendant received concurrent sentences, thereby meeting the requirements of subsection (3). People v. Montanez, 944 P.2d 529 (Colo. App. 1996).

Prosecutor determines under which statute to proceed. A single transaction may give rise to the violation of more than one statute, and in such a situation it is a proper function of the

prosecutor to determine under which of the statutes he wishes to prosecute. People v. James, 178 Colo. 401, 497 P.2d 1256 (1972).

Enactment of a specific criminal statute does not preclude prosecution under a general criminal statute unless a legislative intent to limit prosecution to the special statute is shown. People v. James, 178 Colo. 401, 497 P.2d 1256 (1972); People v. Tippet, 733 P.2d 1183 (Colo. 1987).

In a situation where a single transaction violates two criminal statutes, it is the proper function of the district attorney to determine under which of the statutes, he wishes to prosecute. People v. Fowler, 183 Colo. 300, 516 P.2d 428 (1973).

Prosecution under the general burglary statutes was precluded where the defendant's actions violated the specific provisions of criminal offenses included in the Limited Gaming Act of 1991. Because the Act invokes the full extent of the state's police powers, creates a comprehensive and thorough regulatory scheme to control limited gaming, and specifically defines criminal offenses related to gambling both in the Act and in sections reproduced verbatim in this title, the general assembly adequately demonstrated its intention that conduct violating the specific limited gaming provisions be prosecuted under those provisions only. People v. Warner, 930 P.2d 564 (Colo. 1996).

A defendant does not impliedly waive his right to rely upon the statute and rule by entering a plea of guilty in a county court case with knowledge that the district court case is pending. People v. Robinson, 774 P.2d 884 (Colo. 1989).

The right to imposition of concurrent sentences applies equally to a conviction arising from a trial or one arising from the entry and acceptance of a guilty plea. Construing statute to allow the imposition of a more severe sentence for a guilty plea than for a conviction resulting from trial would likely raise constitutional concerns. Juhl v. People, 172 P.3d 896 (Colo. 2007).

Right to compulsory joinder may be waived by raising the issue after jeopardy attaches in the second prosecution. People v. Wilson, 819 P.2d 510 (Colo. App. 1991).

"Single prosecution", as used in this section, means those proceedings from the commencement of the criminal action until further prosecution is barred. People v. District Court, 183 Colo. 101, 515 P.2d 101 (1973); Ruth v. County Court, 198 Colo. 6, 595 P.2d 237 (1979).

Where there are two separate and distinct offenses which violate the laws of two different jurisdictions, each offense must be prosecuted in the jurisdiction where the respective criminal acts occurred and neither offense could be tried in the court of the other jurisdiction.

People v. Pinyan, 190 Colo. 304, 546 P.2d 488 (1976).

Prosecution in both municipal and state systems not precluded. This section does not preclude prosecution in both municipal and state systems for crimes arising from the same criminal episode, at least in situations where there was no counterpart to the municipal offense under state law. People v. Talarico, 192 Colo. 445, 560 P.2d 90 (1977).

Where there was no knowledge or participation by the district attorney in the decision to prosecute different offenses in both the municipal and state systems, this section does not apply. People v. Talarico, 192 Colo. 445, 560 P.2d 90 (1977); Blum v. County Court, 631 P.2d 1191 (Colo. App. 1981).

Guilty plea to related charge bars subsequent prosecution. Crim. P. 8(a) and this section bar the prosecution of a defendant for two pending charges arising out of a single criminal episode after the defendant has pleaded guilty and has been sentenced for a third related charge. Ruth v. County Court, 198 Colo. 6, 595 P.2d 237 (1979).

The denial of a motion to dismiss for failure to comply with this section is appealable. County Court v. Ruth, 194 Colo. 352, 575 P.2d 1 (1977).

Concurrent sentence does not affect fines for separate counts. Although the defendant is concurrently sentenced, this has no effect on individual fines for separate counts. People v. Blair, 195 Colo. 462, 579 P.2d 1133 (1978).

Defendant's multiple convictions arise from crimes committed upon different victims and, therefore, evidence is not identical and prohibition against consecutive sentences in this section is not applicable. People v. Wafai, 713 P.2d 1354 (Colo. App. 1985), aff'd, 750 P.2d 37 (Colo. 1988) (decided under law in effect prior to 1985 amendment); People v. Grant, 30 P.3d 667 (Colo. App. 2000), aff'd on other grounds, 48 P.3d 543 (Colo. 2002); People v. O'Dell, 53 P.3d 655 (Colo. App. 2001).

When determining whether to sentence two crimes of violence consecutively or concurrently in relation to § 16-11-309, the determining factor is whether the evidence supporting the convictions is identical. If the evidence supporting the convictions is not identical, the sentences are consecutive. People v. Jurado, 30 P.3d 769 (Colo. App. 2001).

The test for identical evidence is an evidentiary test rather than an elemental test. The court of appeals incorrectly interpreted "identical evidence" to entail an analysis of the evidence necessary to prove the elements of the offenses charged, rather than what evidence supports the conviction. Juhl v. People, 172 P.3d 896 (Colo. 2007).

Convictions not based upon identical evidence. Kidnapping occurred at a different time

and in a different place than the sexual assault. People v. Glasser, __ P.3d __ (Colo. App. 2011).

Because the evidence supporting the convictions for conspiracy and solicitation was identical, concurrent sentencing was required even though the crime of solicitation requires proof of inducement and conspiracy requires proof of an agreement and an act in furtherance thereof. The convictions here were based on the same acts: The planning by the members of the group to rob the home of the victim and the performance of that robbery. People v. Le, 74 P.3d 431 (Colo. App. 2003).

Convictions for first degree assault and vehicular assault were supported by identical evidence because both convictions were based on one distinct act rather than multiple acts separated by time or place. Consequently, pursuant to the mandate in subsection (3), the trial court lacked the authority to impose consecutive sentences where the convictions were supported by identical evidence. Juhl v. People, 172 P.3d 896 (Colo. 2007).

By waiving the establishment of a factual basis for the added second degree assault charge, defendant also waived right to rely on subsection (3). If defendant wanted to ensure that all of the sentences imposed pursuant to the plea bargain would be subject to concurrent sentencing mandate of subsection (3), defendant could have rejected any plea agreement that called for guilty pleas to multiple charges or by rejecting any plea agreement that did not include a stipulation for concurrent sentences. People v. Maestas, 224 P.3d 405 (Colo. App. 2009).

Unless multiple victims are involved, concurrent sentences are required where two or more convictions are based upon the same act or series of acts arising from the same criminal episode and the evidence supporting the counts is identical. People v. Farrell, 10 P.3d 672 (Colo. App. 2000), rev'd on other grounds, 34 P.3d 401 (Colo. 2001).

Even though identical evidence is used for multiple convictions of felony murder and attempted aggravated robbery, the court may impose consecutive sentences because there were two separate victims involved. People v. Laurson, 15 P.3d 791 (Colo. App. 2000).

Thus, where multiple victims are involved, the court may, within its discretion, impose consecutive sentences. People v. Trujillo, 114 P.3d 27 (Colo. App. 2004).

The mere possibility that the jury may have relied on identical evidence in returning more than one conviction is not sufficient to trigger the mandatory concurrent sentencing provision. There was sufficient evidence for the trial court to conclude that the two acts were sufficiently separate to justify consecutive sentencing. The mandatory concurrent sentencing provision is only implicated when the evidence supports no conclusion that the charges are

based on identical evidence. *People v. Muckle*, 107 P.3d 380 (Colo. 2005) (overruling *People v. Page*, 907 P.2d 624 (Colo. App. 1995)).

Prosecutor not required to select specific instances of sexual assault on which the state would rely when there were numerous counts of sexual assault on a child. *People v. Elinger*, 754 P.2d 396 (Colo. App. 1987).

Court could properly impose consecutive sentences for multiple sexual exploitation convictions since the crime recognizes that each sexually exploitive image of a child constitutes a discrete act of victimization of the child. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

Conduct that violates a specific provision of the liquor code may only be filed under the penal provisions specifically provided by said code. *People v. Bagby*, 734 P.2d 1059 (Colo. 1987).

When the jury could have relied on identical evidence to support separate charges, and the record provides no basis to determine that each charge is supported by separate evidence, subsection (3) requires concurrent sentencing. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Imposition of concurrent or consecutive sentences lies in trial court's discretion if the multiple counts are not supported by identical evidence. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990).

Trial court did not abuse its discretion in imposing consecutive sentences where the conspiracy conviction was not based on the same evidence as the robbery convictions. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

Consecutive sentencing was proper for convictions of first degree sexual assault, second degree kidnapping, and second degree assault committed against one victim when evidence establishing each charge was not identical for purposes of subsection (3) and when taking into account the gravity of defendant's conduct toward both victims. *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

When multiple victims are involved, court has discretion to impose consecutive sentences. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

More than one felony conviction may be based upon same occurrence. *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

When an identical act gives rise to multiple charges, the court must impose concurrent sentences for convictions on the multiple charges. *People v. Blankenship*, 30 P.3d 698 (Colo. App. 2000); *People v. Dotson*, 55 P.3d 175 (Colo. App. 2002).

Because defendant could not be convicted of first degree assault without proof that he committed a class 3 felony sexual assault under § 18-3-202 (1)(d), the latter offense was a lesser included offense of the first degree assault

charge and he could not, therefore, be convicted of both offenses. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

Court can deny request to include lesser included offense instruction where the record does not present any evidence leading to a rational basis for acquitting a defendant of the greater offense and convicting him or her of the lesser offense. *People v. Cardenas*, 25 P.3d 1258 (Colo. App. 2000).

A defendant may be convicted of more than one offense arising out of a single incident if the defendant has violated more than one statute. *People v. Moore*, 877 P.2d 840 (Colo. 1994); *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

Assaults committed within a relatively short period of time did not constitute a continuing course of conduct. Each incident constituted a separate offense and the charges were not multiplicitous. *People v. Quintano*, 81 P.3d 1093 (Colo. App. 2003), *aff'd*, 105 P.3d 585 (Colo. 2005).

Applied in *People v. Hauschel*, 37 Colo. App. 114, 550 P.2d 876 (1976); *People v. Bielecki*, 41 Colo. App. 256, 588 P.2d 377 (1978); *People v. Hanes*, 42 Colo. App. 527, 596 P.2d 395 (1978); *People v. Taylor*, 197 Colo. 161, 591 P.2d 1017 (1979); *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *People v. Scott*, 615 P.2d 680 (Colo. 1980); *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980); *People v. Riddick*, 626 P.2d 641 (Colo. 1981); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. Clerkin*, 638 P.2d 808 (Colo. App. 1981); *People v. Williams*, 651 P.2d 899 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Williams*, 654 P.2d 319 (Colo. App. 1982); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Hepler*, 665 P.2d 627 (Colo. App. 1982); *People v. Santisteven*, 693 P.2d 1008 (Colo. App. 1984); *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986); *People v. Avila*, 770 P.2d 1330 (Colo. App. 1988).

II. JOINDER AND ELECTION OF OFFENSES.

A. In General.

Offenses defined in terms of general and specific conduct. Subsection (1)(d) of this section is intended to deal with situations where the offenses themselves are defined in terms of general and specific kinds of conduct. *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979).

Statutory elements to be satisfied to bar subsequent prosecution. This section can be broken down into the following elements, all of

which must be satisfied in order for the bar to apply to a subsequent prosecution: (1) Several offenses committed within the same judicial district; (2) a prosecution against the offender; (3) prosecutorial knowledge of the several offenses at the commencement of the prosecution; (4) the several offenses arising from the same criminal episode; and (5) the offender previously having been subjected to a single prosecution. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981); *People v. Garcia*, 735 P.2d 897 (Colo. App. 1986); *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

Test for "same criminal episode" under this section should be identical to the standard for joinder under *Crim. P. (8)(a)*. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

The term "same criminal episode" contemplates a joinder standard sufficiently broad to include offenses committed within the same unit of time at the same location, irrespective of whether these offenses are otherwise related to each other by some underlying unity of purpose or scheme. *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Factors to consider when making the determination as to whether a series of acts arose from the same criminal episode include whether the physical acts were committed simultaneously or in close sequence, whether they occurred in the same place or closely related places, and whether they formed part of a schematic whole. Where the two incidents occurred at different times, at different places, with different victims, and under different circumstances and were not part of any schematic whole, it can be concluded that the two offenses did not arise from the same criminal episode. *People v. Garcia*, 735 P.2d 897 (Colo. App. 1986).

Test must be interpreted to include the condition that the offenses be connected in such a manner that prosecution of the offenses involve substantially interrelated proof. *People v. Rogers*, 742 P.2d 912 (Colo. 1987); *People v. Miranda*, 754 P.2d 377 (Colo. 1988); *People v. Patrick*, 773 P.2d 575 (Colo. 1989).

Where a six-day interval existed between the distribution, possession, and conspiracy offenses charged in the separate prosecutions and where there were other factual differences relating to the charges alleged in the separate prosecutions, proof of the offenses at issue involved evidence substantially different from the evidence underlying the former prosecution. *People v. Miranda*, 754 P.2d 377 (Colo. 1988).

Where the seizure of drugs from defendant's car occurred after defendant was arrested on an outstanding warrant and the car was impounded and inventoried, the drug possession charge did not arise from the same criminal episode as the speeding charges which were the initial cause

for which defendant was stopped. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

Charges against the defendant were based on identical evidence when the defendant engaged in a continuous attack of the victim and there was no break in the time and change in circumstances between the inflicted wounds. *People v. DeBoer*, 829 P. 2d 447 (Colo. App. 1991).

The compulsive joinder rule did not bar subsequent prosecution for drug possession arising from the discovery of drugs in defendant's car where the district attorney was not involved in disposing of the original traffic infraction in county court. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

Required before dismissal. Trial court must determine extent to which two prosecutions would burden defendant with repetitive proof before it could dismiss for violation of compulsory joinder statute. *People v. Rogers*, 742 P.2d 912 (Colo. 1987).

The compulsory joinder bar of subsection (2) is applicable even though it might have been one of a series of criminal acts committed in several judicial districts as part of a single criminal episode. *People v. Taylor*, 732 P.2d 1172 (Colo. 1987).

Because § 42-4-1505.3 clearly contemplates separate trials and hearings where separate complaints alleging traffic infractions and crimes are filed, and the district attorney does not participate in the decision to "prosecute" traffic infractions, the compulsory joinder statute does not apply. *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

Section permitting joinder of offenses is a declaration of the common law on the subject of joinder of counts in one indictment. *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900).

This section permits the joinder of crimes or offenses which may be properly joined as consistent with the common-law rule upon the subject. At common law, disconnected and independent felonies might not be properly joined. *White v. People*, 8 Colo. App. 289, 45 P. 539 (1896).

This section is in reality but an embodiment of a well established principle of the common law, and is no broader than was that rule unless it be in the consolidation of causes, and confers no greater power than that enjoyed and exercised prior to the enactment of the statute. *Cummins v. People*, 4 Colo. App. 71, 34 P. 734 (1893).

Subsection (2) was adapted from the model penal code, section 108 (2). *People v. Tulipane*, 192 Colo. 476, 560 P.2d 94 (1977).

The purpose of subsection (2) was to prevent the bringing of successive prosecutions based upon essentially the same conduct. *People v. Tulipane*, 192 Colo. 476, 560 P.2d 94 (1977);

Brutcher v. District Court, 195 Colo. 579, 580 P.2d 396 (1978).

The evil which subsection (2) was designed to cure was harassment of the defendant by means of multiple prosecution for the same act. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974); *People v. Tulipane*, 192 Colo. 476, 560 P.2d 94 (1977).

The concern of the general assembly in enacting this section was not an insufficient number of charges, but rather duplicitous charges which charge in the same count two or more separate offenses. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

The purpose of the joinder statute is to "prevent vexatious prosecution and harassment of a defendant by a district attorney who initiates successive prosecutions for crimes which stem from the same criminal episode". Subsequent prosecution is permissible when the statute by its terms does not apply. *County Court v. Ruth*, 194 Colo. 352, 575 P.2d 1 (1977); *Ruth v. County Court*, 198 Colo. 6, 595 P.2d 237 (1979).

The purposes of compulsory joinder are to protect the accused against the oppressive effect of sequential prosecutions based on conduct occurring during the same criminal episode and to conserve judicial and legal resources that otherwise would be wasted in duplicative proceedings. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

Compulsory joinder broader than "same offense" principle or collateral estoppel. The compulsory joinder requirement of subsection (2) of this section is broader than both the "same offense" principle of double jeopardy as codified in § 18-1-301 and the collateral estoppel effect of a prior determination of an ultimate fact as outlined in § 18-1-302. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

Attachment of jeopardy triggers bar of subsection (2). Jeopardy attaches upon the court's acceptance of a plea of guilty, and the attachment of jeopardy is what triggers the statutory bar of subsection (2). *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

Compulsory joinder claim is waived if the defendant fails to raise the issue prior to the time at which jeopardy attaches in the second prosecution. *People v. Bossert*, 722 P.2d 998 (Colo. 1986); *People v. Carey*, 198 P.3d 1223 (Colo. App. 2008).

Compulsory joinder defense not waived. Where compulsory joinder defense was not available when prosecution of felony offense was initiated because second charge had not been filed, defendant did not waive compulsory joinder claim when he failed to raise issue within twenty days after arraignment on felony charge. *People v. Rogers*, 742 P.2d 912 (Colo. 1987).

Compulsory joinder section provides no exceptions to requirement of a single multi-

ple-count prosecution. A juvenile faced with a misdemeanor charge and related traffic charges committed as part of the same act or series of acts should be afforded the protection of the compulsory joinder statute despite the fact that under the juvenile code a juvenile court has no authority to try traffic charges when such charges are the sole basis for a delinquency petition. *Marquez v. County Court*, 719 P.2d 797 (Colo. App. 1986).

Several counts based on one transaction proper. It was not error to consolidate two informations upon the statement of the district attorney that the several counts in the two informations referred to the same transaction, and where the evidence showed that such was the case. *Short v. People*, 27 Colo. 175, 60 P. 350 (1900).

Several cognate offenses growing out of the same transaction may be charged in separate counts in the same indictment or information. *Roland v. People*, 23 Colo. 283, 47 P. 269 (1896).

A single transaction may give rise to the violation of more than one statutory provision, and in such a situation separate offenses are perpetrated, each of which may be subject to prosecution. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Since a dismissal of a felony complaint by a county court does not bar further prosecution, this statute does not prohibit the filing of a direct information joining any or all offenses arising from a criminal episode. *People v. District Court*, 183 Colo. 101, 515 P.2d 101 (1973).

Where the acts involved were committed at the same time or in immediate succession and at the same place, they arose out of the same criminal episode; therefore, it is appropriate to include the separate counts in a single information. *People v. McGregor*, 635 P.2d 912 (Colo. App. 1981).

All offenses alleged must be alleged in separate counts. Subsection (2) does not provide that all offenses upon which the prosecution desires to proceed must be alleged, but rather that all offenses which the district attorney does allege must be alleged in separate counts. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

State's amendment to information adding charge of sale of narcotic drugs to conspiracy charge complied with provision which requires that all offenses against defendant be "prosecuted by separate counts in a single prosecution". *People v. Wright*, 678 P.2d 1072 (Colo. App. 1984).

Each count must charge a distinct offense. When separate counts are charged in the same indictment, each count, to be valid, must be independent of the others, and in itself charge the defendant with a different and distinct offense. *Roland v. People*, 23 Colo. 283, 47 P. 269 (1896).

Not more than one offense should be charged in one count. *Sweek v. People*, 85 Colo. 479, 277 P. 1 (1929).

Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. *Leyba v. People*, 174 Colo. 1, 481 P.2d 417 (1971).

Exception made in cases of embezzlement over period of time. Under this section an indictment which charges a clerk of the district court with failure to pay over a large number of jury and witness fees amounting to several thousand dollars is not defective as charging a number of offenses in one count because the fees were collected by him at various times in small amounts, nor because part of it was collected during each of three different appointments under which he acted in discharge of his official duties. *Adams v. People*, 25 Colo. 532, 55 P. 806 (1898).

It is proper for the prosecution in a charge of embezzlement to lump several items into one count of an information and to try them as a single transaction. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

When counts may not be joined. Wherever the felonies are separate and distinct, are not provable by the same evidence, and have been committed at different times, so that they cannot be deemed to result from the same series of acts, they may not be joined in one indictment; and, if several indictments be found, the court cannot consolidate the causes. *Cummins v. People*, 4 Colo. App. 71, 34 P. 734 (1893).

If the actions or transactions covered by the information are so connected together as to bring them within the provisions of this section the same should be charged in separate counts of the information. If, on the other hand, they were separate, distinct, and disconnected acts and transactions, they should be charged in separate and distinct informations or indictments. *Trask v. People*, 35 Colo. 83, 83 P. 1010 (1905).

This section is undoubtedly clear as to the joinder of charges growing out of the same transaction or transactions that are connected; however, "transactions of the same class of crimes or offenses, which may be properly joined", presents a debatable question when a felony and misdemeanor are joined. *Eckhardt v. People*, 126 Colo. 18, 247 P.2d 673 (1952).

A motion to dismiss will lie. Upon a motion to quash the information interposed at the close of the state's case, at which time it appeared from the evidence that several offenses had been charged in one count, it is error not to sustain the motion. *Trask v. People*, 35 Colo. 83, 83 P. 1010 (1905).

The question of whether or not an information is duplicitous must be presented either by motion to quash or demurrer, and in limine.

Critchfield v. People, 91 Colo. 127, 13 P.2d 270 (1932).

Duplicity may be overcome by election of district attorney. If an information is duplicitous the defect is overcome where the district attorney in his opening statement elects to proceed on one specific charge. *Critchfield v. People*, 91 Colo. 127, 13 P.2d 270 (1932).

It is improper to include distinct offenses in the same indictment, and either in the case of duplicity or of misjoinder of counts, if objection is made in apt time, the court will in the one case quash the indictment, and in the other compel the prosecutor to elect on which count he will proceed. *White v. People*, 8 Colo. App. 289, 45 P. 539 (1896).

Subsection (3) relates to court's discretionary power requiring prosecutor to elect between multiple counts. Subsection (3) relates to the discretionary power of the trial court, upon motion of the defendant at the conclusion of all of the evidence, to require the prosecution to elect between multiple counts when they are supported by identical evidence. *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974).

Motion to compel election. A motion to compel a prosecutor to elect upon which count in an indictment he will proceed, when such indictment contains more than one count, each charging a felony, is a matter addressed to the discretion of the trial court. *Roberts v. People*, 11 Colo. 213, 17 P. 637 (1888).

Compelling election is discretionary with the court. *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924).

Motions to compel the prosecutor to elect upon which of several counts of a criminal information he will proceed are addressed to the sound discretion of the trial court. *Smaldone v. People*, 102 Colo. 500, 81 P.2d 385 (1938).

A motion to require the district attorney to elect upon which of two counts relating to the same transaction he desired to proceed generally is addressed to the sound discretion of the court. *Sanders v. People*, 109 Colo. 243, 125 P.2d 154 (1942); *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986).

Defendant's remedy, in cases where two sections overlap and evidence is identical, is to move for an election as between counts as provided for by this section; and if no such application is filed, he is limited to the remedy of concurrent sentencing. *People v. Blair*, 195 Colo. 462, 579 P.2d 1133 (1978).

Knowledge and actions of deputies and assistants imputed to district attorney. Deputies and assistant district attorneys function only by virtue of the district attorney's authority, and their knowledge and official actions are imputed to the district attorney for purposes of the compulsory joinder statute. *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Power of court to protect accused in this regard. When the evidence in this case disclosed that the defendant was being prosecuted under two counts for distinct and different felonies, the court should have interposed sua sponte to protect him from being tried and convicted upon both counts together. Not to do so was reversible error. *White v. People*, 8 Colo. App. 289, 45 P. 539 (1896).

Prosecutor need not elect where different counts properly joined. Where different counts are properly joined in a criminal information, the prosecutor is not obliged to elect one upon which he will proceed to trial. *Smaldone v. People*, 102 Colo. 500, 81 P.2d 385 (1938).

Prosecutor may go to jury on both counts. Where a criminal information embraces two counts, one for larceny and the other for receiving stolen goods, the same evidence being admissible to support both charges, the prosecutor is not required to elect, but may go to the jury on both. *Smaldone v. People*, 102 Colo. 500, 81 P.2d 385 (1938).

Or request jury be instructed verdict of guilt is returnable on one count only. Where two counts were based upon the same transaction, counsel may request the court to instruct the jury that a verdict of guilty could be returned on only one of the counts. *Sanders v. People*, 109 Colo. 243, 125 P.2d 154 (1942).

While a conviction on joined counts of confidence game and false pretenses predicated upon the same transaction cannot necessarily stand, the question is solved where the trial court instructs the jury that, if it finds the defendant guilty of confidence game it cannot find him guilty of false pretenses; that if it finds him guilty of false pretenses it cannot find him guilty of confidence game; and if it finds him guilty of conspiracy to commit one of the foregoing felonies, it cannot find him guilty of conspiracy to commit the other. *Small v. People*, 173 Colo. 304, 479 P.2d 386 (1970).

Subsection (3) requires concurrent sentences only where the counts of which the accused was convicted were supported by identical evidence. *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974); *Qureshi v. District Court*, 727 P.2d 45 (Colo. 1986); *People v. Ellinger*, 754 P.2d 396 (Colo. App. 1987); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002); *People v. Le*, 74 P.3d 431 (Colo. App. 2003).

If, under the discretionary authority of subsection (3), the trial court chooses not to require the prosecution to elect, and the defendant is convicted on multiple counts based on identical evidence, then "the sentences imposed must run concurrently". *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974); *People v. Tivis*, 727 P.2d 392 (Colo. App. 1986).

The trial court has discretion to impose consecutive or concurrent sentences when a

defendant is convicted of multiple offenses. Such authority is not affected by this section unless the crimes are supported by identical evidence. *People v. Dixon*, 950 P.2d 686 (Colo. App. 1997).

Evidence supporting different crimes is considered identical for purposes of this section when the same act or acts gave rise to both charges. *People v. Dixon*, 950 P.2d 686 (Colo. App. 1997).

No requirement that sentences run concurrently. Where the offenses for which a defendant are convicted are not based on the same act or series of acts arising from the same criminal episode, there is no requirement that the sentences for each offense run concurrently. *People v. Early*, 692 P.2d 1116 (Colo. App. 1984); *Qureshi v. District Court*, 727 P.2d 45 (Colo. 1986).

Inapplicable to different theories of same crime. Subsection (3) applies only to cases charging several different offenses, and not to the various theories of first-degree murder. *People v. Bowman*, 669 P.2d 1369 (Colo. 1983).

Consecutive sentencing for same transaction improper. When the burglary and the larceny involve one transaction, typical of many burglary-larceny situations, consecutive, double sentencing for the same transaction is inherently wrong and basically unjust and evades the legislative intent. *Maynes v. People*, 169 Colo. 186, 454 P.2d 797 (1969). But see *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967).

Consecutive sentences for burglary and for larceny are improper. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

But consecutive sentences proper for multiple offenses occurring during one continuous criminal episode where offenses, although involving some common elements of proof, were nevertheless separate and distinct, and required proof of different facts to establish their disparate elements. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Consecutive sentences may be imposed when the crimes require proof of different elements and are supported by different evidence. *People v. Russom*, 107 P.3d 986 (Colo. App. 2004).

Concurrent sentences are not prejudicial. The denial of a motion to compel election might constitute prejudicial error, but where the sentences run concurrently, there was no prejudice. *Sanders v. People*, 109 Colo. 243, 125 P.2d 154 (1942).

Law depends on facts in each particular case. The law relating to joinder and severance and that which permits consolidation of charges depends on the facts in each particular case. *Hunter v. District Court*, 193 Colo. 308, 565 P.2d 942 (1977).

Applicability to proceedings against juvenile. When a court has jurisdiction to entertain criminal proceedings against a juvenile under § 19-1-104(4)(b)(II), any additional charges arising out of the same act or series of acts can and must be prosecuted in that same action, even though they do not rise to the seriousness of class 3 felonies. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

Compulsory joinder section provides no exceptions to requirement of a single multiple-count prosecution. A juvenile faced with a misdemeanor charge and related traffic charges committed as part of the same act or series of acts should be afforded the protection of the compulsory joinder statute despite the fact that under the juvenile code a juvenile court has no authority to try traffic charges when such charges are the sole basis for a delinquency petition. *Marquez v. County Court*, 719 P.2d 797 (Colo. App. 1986).

Where multiple convictions are erroneously entered based on identical evidence, the appropriate remedy is to sustain the conviction that gives maximum effect to the jury's verdicts and vacate the duplicate convictions. *People v. Denton*, 91 P.3d 388 (Colo. App. 2003).

Where defendant is convicted of multiple counts arising out of the same incident, but proof of each count was not based on identical evidence, the imposition of consecutive sentences was appropriate. *People v. Jiron*, 796 P.2d 499 (Colo. App. 1990).

This section is designed to protect an accused defendant from an oppressive second trial and to preserve judicial and legal resources. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

By extending the constitutional guarantee against double jeopardy, this section establishes the specific circumstances under which a subsequent prosecution may be barred. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

This section contains five elements which must be satisfied before a subsequent prosecution is barred: (1) The offenses must have been committed in the same judicial district; (2) there must be a prosecution against the offender; (3) the prosecutor must have had knowledge of the several offenses at the commencement of the prosecution; (4) the offenses must have arisen out of the same criminal episode; and (5) the offender must have been previously subjected to a single prosecution. *People v. McCormick*, 859 P.2d 846 (Colo. 1993); *Zipse v. County Ct. for Jefferson County*, 917 P.2d 331 (Colo. App. 1996); *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

In determining whether the third element has been met, the focus should be on prosecutorial knowledge at the commencement of the jeopardy phase of the criminal prosecution. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

This section does not bar a subsequent prosecution where the attorney had no knowledge and does not participate in the decision to prosecute the different offenses. *People v. McCormick*, 859 P.2d 846 (Colo. 1993); *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

For a subsequently charged offense to be properly barred, the offense must have been ready for prosecution prior to the first trial, in addition to the district attorney having knowledge of the offense. *People v. McCormick*, 859 P.2d 846 (Colo. 1993).

Wife's authority as a private party to seek contempt sanctions for violation of a restraining order was independent of district attorney's authority to file criminal charges. Contempt of court proceeding and prosecution for criminal trespass and misdemeanor menacing, therefore, were not subject to compulsory joinder pursuant to this section. *People v. Allen*, 944 P.2d 541 (Colo. App. 1996).

Absent contrary evidence, fact that police officers issue separate summonses and complaints for multiple misdemeanors or petty offenses arising out of the same criminal episode provides no basis in fact or law to impute the knowledge of the separate offenses to the district attorney. *Zipse v. County Ct. for Jefferson County*, 917 P.2d 331 (Colo. App. 1996).

B. Illustrative Cases.

Count for murder and one for manslaughter may be tried together. Where the first count of an indictment was for murder and the second for manslaughter, it was held that the prosecutor might proceed to trial upon both counts at the same time, and that he could not properly be required to elect upon which count he would rely, so long as it appeared from the evidence that the two counts related to the same transaction. *Kelly v. People*, 17 Colo. 130, 29 P. 805 (1892).

Counts for burglary, larceny, and related offenses. One indictment may contain a count for burglary and one for larceny. *Parker v. People*, 13 Colo. 155, 21 P. 1120 (1889).

An information charging defendants in separate counts with breaking ore from certain mines with intent to steal, and with removing ore from the same premises with intent to defraud, was properly consolidated for trial with an information charging the same defendants in separate counts with larceny and receiving stolen goods knowing them to have been stolen, where both informations and both counts in each information refer to one and the same transaction and constitute but one offense. *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900).

The stealing of several articles of property at the same time and place as one continuous transaction may be prosecuted as a single offense, although the several articles belonged to

several owners. *Sweck v. People*, 85 Colo. 479, 277 P. 1 (1929).

Rape and assault to commit rape. When relating to the same transaction, completed rape and an assault to commit that offense rightly may be charged in separate counts of the same information. *Abeyta v. People*, 112 Colo. 195, 147 P.2d 481 (1944).

Joinder of count for assault on child under 16 with count for contributing to juvenile delinquency was proper. *Warren v. People*, 121 Colo. 118, 213 P.2d 381 (1949).

Two separate counts charging perjury were properly joined in one indictment where the two counts were admittedly based upon the same facts, and such facts would render defendants guilty under both sections. *People v. Swanson*, 109 Colo. 371, 125 P.2d 637 (1942).

Marijuana possession and motor vehicle offenses. Where a charge of possession of a marijuana concentrate involves an act which occurs at practically the same time and in the same place as the offenses of speeding and driving under the influence, the marijuana charge arises out of the "same criminal episode" as those other offenses for purposes of the compulsory joinder statute. *Corr v. District Court*, 661 P.2d 668 (Colo. 1983).

Concealed weapon and possession of controlled substance. Where a defendant enters a plea of guilty to a concealed weapons charge, the trial court can later dismiss a charge of possession of a controlled substance which arises out of the same criminal episode when the police and district attorney, through a field test, had probable cause to believe that the capsules seized contained barbiturates and when they could have and should have learned of the specific identity of the capsules prior to the time of the first preliminary hearing. *People v. Deschamp*, 662 P.2d 171 (Colo. 1983).

Second degree kidnapping and violation of custody. Where charges resulted from long family dispute and defendants took their children from guardians who had legal custody, trial court abused its discretion in not requiring district attorney to elect one charge or in not instructing jury that it could find defendants guilty of only one offense. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

Court did not abuse its discretion by not requiring election between kidnapping and violation of custody where, in contrast with *Tippet* case, defendant never attempted to contact police or child welfare agency, never initiated proceeding to obtain custody, and apparently was motivated only by a desire to punish his former wife for the marital dissolution. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Second degree kidnapping and second degree kidnapping involving sexual assault are not separate offenses; therefore this section held not to apply. *People v. Henderson*, 810 P.2d

1058 (Colo. 1991); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Either the crime of first degree sexual assault or the crime of sexual assault on a child, depending on the facts of the case, is necessarily a lesser included offense of second degree kidnapping including sexual assault. Defendant's conviction for at least one of such sexual assault crimes must merge into the defendant's conviction for second degree kidnapping including sexual assault. Because the two sexual assault crimes are not lesser included crimes of each other, and because the sexual assault elements in the kidnapping conviction are satisfied by proof of either of the sexual assault crimes, the defendant's conviction for only one of the sexual assault crimes must be vacated. *People v. Henderson*, 794 P.2d 1050 (Colo. App. 1990).

There can be only one conviction for first degree murder when there is only one victim. *People v. Fincham*, 799 P. 2d 419 (Colo. App. 1990).

Convictions may not be entered for both second degree murder and first degree felony murder when there is only one victim. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Defendant cannot be convicted of both felony murder and aggravated robbery when felony murder conviction is based upon offense of aggravated robbery. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Defendant may not be simultaneously convicted of felony murder and the felony on which the felony murder conviction rests. Where a defendant is convicted of multiple felonies, all of which are alleged as the legal predicates for the commission of felony murder, only that felony that most directly contributes to the death of the victim should be vacated. *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004).

Convictions for aggravated motor vehicle theft and attempted aggravated robbery are factually and legally inconsistent. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

Trial court did not abuse its discretion in denying motion to elect between second degree murder and second degree assault. The two offenses are separate offenses having different elements, and in any event, the court sentenced defendant to concurrent sentences as required by subsection (3). *People v. Fry*, 74 P.3d 360 (Colo. App. 2002), *aff'd* on other grounds, 92 P.3d 970 (Colo. 2004).

III. LESSER-INCLUDED OFFENSES.

A. In General.

Burden on defendant not enough to make constructive notice unconstitutional. It is true that a prosecution's use of the lesser included offense doctrine places some burden upon a

defendant to determine the specific charges that have been made against him. This fact, in itself, however, is not enough to make the constructive notice that is embodied in the greater charge unconstitutional. The effectiveness of many constitutional rights of an accused depends upon the self-initiative of the accused. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

Defendant presumed on notice that he or she can be convicted of lesser included offense. The provisions of this section and Crim. P. 31(c) are embodiments of the rule at common law that a defendant was presumed to be on notice that he or she could be convicted of the crime charged or a lesser offense included therein. If this presumption of notice can be said to satisfy the sixth amendment guarantees of notice, the prosecution's right to an instruction on an offense necessarily included within the offense charged must be upheld. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

One count may incorporate another count by reference. *People v. Incerto*, 180 Colo. 928, 505 P.2d 1309 (1973).

A defendant cannot be convicted of more than one offense if one offense is a lesser included offense of the other. *People v. Hancock*, 186 Colo. 30, 525 P.2d 435 (1974); *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981); *People v. Ball*, 813 P.2d 759 (Colo. App. 1990); *Armintrout v. People*, 864 P.2d 576 (Colo. 1993); *People v. Moore*, 877 P.2d 840 (Colo. 1994); *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994); *Litwinsky v. Zavaras*, 132 F. Supp. 2d 1316 (D. Colo. 2001).

The rule of merger in Colorado treats an offense as lesser included when proof of the essential elements of the greater offense necessarily establishes the elements required to prove the lesser offense. *Armintrout v. People*, 864 P.2d 576 (Colo. 1993); *Boulies v. People*, 770 P.2d 1274 (Colo. 1989); *Litwinsky v. Zavaras*, 132 F. Supp. 2d 1316 (D. Colo. 2001).

The lesser included offense "merges" into the conviction of the greater offense, and the defendant cannot be separately punished for it. *Litwinsky v. Zavaras*, 132 F. Supp. 2d 1316 (D. Colo. 2001).

When defendant is convicted of multiple lesser included offenses, the court must vacate the conviction of the offense that most directly relates to the elements of the greater offense. *People v. Halstead*, 881 P.2d 401 (Colo. App. 1994).

When the trial court must vacate a conviction among multiple convictions, the court should enter as many convictions and impose the longest sentences that are legally possible to fully effectuate the jury's verdict. *People v. Glover*, 893 P.2d 1311 (Colo. 1995) (standard established subsequent to the decision in *People v. Halstead* annotated above).

Jury not required to acquit defendant of offense charged in order to consider lesser nonincluded offenses. *People v. Skinner*, 825 P.2d 1045 (Colo. App. 1991).

B. Legal Standard.

In determining whether an offense is a lesser included offense of another, a court applies the strict comparison of the elements test, comparing the elements of the statutes involved. *People v. Rivera*, 186 Colo. 24, 525 P.2d 431 (1974); *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977); *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981); *People v. Ball*, 813 P.2d 759 (Colo. App. 1990); *Patton v. People*, 35 P.3d 124 (Colo. 2001); *Litwinsky v. Zavaras*, 132 F. Supp. 2d 1316 (D. Colo. 2001); *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002); *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004); *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

The test requires a comparison of the elements, not the evidence presented on those elements. *Armintrout v. People*, 864 P.2d 576 (Colo. 1993); *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994); *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004).

"Evidentiary test" in determining what is a lesser included offense is that an offense is lesser included when the evidence of the two crimes, as shown at trial, establishes the elements of the lesser offense. *People v. Rivera*, 186 Colo. 24, 525 P.2d 431 (1974).

Statutory test better view and will be applied. The better view is that the statutes, and not the evidence, must establish the essential elements of the lesser included offense. In other words, in determining whether an offense is lesser included, the statutory test, which mandates that the greater offense must establish every essential element of the lesser included offense, will be applied. *People v. Rivera*, 186 Colo. 24, 525 P.2d 431 (1974).

Because the statutory test is easily and more uniformly applied and a defendant is entitled to fair notice of the charges against him, the only reasonable method of ensuring such notice is the statutes that set forth the constituent elements. It would be haphazard and unfair to say to a defendant that he must defend on the principal charge and any other charge that the evidence established. *People v. Rivera*, 186 Colo. 24, 525 P.2d 431 (1974).

The test to determine whether a lesser crime is included within a greater is: If the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058

(1959); *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970); *People v. Velasquez*, 178 Colo. 264, 497 P.2d 12 (1972); *People v. Ellinger*, 754 P.2d 396 (Colo. App. 1987); *People v. Ager*, 928 P.2d 784 (Colo. App. 1996); *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

The “statutory elements test” is described as: If proof of the facts establishing the statutory elements of the greater offense necessarily establishes all of the elements of the lesser offense, the lesser offense is included for the purposes of subsection (5)(a). If, however, each offense necessarily requires proof of at least one additional fact that the other does not, the test is not satisfied. *People v. Leske*, 957 P.2d 1030 (Colo. 1998); *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

The test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971); *People v. Wieckert*, 191 Colo. 511, 554 P.2d 688 (1976), overruled on other grounds in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

An offense is included within another if it is impossible to commit one offense without also committing the other, or if the only difference between the charges is in the degree of mens rea required or in the severity of the injury inflicted by the criminal conduct. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

Greater offense includes a lesser offense when the establishment of the essential elements of the greater necessarily establishes all of the elements required to prove the lesser. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

It is the character of the evidence that must control in determining whether the lesser included offense of assault with intent to commit rape can stand alone or fall on acquittal of forcible rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

C. Jury Instructions.

A court should instruct a jury on a lesser included offense only when there is a rational basis, warranted by the evidence, for acquitting the defendant of the greater offense and convicting him or her of the lesser. *People v. Hansen*, 191 Colo. 175, 551 P.2d 710 (1976); *People v. Bowers*, 42 Colo. App. 467, 600 P.2d 95 (1979); *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (Colo. 1980); *Bowers v. People*, 617 P.2d 560 (Colo. 1980); *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984); *People v. Bustos*, 725 P.2d 1174 (Colo. App. 1986); *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000); *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

When a jury could entertain a reasonable doubt of a defendant’s guilt of a greater of-

fense, and simultaneously be convinced beyond a reasonable doubt of the defendant’s guilt of a lesser included offense, the defendant is entitled to have the jury instructed on the lesser included offense. *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984); *People v. Castro*, 10 P.3d 700 (Colo. App. 2000).

A defendant is not entitled to an instruction on a lesser included offense unless there is some evidence that, if believed, would render the defendant guilty of the lesser included offense, rather than the specifically charged offense. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

Evidence must justify submission of lesser included offense to jury. The submission of a lesser degree or an included crime is justified only where there is some basis in the evidence for finding the accused innocent of the higher crime and yet guilty of the lower one. *People v. Velasquez*, 178 Colo. 264, 497 P.2d 12 (1972).

In determining whether a lesser nonincluded offense instruction is appropriate, a court should use the same legal standard used to determine whether a lesser included offense instruction is required. A lesser included offense instruction is required whenever there is a rational basis for the jury to acquit the defendant on the greater charge and convict on the lesser offense. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

When prosecutor may obtain lesser included offense instruction. Mindful of the primacy of notice within the constitutional guarantee of due process of law and of the duty of the courts to safeguard this right, where the lesser included offense upon which the prosecution requested an instruction is easily ascertainable from the charging instrument and not so remote in degree from the offense charged that the prosecution’s request appears to be an attempt to salvage a conviction from a case that has proven to be weak, the prosecution may obtain a lesser included offense instruction over the defendant’s objection. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

Before a lesser nonincluded offense may be submitted to a jury in a theory of the case instruction, there must be a rational basis for the jury to acquit the defendant of the offense charged and simultaneously find him guilty of the lesser offense. *People v. Bustos*, 725 P.2d 1174 (Colo. App. 1986).

A rational basis does not exist when the lesser offense instruction is inconsistent with defendant’s theory of defense. *People v. Chavez*, 190 P.3d 760 (Colo. App. 2007).

When the record failed to present any evidence that would lead to a rational basis for acquitting the defendant of the greater offense but convicting the defendant of the lesser offense, request to instruct jury on lesser included

offense was properly denied. *People v. Price*, 969 P.2d 766 (Colo. App. 1998).

A criminal defendant who maintains his or her innocence at trial is not automatically barred from seeking jury instructions on a lesser included offense or on a related defense. If an instruction is given in that case, there must be a rational basis for it in the evidence presented at trial. After a review of the record, there was no rational basis in the evidence for the lesser included offense instruction or the voluntary intoxication instruction. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

No error for trial court to fail to instruct jury on second and third degree criminal trespass as lesser offense of second degree burglary of a building since there was no rational basis for acquitting the defendant of the offense charged and convicting him of the included offense. *People v. Romero*, 694 P.2d 1256 (Colo. 1985).

It was not error for the trial court to refuse defendant's requested instruction that stated that false imprisonment was a lesser included offense of attempted second degree kidnapping since there was no rational basis, supported by the evidence, for acquitting the defendant of the greater offense charged and convicting him of the lesser included offense. *People v. Arispe*, 191 Colo. 555, 555 P.2d 525 (1976).

Subsection (8) prohibits the trial court to instruct the jury to return a guilty verdict on a lesser included offense without the prosecutor's consent if the jury has reached consensus as to the defendant's guilt but is deadlocked as to the degree of guilt. *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

However, it does not prevent a jury from being presented with a verdict form that gives jurors the option of considering the charge and its lesser included offenses on an individual basis, and acquitting the defendant on some or all of them. *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

Therefore, the verdict form that allowed the jurors to return a not guilty verdict only if they found defendant not guilty of first degree murder, second degree murder, manslaughter, and criminally negligent homicide was not required by subsection (8). *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

Claim of innocence alone does not disentitle defendant to lesser included offense instruction. The instruction, however, must be supported by evidence at trial. There was no error in failing to instruct the jury on attempted first degree murder where victim's injuries were such that no rational jury could have found the shooter acted with anything but a premeditated intent to cause death. *People v. Brown*, 218 P.3d 733 (Colo. App. 2009), *aff'd*, 239 P.3d 764 (Colo. 2010).

Instruction not required. Mere chance of the jury's rejection of uncontroverted testimony and conviction on a lesser charge does not necessitate an instruction on the lesser charge. *People v. Campbell*, 678 P.2d 1035 (Colo. App. 1983).

When the undisputed evidence clearly established the completed crime of second degree kidnapping, the trial court did not err in refusing to submit to the jury the defendant's instruction on the lesser offense of attempted second degree kidnapping. *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

Instruction on lesser offense when evidence supported conviction for greater offense. When the evidence supported a conviction for felony menacing, the fact that the trial court improperly submitted an instruction on misdemeanor menacing to the jury did not affect defendant's conviction for the lesser included offense of misdemeanor menacing. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Lesser offense instruction is properly refused when an element that distinguishes the greater offense from the lesser offense is uncontested. Defendant charged with aggravated robbery and felony murder was not entitled to lesser theft offense instruction because there was no evidence disputing the use of force against, and the killing of, the victim. *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Error to refuse instruction on included offense. Where the evidence is sufficient to support a charge of assault with the intent to commit rape, and such as to justify a simultaneous acquittal of the charge of rape, refusal of a trial court to submit a verdict and instruction on assault with intent to commit rape is error. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Trial court's refusal to give a lesser nonincluded offense instruction does not justify reversal if the court instructed on a comparable lesser nonincluded offense. *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

Jury instruction that characterizes lesser nonincluded offenses as lesser included offenses is harmless error when jury does not convict defendant of any lesser nonincluded offenses. *People v. Skinner*, 825 P.2d 1045 (Colo. App. 1991).

D. Finding of Lesser Included Offenses.

For purposes of determining which of the underlying felonies constitutes the lesser included offense of felony murder, the felony that most directly contributes to the death of the victim should serve as the legal predicate for the felony murder conviction. *Callis v. People*, 692 P.2d 1045 (Colo. 1984).

When conviction for felony murder is based upon kidnapping, conviction on the

lesser included offense of kidnapping is precluded; however, defendant may be convicted on the separate crimes of kidnapping and first degree murder. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990); *People v. McCormick*, 881 P.2d 423 (Colo. App. 1994).

When conviction for felony murder was predicated on the death of a robbery victim, a simultaneous conviction for robbery is precluded. *People v. Cook*, 22 P.3d 947 (Colo. App. 2000).

Aggravated robbery within felony murder based on robbery victim's death. Where the defendant's conviction for felony murder is based upon the causation of the robbery victim's death during the course of the robbery, a charge of aggravated robbery of the same victim is a lesser included offense of the felony murder charge within the meaning of subsection (5)(c). *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Rape within felony murder based on rape victim's death. Where first degree sexual assault victim is killed during the course of the assault, charge of first degree sexual assault is a lesser included offense of felony murder charge. *People v. Horton*, 683 P.2d 358 (Colo. App. 1984); *Callis v. People*, 692 P.2d 1045 (Colo. 1984); *People v. Angelini*, 706 P.2d 2 (Colo. App. 1985).

Under the circumstances present in the case, subsections (1)(a) and (5)(a) prohibit a judgment of conviction for attempted sexual assault in addition to a conviction for felony murder. *People v. Blackmer*, 888 P.2d 343 (Colo. App. 1994).

The predicate offenses for "felony" first degree assault under § 18-3-202 fit the statutory test for a lesser included offense. As such, the conviction of the predicate offense must merge into the conviction for "felony" first degree assault, even though the predicate offense is a more serious offense and carries a greater punishment. *People v. Halstead*, 881 P.2d 401 (Colo. App. 1994).

The trial court correctly merged defendant's conviction for first degree assault into one of his convictions for first degree sexual assault. *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

Since defendant could not be convicted of both felony assault and aggravated robbery (since commission of robbery is an element of the assault), the assault conviction, rather than the robbery conviction, should be vacated. *People v. Fisher*, 926 P.2d 170 (Colo. App. 1996).

Generally, the crimes of second degree murder and attempted second degree murder are, respectively, lesser included offenses of first degree murder or attempted first degree murder under any theory, and second degree murder is a lesser included offense of first degree murder by extreme indifference. *Peo-*

ple v. Rodriguez, 888 P.2d 278 (Colo. App. 1994).

When jury convicted defendant of both extreme indifference murder and second degree murder and attempted murder, the trial court erred in applying the rule of lenity by vacating the more serious offenses instead of the lesser offenses. The proper course of action under such circumstances is to vacate the lesser offenses. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Reckless endangerment is a lesser included offense of first degree assault with intent to cause serious bodily injury. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

Assault to rape is an included offense of the crime of rape, both include the necessary aggravated intent and both contain the element of assault. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. Proof of sexual intrusion requires proof of sexual contact with a person's intimate parts satisfying the strict elements test, and unlawful sexual contact involves less serious injury than sexual intrusion and lesser culpability than sexual assault. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010).

One who commits reckless driving necessarily has been guilty of careless driving, for the greater degree of negligence includes the lesser. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

In terms of subsection (5), careless driving "is established by proof of the same or less than all the facts required to establish ..." reckless driving. *People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

Reckless driving is a lesser included offense of vehicular eluding. *People v. Pena*, 962 P.2d 285 (Colo. App. 1997); *People v. Esparza-Treto*, ___ P.3d ___ (Colo. App. 2011).

Trial court erred when it failed to merge a conviction of reckless endangerment with a conviction for attempted first degree murder with extreme indifference. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Assault, a predicate offense for first degree burglary, is a lesser included offense of first degree burglary. Therefore, the two counts merge. *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004).

Attempt to induce child prostitution is a lesser included offense encompassed within the crime of inducement of child prostitution. *People v. Hansen*, 708 P.2d 468 (Colo. App. 1985).

Possession of an illegal weapon under § 18-12-102 (4) is a lesser included offense of possession of weapon by a previous offender under § 18-12-108 (1) when the same weapon is

alleged in each charge. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

In a case where the lesser included offense carries a higher penalty, the court must vacate the conviction carrying the lower penalty and impose the higher penalty in order to maximize the jury's verdict. *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004).

E. Find Not Lesser Included Offense.

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

Sexual assault on a child does not differ from sexual assault on a child by one in a position of trust only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission. In fact, these offenses do not involve different degrees of culpability, injury, or risk of injury, but they do differ with respect to other elements. Because the offenses differ in ways other than those contemplated by subsection (5)(c), sexual assault on a child is not a lesser included offense of sexual assault by one in a position of trust. *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Conviction of sexual assault on a child by one in a position of trust does not encompass the offense of sexual assault on a child as a lesser included offense. Subsection (5)(a) does not require an "evidentiary test" for determining lesser included offenses. Instead, a "strict elements test", or a comparison of the statutory elements of the offenses in question, is required in order to determine whether an offense is lesser included. Applying this test, the language of sexual assault on a child offense requires that the victim be 15 years of age or younger, whereas the position of trust offense requires only that the victim be less than 18 years of age. Thus, each offense requires proof of a fact that the other does not, and sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of trust. *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Second degree burglary not lesser included offense of first degree burglary because conviction of class 3 felony second degree burglary required proof of a fact beyond the proof required for first degree burglary, even though entry was made into only one condominium unit. *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

When defendant's burglary conviction for first degree burglary is vacated as to victim, defendant's conviction for third degree assault as to the same victim is not a lesser included offense and thus does not merge. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

Burglary is an offense against property, and the general assembly intended the additional element of assault in the first degree burglary statute to modify and aggravate the offense of burglary and not to change the gravamen of the crime. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

A single entry can support only one conviction of first degree burglary, even if multiple assaults occur. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

Not error to impose consecutive sentences of 32 years for first degree assault and life sentence for murder. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. The use of a deadly weapon is an element of attempted assault in the first degree but not of attempted murder. *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004).

Under former criminal code, assault with deadly weapon was not a lesser included offense of assault with intent to commit murder. *People v. Rivera*, 186 Colo. 24, 525 P.2d 431 (1974).

Heat of passion manslaughter is not a pure lesser included offense of either first or second degree murder because the greater inclusive offenses do not necessarily establish every essential element of this form of manslaughter. *People v. Lewis*, 676 P.2d 682 (Colo. 1984).

Attempted reckless manslaughter is not a lesser included offense of first degree assault with intent to cause serious bodily injury, because the fact that a defendant causes serious bodily injury to a person does not necessarily mean that he or she recklessly took a step toward causing the death of a person. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

Convictions do not merge when the elements required to be proven to convict defendant as a complicitor to an assault committed by another are not identical to those required to be proven to convict him of committing first degree assault as a principal. *People v. Martinez*, 1 P.3d 192 (Colo. App. 1999).

Second degree assault is not a lesser included offense of aggravated robbery because second degree assault requires proof of bodily injury and specific intent. *People v. Dotson*, 55 P.3d 175 (Colo. App. 2002).

Menacing is not a lesser included offense of second degree assault because the offenses differ with respect to both the culpability required

and the injury or risk of the injury required. *People v. Palmer*, 944 P.2d 634 (Colo. App. 1997), *aff'd in part and rev'd in part* on other grounds, 964 P.2d 524 (Colo. 1998).

Third degree assault not included in robbery. Third degree assault requires proof of bodily injury, an element not necessary to culpability under robbery; therefore, the former offense is not included within the latter. *People v. Flores*, 39 Colo. App. 556, 575 P.2d 11 (1977).

First degree criminal trespass is not a lesser included offense of first degree burglary. However, it is a lesser nonincluded offense, and the trial court may instruct a jury on such offense over the objection of the defendant if the charging document provides notice that defendant might have to defend against that charge. *People v. Satre*, 950 P.2d 667 (Colo. App. 1997).

First degree criminal trespass is distinct from misdemeanor theft. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

When the essential elements of vehicular homicide are compared to those of criminally negligent homicide, it becomes clear that criminally negligent homicide is not a lesser included offense in a charge brought under § 18-3-106 (1)(b). *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984).

Reckless driving is not a lesser included offense of vehicular homicide and vehicular assault because reckless driving posed an additional risk of injury to other persons and property in the vicinity of the accident. *People v. Clary*, 950 P.2d 654 (Colo. App. 1997).

Eluding a police officer, as defined in § 42-4-1413, is not a lesser-included offense of vehicular eluding, as defined in § 18-9-116.5. *People v. Fury*, 872 P.2d 1280 (Colo. App. 1993) (decided prior to 1994 amendment relocating former § 42-4-1512 to § 42-4-1413); *People v. Pena*, 962 P.2d 285 (Colo. App. 1997); *People v. Esparza-Treto*, __ P.3d __ (Colo. App. 2011).

None of the elements of the offense of possession of drug paraphernalia are the same as those that relate to the charge of possession of a controlled substance, and thus a jury's finding that a defendant was guilty of the lesser

offense would in no way tend to disprove the greater charge nor present a rational basis on which the jury could have chosen between them. *People v. Bustos*, 725 P.2d 1174 (Colo. App. 1986).

Possession of a controlled substance is not a lesser included offense of distribution of the same controlled substance. *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997).

Information charging possession of narcotics with intent to sell was sufficient to advise the defendant that he must be prepared to controvert evidence of possession and to defend on that charge. Because possession is an essential element of possession with intent to sell, the defendant can scarcely claim surprise by the introduction of evidence establishing possession. *People v. Cooke*, 186 Colo. 44, 525 P.2d 426 (1974).

Rape and incest, as well as the other named kindred offenses, remain separate and distinct offenses. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

As do assault and kidnapping. The facts necessary to prove that the defendant was guilty of assault with a deadly weapon were not the same as those required to prove that the defendant was guilty of kidnapping. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Sexual assault is not a lesser included offense of, and therefore not merged into, second degree kidnapping involving sexual assault. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Since reckless endangerment requires proof of an element that is not required to prove first degree assault on a peace officer, it is not a lesser included offense of such charge. The trial court did not err when it refused defendant's tendered jury instruction on reckless endangerment as a lesser included offense on that charge. *People v. Delgado-Elizarras*, 131 P.3d 1110 (Colo. App. 2005).

Arson is distinct from criminal mischief because each contains elements not required for the other. *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997).

18-1-409. Appellate review of sentence for a felony. (1) When sentence is imposed upon any person following a conviction of any felony, other than a class 1 felony in which a death sentence is automatically reviewed pursuant to section 18-1.3-1201 (6), 18-1.3-1302 (6), or 18-1.4-102 (6), the person convicted shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based; except that, if the sentence is within a range agreed upon by the parties pursuant to a plea agreement, the defendant shall not have the right of appellate review of the propriety of the sentence. The procedures to be employed in the review shall be as provided by supreme court rule.

(2) No appellate court shall review any sentence which is imposed unless, within forty-nine days from the date of the imposition of sentence, a written notice is filed in the trial court to the effect that review of the sentence will be sought; said notice must state the grounds upon which it is based.

(2.1) and (2.2) Repealed.

(3) The reviewing court shall have power to affirm the sentence under review, substitute for the sentence under review any penalty that was open to the sentencing court other than granting probation or other conditional release, or remand the case for any further proceedings that could have been conducted prior to the imposition of the sentence under review, and for resentencing on the basis of such further proceedings. No sentence in excess of the one originally imposed shall be given unless matters of aggravation in addition to those known to the court at the time of the original sentence are brought to the attention of the court during the hearing conducted under this section. If the court imposes a sentence in excess of the one first given, it shall specifically identify the additional aggravating facts considered by it in imposing the increased sentence.

Source: **L. 71:** R&RE, p. 401, § 1. **C.R.S. 1963:** § 40-1-509. **L. 76:** (2) R&RE, p. 549, § 8, effective July 1. **L. 79:** (2.1) repealed and (2.2) R&RE, pp. 670, 672, §§ 17, 24, effective July 1; (1) amended, p. 675, § 2, effective August 1. **L. 81:** (2.2) repealed, p. 969, § 2, effective July 1. **L. 91, 2nd Ex. Sess.:** (1) amended, p. 14, § 2, effective September 20; (1) amended, p. 22, § 2, effective October 11. **L. 93:** (2) amended, p. 1460, § 4, effective June 6. **L. 99:** (1) amended, p. 799, § 21, effective July 1. **L. 2002:** (1) amended, p. 1510, § 179, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1) amended, pp. 33, 34, §§ 29, 30, effective July 12. **L. 2012:** (2) amended, (SB 12-175), ch. 208, p. 862, § 102, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: (1) For the supreme court rule concerning appellate review of felony sentences, see rule C.A.R. 4(c).

(2) For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (1), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

The power to declare by statute what punishment may be assessed against those convicted of crime is legislative and not judicial. If the statute is not in violation of the constitution, then any punishment assessed by a court within the limits fixed thereby cannot be adjudged excessive. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

This section is constitutional. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

Not improper exercise of commutation reserved to executive. Appellate review of sentences by supreme court, before finality of judgment of conviction, as allowed by this section, is a proper judicial function and not an improper exercise of the power of commutation reserved to the executive department. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

This section is a constitutionally permitted expansion of appellate jurisdiction by the general assembly. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

And does not amount to a legislative grant of additional original jurisdiction to the supreme court. It is exactly what it expressly purports to be — an appellate review of sentencing — clearly within the jurisdiction of the supreme court under § 2 of art. VI, Colo. Const. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

This section sets the parameters for an appellate court's review of a defendant's sentence. *People v. Williams*, 916 P.2d 624 (Colo. App. 1996).

But this section does not limit sentencing following new trial, as opposed to remand after review of sentence. Where defendant did not seek a review of his sentence but, rather,

appealed the judgment of conviction, this section did not bar sentencing of defendant as an habitual criminal. *People v. Williams*, 916 P.2d 624 (Colo. App. 1996).

This section does not preclude review of constitutional challenges. An eighth amendment challenge is of a different magnitude than a statutory challenge. The issue is not whether a particular sentence was a wise exercise of discretion, but whether it was so disproportionate as to constitute cruel and unusual punishment. *People v. McCulloch*, 198 P.3d 1264 (Colo. App. 2008).

Jurisdiction to review propriety of sentence. Neither the court of appeals nor the supreme court of Colorado has jurisdiction to review the propriety of a sentence except on direct appeal from the initial sentence and then only under the limitations established in § 18-1-409 and C.A.R. 4(c)(I). *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

Good cause standard under C.A.R. 26(b) for an enlargement of time to file appeal encompasses the statutory deadline in this section. *People v. Hill*, __ P.3d __ (Colo. App. 2011).

Propriety of imposing a consecutive sentence is reviewable on appeal under subsection (1) even though defendant's plea was subject to a sentencing cap. Review of the propriety of a sentence involves a review of the intrinsic fairness or appropriateness of the sentence itself taking into account the nature of the offense, the character of the offender, and the public interest. The question of whether the trial court was statutorily prohibited from imposing consecutive rather than concurrent sentences is not a matter of the intrinsic fairness or appropriateness of the sentence, but rather of whether the trial court exceeded its statutory authority in determining the sentence. Thus, subsection (1) does not preclude review of defendant's appeal. *Juhl v. People*, 172 P.3d 896 (Colo. 2007).

Filing of notice of appeal is jurisdictional prerequisite for appellate review of a lower court decision to deny a Crim. P. 35(a) motion. *People v. Silvola*, 198 Colo. 228, 597 P.2d 583 (1979); *People v. Boesflug*, 107 P.3d 1118 (Colo. App. 2004).

Review of denial of Crim. P. 35(b) motion. It is only in situations where the trial court has refused to consider any information in mitigation and does not make findings in support of its decision, that an error in denying a Crim. P. 35(b) motion is sufficient to invoke appellate jurisdiction. *Mikkleson v. People*, 199 Colo. 319, 618 P.2d 1101 (1980).

Only exception to rule that relief from sentence imposed lies only with executive. *People v. Spann*, 37 Colo. App. 152, 549 P.2d 427 (1975), rev'd on other grounds, 193 Colo. 53, 561 P.2d 1268 (1977).

Mandates appellate court correction. This section not only permits but also directs the appellate court to mandate the correction of a sentence excessive in length, having due regard for the protection of the public interest, the nature of the offense, and the character of the offender as it relates to the probability of his rehabilitation. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976).

A sentencing hearing is a critical stage of a criminal proceeding. However, hearsay is admissible because of the substantial difference between the sentencing hearing and the trial itself. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Sentencing decision should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Proper and fair sentence is one that can be reasonably explained. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

A trial court has wide discretion in the imposition of a sentence. *Rochon v. People*, 134 Colo. 448, 306 P.2d 1080 (1957).

The choice of place of confinement is within the sound discretion of the court, just as is the length of term of imprisonment. *People v. Weihs*, 187 Colo. 124, 529 P.2d 317 (1974).

Of necessity the trial judge has wide latitude in imposing sentence. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Sentencing by its very nature is a discretionary decision which requires the weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and society's interest in safety and deterrence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

A sentencing judge has wide discretion in selecting the appropriate disposition. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

The trial court has wide discretion in sentencing and, absent a finding of abuse of discretion, an appellate court will not substitute its judgment for that of the trial judge. *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

Sentencing discretion reposes in court. It is the court, however, and not the probation department, in whom sentencing discretion is reposed. *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979).

Cause may be remanded for proper sentence. Where specifications of error principally stressed the question of whether punishment may be decreed properly for both rape and kidnapping offenses upon the theory that the evidence showed no more than a single continuous act, it was held that where sentence for kidnapping was excessive, the cause should be remanded to the district court for the imposition

of a proper sentence for the kidnapping offense within the limits of the proper section. *Abeyta v. People*, 112 Colo. 49, 145 P.2d 884 (1944).

Or correction may be made in appellate court. An erroneous judgment of the district court sentencing one guilty of second degree murder to confinement in the penitentiary at hard labor for the remainder of his natural life may be corrected by appeal or other like proceeding in the appellate court. *People ex rel. Best v. District Court*, 115 Colo. 240, 171 P.2d 774 (1946).

Appellate court should not modify sentence imposed by trial judge unless record exhibits clear abuse of discretion by the trial judge in his determination. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

The supreme court of Colorado should not modify a sentence unless it appears that the trial court has failed to give appropriate consideration to both the needs of the defendant and those of society. *People v. Cameron*, 200 Colo. 279, 613 P.2d 1312 (1980).

Guidelines for appellate review. The appellate court's determination of whether a sentence is intrinsically unfair or excessive requires consideration of its propriety or fairness within the context of the nature of the offense, the character of the offender, and the public interest. *People v. Piro*, 671 P.2d 1341 (Colo. App. 1983).

Sentencing error where extraordinary aggravating circumstances not found. Judge erred in sentencing a 19-year old beyond the presumptive range because extraordinary aggravating circumstances justifying the sentence were not found even though the defendant was accused of committing five felonies in a nine-month period, including an arrest while on probation. *People v. Jenkins*, 674 P.2d 981 (Colo. App. 1983).

Guidelines for the determination of a sentence involve weighing several factors, including the nature of the offense, the character of the offender, rehabilitation of the defendant, the development of respect for law and deterrence of crime, and the protection of the public. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975); *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980); *People v. Cohen*, 617 P.2d 1205 (Colo. 1980); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Magee*, 626 P.2d 1139 (Colo. 1981).

In deciding what sentence is most appropriate, the trial judge must attempt to work out a fair accommodation between the need to protect society at large and to deter potential offenders, to punish the convicted offender, and to rehabilitate him. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *People v. Cameron*, 200 Colo. 279, 613 P.2d 1312 (1980).

The sentencing judge properly may consider the public interest in safety and deterrence in sentencing an offender, especially in crimes of

serious personal violence. *People v. Self*, 200 Colo. 406, 615 P.2d 693 (1980).

Before imposing sentence, the trial court should consider the nature of the offense, the character of the offender, and the public interest in safety and deterrence. *People v. Hunt*, 632 P.2d 572 (Colo. 1981).

In reviewing the district court's imposition of sentence, the supreme court is to consider the following factors: The nature of the offense, the character of the offender, the public interest in safety and deterrence, and the sufficiency and accuracy of the information on which the sentence was based. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

Trial judge held to have properly considered evidence of the defendant's improved conduct while in prison, the nature of the offense, the character of the offender and the public interest in safety and deterrence in arriving at the decision to reduce the defendant's sentence. *People v. Bridges*, 662 P.2d 161 (Colo. 1983).

All factors to be considered in imposition of sentence. Although a sentencing court may consider a defendant's false testimony as probative of his rehabilitative potential, the fact that defendant may have lied under oath is insufficient justification, standing alone, to warrant the imposition of a maximum sentence. Equal weight must be given to all factors which comprise the goals of sentencing. *People v. Wilson*, 43 Colo. App. 68, 599 P.2d 970 (1979).

Although the absence of a prior felony conviction or significant criminal involvement, by itself, certainly may constitute a mitigating factor worthy of consideration, it is only one factor and is not conclusive on the sentencing decision. *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980).

Sentence must be supported by reasons in record. In felony convictions involving the imposition of a sentence to a correctional facility, the sentencing judge must state on the record the basic reasons for the imposition of sentence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Particularly where sentence involves restrictive form of deprivation. Requirement that sentencing judge state on the record the basic reasons for imposing a sentence is particularly essential in those cases where the sentence involves a very restrictive form of deprivation, such as a term of confinement to a correctional facility. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

A sentence for an extended term must be clearly justified in the record. *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980); *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Where a sentence of an extended duration is imposed, the record must establish a clear justification for the trial judge's action. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

When sentence is within presumptive range without regard to crime of violence-bodily injury aggravator, defendant is not prejudiced by jury's finding that victim suffered bodily injury as to each count even though there was no evidence of bodily injury on one of the counts. *People v. Anderson*, 183 P.3d 649 (Colo. App. 2007).

Failure to state reasons creates obstacle to appellate review. The failure of a sentencing judge to state on the record the basic reasons for the selection of a particular sentence creates a burdensome obstacle to effective and meaningful appellate review of sentences. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentence may not be based on speculation. Speculation or conjecture regarding possible future facts is not accurate information upon which a sentence may be crafted. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983).

Consideration of trauma of witnesses is not proper factor. Any consideration of the trauma to the victims caused by their having to testify in determining the length of sentence would be error in light of defendant's fundamental right to require the prosecution to prove every element of the case. *People v. Wilson*, 43 Colo. App. 68, 599 P.2d 970 (1979).

In sentencing, the court's responsibility is to individualize a sentence and to tailor the sentence to fit the crime and the particular defendant who is before the court. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Presentence investigation report should always be made part of record on appeal when review of the appropriateness of a sentence is sought. *People v. Horne*, 619 P.2d 53 (Colo. 1980).

Any imposition of the maximum or close to the maximum penalty must be supported by sound reasons in the record for a sentence that is too long tends to reenforce the criminal tendencies of the convicted defendant. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *People v. Wilson*, 43 Colo. App. 68, 599 P.2d 970 (1979).

A long sentence may sometimes be justified on the basis of the depravity of the crime for which the defendant has been convicted. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976).

Where a vicious or serious crime is committed by a hardened criminal, the need for a maximum or near-maximum sentence may be clearer still. *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976).

Or because of repeated convictions. A long or even maximum sentence may also be justified where the defendant's past record reveals repeated convictions and where the public safety can only be assured if the offender is confined.

People v. Strong, 190 Colo. 189, 544 P.2d 966 (1976).

Trial court acted within its discretion when it accorded substantial weight to defendant's pattern of criminal behavior and the likelihood he would commit further crimes that would endanger the public, and the court made sufficient findings to exceed the presumptive sentence range. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Judgment and sentence not final until appellate remedies exhausted. For the purposes of reviewing and granting relief from sentences validly imposed, the judgment and sentence is not final until after appellate remedies for review have been exhausted. *People v. Carter*, 186 Colo. 391, 527 P.2d 875 (1974).

Defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes, when relief is sought before finality has attached to the judgment of conviction. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

Possible ameliorative benefits of an amended habitual criminal statute must be made available to a defendant notwithstanding the requirements of this section. *People v. Vigil*, 39 Colo. App. 371, 570 P.2d 13 (1977).

Defendant may seek such relief by direct appeal under section. A defendant, who is entitled to the benefits of amendatory legislation which mitigates penalties for crimes, when relief is sought before finality has attached to the judgment of conviction, may seek such relief by direct appeal under this section. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

Section limited to felonies. Where the defendant was convicted of simple assault and was sentenced to six months in jail and fined \$500, all within the statutory limits, even had the present statute on review of sentences been in effect, the sentence imposed would not be subject to review, for it is limited to felonies. *People v. DeJesus*, 184 Colo. 230, 519 P.2d 944 (1974).

No review for misdemeanor. There is no provision for appellate review of the propriety of a misdemeanor sentence. *People v. Roberts*, 668 P.2d 977 (Colo. App. 1983).

A minimum sentence is a prerequisite to appellate review. Otherwise, there is no means to determine whether the minimum given is three years greater than the minimum provided in the statute. *Nugent v. District Court*, 184 Colo. 353, 520 P.2d 592 (1974) (decided prior to the 1976 amendment to this section).

This section entitled defendant to benefits of §§ 16-11-101 and 16-11-304. Defendant, who was sentenced prior to the effective date of the 1973 amendments to §§ 16-11-101 and 16-11-304 — which legislation provided for the imposition of indeterminate sentences for class 4 and class 5 felonies — was entitled to the benefit of this legislation under relief sought by

this section. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

A defendant who was sentenced to a term with a fixed minimum and fixed maximum for conviction of a class 4 felony was entitled under this section to the benefits of §§ 16-11-101 and 16-11-304. *People v. Race*, 187 Colo. 204, 529 P.2d 629 (1974).

Failure to impose equal sentences on criminal confederates not violative of equal protection. Due to the individualized nature of sentencing, there is no rule that confederates in crime must receive equal sentences, nor that failure to impose equal sentences violates equal protection of the law under the Colorado or United States Constitutions. *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975).

Contention that statutory penalties cruel and unusual not justifiable where sentence suspended. Where accused was given a suspended sentence and granted probation, his contention on appeal that the penalties statutorily prescribed for the offense of which he was convicted were "cruel and unusual punishments" did not present a justifiable question. *People v. Summit*, 183 Colo. 421, 517 P.2d 850 (1974).

Ten- to 15-year term for assault in the first degree was not excessive in light of appellant's active participation in the planning and execution of the crimes, and the violence involved in the attempt to flee the scene of the crimes and avoid capture by law enforcement officers. *People v. Campbell*, 188 Colo. 79, 532 P.2d 945 (1975).

Sentence may be imposed to run consecutively to sentence already imposed. A sentencing court has discretion to impose a sentence to be served concurrently with or consecutively to a sentence already imposed upon a defendant. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983); *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984); *People v. Martinez*, 179 P.3d 23 (Colo. App. 2007).

But not to sentence not yet imposed. A trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983).

Consecutive sentences for separate assaults not excessive. A defendant convicted by a jury on two counts of assault and sentenced on each count, the sentences to run consecutively, contended that the sentences amounted to excessive, cruel, and unusual punishment because the defendant must serve an entire term before being eligible for probation on the second consecutive term, and because the second assault following so closely upon the first assault amounted to one transaction. It was held that

this was clearly not the case as the two victims were in two different places and were not assaulted contemporaneously. *Harris v. People*, 174 Colo. 483, 484 P.2d 1223 (1971).

Statute inapplicable where defendant sentenced in 1969 and rehearing held in 1970. *People v. Jenkins*, 180 Colo. 35, 501 P.2d 742 (1972).

Since the offense for which the defendant was sentenced was committed prior to July 1, 1972, the right of appeal under this section is not available to him. *People v. Knight*, 185 Colo. 364, 525 P.2d 425 (1974).

This section applies only to offenses committed after July 1, 1972. *People v. Silvola*, 198 Colo. 228, 597 P.2d 583 (1979).

Invoking fifth amendment at codefendant's trial. Where a defendant is appealing his sentence and fears that his testimony in the trial of his codefendant might be used at a subsequent hearing to enhance the sentence should it be vacated, he may invoke his fifth amendment right against self-incrimination. *People v. Villa*, 671 P.2d 971 (Colo. App. 1983).

Claim of unjust sentencing not allowed after plea bargain. Where trial court repeatedly reminded the defendant of what the sentence would be when it advised him, at the time of the acceptance of his plea of guilty, pursuant to Crim. P. 11, and at no time did the defendant or his counsel protest the sentence or raise an objection that the trial court was not properly exercising its discretion in imposing the sentence, the defendant could not, after benefitting from the plea bargain, claim on appeal that he has been unjustly sentenced. *People v. Cunningham*, 200 Colo. 303, 614 P.2d 886 (1980).

A sentence imposed within a range agreed upon by the parties pursuant to a plea bargain precludes challenging the sentence on appeal. Subsection (1) does not require a sentencing range or cap to confer a benefit or concession on the defendant. *People v. Scofield*, 74 P.3d 385 (Colo. App. 2002).

Section precludes review of sentence imposed within limits of the plea agreement. *People v. Garcia*, 55 P.3d 243 (Colo. App. 2002).

The plea agreement proviso in subsection (1) precludes nonconstitutional challenges to a sentencing proceeding by a defendant whose sentence did not exceed the cap agreed to in the plea agreement. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005).

Statute creates single right to review the propriety of the sentence not a separate right to review of sentencing proceedings. While the manner in which the sentence was imposed is an enumerated factor that may affect the propriety of the sentence, there is no separate right to review of the manner of the sentencing. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005).

For defendants whose sentences did not exceed the agreed cap, the proviso's prohibition

against appellate review of the propriety of the sentence bars review of all statutory factors that may have affected propriety, including the manner in which the sentence was imposed. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005).

Review not precluded if aggravating circumstances imposed on sentence but plea bargain did not include agreement that aggravating factors existed. Defendant cannot be said to have agreed to a sentence within an aggravated range if plea agreement merely identified the number of years the sentence was not to exceed, not an acknowledgment that aggravating factors existed. *People v. Misenhelter*, 121 P.3d 230 (Colo. App. 2004).

Sentence in a plea agreement can be subject to appellate review if there is no indication in the record that the defendant's agreement included any type of agreed sentencing range or cap under subsection (1). *People v. O'Dell*, 53 P.3d 655 (Colo. App. 2001).

Refusal to grant defendant credit for presentence confinement not error. *People v. Magee*, 626 P.2d 1139 (Colo. 1981).

An order of restitution becomes part of the sentence which, in accordance with Crim. P. 32(c), is part of the judgment of conviction. When a court orders a defendant, over his objection, to pay restitution to the victim or the victim's family as part of the judgment of conviction for a felony, the order of restitution is appealable pursuant to the statutory procedures applicable to the appellate review of a felony sentence. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

A fine was unconstitutionally excessive where the court failed to consider the particular financial circumstances of the defendant in setting the fine and the court set the fine in an amount that was so disproportionate to the de-

fendant's circumstances that there could be no realistic expectation that the defendant would be able to pay the fine. *People v. Malone*, 923 P.2d 163 (Colo. App. 1995).

Statute as basis for jurisdiction. See *People v. Pacheco*, 41 Colo. App. 188, 581 P.2d 741 (1978); *Triggs v. People*, 197 Colo. 229, 591 P.2d 1024 (1979).

Rule of appellate review on filing notice of appeal of criminal sentence governs over conflicting statute which had not been amended after rule was changed. *People v. Arevalo*, 835 P. 2d 552 (Colo. App. 1992).

However, the statute prevails over a conflicting supreme court rule in substantive matters. *People v. Prophet*, 42 P.3d 61 (Colo. App. 2001).

Trial court violated defendant's statutory right when it imposed a harsher department of corrections sentence on resentencing than the original sentence to community corrections. The court imposed a sentence based on what it would have done if it had been the original sentencing court, in violation of subsection (3). *People v. Hopkins*, 190 P.3d 833 (Colo. App. 2008).

Applied in *People v. Cushon*, 189 Colo. 230, 539 P.2d 1246 (1975); *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975); *People v. District Court*, 196 Colo. 401, 586 P.2d 31 (1978); *People v. Edwards*, 198 Colo. 52, 598 P.2d 126 (1979); *People in Interest of R.R.*, 43 Colo. App. 208, 607 P.2d 1013 (1979); *People v. Espinosa*, 200 Colo. 307, 614 P.2d 889 (1980); *People v. Foster*, 200 Colo. 283, 615 P.2d 652 (1980); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. District Court*, 638 P.2d 65 (Colo. 1981); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

18-1-409.5. Appellate review of sentence not within the presumptive range. (Repealed)

Source: **L. 79:** Entire section added, p. 670, § 18, effective July 1. **L. 81:** Entire section repealed, p. 969, § 2, effective July 1.

18-1-410. Postconviction remedy. (1) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make applications for postconviction review. Except as otherwise required by subsection (1.5) of this section, an application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

(a) That the conviction was obtained or sentence imposed in violation of the constitution or laws of the United States or the constitution or laws of this state;

(b) That the applicant was convicted under a statute that is in violation of the constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(c) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(d) That the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(e) That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice;

(f) (I) That there has been significant change in the law, applied to the applicant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard.

(II) The ground set forth in this paragraph (f) may not be asserted if, prior to filing for relief pursuant to this paragraph (f), a person has not sought appeal of a conviction within the time prescribed therefor or if a judgment of conviction has been affirmed upon appeal.

(g) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

(h) That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

(1.5) An application for postconviction review in a class 1 felony case where a sentence of death has been imposed shall be limited to claims of newly discovered evidence and ineffective assistance of counsel; except that, for any sentence of death imposed on or after the date upon which the Colorado supreme court adopts rules implementing the unitary system of review established by part 2 of article 12 of title 16, C.R.S., any application for postconviction review in such case shall be governed by the provisions of part 2 of article 12 of title 16, C.R.S.

(2) (a) Except as otherwise required by paragraph (b) of this subsection (2), procedures to be followed in implementation of the right to postconviction remedy shall be as prescribed by rule of the supreme court of the state of Colorado.

(b) In any class 1 felony case where a sentence of death has been imposed, the district court shall expeditiously consider an application for postconviction remedy. It is the general assembly's intent that the district court give priority to cases in which a sentence of death has been imposed.

(3) (a) Except as otherwise provided in paragraph (b) of this subsection (3), an appeal of any order by the district court granting or denying postconviction relief in a case in which a sentence of death has been imposed shall be to the Colorado supreme court as provided by section 13-4-102 (1) (h), C.R.S. The procedures to be followed in the implementation of such review shall be in accordance with any rules adopted by the Colorado supreme court in response to the legislative intent expressed in section 16-12-101.5 (1), C.R.S.

(b) In any class 1 felony case in which a sentence of death is imposed on or after the date upon which the Colorado supreme court adopts rules implementing the unitary system of review established under part 2 of article 12 of title 16, C.R.S., the procedures for appealing any order by the district court granting or denying postconviction relief and review by the Colorado supreme court of such order shall be governed by the provisions of part 2 of article 12 of title 16, C.R.S., and by such rules adopted by the supreme court.

Source: L. 71: R&RE, p. 402, § 1. C.R.S. 1963: § 40-1-510. L. 73: p. 533, § 2. L. 75: (1)(f) amended, p. 211, § 28, effective July 16. L. 94: IP(1) and (2) amended and (1.5) and (3) added, p. 1474, § 2, effective July 1. L. 97: (1.5) and (3) amended, p. 1583, § 5, effective June 4.

Cross references: For limitations on collateral attacks, see § 16-5-402; for similar provisions concerning postconviction remedies, see Crim. P. 35.

ANNOTATION

Law reviews. For comment on People v. Herrera (183 Colo. 155, 516 P.2d 626 (1973)), see 46 U. Colo. L. Rev. 311 (1974); for article, "Crim. P. 35(c): Colorado Law Regarding Post-

conviction Relief", see 22 Colo. Law. 729 (1993).

Interests of justice control. Unless otherwise required in the interests of justice, any grounds

for postconviction relief which have been fully and finally litigated should not be relitigated. *Morse v. People*, 180 Colo. 49, 501 P.2d 1328 (1972).

Proceedings where relief applicable. It is apparent on the federal constitutional level and on the state level, both as a matter of constitutional policy as expressed by the supreme court and of legislative policy, that criminal safeguards attach regardless of the formal designation of a proceeding if the proceeding substantively involves incarceration or other criminal sanctions. *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972).

Relief granted where after-discovered evidence would render conviction uncertain. This section shows a legislative intent that in situations where it cannot be said with certainty that the jury would have convicted the defendant had it known the after-discovered evidence and where there is a possibility of perjury, at least for alleged crimes committed after July 1, 1972, postconviction relief may be granted. *People v. Armstead*, 179 Colo. 387, 501 P.2d 472 (1972).

The general assembly intended subsection (1)(f) to confer a right of review of sentences, to the end that sentences might be equalized in light of changes in the Colorado criminal laws. *People v. Herrera*, 183 Colo. 155, 516 P.2d 626 (1973).

But subsection (1)(f) invades the governor's exclusive power to grant a commutation after conviction as provided in § 7 of art. IV, Colo. Const., and therefore violates the doctrine of separation of powers embodied in art. III, Colo. Const. *People v. Herrera*, 183 Colo. 155, 516 P.2d 626 (1973); *People v. Johnson*, 185 Colo. 285, 523 P.2d 1403 (1974); *People v. Rupert*, 185 Colo. 288, 523 P.2d 1406 (1974); *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974); *People v. Chavez*, 185 Colo. 310, 524 P.2d 307 (1974); *People v. Simms*, 186 Colo. 447, 528 P.2d 228 (1974).

Relief from a sentence validly imposed may not be obtained through the judiciary after final conviction. *People v. Rupert*, 185 Colo. 288, 523 P.2d 1406 (1974).

After conviction and exhaustion of appellate remedies, relief from a validly imposed criminal sentence may not be obtained through the judiciary. *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974).

Trial court was without jurisdiction to grant postconviction relief from sentence imposed upon conviction for second-degree murder which became final on December 11, 1968. *People v. Fulmer*, 185 Colo. 366, 524 P.2d 606 (1974).

Because once a criminal conviction has become final, any remedy lies in the executive department by way of commutation. *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974);

People v. Chavez, 185 Colo. 310, 524 P.2d 307 (1974).

Where the governor has commuted defendant's sentence, the supreme court lacks jurisdiction to reduce or in any way alter or amend the sentence as commuted. *People v. Simms*, 186 Colo. 447, 528 P.2d 228 (1974).

Where appellant filed his motion for post-conviction remedy before his conviction had become final, the court had jurisdiction to entertain his motion for relief. *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974).

Because a defendant whose conviction has not become final is entitled to the benefits of amendatory legislation mitigating the penalty for the crime of which he was convicted. *McClure v. District Court*, 187 Colo. 359, 532 P.2d 340 (1975); *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976); *People v. Macias*, 631 P.2d 584 (Colo. 1981).

A defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes when the relief is sought before finality has attached to the judgment of conviction. *Shook v. District Court*, 188 Colo. 76, 533 P.2d 41 (1975); *Litsey v. District Court*, 193 Colo. 341, 565 P.2d 1343 (1977).

A defendant is entitled to the benefits of amendatory legislation mitigating the penalty for a crime where a defendant seeks relief from the sentence imposed before his conviction has become final. *Naranjo v. District Court*, 189 Colo. 21, 536 P.2d 36 (1975).

Sentence imposed by the trial court which did not afford the defendant the benefit of amendatory legislation was not a valid and legal sentence. As such, it was subject to correction by the trial court at any time. *People v. Jenkins*, 40 Colo. App. 140, 575 P.2d 13 (1977).

Where criminal statute declared unconstitutional. Where, within 120 days of imposition of sentence, the criminal statute underlying a conviction for disorderly conduct was declared unconstitutional, the court had jurisdiction to set aside the convictions and sentences and dismiss the charged offenses, even though the sentences for disorderly conduct were to be served concurrently with the sentences imposed for another offense for which defendants were properly convicted. *People v. Henderson*, 40 Colo. App. 147, 574 P.2d 872 (1977).

Subsection (1)(f) provides for the application of changed legal standards where there is a change in law mitigating penalties for crimes, and the application of the changed legal standards is mandatory. *People v. Anderson*, 187 Colo. 171, 529 P.2d 310 (1974).

Subsection (1)(f) is especially appropriate where a change in the law intervenes before conviction is had and sentence is imposed. *People v. Thomas*, 185 Colo. 395, 525 P.2d 1136 (1974).

Remedy not applicable to § 42-4-1202.

While this section provides for consideration of a significant change in the law upon review of a conviction of a crime, such review is not afforded to one who fails to comply with the implied consent statute, former § 42-4-1202 (3)(e), because no crime is involved there. *Noe v. Dolan*, 197 Colo. 32, 589 P.2d 483 (1979).

Repeal of § 16-11-101 (1)(d) effective three months after sentencing. Where the effective date (July 1, 1979) of the repeal of § 16-11-101 (1)(d) was more than three months after the defendant was sentenced under its provisions, the repeal did not entitle the defendant to relief under subsection (1)(f)(I). *People v. Steelman*, 200 Colo. 177, 613 P.2d 334 (1980).

When motions under subsection (1)(f) to be filed. Motions pursuant to Crim. P. 35(b) and subsection (1)(f) may be filed at any time before the conviction becomes final. *Litsey v. District Court*, 193 Colo. 341, 565 P.2d 1343 (1977).

No modification where old crimes repealed and replaced by new ones. It was clearly not the legislative intent behind this section to permit the modification of sentences where the earlier crimes have been subsequently repealed and substantially new crimes have been enacted in their place. *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976).

It was not the legislative intent behind this section to permit the modification of sentences where the earlier crimes have been subsequently repealed and substantially new crimes have been enacted in their place. *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978).

Relitigation of a claim based on a change of law is specifically prohibited in a postconviction proceeding once a judgment of conviction has been affirmed upon appeal. *People v. Banks*, 924 P.2d 1161 (Colo. App. 1996).

Effect of § 16-5-402. Even though the Colorado criminal code grants a convicted offender the right to seek collateral review of a constitutionally flawed conviction, the effect of § 16-5-402 (1) is to immediately cut off this right for all persons whose convictions antedate the statute by an interval of time in excess of the statutory limitation period. Such retrospective elimination of an existing statutory right, which the general assembly itself has recognized as a matter of "substantive right" included "within the concept of due process of law", cannot be squared with the constitutional prohibition against retrospectively depriving a person of a statutory right without due process of law. *People v. Germany*, 674 P.2d 345 (Colo. 1983) (decided under former law).

Motion properly denied without evidentiary hearing where only issues of law raised. Where motion for postconviction relief of sentence reduction, alleging that the penalty for the degree of burglary of which defendant had been

convicted had been reduced from five to 20 years to one to 10 years confinement in the state penitentiary, raised only issues of law, it was properly denied without an evidentiary hearing. *People v. Martinez*, 184 Colo. 155, 524 P.2d 73 (1974).

No error occurred in manner hearing conducted. Where court had no jurisdiction to deal with motion for postconviction relief, no error occurred in the manner in which the hearing on such motion was conducted. *People v. Mankowsky*, 187 Colo. 145, 529 P.2d 314 (1974).

When final conviction becomes basis for imposition of life sentence pursuant to the provisions of the habitual criminal statute, the supreme court has jurisdiction to determine whether that conviction may validly be considered under the terms of the recidivist statute. *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978).

Defendant convicted of theft by receiving does not receive ameliorative benefit when retroactive application of amendatory legislation is clearly not intended by its own terms. Legislation that amended theft by receipt statute to provide that amendment shall apply to acts committed on or after July 1, 1985 makes it clear that amendatory legislation is to apply prospectively only. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

Five-year grace period from the effective date of § 16-5-402 on July 1, 1984, was implied for person seeking to challenge a constitutionally flawed conviction under this section, where conviction predated the length of time specified as a limitation period in § 16-5-402. *People v. Fagerholm*, 768 P.2d 689 (Colo. 1989).

Time limitations in § 16-5-402 are supplementary to and not in conflict with § 18-1-410. *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993).

Statute as basis for jurisdiction. See *People v. White*, 623 P.2d 868 (Colo. 1981).

Irreconcilable conflict exists between this section and § 16-5-402, and § 16-5-402 prevails as it is the later enacted statute. *People v. Heitzman*, 852 P.2d 443 (Colo. 1993).

Time bar in § 16-5-402 applies where defendant's motion is a collateral attack and is a request for post-conviction relief under this section. *People v. Vigil*, 983 P.2d 805 (Colo. App. 1999).

For purposes of postconviction review and collateral attack limitations, a "conviction" occurs when the trial court enters judgment and sentence is imposed, if there is no appeal; if an appeal is pursued, then the conviction is not final until the appellate process is exhausted. *People v. Hampton*, 857 P.2d 441 (Colo. App. 1992), aff'd, 876 P.2d 1236 (Colo. 1994).

Applied in *People v. McClure*, 190 Colo. 250, 545 P.2d 1038 (1976); *Salas v. District Court*, 190 Colo. 447, 548 P.2d 605 (1976);

People v. Lobato, 192 Colo. 357, 559 P.2d 224 P.2d 1361 (1977); Tacorante v. People, 624 P.2d (1977); People v. Orr, 39 Colo. App. 289, 566 1324 (Colo. 1981).

18-1-411. Postconviction testing of DNA - definitions. As used in this section and in sections 18-1-412 to 18-1-416, unless the context otherwise requires:

(1) “Actual innocence” means clear and convincing evidence such that no reasonable juror would have convicted the defendant.

(2) “Actual or constructive possession” means the biological evidence is maintained or stored on the premises of the law enforcement agency or at another location or facility under the custody or control of the law enforcement agency, including pursuant to an agreement or contract with the law enforcement agency and a third-party service provider, in Colorado or elsewhere.

(3) “DNA” means deoxyribonucleic acid.

(4) “Incarcerated” means physically housed in a department of corrections facility, a private correctional facility under contract with the department of corrections, or a county jail following a felony conviction, or in a juvenile facility following adjudication for an offense that would have been a felony if committed by an adult, or under parole supervision.

Source: L. 2003: Entire section added, p. 815, § 1, effective August 6.

18-1-412. Procedure for application for DNA testing - appointment of counsel.

(1) An incarcerated person may apply to the district court in the district where the conviction was secured for DNA testing concerning the conviction and sentence the person is currently serving.

(2) A motion filed pursuant to this section shall include specific facts sufficient to support a prima facie showing that post-conviction relief is warranted under the criteria set forth in section 18-1-413. The motion shall include the results of all prior DNA tests, regardless of whether a test was performed by the defense or the prosecution.

(3) If the motion, files, and record of the case show to the satisfaction of the court that the petitioner is not entitled to relief based on the criteria specified in section 18-1-413, the court shall deny the motion without a hearing and without appointment of counsel. The court may deny a second or subsequent motion requesting relief pursuant to this section.

(4) If the court does not deny the petitioner’s motion for testing, the court shall appoint counsel if the court determines the petitioner is indigent and has requested counsel. The court shall forward a copy of the motion for DNA testing to the district attorney.

(5) Counsel for the defendant may request the court to set the matter for a hearing, if, upon investigation of the petitioner’s motion for testing, counsel believes sufficient grounds exist to support an order for DNA testing. If the petitioner represents himself or herself, the court may set the matter for a hearing upon his or her request.

(6) Following a request for a hearing, the court shall allow the district attorney a reasonable amount of time, but not less than thirty-five days, to respond to the motion and any supplement filed by the petitioner’s counsel and to prepare for the hearing.

(7) A court shall not order DNA testing without a hearing, except upon written stipulation of the district attorney.

(8) The court shall deny a motion for production of transcripts unless the petitioner makes a prima facie showing that a transcript will be necessary at a hearing conducted pursuant to this section.

(9) Upon motion of the defendant or his or her counsel, the court shall order a database search by a law enforcement agency if the court determines that a reasonable probability exists that the database search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing. DNA profiles must meet current national DNA database index system eligibility standards and conform to current federal bureau of investigation quality assurance standards in order to be eligible for search against the state index system.

Source: L. 2003: Entire section added, p. 816, § 1, effective August 6. **L. 2009:** (9) added, (SB 09-241), ch. 295, p. 1582, § 11, effective July 1. **L. 2012:** (6) amended, (SB 12-175), ch. 208, p. 862, § 103, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (6) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

18-1-413. Content of application for DNA testing. (1) A court shall not order DNA testing unless the petitioner demonstrates by a preponderance of the evidence that:

(a) Favorable results of the DNA testing will demonstrate the petitioner's actual innocence;

(b) A law enforcement agency collected biological evidence pertaining to the offense and retains actual or constructive possession of the evidence that allows for reliable DNA testing;

(c) (I) Conclusive DNA results were not available prior to the petitioner's conviction; and

(II) The petitioner did not secure DNA testing prior to his or her conviction because DNA testing was not reasonably available or for reasons that constitute justifiable excuse, ineffective assistance of counsel, or excusable neglect; and

(d) The petitioner consents to provide a biological sample for DNA testing.

Source: L. 2003: Entire section added, p. 816, § 1, effective August 6.

18-1-414. Preservation of evidence. (1) A petitioner shall not be entitled to relief based solely on an allegation that a law enforcement agency failed to preserve biological evidence.

(2) (a) A court granting a motion for hearing pursuant to section 18-1-412 shall order the appropriate law enforcement agency to preserve existing biological evidence for DNA testing.

(b) If a law enforcement agency, through negligence, destroys, loses, or otherwise disposes of biological evidence that is the subject of an order pursuant to this subsection (2) before the evidence may be tested, the court shall set a hearing to determine whether a remedy is warranted. If the court determines that a remedy is warranted, the court may order whatever remedy the court finds is just, equitable, and appropriate. Nothing in this subsection (2) shall be construed to limit or eliminate the court's authority to order any remedy otherwise available under law for the destruction, loss, or disposal of evidence.

(c) For the purposes of this subsection (2), "negligence" means a departure from the ordinary standard of care.

(3) Except as provided in subsection (2) of this section, this section does not create a duty to preserve biological evidence. Notwithstanding the provisions of subsection (2) of this section, this section does not create a liability on the part of a law enforcement agency for failing to preserve biological evidence.

Source: L. 2003: Entire section added, p. 817, § 1, effective August 6. L. 2008: (2) and (3) amended, p. 1513, § 2, effective May 28.

Cross references: For the legislative declaration contained in the 2008 act amending subsections (2) and (3), see section 1 of chapter 322, Session Laws of Colorado 2008.

18-1-415. Testing - payment. All testing shall be performed at a law enforcement facility, and the petitioner shall pay for the testing. If the petitioner is indigent and represented by either the public defender or alternate defense counsel, and with the approval of the public defender or the alternate defense counsel, the costs of the testing shall be paid from their budget.

Source: L. 2003: Entire section added, p. 817, § 1, effective August 6. L. 2010: Entire section amended, (HB 10-1422), ch. 419, p. 2073, § 31, effective August 11.

18-1-416. Results of the DNA test. (1) Notwithstanding any law or rule of procedure that bars a motion for post-conviction review as untimely, a petitioner may use the results

of a DNA test ordered pursuant to section 18-1-413 as the grounds for filing a motion for post-conviction review under section 18-1-410 and the Colorado rules of criminal procedure.

(2) The testing laboratory shall make the results of a DNA test ordered pursuant to section 18-1-413 available to the combined DNA index system and to any Colorado, federal, or other law enforcement DNA databases.

Source: L. 2003: Entire section added, p. 817, § 1, effective August 6.

18-1-417. Ineffective assistance of counsel claims - waiver of confidentiality.

(1) Notwithstanding any other provision of law, whenever a defendant alleges ineffective assistance of counsel, the defendant automatically waives any confidentiality, including attorney-client and work-product privileges, between counsel and defendant, and between the defendant or counsel and any expert witness retained or appointed in connection with the representation, but only with respect to the information that is related to the defendant's claim of ineffective assistance. After the defendant alleges ineffective assistance of counsel, the allegedly ineffective counsel and an expert witness may discuss with, may disclose any aspect of the representation that is related to the defendant's claim of ineffective assistance to, and may produce documents related to such representation that are related to the defendant's claim of ineffective assistance to the prosecution without the need for an order by the court that confidentiality has been waived.

(2) If the allegedly ineffective counsel or an expert witness has released his or her file or a portion thereof to defendant or defendant's current counsel, defendant or current counsel shall permit the prosecution to inspect and copy any or all portions of the file that are related to the defendant's claim of ineffective assistance upon request of the prosecution.

Source: L. 2005: Entire section added, p. 424, § 2, effective April 29.

PART 5

PRINCIPLES OF CRIMINAL CULPABILITY

Law reviews: For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to erroneous malice presumption, see 15 Colo. Law. 1616 (1986).

18-1-501. Definitions. The following definitions are applicable to the determination of culpability requirements for offenses defined in this code:

(1) "Act" means a bodily movement, and includes words and possession of property.

(2) "Conduct" means an act or omission and its accompanying state of mind or, where relevant, a series of acts or omissions.

(3) "Criminal negligence". A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

(4) "Culpable mental state" means intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence, as these terms are defined in this section.

(5) "Intentionally" or "with intent". All offenses defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are declared to be specific intent offenses. A person acts "intentionally" or "with intent" when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred.

(6) "Knowingly" or "willfully". All offenses defined in this code in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes. A person acts "knowingly" or "willfully" with respect to conduct or

to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts “knowingly” or “willfully”, with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

(7) “Omission” means a failure to perform an act as to which a duty of performance is imposed by law.

(8) “Recklessly”. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

(9) “Voluntary act” means an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.

Source: L. 71: R&RE, p. 403, § 1. C.R.S. 1963: § 40-1-601. L. 75: (3), (5), (6), and (8) R&RE, p. 616, § 1, effective July 21. L. 77: (4) amended and (5) and (6) R&RE, p. 959, §§ 1, 2, effective July 1.

ANNOTATION

Law reviews. For comment on *Trujillo v. People* (133 Colo. 186, 292 P.2d 980 (1956)), see 28 Rocky Mt. L. Rev. 409 (1956). For article, “Homicides Under the Colorado Criminal Code”, see 49 Den. L.J. 137 (1972). For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981).

Annotator’s note. Since § 18-1-501 (1) is similar to former § 40-1-2, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

General assembly may establish statutory constituents of criminal culpability. The constitutional mandate requiring the prosecution to establish all essential elements of a crime beyond a reasonable doubt does not impair the general assembly’s competence to establish the statutory constituents of criminal culpability for various offenses and to formulate particular rules of justification or excuse for acts that otherwise might be criminally punishable. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant’s mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant’s head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim’s death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

The narcotics act is not governed by the definitions in the criminal code. *People v. Quick*, 190 Colo. 171, 544 P.2d 629 (1976).

“Criminal negligence”, as applied to homicide, means a failure to perceive, through a

gross deviation from the standard of reasonable care, a substantial and unjustifiable risk that death will result from certain conduct. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Intent is an act or purpose of the mind rarely discoverable except by the acts of the person committing them; consequently, acts which tend to prove a specific intent are direct evidence of that intent. *Wechter v. People*, 53 Colo. 89, 124 P. 183 (1912).

Circumstances attending an act give character to it, inasmuch as they evince the intention of the actor at the time of the act. Usually, the proof of a homicide will disclose the circumstances attending it, and the character of the crime is demonstrated by the same evidence which establishes it. *Hill v. People*, 1 Colo. 436 (1872).

Intention to commit an offense is manifested by circumstances attendant upon the commission of the offense. *Arridy v. People*, 103 Colo. 29, 82 P.2d 757 (1938).

Intent may be shown by inference from all the surrounding circumstances, if they are sufficient to prove this element beyond a reasonable doubt. However, if the circumstances themselves are insufficient or if the defendant feels required to rebut facts or inferences from other evidence adduced at trial detrimental to his position, it is axiomatic that, this being material, his offer should be allowed in as evidence. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

The mind of an alleged offender may be read from his acts, his conduct, and the reasonable inferences which may be drawn from the circumstances of the case. *Maraggos v. People*, 175 Colo. 130, 486 P.2d 1 (1971).

Intent is a state of mind existing at the time a person commits an offense; however, that intent is not required to be proven by direct substantive evidence, for to do so would make it impossible to convict in any case where there was not a culmination of the intent. *Maraggos v. People*, 175 Colo. 130, 486 P.2d 1 (1971).

Intent is a question of fact, provable like any other fact in issue in a criminal case. *Wechter v. People*, 53 Colo. 89, 124 P. 183 (1912).

Instructions on specific intent phrased in language of this section are proper and will be upheld by the supreme court. *Blincoe v. People*, 178 Colo. 34, 494 P.2d 1285 (1972).

Instruction defining "intentionally" properly refused. Where defense requested instruction defining "intentionally" in terms of new statute which became effective July 1, 1972, but offense had occurred prior to that time, trial court did not err in refusing such request. *People v. Crawford*, 191 Colo. 504, 553 P.2d 827 (1976).

Defendant cannot avoid his conviction of criminally negligent homicide on the ground that he did not intend death to result from his act. *People v. Palumbo*, 192 Colo. 7, 555 P.2d 521 (1976).

"Knowingly." The definition of "knowingly" in subsection (6) is an accurate expression of the common-law understanding of "knowingly". *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983).

The definition of "knowingly" or "willfully" in subsection (6) applied in *People v. Riley*, 708 P.2d 1359 (Colo. 1985); *People v. Eastep*, 884 P.2d 305 (Colo. 1994); *People v. Parga*, 964 P.2d 571 (Colo. App. 1998).

A person may be found to act "intentionally" even though the length of time for deliberation is not long. *People v. Valenzuela*, 825 P.2d 1015 (Colo. App. 1991), *aff'd*, 856 P.2d 805 (Colo. 1993).

A person acts intentionally if the person's "conscious objective" is to cause the specific result prohibited by statute. *People v. Moore*, 877 P.2d 840 (Colo. 1994); *People v. District Ct., 17th Jud. Dist.*, 926 P.2d 567 (Colo. 1996); *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

Phrase "reasonably should be aware" is not the equivalent of "knowingly". *People v. Etchells*, 646 P.2d 950 (Colo. App. 1982); *Espinoza v. People*, 712 P.2d 476 (Colo. 1985).

Menacing is a general intent crime requiring only that the defendant be aware that the defendant's conduct is practically certain to cause the result. *People v. Zieg*, 841 P.2d 342 (Colo. App. 1992).

Omission of conduct-and-circumstance factor from instruction on "knowingly" held not error. No substantial rights of the defendant are seriously affected by the omission of the conduct-and-circumstance factor of the mental culpability requirement of "knowingly" from the instructions, as provided in subsection (6), where the instruction given refers to both conduct and result. If one is aware that his conduct will achieve a certain result, then of necessity he must also be aware of that conduct. *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982).

A mental culpability instruction defining "knowingly" as an awareness by the defendant that his conduct is "practically certain to cause the result" would necessarily require the jury to be satisfied beyond a reasonable doubt that he also was aware that "his conduct is of such nature" and that "the circumstance exists" before he could be found guilty of these offenses. Although such an instruction is technically incomplete, the trial court's failure to instruct the jury on the conduct and circumstance components of "knowingly" is not plain error because the substantial rights of the defendant are not affected. *People v. Dererra*, 667 P.2d 1363 (Colo. 1983).

"Knowingly" instruction which is equivalent to negligence is error. Where the court's definition of "knowingly" permits a finding, not on the defendant's guilty knowledge, but rather on a basis that amounts to a negligence standard, that instruction is fundamentally flawed. *People v. Freeman*, 668 P.2d 1371 (Colo. 1983).

Where an instruction permits the jury to find that the defendant acted intentionally on the basis of his actions alone, rather than on the precise "conscious objective" standard required by statute, the instruction is erroneous. *People v. Freeman*, 668 P.2d 1371 (Colo. 1983).

Evidence of mental slowness may be offered to negate the culpable mental state for the crime charged. *People v. Vanrees*, 125 P.3d 403 (Colo. 2005).

Offenses requiring knowledge as the culpable mental state are not specific intent crimes. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

No requirement that "knowing conduct" be directed against person killed. There is no requirement that the "knowing conduct" essential to extreme indifference murder and second-degree murder be directed against the person actually killed. On the contrary, both offenses are general intent crimes, and as long as the offender knowingly acts in the proscribed manner and causes the death of another, he is guilty of the crime, even though the person killed is not the person against whom the criminal conduct was directed. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

Willful and ordinary negligence distinguished. The demarcation between ordinary negligence and willful and wanton disregard is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in prevention of accident is but simple negligence; a mentally active restraint from such action is willful. Omitting to weigh consequences is simple negligence; refusing to weigh them is willful. *Trujillo v. People*, 133 Colo. 186, 292 P.2d 980 (1956).

Before defendant could be convicted of manslaughter under former provisions, there must

have been evidence tending to prove he recklessly and wantonly failed to exercise the care and caution that a reasonably prudent person would have exercised under similar circumstances, and that his conduct was such as to indicate a reckless and wanton disregard for the safety of others. Ordinary or simple negligence was not sufficient to sustain the former charge of involuntary manslaughter. *Bennett v. People*, 155 Colo. 101, 392 P.2d 657 (1964).

“Recklessly” and “criminally negligent” distinguished. The difference between acting “recklessly” and being “criminally negligent” is the distinction between becoming aware of a risk yet consciously choosing to disregard it as opposed to negligently failing to become aware of the risk. *People v. Bettis*, 43 Colo. App. 104, 602 P.2d 877 (1979).

Instruction defining “recklessly” properly refused where it contained the term “accidentally”. *People v. Bookman*, 646 P.2d 924 (Colo. 1982).

Instruction defining “recklessly” pursuant to this section, rather than defining “reckless driving” under § 42-4-1401, was properly given as to an element of the offense of vehicular homicide involving reckless driving. The definition of “recklessly” in subsection (8) is contained in the criminal code and is plainly intended to be used in interpreting other statutory sections, such as vehicular homicide, within the criminal code. *People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998).

“Recklessly” in second degree assault requires that a defendant consciously disregard a substantial and unjustifiable risk that a result will occur (or that a circumstance exists), not that a defendant disregard the result that ultimately occurs. Therefore, the People did not have to prove that defendant had knowledge of the existence of the specific deadly weapon held by the victim of the assault. *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Conspiracy to commit reckless manslaughter is not a crime in Colorado. *Palmer v. People*, 964 P.2d 524 (Colo. 1998).

Finding of knowing or willful conduct sufficient for recklessness. A finding of knowing or willful conduct is sufficient to establish the culpable mental state of recklessness. *People v. Yanaga*, 635 P.2d 925 (Colo. App. 1981); *People v. Howard*, 215 P.3d 1134 (Colo. App. 2008).

To determine whether a risk is substantial and unjustified, trier of fact must weigh the likelihood and potential magnitude of harm presented by the conduct and consider whether the conduct constitutes a gross deviation from the

reasonable standard of care. *People v. Hall*, 999 P.2d 207 (Colo. 2000).

The phrase “starts or maintains a fire” in § 18-4-105 must be read in accordance with subsection (9) and § 18-1-502. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Intoxication provision applicable in analysis of “voluntary act”. Section 18-1-804 applies not only to the mental state of a defendant in general intent crimes but is also applicable in the analysis of a “voluntary act”, as that phrase is used in the definition of “criminal liability” in § 18-1-502. *People v. Huskey*, 624 P.2d 899 (Colo. App. 1980).

Different culpable mental states may exist simultaneously. *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. Howard*, 215 P.3d 1134 (Colo. App. 2008).

For discussion of culpable mental state required for conviction of criminal attempt, see *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

Applied in *McPhee v. People*, 105 Colo. 539, 100 P.2d 148 (1940); *Gallegos v. Tinsley*, 139 Colo. 157, 337 P.2d 386 (1959); *Mora v. People*, 172 Colo. 261, 472 P.2d 142 (1970); *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974); *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976); *People v. Sexton*, 192 Colo. 181, 555 P.2d 1151 (1976); *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1979); *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Brown*, 632 P.2d 1025 (Colo. 1981); *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. People*, 635 P.2d 543 (Colo. 1981); *People v. R.V.*, 635 P.2d 892 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Padilla*, 638 P.2d 15 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Founds*, 631 P.2d 1166 (Colo. App. 1981); *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Giles*, 662 P.2d 1073 (Colo. 1983); *People v. Heller*, 698 P.2d 1357 (Colo. App. 1984), rev’d on other grounds, 712 P.2d 1023 (Colo. 1986); *People v. Lybarger*, 700 P.2d 910 (Colo. 1985); *People v. Breland*, 728 P.2d 763 (Colo. App. 1986); *People v. Bowman*, 738 P.2d 387 (Colo. App. 1987); *People v. District Court*, 779 P.2d 385 (Colo. 1989).

18-1-502. Requirements for criminal liability in general and for offenses of strict liability and of mental culpability. The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to

perform an act which he is physically capable of performing. If that conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of "strict liability". If a culpable mental state on the part of the actor is required with respect to any material element of an offense, the offense is one of "mental culpability".

Source: L. 71: R&RE, p. 404, § 1. C.R.S. 1963: § 40-1-602.

ANNOTATION

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L.J. 137 (1972). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

The minimum requirements for criminal liability are set out in this section. People v. Caddy, 189 Colo. 353, 540 P.2d 1089 (1975).

Conscious mental activity required. The minimal requirement for a "strict liability" offense is proof that the proscribed conduct was performed voluntarily — i.e., that such act must be the product of conscious mental activity involving effort or determination. People v. Rostad, 669 P.2d 126 (Colo. 1983).

Intoxication provision applicable in analysis of "voluntary act". Section 18-1-804 applies not only to the mental state of a defendant in general intent crimes but is also applicable in the analysis of a "voluntary act", as that phrase is used in the definition of criminal liability in this section. People v. Huskey, 624 P.2d 899 (Colo. App. 1980).

This section expressly removes any ambiguity as to the culpability requirement of § 18-4-105. That section states that if an offense does not require a culpable mental state on the

part of the actor, the offense is one of strict liability. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Construed in accordance with this section, § 18-4-105 would be inapplicable to those situations in which there was no voluntary act or omission to perform an act within the physical capabilities of the person. Thus, the statute would not apply to a fire started by events beyond the actor's control. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

However, the phrase "starts or maintains a fire" in § 18-4-105 must be read in accordance with § 18-1-501(9) and this section. People v. Garcia, 189 Colo. 347, 541 P.2d 687 (1975).

Cruelty to animals as proscribed by § 35-42-112 held to be strict liability offense. People v. Wilhelm, 676 P.2d 702 (Colo. 1984).

Cruelty to animals as proscribed by § 18-9-202 held to be an offense of mental culpability. People v. Wilhelm, 676 P.2d 702 (Colo. 1984).

Applied in People v. Marcy, 628 P.2d 69 (Colo. 1981); People v. Noble, 635 P.2d 203 (Colo. 1981); Hendershott v. People, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983); People v. Saiz, 660 P.2d 2 (Colo. App. 1982).

18-1-503. Construction of statutes with respect to culpability requirements.

(1) When the commission of an offense, or some element of an offense, requires a particular culpable mental state, that mental state is ordinarily designated by use of the terms "intentionally", "with intent", "knowingly", "willfully", "recklessly", or "criminal negligence" or by use of the terms "with intent to defraud" and "knowing it to be false" describing a specific kind of intent or knowledge.

(2) Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.

(3) If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly, or intentionally. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

(4) When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears.

Source: L. 71: R&RE, p. 404, § 1. C.R.S. 1963: § 40-1-603. L. 77: (1) amended, p. 960, § 3, effective July 1.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Specific intent is element of crime and is not presumed. Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. Mere general malice or criminal intent is insufficient, and the requisite specific intent must be shown as a matter of fact, either by direct or circumstantial evidence. The general rule that a criminal intention will be presumed from the commission of the unlawful act does not apply; and proof of the commission of the act does not warrant the presumption that accused had the requisite specific intent. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Proof of specific intent. Specific intent is ordinarily inferable from the facts, and proof thereof is necessarily by circumstantial evidence. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Mental state required may be implied. Because a crime ordinarily requires the conjunction of an act and a culpable mental state, legislative silence on the element of intent in a criminal statute is not to be construed as an indication that no culpable mental state is required. Rather, the requisite mental state may be implied from the statute. *People v. Moore*, 674 P.2d 354 (Colo. 1984).

If a statute merely implies a mens rea, that mental state must be deemed to apply to every element of the offense. *People v. Trevino*, 826 P.2d 399 (Colo. App. 1991). But see *Gorman v. People*, 19 P.3d 662 (Colo. 2000).

If there is no clear intent to limit the application of the culpable mental state to a particular element of the offense, it applies to all elements of the offense. *People v. Coleby*, 34 P.3d 422 (Colo. 2001).

Where the statute merely implies a mens rea, subsection (2), rather than subsection (4), applies. Thus, the implied mens rea may not apply to all elements of the offense, depending on the legislature's intent in criminalizing the offense. The implied mens rea for § 18-6-701, contributing to the delinquency of a minor, applies only to the defendant's actions in knowingly inducing, aiding, or encouraging a minor to violate the law, and not to whether the defendant knows the minor's age, because the intent of this offense is to protect the minor. *Gorman v. People*, 19 P.3d 662 (Colo. 2000).

Finding of knowing or willful conduct sufficient for recklessness. A finding of knowing or willful conduct is sufficient to establish the culpable mental state of recklessness. *People v. Yanaga*, 635 P.2d 925 (Colo. App. 1981).

Instruction errors inure to defendant's benefit. Where an instruction requires the prosecution to prove a higher degree of culpability than otherwise required by statute in relation to the various elements of the offense, any errors in the instruction inure solely to the defendant's benefit. *People v. Mack*, 638 P.2d 257 (Colo. 1981).

Subsection (2) inapplicable to violation of custody under § 18-3-304. The language of that section requiring intent is limited to the deprivation of custody of the child, and is not extended to the additional elements of the offense. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Applied in *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981); *Bollier v. People*, 635 P.2d 543 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Walker*, 634 P.2d 1026 (1981); *People v. Mattas*, 645 P.2d 254 (Colo. 1982); *People v. Hart*, 658 P.2d 857 (Colo. 1983); *People v. Saiz*, 660 P.2d 2 (Colo. App. 1982); *People v. Annan*, 665 P.2d 629 (Colo. App. 1983); *People v. Thompson*, 756 P.2d 353 (Colo. 1988).

18-1-503.5. Principles of criminal culpability. (1) If the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older. This affirmative defense shall not be available if the criminality of conduct depends on the defendant being in a position of trust.

(2) If the criminality of conduct depends on a child's being younger than eighteen years of age and the child was in fact younger than fifteen years of age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.

(3) If the criminality of conduct depends on a child being younger than fifteen years of age, it shall be no defense that the defendant did not know the child's age or that the defendant reasonably believed the child to be fifteen years of age or older.

Source: **L. 2001:** Entire section added, p. 859, § 6, effective July 1. **L. 2007:** (1) amended, p. 1687, § 4, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Subsection (1) eliminates the culpable mental state as to age prescribed by § 18-6-403 (3), “knowingly”, and replaces it with that of subsection (1), “lack of reasonable belief”. People v. Bath, 890 P.2d 269 (Colo. App. 1994).

The affirmative defense created in this section applies to the offense of contributing to the delinquency of a minor under § 18-6-107. But where defendant did not raise this affirmative defense in a manner sufficient to meet the defendant’s initial burden, the trial court did not err in refusing to instruct the jury on this affirmative defense. *People v. Hastings*, 983 P.2d 78 (Colo. App. 1999), *aff’d*, 19 P.3d 662 (Colo. 2000); *People v. Gorman*, 983 P.2d 92 (Colo. App. 1999), *aff’d*, 19 P.3d 662 (Colo. 2000).

Subsection (1), by providing for the affirmative defense of reasonable belief, manifests a clear legislative intent that the culpable men-

tal state of “knowingly” in § 18-6-403 does not apply to the age of the victim. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Subsection (2) limits an affirmative defense and creates a strict liability crime, both of which are within the constitutional power of the general assembly. *People v. Salazar*, 920 P.2d 893 (Colo. App. 1996).

By applying subsection (2), the trial court did not relieve the prosecution of its burden to prove essential elements of the offense charged. *People v. Salazar*, 920 P.2d 893 (Colo. App. 1996).

Legislative history relating to the adoption of subsection (2) and § 18-3-405 (1) demonstrates that the general assembly intended the offense of sexual assault on a child to be a strict liability offense. *People v. Salazar*, 920 P.2d 893 (Colo. App. 1996).

18-1-504. Effect of ignorance or mistake upon culpability. (1) A person is not relieved of criminal liability for conduct because he engaged in that conduct under a mistaken belief of fact, unless:

(a) It negates the existence of a particular mental state essential to commission of the offense; or

(b) The statute defining the offense or a statute relating thereto expressly provides that a factual mistake or the mental state resulting therefrom constitutes a defense or exemption; or

(c) The factual mistake or the mental state resulting therefrom is of a kind that supports a defense of justification as defined in sections 18-1-701 to 18-1-707.

(2) A person is not relieved of criminal liability for conduct because he engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless the conduct is permitted by one or more of the following:

(a) A statute or ordinance binding in this state;

(b) An administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant the permission under the laws of the state of Colorado;

(c) An official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, order, or law. If such interpretation is by judicial decision, it must be binding in the state of Colorado.

(3) Any defense authorized by this section is an affirmative defense.

Source: **L. 71:** R&RE, p. 404, § 1. **C.R.S. 1963:** § 40-1-604.

Cross references: For other provisions concerning affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 through 18 of this title.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Section 18-2-101 and this section may be harmonized. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

Subsection (1)(a) of this section and § 18-2-101(1) do not conflict. Darr v. People, 193 Colo. 445, 568 P.2d 32 (1977).

No defense of impossibility in attempt prosecution. The general assembly intended that the defense of factual or legal impossibility not be available in an attempt prosecution. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

Defendant may raise defense of general mistake of fact. A defendant may not rely on the defense of legal impossibility in a prosecution for attempted theft, but may raise the defense of general mistake of fact by alleging that he never believed the goods were stolen. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977).

18-1-505. Consent. (1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is not a defense unless the consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to that conduct or to the infliction of that injury is a defense only if the bodily injury consented to or threatened by the conduct consented to is not serious, or the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport, or the consent establishes a justification under sections 18-1-701 to 18-1-707.

(3) Unless otherwise provided by this code or by the law defining the offense, assent does not constitute consent if:

(a) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) It is given by a person who, by reason of immaturity, mental disease or mental defect, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) It is given by a person whose consent is sought to be prevented by the law defining the offense; or

(d) It is induced by force, duress, or deception.

(4) Any defense authorized by this section is an affirmative defense.

Source: L. 71: R&RE, p. 405, § 1. C.R.S. 1963: § 40-1-605. L. 81: (2) amended, p. 980, § 1, effective May 13.

ANNOTATION

Whether the victim consented to sexual contact is directly relevant to submission. Thus, if the victim consented to having sex with

If the defendant does every act within his power to commit an offense and would have committed the offense if the facts had been as he believed them to be, then he may not escape criminal liability. People v. Borrego, 738 P.2d 59 (Colo. App. 1987).

A mistaken belief that one's conduct is legal does not relieve a person of criminal liability for engaging in proscribed conduct. Becker & Tenenbaum v. Eagle Restaurant, 946 P.2d 600 (Colo. App. 1997).

Mistake of law defense not available when acting upon unauthorized directions from sheriff. Sheriff is not empowered or authorized to place listening device without court order. Deputy sheriff, then, cannot rely upon such direction as a defense to his actions. People v. Lesslie, 24 P.3d 22 (Colo. App. 2000).

Reliance upon court opinion is not basis for mistake of law defense when opinion is clearly factually distinguishable. People v. Lesslie, 24 P.3d 22 (Colo. App. 2000).

Applied in People v. Andrews, 632 P.2d 1012 (Colo. 1981); People v. Castro, 657 P.2d 932 (Colo. 1983).

the defendant, the element of submission would be negated because the victim cannot both consent to sexual contact and be made to submit

against her will to such contact. *People v. Williams*, 899 P.2d 306 (Colo. App. 1995).

Trial court committed reversible error by refusing defendants' request to instruct the jury on the affirmative defense of consent where the evidence bearing on the possible existence of consent, while not strong, at least satisfied the "scintilla" standard required for an instruction on an affirmative defense. *People v. Cruz*, 903 P.2d 1198 (Colo. App. 1995).

Because the alleged victim's alleged consent would have "negative[d] an element of the [sexual assault] offense", the trial court was required to instruct the jury on the affirmative defense of consent. *People v. Cruz*, 903 P.2d 1198 (Colo. App. 1995).

This section does not impose a requirement that the jury be instructed on an affirmative defense of consent in a case under the first degree sexual assault statute which itself requires, in effect, that the prosecution prove a lack of consent. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996).

Trial court did not err in refusing to give jury instruction defining the affirmative defense of consent where proof of the elements of the charged offense necessarily required disproof of the issues raised by said defense. *People v. Bush*, 948 P.2d 16 (Colo. App. 1997).

PART 6

PARTIES TO OFFENSES - ACCOUNTABILITY

Law reviews: For article, "Colorado Law Concerning Accomplices and Complicity", see 18 Colo. Law. 2317 (1989); for article, "1992 Criminal Law Legislative Update", see 21 Colo. Law. 2200 (1992).

18-1-601. Liability based upon behavior. A person is guilty of an offense if it is committed by the behavior of another person for which he is legally accountable as provided in sections 18-1-602 to 18-1-607.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-701.

ANNOTATION

Applied in *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979); *People v. R.V.*, 43 Colo. App. 349, 606 P.2d 1311 (1979); *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

18-1-602. Behavior of another. (1) A person is legally accountable for the behavior of another person if:

(a) He is made accountable for the conduct of that person by the statute defining the offense or by specific provision of this code; or

(b) He acts with the culpable mental state sufficient for the commission of the offense in question and he causes an innocent person to engage in such behavior.

(2) As used in subsection (1) of this section, "innocent person" includes any person who is not guilty of the offense in question, despite his behavior, because of duress, legal incapacity or exemption, or unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose, or any other factor precluding the mental state sufficient for the commission of the offense in question.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-702.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Applied in *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

18-1-603. Complicity. A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-703. L. 97: Entire section amended, p. 1540, § 3, effective July 1.

ANNOTATION

- I. General Consideration.
- II. Trial and Punishment.
 - A. In General.
 - B. Indictment or Information.
 - C. Evidence.
 - D. Instructions.
- III. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-1-603 is similar to former § 40-1-12, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common law. At common law an accessory before the fact is he who, being absent at the time of the actual perpetration of the offense, procures, counsels, commands, assists, or abets another to commit it. One who is present aiding and abetting the fact to be committed was considered a principal in the second degree. *Komrs v. People*, 31 Colo. 212, 73 P. 25 (1903).

If general assembly has power to forbid anything, it has power to forbid incitement thereto. *People v. UMW*, Dist. 15, 70 Colo. 269, 201 P. 54 (1921).

Purpose of section. Essence of accessory statute establishing guilt equal to that of principal is to punish for participation in the criminal act. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Complicity and conspiracy are not separate offenses with essentially identical elements. *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

Conspiracy distinguished. Under this section, a defendant is held accountable for a criminal offense committed by another if the defendant participates in the criminal act by intentionally aiding, abetting, or advising the other person in planning or committing the offense. In contrast, the essence of the crime of conspiracy is an illegal agreement or combination, plus an overt act in furtherance of that agreement. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Complicity is not a separate and distinct crime or offense. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Complicity is not a separate and distinct crime or offense under the criminal code and it is not necessary to specifically charge complicity. *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997).

Complicity is merely a theory by which a defendant becomes accountable for a criminal offense committed by another. *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997); *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

No fine or imprisonment may be imposed for complicity since it is merely a theory of law by which a defendant becomes accountable for a criminal offense committed through the conduct of another, the punishment is imposed for the underlying crime and not for complicity. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Conviction of defendant upheld on theory of complicity to criminally negligent homicide on basis that jury could find defendant guilty if it believed that defendant knew that the principal was about to engage in conduct that was a gross deviation from the standard of care that a reasonable person would exercise, even though the principal was not charged with criminally negligent homicide. Such knowledge on the part of the alleged complicitor is sufficient to meet the requirement that the complicitor had knowledge that the principal intended to commit the crime. *People v. Wheeler*, 772 P.2d 101 (Colo. 1989).

Accomplice liability tracks that degree of knowledge that the complicitor's actions of aiding and abetting evince, and, where the complicitor is engaged in a common enterprise with the principal, he or she may be held liable as a complicitor for reckless crimes. *Grissom v. People*, 115 P.3d 1280 (Colo. 2005).

Conviction as a complicitor, under the complicity statute, requires that: (1) The principal committed the crime; (2) the complicitor had knowledge that the principal intended to commit the crime; and (3) the complicitor aided or encouraged, with specific intent to aid or encourage, the principal's commission of the crime. *People v. Wilson*, 791 P.2d 1247 (Colo.

App. 1990); *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994).

A criminal defendant may be a complicitor to the crime of accessory by rendering assistance to another who is engaged in destroying evidence of a crime, even though the crime underlying the accessory charge may have been committed by the defendant. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996).

Requirement that a defendant knew another person intended to commit a crime for purposes of being convicted as a complicitor is met where the principal consciously caused the prohibited sexual contact with the child. *People v. Moore*, 877 P.2d 840 (Colo. 1994).

Section distinguished from solicitation statute. Although encouragement of a criminal offense is prohibited under both § 18-2-301 and this section, the solicitation statute concerns incomplete acts, and the complicity statute covers consummated criminal offenses. Because the provisions proscribe distinguishable behavior, there is no violation of equal protection. *Alonzi v. People*, 198 Colo. 160, 597 P.2d 560 (1979).

Liability of accessory and associates governed by same principle. Where one is an accessory he of necessity must act in concert with some other or others and whether charged jointly or separately the legal consequences arising from his conduct and that of his associates are measured by the same principle. *Bacino v. People*, 104 Colo. 229, 90 P.2d 5 (1939).

There is no statutory distinction between accessories before the fact and principals. *Noble v. People*, 23 Colo. 9, 45 P. 376 (1896); *Pacheco v. People*, 96 Colo. 401, 43 P.2d 165 (1935); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959); *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968).

Thus, one who is an accessory to a crime is guilty of the same degree of crime as the principal. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

One who comes under this section is equivalent to a principal. *People v. Saiz*, 42 Colo. App. 469, 600 P.2d 97 (1979).

An accessory who stands by and aids, abets, or assists in the perpetration of a crime is deemed and considered as a principal and punished accordingly. *Medina v. People*, 168 Colo. 255, 450 P.2d 662 (1969).

An accessory standing by, aiding, abetting, or assisting in a kidnapping is guilty as a principal. *Brady v. People*, 175 Colo. 252, 486 P.2d 436 (1971).

An accessory to a crime of violence as defined by § 16-11-309 (2) may be charged, tried, and punished as a principal. *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

A person who intends to aid the principal in committing murder and who possesses the intent to murder a person is criminally liable for the killing of an unintended third party

by the principal. To decide otherwise would defeat the purpose of the complicity statute, which provides that a complicitor is "legally accountable as principal". *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), aff'd in part and rev'd in part on other grounds, 148 P.3d 178 (Colo. 2006).

It is not true that if one is not a conspirator he cannot be an accessory. *Jacobs v. People*, 174 Colo. 403, 484 P.2d 107 (1971).

One who merely aids and advises another in a legitimate matter is not an accessory within the meaning of this section. *French v. People*, 6 Colo. App. 311, 40 P. 463 (1895).

Definition of "abets" encompasses "encourages". *Alonzi v. People*, 198 Colo. 160, 597 P.2d 560 (1979).

A bystander is not required to endanger his own safety by interfering and giving help to prevent the commission of a crime, in order to avoid being held an accessory under this section. *Farrell v. People*, 8 Colo. App. 524, 46 P. 841 (1896).

Defendant's involvement as a conspirator and as a complicitor was tied to separate and distinct crimes, and the doctrine of merger did not apply. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Section applies to felony murder. A complicitor, being a principal, is included in the felony murder statute as one who commits or attempts to commit the underlying felony. *People v. Saiz*, 42 Colo. App. 469, 600 P.2d 97 (1979).

Colorado courts have recognized that complicity liability applies to attempt offenses. Thus, attempted murder is not an inchoate crime. *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), aff'd in part and rev'd in part on other grounds, 148 P.3d 178 (Colo. 2006).

Applied in *Polochio v. People*, 76 Colo. 574, 233 P. 833 (1925); *Stewart v. People*, 83 Colo. 289, 264 P. 720 (1928); *De Salvo v. People*, 98 Colo. 368, 56 P.2d 28 (1936); *Thompson v. People*, 139 Colo. 15, 336 P.2d 93 (1959), cert. denied, 361 U.S. 972, 80 S. Ct. 606, 4 L. Ed.2d 552 (1960); *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968); *Mingo v. People*, 171 Colo. 474, 468 P.2d 849 (1970); *Brady v. People*, 175 Colo. 252, 486 P.2d 436 (1971); *People v. Cox*, 190 Colo. 326, 546 P.2d 956 (1976); *People v. Brionez*, 39 Colo. App. 396, 570 P.2d 1296 (1977); *People v. Simien*, 656 P.2d 698 (Colo. 1983).

II. TRIAL AND PUNISHMENT.

A. In General.

In order for a defendant to be accountable as a principal under this section, it must be shown (1) that the principal actually committed the robbery; (2) that defendant had knowledge

that the principal intended to commit the crime; and (3) that defendant aided, abetted, or advised the principal in planning or committing the offense. *People v. Martin*, 192 Colo. 491, 561 P.2d 776 (1977); *People v. Thompson*, 655 P.2d 416 (Colo. 1982).

It is immaterial whether the principal was identified by name in the complicity count against the defendant. *People v. Martin*, 192 Colo. 491, 561 P.2d 776 (1977).

Formal agreement is not required. It is not necessary that persons implicated in crime shall have reached a formal or distinct agreement either orally or in writing as to the exact procedure in the accomplishment thereof. *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

Defendant need not perform all acts necessary to offense. Where two or more are involved in the commission of a criminal offense and one helps the other, though not actually performing all the acts necessary to the commission of the offense, all are, nevertheless, principal offenders and are punishable as though all have committed the necessary acts. *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970).

Absence from state at time of crime does not prevent conviction. That defendant charged as accessory in a criminal case was at all times during the happening of the events involved in the crime in another state does not invalidate conviction. *Newton v. People*, 96 Colo. 246, 41 P.2d 300 (1935).

No election required as to which defendant was accessory. There was no error in the trial court's refusing to compel the district attorney to elect, before the evidence was presented, as to which defendant was principal and which accessory. *Block v. People*, 125 Colo. 36, 240 P.2d 512 (1951), cert. denied, 343 U.S. 978, 72 S. Ct. 1076, 96 L. Ed. 1370, reh'g denied, 344 U.S. 848, 73 S. Ct. 6, 97 L. Ed. 659 (1952).

An accessory who stands by and aids in the perpetration of a crime may properly be charged as a principal, and in the case of codefendants it is unnecessary to spell out which one is the principal and which the accessory, nor is it necessary to characterize and classify the specific acts of each. *Schreiner v. People*, 146 Colo. 19, 360 P.2d 443, cert. denied, 368 U.S. 856, 82 S. Ct. 94, 7 L. Ed.2d 53 (1961).

In the case of codefendants it is unnecessary to spell out which one is the principal and which the accessory. *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

When two persons are charged with the same crime, the prosecution is not required to spell out which one is the principal and which is the accessory. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Applied in *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978); *People v. Alonzi*, 40 Colo. App. 507, 580 P.2d 1263 (1978).

B. Indictment or Information.

An accessory may be charged as principal. *Voris v. People*, 75 Colo. 574, 227 P. 551 (1924); *Newton v. People*, 96 Colo. 246, 41 P.2d 300 (1935); *Pacheco v. People*, 96 Colo. 401, 43 P.2d 165 (1935); *Bacino v. People*, 104 Colo. 229, 90 P.2d 5 (1939); *Erwin v. People*, 126 Colo. 28, 245 P.2d 1171 (1952); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959); *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968).

An accessory may be indicted and punished as a principal. *People v. Zobel*, 54 Colo. 284, 130 P. 837 (1913); *Mulligan v. People*, 68 Colo. 17, 189 P. 5 (1920); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

If accessories are under the law deemed and considered as principals, then they are principals insofar as the indictment, trial, and punishment are concerned. *Mulligan v. People*, 68 Colo. 17, 189 P. 5 (1920); *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

The acts of the principal are the acts of the accessory, and the accessory may be charged and punished accordingly as a principal. *Oaks v. People*, 161 Colo. 561, 424 P.2d 115 (1967).

A person who aids, abets, or assists in the perpetration of a criminal offense becomes an accessory to that offense and is chargeable and punishable as a principal. *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970).

An accessory who stands by and aids in the perpetration of a crime may properly be charged as a principal. *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

An accessory charged as a principal for an accessory is deemed and considered a principal, punishable as a principal, and plainly shall be charged as a principal. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Nothing substantial was added to the charge by adding the charge that defendants had aided, counseled, and procured the burning, since, in Colorado, one who aids and abets or advises or encourages is deemed and considered a principal, and may be charged as a principal. *People v. Buckner*, 180 Colo. 65, 504 P.2d 669 (1972).

A defendant may be charged as the principal in a criminal transaction and subsequently tried as an accessory. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

One charged as a principal may be tried and convicted as a complicitor. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

Proper charge satisfies constitution. All participants in the crime are made guilty of the crime under the statute, and therefore when properly charged with the crime, they are sufficiently advised of the accusation against them, within the requirement of the constitutional provision that accused shall have the right to demand the nature and cause of the accusation against him. *Mulligan v. People*, 68 Colo. 17,

189 P. 5 (1920); *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Particulars in which he aided need not be recited. The particulars in which an accessory aided and abetted or advised and encouraged the principal need not be recited. *Newton v. People*, 96 Colo. 246, 41 P.2d 300 (1935); *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968).

In the case of codefendants it is unnecessary to characterize and classify the specific acts of the principal and the accessory. *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

It is ultimately the jury's responsibility to determine the specific role a defendant plays. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

C. Evidence.

Elements may be established by reasonable inference. That one charged as accessory to crime had knowledge of the principal's intention, coincided therewith, and cooperated in his efforts may be established by reasonable inference from other established facts and circumstances. *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

In the trial of an alleged accessory, the state must show by some substantial proof, either directly or by conclusive circumstances, that the accessory had some knowledge of the principal's offense. *Dressel v. People*, 178 Colo. 115, 495 P.2d 544 (1972).

An admission by alleged principal may be introduced as evidence of the principal's guilt so long as all references to the defendant-accessory are effectively deleted. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

Defendants' statements were admissible in prosecution for attempted theft where those statements were not offered to prove conspiracy, but rather to show each defendant's complicity in offense, and court made it clear that it considered any statement offered only as evidence against the defendant who made it. *People v. Adams*, 678 P.2d 572 (Colo. App. 1984).

Prosecutor at defendant-accessory's trial permitted to introduce evidence establishing principal's guilt. Before a defendant may be convicted as an accessory, the jury must be convinced beyond a reasonable doubt that his accomplice, as the principal, is also guilty of the crime, and in order to satisfy that burden of proof, the prosecution is allowed to introduce evidence otherwise inadmissible at the defendant-accessory's trial for the limited purpose of establishing the guilt of the principal. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Principal's mental state not relevant. Only the defendant's mental state is relevant in proving a charge of complicity. Accordingly, it is no defense that the person with whom the defendant acted is legally not responsible for the

crime. *People v. McCoy*, 944 P.2d 577 (Colo. App. 1996).

Evidence established intent. Where the evidence discloses that the defendants, acting in concert with another, inflicted stab wounds upon the complaining witness and other victims of the assault, a claim that a defendant had no specific intent to commit bodily injury on the person of the complaining witness, and therefore is not accountable for injuries to her, is without merit. *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

Evidence sufficient to make a prima facie case. *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

D. Instructions.

Evidence warranting instruction on accessory. *Erwin v. People*, 126 Colo. 28, 245 P.2d 1171 (1952).

Where two persons are acting in concert, one holding the victims at bay, the other emptying the cash register, an instruction on accessory is in order. *Schreiner v. People*, 146 Colo. 19, 360 P.2d 443, cert. denied, 368 U.S. 856, 82 S. Ct. 94, 7 L. Ed.2d 53 (1961); *Cruz v. People*, 147 Colo. 528, 364 P.2d 561 (1961), cert. denied, 368 U.S. 978, 82 S. Ct. 483, 7 L. Ed.2d 440 (1962).

An accomplice or accessory instruction is applicable and proper where the evidence indicates that one of the defendants was standing by and was aiding, abetting, or assisting in the perpetration of the crime. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

Where two or more persons jointly engage in the commission of a crime, the giving of an accessory instruction is proper. *Tanksley v. People*, 171 Colo. 77, 464 P.2d 862 (1970); *McGregor v. People*, 176 Colo. 309, 490 P.2d 287 (1971).

Complicity instruction given when joint crime. An instruction on complicity may be given when two or more people engage jointly in a crime. *People v. Naranjo*, 200 Colo. 11, 612 P.2d 1106 (1980); *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997).

But court is not required to instruct jury that it must reach a unanimous decision as to whether defendant is convicted as a principal or as a complicitor. Committing a crime either as a principal or complicitor are alternative legal theories and two means of committing a single offense, and are not an impermissible definitional distinction pertaining to a party's status. *People v. Hall*, 60 P.3d 728 (Colo. App. 2002).

Instruction not error simply because possibility of inconsistent verdict. The trial court did not err by instructing on complicity and on sexual assault when the defendant was aided or abetted by others simply because the instructions, when given together, could lead to an

inconsistent verdict. *People v. Naranjo*, 200 Colo. 11, 612 P.2d 1106 (1980).

If request made, court required to give limiting instruction. If a request is made for an instruction limiting the use of evidence introduced to establish guilt of principal, the court is required to caution the jury that the evidence can be considered only to show the guilt of the principal and not that of the defendant-accessory. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

If no request made, no duty to limit jury's consideration. Where the defendant failed to request a limiting instruction both at the time the evidence was introduced and at the close of the trial, absent such a request, there was no duty on the trial court to limit the jury's consideration of the testimony. *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973).

Instruction on criminal responsibility held not erroneous. An instruction designed to inform the jury regarding the criminal responsibility of the persons engaged in the concerted common purpose of committing a felony, where the accessory, made a principal by statute, is tried under a separate information is not erroneous. *Bacino v. People*, 104 Colo. 229, 90 P.2d 5 (1939).

Instruction using phrase has "advised or encouraged" is not erroneous. Under the provisions of this section that an accessory is one who has "advised and encouraged, etc.", a court instruction using the phrase, has "advised or encouraged", held not erroneous. *Voris v. People*, 75 Colo. 574, 227 P. 551 (1924).

Instruction given was sufficient. Instruction given, which was couched in the language of the statute and which was read together with the courts' general reasonable doubt instruction, was sufficient to instruct jury properly on complicity. *People v. Lillie*, 707 P.2d 1043 (Colo. App. 1985).

Words "with intent to promote or facilitate" are not words of uncommon meaning which are apt to be misunderstood by a jury and therefore require further definition. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Failure of trial court to give cautionary instruction on accomplices does not constitute reversible error, where there was ample corroboration. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933).

Statutory definitions of mens rea not applicable to complicity. Since complicity is not a substantive crime, the statutory definitions of mens rea do not apply, and instructions defining the mens rea elements of "specific intent" and "intentionally or with intent" are not applicable to, or a necessary element of, the definition of complicity. *People v. R.V.*, 635 P.2d 892 (Colo. 1981).

Erroneous instruction including mens rea is harmless error. The statutory definitions of

mens rea are not necessary elements of complicity. Where an erroneous instruction on complicity requires the finding of a higher standard of culpability, such failure inures to the benefit of the defendant and constitutes harmless error. *People v. Simien*, 671 P.2d 1021 (Colo. App. 1983).

Asserted errors are not structural because the plain language of the pattern complicity instruction sufficiently reflects the complicitor's two mental state requirements under the complicity statute: (1) The defendant had the requisite mens rea for the underlying crime committed by the principal; and (2) the defendant intended that his own conduct would promote or facilitate the commission of the crimes committed by the principal. *Bogdanov v. People*, 941 P.2d 247 (Colo. 1997) (disapproved of by Supreme Court in *Griego v. People*, 19 P.3d 1 (Colo. 2001)).

An incorrect jury instruction in a criminal case is not a structural error; instead, such instruction is subject only to harmless or plain error review, following the U.S. supreme court precedent in *Neder v. United States*, 527 U.S. 1 (1999). Therefore, if a conviction is not attributable to the incorrect instruction, a conviction shall not be overturned and all contrary precedent is disapproved of. *Griego v. People*, 19 P.3d 1 (Colo. 2001) (disapproving on this point *Cooper v. People*, 973 P.2d 1234 (Colo. 1999), *Bogdanov v. People*, 941 P.2d 247 (Colo. 1997), *People v. Vance*, 933 P.2d 576 (Colo. 1997), *People v. Villa-Villa*, 983 P.2d 181 (Colo. App. 1999)).

"All or part of" language in the standard complicity instruction was not plain error, even though the defendant being charged with the underlying crime under a complicity theory did not actually commit any of the essential elements of that crime and one principal alone committed all elements of the crime. *Bogdanov v. People*, 941 P.2d 247 (Colo. 1997).

Evidence sufficient to warrant complicity instruction. Evidence led to a reasonable inference that defendant knew of the other man's possession and intent to distribute controlled substances and that defendant facilitated that conduct by allowing the other man to use his apartment for those purposes. *People v. Chavez*, 190 P.3d 760 (Colo. App. 2007).

Submission of complicity instruction was error and not harmless where there was no evidence with respect to the existence of an accomplice, despite strong evidence of defendant's guilt on the underlying offense. *People v. Gonzales*, 728 P.2d 384 (Colo. App. 1986).

Trial court erred in giving complicity instruction. Although the jury was instructed on first degree assault and sexual assault charges that, in order to convict, it must find that defendant's wife intended to commit the crime of sexual assault on a child, that defendant must

have known that she intended to commit that crime, and that the defendant did not intentionally aid, abet, advise or encourage her in committing this crime, the evidence did not justify that the wife voluntarily committed sexual assault on her daughter or that defendant's actions were designed to aid her in carrying out such an intent. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

But trial court erred in refusing to give complicity instruction where evidence supported theory that defendant and co-defendant had engaged jointly in crimes. Complicity instruction was warranted when there was evidence that defendant had previously confessed to shootings and admitted that co-defendant had driven car, and that neighborhood residents had seen two persons, a shooter and a driver, involved in the crimes. Despite defendant's assertion at trial that he had falsely admitted to the shootings and had switched roles with co-defendant, the evidence was sufficient to support a jury instruction on complicity. *People v. Grant*, 30 P.3d 667 (Colo. App. 2000), *aff'd* on other grounds, 48 P.3d 543 (Colo. 2002).

Erroneous instruction on value of stolen property received. Where defendant received property knowing it to have been stolen, and subsequently received from the same parties additional property, fruits of a burglary committed at his suggestion but in which he did not participate, it was error for the trial court to instruct the jury that in arriving at the value of the property received they were limited to the value of such as was "shown to have been stolen prior to the time any knowledge thereof came to the defendant". *People v. Spinuzza*, 99 Colo. 303, 62 P.2d 471 (1936).

III. ILLUSTRATIVE CASES.

Insufficient evidence to show occupant of automobile was accessory. Where two men were charged with causing death by operating a car in a reckless manner while intoxicated, and the only evidence supporting the charge that defendant was an accessory was that he was in the car and was under the influence of intoxicating liquor at the time of the accident, it could not be successfully contended from the evidence that defendant in any way aided and abetted in that regard. *Quintana v. People*, 106 Colo. 174, 102 P.2d 486 (1940).

Participant in robbery during which homicide is committed. If a homicide is committed by one of defendant's associates while engaged in a robbery in furtherance of a common purpose, defendant is guilty of murder in the first degree. *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

To convict defendant of attempted murder as a complicitor, defendant must have had the

culpable mental state required for attempted murder and must have intended that his own conduct promote or facilitate the commission of attempted first degree murder committed by the principal. *People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004), *aff'd* in part and *rev'd* in part on other grounds, 148 P.3d 178 (Colo. 2006).

Culpability of participant in assault. Where defendants and another agree to embark upon an enterprise of stealing hubcaps from automobiles, stole a hubcap from a car belonging to one of the victims of their assault, and upon being pursued and overtaken attack their pursuers, severely cutting and beating them, the assault and the use of knives being concerted and participated in by all three thieves, all are guilty of assault with a deadly weapon. *Harris v. People*, 139 Colo. 9, 335 P.2d 550 (1959).

Where the evidence disclosed that only slight injury was inflicted on deceased in an altercation with defendant, and that thereafter deceased was severely beaten by a third party, resulting in his death, and there was no evidence that defendant participated therein or that there was an express or tacit understanding between defendant and such third party to injure deceased through a common unlawful purpose, defendant was not an accessory to the acts of such third party. *Smith v. People*, 142 Colo. 523, 351 P.2d 457 (1960).

Principles of complicity apply to sexual assault in the first degree such that if the actor or an accomplice is armed with and uses a deadly weapon then both may be found to have committed a class 2 felony. *People v. Walford*, 716 P.2d 137 (Colo. App. 1985).

Proof that the complicitor had some knowledge of the principal's offense may be sufficient. Evidence was sufficient to establish that defendant knew that his companion had a knife in his possession and planned to rob the male robbery victim after both men were informed by the woman victim that her husband was in the house. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Record supported jury's determination that defendant was guilty beyond a reasonable doubt of first degree assault where defendant was a complicitor in the robbery of the victim, and in the course of or in furtherance of that crime, the victim was seriously injured by one of the individuals involved in the robbery. Defendant may be held responsible for that serious bodily injury whether or not he knew that someone else intended to inflict it. *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of § 18-3-202 (1)(d)).

One agreeing in advance to buy stolen property. Under this section if one agrees in advance to buy stolen property, knowing that the property is to be stolen, he thereby encourages the perpetration of the theft, and if the crime is

committed he is deemed and considered as principal and punished accordingly. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933); *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Where there was evidence presented at trial to the effect that the defendant had stated, prior to the theft, that he would take all the color television sets which could be provided, and there was evidence from which a jury could properly infer that the defendant knew that the television sets would be stolen, the evidence was sufficient to permit submission of the theft by taking count to the jury, it being properly instructed as to an accessory becoming liable as a principal. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Purchaser from one knowingly unauthorized to sell liquor. Under this section each person presenting himself as a buyer from one knowingly unauthorized to sell liquor, became a participant in the act of selling. *Walt v. People*, 46 Colo. 136, 104 P. 89 (1909).

One who knowingly rents premises to be occupied for the purpose of prostitution, and

which with his knowledge are conducted as a bawdy house, aids, abets, and assists in keeping and maintaining a house of ill-fame, for the obvious reason that by his affirmative act he knowingly aids another to commit that offense, and as this section makes him a principal, he may be proceeded against and punished accordingly. *Griffin v. People*, 44 Colo. 533, 99 P. 321 (1908).

Employee not liable for embezzlement of manager. A conviction for embezzlement by a warehouseman of property must be reversed when there is no evidence to show that the defendant actually took part in the crime and the prosecution failed to establish that the defendant had some knowledge that the manager had perpetrated the crime. *Dressel v. People*, 178 Colo. 115, 495 P.2d 544 (1972).

Complicity in arson. Evidence was sufficient to make prima facie case against two defendants as complicitors. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

18-1-604. Exemptions from liability based upon behavior of another. (1) Unless otherwise provided by the statute defining the offense, a person shall not be legally accountable for behavior of another constituting an offense if he is a victim of that offense or the offense is so defined that his conduct is inevitably incidental to its commission.

(2) It shall be an affirmative defense to a charge under section 18-1-603 if, prior to the commission of the offense, the defendant terminated his effort to promote or facilitate its commission and either gave timely warning to law enforcement authorities or gave timely warning to the intended victim.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-704.

Cross references: For other provisions concerning affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-1-605. Liability based on behavior of another - no defense. In any prosecution for an offense in which criminal liability is based upon the behavior of another pursuant to sections 18-1-601 to 18-1-604, it is no defense that the other person has not been prosecuted for or convicted of any offense based upon the behavior in question or has been convicted of a different offense or degree of offense, or the defendant belongs to a class of persons who by definition of the offense are legally incapable of committing the offense in an individual capacity.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-705.

ANNOTATION

Annotator's note. Since § 18-1-605 is similar to former § 40-1-12, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

At common law a conviction of the principal was required to precede or accompany that of one charged as an accessory and the accessory was subject to the same punishment as the

principal. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

The conviction of the principal is not a condition precedent to the conviction of an accessory after the fact, before, or during the fact. *Oaks v. People*, 161 Colo. 561, 424 P.2d 115 (1967).

An accessory is subject to independent prosecution and can be convicted even though

principal actor has been neither charged nor convicted of an offense. *Oaks v. Patterson*, 278 F. Supp. 703 (D. Colo.), *aff'd* on other grounds, 400 F.2d 392 (10th Cir. 1968).

He may be convicted of a greater crime than the principal, who pled guilty to a lesser included crime, and according to the state, acted under influence of accessory when shooting decedent; such conviction does not deny accessory due process. *Oaks v. Patterson*, 278 F. Supp. 703 (D. Colo.), *aff'd* on other grounds, 400 F.2d 392 (10th Cir. 1968).

Dismissal of information as to principal does not justify discharge of accessory by court. The dismissal of an information as to a principal, and his discharge, does not justify the discharge of the accessory by the court of its own motion, against the protests of the district attorney. *People v. Zobel*, 54 Colo. 284, 130 P. 837 (1913).

Applied in *People v. Fletcher*, 37 Colo. App. 173, 546 P.2d 980 (1975), *rev'd* on other grounds, 193 Colo. 314, 566 P.2d 345 (1977).

18-1-606. Criminal liability of business entities. (1) A business entity is guilty of an offense if:

(a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law; or

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the governing body or individual authorized to manage the affairs of the business entity or by a high managerial agent acting within the scope of his or her employment or in behalf of the business entity.

(2) As used in this section:

(a) "Agent" means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity, and "high managerial agent" means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity's policy or the supervision in a managerial capacity of subordinate employees.

(b) "Business entity" means a corporation or other entity that is subject to the provisions of title 7, C.R.S.; foreign corporations qualified to do business in this state pursuant to article 115 of title 7, C.R.S., specifically including federally chartered or authorized financial institutions; a corporation or other entity that is subject to the provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of individuals doing business in the state.

(3) Every offense committed by a corporation prior to July 1, 1985, which would be a felony if committed by an individual shall subject the corporation to the payment of a fine of not less than one thousand dollars nor more than fifteen thousand dollars. For such offenses committed on or after July 1, 1985, the corporation shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). Every offense committed by a corporation which would be a misdemeanor or petty offense if committed by an individual shall subject the corporation to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the corporation is convicted. For an offense committed on or after July 1, 2003, a business entity shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). An offense committed by a business entity that would be a misdemeanor or petty offense if committed by an individual shall subject the business entity to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the business entity is convicted.

Source: L. 71: R&RE, p. 406, § 1. C.R.S. 1963: § 40-1-706. L. 85: (3) amended, p. 658, § 7, effective July 1. L. 2002: (3) amended, p. 1511, § 180, effective October 1. L. 2003: Entire section amended, p. 982, § 18, effective April 17.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Criminal Prosecution of Employers for Workplace Deaths and Injuries", see 16 Colo. Law. 1974 (1987).

18-1-607. Criminal liability of an individual for corporate conduct. A person is criminally liable for conduct constituting an offense which he performs or causes to occur in the name of or in behalf of a corporation to the same extent as if that conduct were performed or caused by him in his own name or behalf.

Source: L. 71: R&RE, p. 407, § 1. C.R.S. 1963: § 40-1-707.

ANNOTATION

Law reviews. For article, "Criminal Prosecution of Employers for Workplace Deaths and Injuries", see 16 Colo. Law. 1974 (1987).

A corporate officer may be criminally liable for embezzlement or larceny of property of third person through a corporate act where the act was performed by the individual officer, or at his direction, or by his permission. Hartson

v. People, 125 Colo. 1, 240 P.2d 907 (1951) (decided under CSA, C. 108, § 102).

It is not grounds for dismissal that defendant did not personally participate in every part of the transaction if, as the evidence indicates, he was the causative force behind acts performed in the corporation's name. People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977).

PART 7

JUSTIFICATION AND EXEMPTIONS
FROM CRIMINAL RESPONSIBILITY

18-1-701. Execution of public duty. (1) Unless inconsistent with other provisions of sections 18-1-702 to 18-1-710, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by a provision of law or a judicial decree binding in Colorado.

- (2) A "provision of law" and a "judicial decree" in subsection (1) of this section mean:
 - (a) Laws defining duties and functions of public servants;
 - (b) Laws defining duties of private citizens to assist public servants in the performance of certain of their functions;
 - (c) Laws governing the execution of legal process;
 - (d) Laws governing the military service and conduct of war;
 - (e) Judgments and orders of court.

Source: L. 71: R&RE, p. 407, § 1. C.R.S. 1963: § 40-1-801.

ANNOTATION

Defense not available to penitentiary guard accused of aiding escape. A penitentiary guard, accused of aiding an escape, whose theory of the case is that he was attempting to apprehend an escaped criminal by using undercover techniques is not entitled to a jury instruction on the affirmative defense of execution of public duty when his authority to make an arrest is limited to penitentiary grounds and there is no evidence he had any authorization to engage in undercover activities. People v. Roberts, 43 Colo. App. 100, 601 P.2d 654 (1979).

Defense not available to deputy sheriff when directed to perform an unauthorized act by sheriff. Deputy sheriff's installation of an eavesdropping device at the direction of the sheriff was not an execution of a public duty when sheriff did not have legal authority to place electronic listening device without court order. People v. Lesslie, 24 P.3d 22 (Colo. App. 2000).

18-1-702. Choice of evils. (1) Unless inconsistent with other provisions of sections 18-1-703 to 18-1-707, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

Source: L. 71: R&RE, p. 407, § 1. C.R.S. 1963: § 40-1-802.

ANNOTATION

Law reviews. For comment, "Civil Disobedience as the Lesser Evil", see 59 U. Colo. L. Rev. 961 (1988). For article, "Choice of Evils in Colorado", see 18 Colo. Law. 1117 (1989).

The "choice of evils" defense has its roots in the common-law doctrine of necessity, and has long been recognized in criminal law under the latter description. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975).

This section is really no more than a codification of the common law on "justification defenses". *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

The statutory codification of the choice of evils defense has its roots in the common-law doctrine of necessity. *People v. Strock*, 623 P.2d 42 (Colo. 1981); *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

Choice of evils defense may be found even though defendant has requisite intent of "knowingly" with respect to offense charged. *People v. Trujillo*, 682 P.2d 499 (Colo. App. 1984).

For this defense to be available, it must first be shown that defendant's conduct was necessitated by a specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975); *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979); *People v. Strock*, 623 P.2d 42 (Colo. 1981); *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

Normal conditions of confinement will not support a defense of choice of evils pursuant to this section. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Defense is available in prison escape situation where the prisoner is motivated by a defi-

nite, specific, and imminent threat of death or substantial bodily injury. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev'd on other grounds, 623 P.2d 42 (Colo. 1981).

The choice of evils defense may be available to justify a prison escape if the facts of the case, as a matter of law, satisfy the conditions stated in this section. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

But only if escapee immediately reports duress, or choice of evils, which he faced to the proper authorities when a position of safety is reached. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Where the charge is escape, the defendant must also show that the escape was committed without violence and that he voluntarily submitted to authorities as soon as a position of safety was reached. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

As condition for admitting evidence relating to defense, proper foundation must be laid. As a condition to the admission of evidence relating to the choice of evils defense, a proper foundation must be laid, as indicated by this section. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

The choice of evils defense may only be invoked when an offer of proof is made that establishes the requisite statutory foundation. *Andrews v. People*, 800 P.2d 607 (Colo. 1990); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

Court may refuse to give choice of evils instruction when defendant fails to comply with procedural requirements of statute and was given reasonable opportunity to comply. *People v. Al-Yousif*, 206 P.3d 824 (Colo. App. 2006).

Choice of evils is potentially available as a defense to any criminal charge unless it is inconsistent with other enumerated affirmative defenses or other explicit provisions of the law. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

Once defense credibly raised, burden of proof shifts to prosecution. Choice of evils is an affirmative defense covered by § 18-1-407, which provides that once “some credible evidence” is presented to raise a defense, the burden is on the prosecution to disprove the defense beyond a reasonable doubt as to that issue as well as all other elements of the offense. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev’d on other grounds, 623 P.2d 42 (Colo. 1981).

Evidence entitling defendant to choice of evils instruction. Where defense testimony indicated that three men wearing masks and carrying knives attempted to kill the defendant a few nights prior to the escape, that defendant was informed that there was a “contract on his life”, and that defendant’s cellmates received notes the night of the escape threatening them and the defendant, these facts, if believed by the jury, would show that the defendant was faced with specific and imminent threats mandating a choice of evils instruction. *People v. Strock*, 42 Colo. App. 404, 600 P.2d 91 (1979), rev’d on other grounds, 623 P.2d 42 (Colo. 1981); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

“Morality” and “advisability” of statute are not to be tried to jury. Subsection (2) of this section does nothing but emphasize that “morality” or “advisability” of a statute are not things to be tried to a jury. *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

Preliminary determination of admissibility to be decided by court rather than by the jury. *United States v. Best*, 476 F. Supp. 34 (D. Colo. 1979).

And preliminary ruling by court required. It was well within the province of the general assembly to require that a preliminary ruling by the court would serve as a prerequisite in invoking the defense of choice of evils. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

Defense of choice of evils is very similar to duress and the foundation requirements set forth in the choice of evils statute was intended as a safeguard against abuse of the defense. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

Before a choice of evils defense may be presented to the jury, the trial court must make an initial determination of whether the allegations of facts by the defendant, if proven, would constitute legal justification for the prohibited conduct. *Andrews v. People*, 800 P.2d 607

(Colo. 1990); *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

The threat to defendant’s person must be so definite, specific, and imminent as to rise beyond mere speculation. *People v. Robertson*, 36 Colo. App. 367, 543 P.2d 533 (1975); *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

The felon with a gun statute, § 18-12-108, must be read in pari materia with this section. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Trial court finding that no emergency existed to justify a choice of evils defense did not conflict with a finding of an emergency sufficient to permit a reduced sentence. *People v. Weiser*, 789 P.2d 454 (Colo. App. 1989).

Test for sufficiency of offer of proof. A sufficient offer of proof must establish that: (1) All other potentially viable and reasonable alternative actions were pursued or shown to be futile; (2) the action taken had a direct causal connection with the harm sought to be prevented and would bring about the abatement of the harm; and (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur. *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

Offer of proof is insufficient if the defendants fail to show that their criminal actions, rather than legal actions taken by themselves and others, brought about the abatement of the harm or if the offer merely alleges that other persons have attempted to pursue reasonable alternatives or that the criminal action taken was a more effective alternative. *Andrews v. People*, 800 P.2d 607 (Colo. 1990).

Evidence of a generalized fear of future injury is not sufficient to warrant the invocation of a choice of evils defense. The evidence must affirmatively demonstrate the existence of a specific threat or likelihood of an imminent injury necessitating the actor’s conduct. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990); *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

A choice of evils defense cannot be based upon economic necessity. *People v. Fontes*, 89 P.3d 484 (Colo. App. 2003).

If a reasonable legal alternative was available to defendants as a means to avoid the threatened injury, they properly may be foreclosed from asserting a choice of evils defense. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

A defendant who seeks to assert a choice of evils defense must offer evidence that his conduct did not exceed that reasonably necessary to avoid the impending injury. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990).

18-1-703. Use of physical force - special relationships. (1) The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(a) A parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person, and a teacher or other person entrusted with the care and supervision of a minor, may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor or incompetent person.

(b) A superintendent or other authorized official of a jail, prison, or correctional institution may, in order to maintain order and discipline, use reasonable and appropriate physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious bodily injury.

(c) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use reasonable and appropriate physical force when and to the extent that it is necessary to maintain order and discipline, but he may use deadly physical force only when it is reasonably necessary to prevent death or serious bodily injury.

(d) A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury upon himself may use reasonable and appropriate physical force upon that person to the extent that it is reasonably necessary to thwart the result.

(e) A duly licensed physician, advanced practice nurse, or a person acting under his or her direction, may use reasonable and appropriate physical force for the purpose of administering a recognized form of treatment that he or she reasonably believes to be adapted to promoting the physical or mental health of the patient if:

(I) The treatment is administered with the consent of the patient, or if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision; or

(II) The treatment is administered in an emergency when the physician or advanced practice nurse reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

Source: L. 71: R&RE, p. 408, § 1. C.R.S. 1963: § 40-1-803. L. 76: (1)(b) amended, p. 534, § 15, effective April 9. L. 81: (1)(b) to (1)(d) amended, p. 980, § 2, effective May 13. L. 2008: IP(1)(e) and (1)(e)(II) amended, p. 128, § 8, effective January 1, 2009.

Cross references: For the justified use of weapons or other aid to enforce obedience at state correctional facilities, see § 17-20-122; for the use of force in preventing escape from a detention facility, see § 18-1-707 (8); for provisions concerning child abuse, see §§ 18-6-401 and 19-3-102 and part 3 of article 3 of title 19; for the use of force in administering medication to persons with mental illness, see § 27-65-111 (5).

ANNOTATION

Parental privilege is common-law principle codified. The parental privilege set out in subsection (1)(a) and the definition of criminal child abuse in § 18-6-401 codify common-law principles concerning the limits of permissible parental chastisement. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

At common law, so long as the chastisement was moderate and reasonable in light of the child's age and condition, the misconduct being punished, the kind of punishment inflicted, the degree of harm done to the child and other relevant circumstances, the parent or custodian would incur neither civil nor criminal liability, even though identical behavior against a stranger would be grounds for an action in tort or prosecution for assault and battery or a sim-

ilar offense. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

Prosecution must establish guilt of child abuse defendant beyond reasonable doubt. Where in a prosecution for child abuse the evidence raises the affirmative defense of justified physical force for disciplinary purposes, the prosecution must establish the guilt of the defendant beyond a reasonable doubt as to that issue as well as all other elements of the offense. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Acts similar in character admissible to negate claim of justification. Where all the prior acts of child abuse the prosecution sought to introduce into evidence were committed against the same person, each act was occasioned by normal childhood behavior on the part of the

victim, each act was similar in severity in that noticeable bruises and marks were left on the child's body, each act took place while the child's mother was absent, and, finally, each act was followed by the defendant's explanation that it was for disciplinary purposes, the acts were sufficiently similar in character to be admissible for purposes of establishing criminal culpability and of negating any claim of accident or justification. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Where statutory affirmative defense of reasonable and appropriate discipline was not raised by defense, failure to include the phrase "without justifiable excuse" in a jury instruction on crime of child abuse was not error. *People v. Lybarger*, 700 P.2d 910 (Colo. 1985).

Applied in *People v. R.V.*, 43 Colo. App. 349, 606 P.2d 1311 (1979).

18-1-704. Use of physical force in defense of a person. (1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; or

(b) The other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary as defined in sections 18-4-202 to 18-4-204; or

(c) The other person is committing or reasonably appears about to commit kidnapping as defined in section 18-3-301 or 18-3-302, robbery as defined in section 18-4-301 or 18-4-302, sexual assault as set forth in section 18-3-402, or in section 18-3-403 as it existed prior to July 1, 2000, or assault as defined in sections 18-3-202 and 18-3-203.

(3) Notwithstanding the provisions of subsection (1) of this section, a person is not justified in using physical force if:

(a) With intent to cause bodily injury or death to another person, he provokes the use of unlawful physical force by that other person; or

(b) He is the initial aggressor; except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

(4) In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction. The court shall instruct the jury that it may consider the evidence of self-defense in determining whether the defendant acted recklessly, with extreme indifference, or in a criminally negligent manner. However, the self-defense law instruction shall not be an affirmative defense instruction and the prosecuting attorney shall not have the burden of disproving self-defense. This section shall not apply to strict liability crimes.

Source: **L. 71:** R&RE, p. 409, § 1. **C.R.S. 1963:** § 40-1-804. **L. 72:** p. 274, § 1. **L. 75:** (2)(c) amended, p. 632, § 4, effective July 1. **L. 79:** (2)(c) amended, p. 726, § 1, effective July 1. **L. 81:** (2)(a) and (3)(a) amended, p. 981, § 3, effective May 13. **L. 2000:** (2)(c) amended, p. 703, § 27, effective July 1. **L. 2003:** (4) added, p. 795, § 1, effective March 25.

Cross references: For limitations on civil suits against persons using physical force in defense of a person or to prevent the commission of a felony, see § 13-80-119.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 38 *Dicta* 65 (1961). For comment on *Vigil v. People* (143 Colo. 328, 353 P.2d 82 (1960)), see 33 *Rocky Mt. L. Rev.* 430 (1961). For article, "One Year Review of Criminal Law and Procedure", see 40 *Den. L. Ctr. J.* 89 (1963). For article, "Homicides Under the Colorado Criminal Code", see 49 *Den. L.J.* 137 (1972). For note, "True Equality for Battered Women: The Use of Self-Defense in Colorado", see 70 *Den. U. L. Rev.* 117 (1992). For article, "Self-Defense in Colorado", see 24 *Colo. Law.* 2717 (1995).

Annotator's note. Since § 18-1-704 is similar to former § 40-2-15, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Doctrine of retreat is from common law. There is no statutory provision regarding the duty of a person to retreat before countering the use of force with force. The doctrine derives from the common law. *People v. Watson*, 671 P.2d 973 (Colo. App. 1983).

The common-law doctrine of retreat to the wall has been modified and is applicable in this jurisdiction only to cases where the defendant voluntarily enters into a fight, or the parties engage in mutual combat, or the defendant, being the assailant, does not endeavor in good faith to decline any further struggle before firing the fatal shot, and possibly to other similar cases. *Harris v. People*, 32 Colo. 211, 75 P. 427 (1904); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

The defendant, if he did not provoke the assault, is not obliged to retreat or flee to save his life, but may stand his ground, and even, in some circumstances, pursue his assailant until the latter has been disarmed or disabled from carrying into effect his unlawful purpose, and this right of the defendant goes even to the extent, if necessary, of taking human life. *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

Court was correct in not instructing the jury on the mutual combat limitation. There must be a definite agreement to fight in place for the court to issue the instruction. *Kaufman v. People*, 202 P.3d 542 (Colo. 2009).

Subsection (2)(a) does not require the innocent victim of an assault to retreat before defending himself or herself. *People v. Willner*, 879 P.2d 19 (Colo. 1994).

The right of self-defense is a natural right and is based on the natural law of self-preservation. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Right to kill in self-defense is not limited to cases where assailant intends to commit a

felony. *Ritchey v. People*, 23 Colo. 314, 47 P. 272 (1896).

Defendant was entitled to a jury instruction specifying that the defendant was justified in using deadly physical force if she reasonably perceived that the aggressor appeared about to commit a sexual assault upon her and a degree of force less than deadly physical force was inadequate. This section does not limit the actor's right to use deadly force to those situations in which the aggressor is committing or is about to commit sexual assault on someone other than the actor. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd*, 28 P.3d 340 (Colo. 2001).

Right to kill in defense of another. Where a known felony is attempted upon a person, the party assaulted may repel force by force, and any other person present may interpose for preventing mischief, and if death ensues the party so interposing will be justified. The right thus to assist applies with peculiar force where a relationship exists, such as father, son, brother, or husband. *Bush v. People*, 10 Colo. 566, 16 P. 290 (1887).

A party who seeks a difficulty cannot avail himself of the doctrine of self-defense. *Bush v. People*, 10 Colo. 566, 16 P. 290 (1887).

The one invoking the right of self-defense cannot be the aggressor or assailant. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Right of self-defense is not lost if danger develops from mild argument. The mere fact that one has interjected himself into a crowd or into a mild situation, does not deprive him of the right of self-defense if the situation beginning with only an argument, develops to a point where he is being subjected to or threatened with such physical violence that he might have to resort to justifiable homicide to protect his person. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

In order to justify theory of self-defense where the defendant used deadly force, he must have reasonably believed that a lesser degree of force was inadequate and that he or another person was in imminent danger of being killed or of receiving great bodily harm (now great bodily injury). *People v. Ferrell*, 200 Colo. 128, 613 P.2d 324 (1980).

Apparent necessity may justify application of doctrine of self-defense. The doctrine applies whether the danger is actual or only apparent; actual danger is not necessary in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent

as actual or real necessity. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910).

Person assailed may act on appearances. When a person has reasonable grounds for believing, and does in fact actually believe, that danger of his being killed or of receiving great bodily harm is imminent, he may act on such appearances and defend himself, even to the extent of taking human life when necessary, although it may turn out that the appearances were false, or although he may have been mistaken as to the extent of the real or actual danger. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910); *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964).

One is entitled to act on appearances in using a deadly weapon to defend himself, but the appearances must be such as, taking into consideration the circumstances at the particular instant, would have caused a reasonable and prudent man to use such weapon for his protection. *Henwood v. People*, 57 Colo. 544, 143 P. 373, 1916A Ann. Cas. 1111 (1914).

Person coming to the aid of a third party is entitled to assert defense of others even if the third party is not entitled to assert self-defense. Person must only have a reasonable belief that intervention is necessary to protect the third party whom he or she believed was under attack. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Character of threat or provocation must be shown. To support the defense of self-defense, it must be shown that the provocation or threat occurred immediately prior to the homicide, and must be of such a character as to place the accused in sudden fear of his life or in fear of great bodily injury. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Belief that lesser degree of force is inadequate must be reasonable, and a reckless perception that defendant needed to use the force he did was inconsistent with a reasonable perception, thus, court did not err in ruling that a self-defense instruction was unavailable. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

In construing subsection (3)(b), according words their plain and ordinary meaning, it is apparent that "initial" means first. *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989).

When an initial aggressor withdraws from an encounter and effectively communicates his withdrawal to the initial victim, the aggressor becomes a victim entitled to act in self-defense should the initial victim retaliate for the attack. Thus, if the initial victim continues the attack, the victim then becomes the aggressor and is no longer entitled to act in self-defense. *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986).

In determining whether "initial aggressor" jury instruction is appropriate in case in which hostilities commence among a group of individuals and escalate to a conclusion without interruption, the conduct of the defendant in the

context of the developing situation must be the focus of any analysis of defendant's right to self-defense. *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989).

Not error for trial court to instruct jury on the initial aggressor exception to self-defense once the court determined to give the self-defense instruction requested by the defendant. *People v. Montoya*, 928 P.2d 781 (Colo. App. 1996); *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Court may give an initial aggressor instruction if there is an inference that defendant initiated the physical conflict by using or threatening the imminent use of unlawful force. Although defendant's initial confrontation was insufficient to make defendant an initial aggressor, returning to the argument with a gun was sufficient. *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009).

Court did not err in failing to define initial aggressor. Although the court may define the term, there is no basis for error in not defining it when it is unlikely the jury would have relied on the wrong event to apply the initial aggressor doctrine. *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009).

When evidence is sufficient to raise a question of fact concerning defendant's right to come to the defense of another person who might have been the initial aggressor, it would be proper for the court to instruct the jury concerning the limitation on an initial aggressor's right to assert self-defense, and the right of defendant to act upon a reasonable belief under the circumstances. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

If a participant determines to withdraw from combat and he effectively communicates that intent to his opponent or opponents, then the requisite intent to commit the crime charged has been abandoned. Under these circumstances, the right of self-defense must be reinstated because there is no requirement in Colorado that one "retreat to the wall" before defending himself. *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989).

Even if a person is a trespasser, the person does not have to "retreat to the wall" before using deadly force to defend himself, unless the person was the initial aggressor. The pattern jury instruction, COLJI-Crim No. 7:68-7 (15) (1983), improperly suggests that a person who is not an initial aggressor may not use physical force to defend himself if the person is not "where he had a right to be". *People v. Toler*, 981 P.2d 1096 (Colo. App. 1998), *aff'd*, 9 P.3d 341 (Colo. 2000).

But a trespasser who is subjected to lawful physical force by a property owner has no privilege under this section to use physical force in self-defense because the privilege applies only when the defendant faces unlawful

force. Whether a defendant faces unlawful force will depend on whether the defendant entered the property unlawfully. In such a case, it is the better practice for the trial court to give an instruction to the jury indicating that, in determining whether a defendant unlawfully entered a dwelling and whether the defendant reasonably believed that unlawful force was used or imminent, the “make-my-day” provision in § 18-1-704.5 should be considered. *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002).

Question for jury. Evidence held to clearly justify the submission to the jury of the question as to whether or not the deceased was a person who manifestly intended and endeavored in a violent, riotous, or tumultuous manner to enter the habitation of the defendant for the purpose of assaulting or offering personal violence to any person dwelling or being therein. *Bailey v. People*, 54 Colo. 337, 130 P. 832 (1913).

Use of word “enormous” instead of “great” in instruction is improper. In an instruction defining the bodily harm to prevent which one may justifiably kill his assailant, the use of the word “enormous” instead of “great” is improper. *Ritchey v. People*, 23 Colo. 314, 47 P. 272 (1896).

Instruction on use of deadly physical force is to be used only if the victim died. Because no victim died, instruction that defendant was justified in use of physical force if he used that degree of force which he reasonably believed to be necessary was proper. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Defendant entitled to instruction on lesser offense of manslaughter. Where during the trial for first degree murder defendant presented a plausible case for self-defense, which even if the jury deemed it to be an overreaction, nevertheless would negate the elements of murder, the trial court should have instructed the jury on the lesser offense of manslaughter, as defendant requested. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Defendant entitled to have jury instructed on self-defense. A person charged with homicide and defending upon the ground of self-defense is entitled, upon request, to have the jury instructed, when there is conflicting testimony upon the evidence of apparent danger and apparent necessity to kill, as well as upon real danger and actual necessity, and in every aspect of the testimony. To refuse the instruction is a determination by the court of matter of fact, and deprives the accused of his constitutional right to a trial by jury. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910).

A defendant is entitled to a self-defense instruction if there is any evidence in the record to support the theory that he acted in self-defense. *People v. Dillon*, 631 P.2d 1153 (Colo. App. 1981), rev'd on other grounds, 655 P.2d 841

(Colo. 1982); *People v. Smith*, 682 P.2d 493 (Colo. App. 1983).

There is an intent element in the consideration of “deadly” physical force. Since defendant’s testimony created a dispute about whether he intended to produce death by use of force, the defendant is entitled to self-defense instructions related to both ordinary physical force and deadly physical force. *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006).

Defendant not entitled to jury instruction on self-defense where defendant did not admit to having engaged in the conduct that led to the charge and then offer self-defense as justification for his action. Also, defendant produced no evidence that he reasonably believed that unlawful force was about to be or was being used against him. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

The prosecution bears no burden in disproving self-defense when self-defense is not an affirmative defense. Self-defense is not an affirmative defense if the crime’s mental state is recklessness, criminal negligence, or extreme indifference; rather, it is an element-negating traverse. The court did not err in instructing the jury that the prosecution did not bear the burden of disproving self-defense in relation to the reckless manslaughter charge. *People v. Pickering*, __ P.3d __ (Colo. 2011) (overruling *People v. Lara*, 224 P.3d 388 (Colo. App. 2009) and *People v. Taylor*, 230 P.3d 1227 (Colo. App. 2009)).

Defense of others is an element-changing defense against extreme indifference murder, rather than a mere circumstance for the jury to consider, and must be portrayed as such in instructions to the jury. *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), overruled on other grounds in *People v. Pickering*, __ P.3d __ (Colo. 2011).

Prosecution must disprove that defendant acted in reasonable defense of a person in order to prove the elements of extreme indifference murder when that defense is asserted with credible evidence at trial. *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), overruled in *People v. Pickering*, __ P.3d __ (Colo. 2011).

Court violated defendant’s due process right by instructing jurors that prosecution “shall not have the burden of disproving self-defense”, when defense of others is asserted with credible evidence at trial. *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), overruled in *People v. Pickering*, __ P.3d __ (Colo. 2011).

Self-defense instruction is not necessary in every case where force or the threat of force is used, but only where there is evidence in the record to support it. *People v. Dillon*, 655 P.2d 841 (Colo. 1982); *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

The trial court properly refused to instruct the theory of self-defense because there was no

evidence that the defendant reasonably believed that unlawful physical force was imminent against him. *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000).

Even though the general assembly has defined self-defense in this section, it is not improper for the courts to instruct further upon the issue of self-defense. *People v. Berry*, 703 P.2d 613 (Colo. App. 1985).

The court's instruction for physical self-defense was sufficient. Generally, a jury instruction that tracks the statutory language is considered to be sufficient. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

Self-defense instruction required for case involving unreasonable or excessive force during an arrest. Self-defense instruction is required when evidence has been presented that officers displayed weapons and were commanded to discharge them in course of effecting arrest and that their conduct was unreasonable or excessive under the circumstances. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

Defendant asserting self-defense, who was not initial aggressor, was entitled to jury instruction regarding no duty to retreat so as to dispel inference that lesser force would have been adequate. *Idrogo v. People*, 818 P.2d 752 (Colo. 1991); *Cassels v. People*, 92 P.3d 951 (Colo. 2004).

Defendant was entitled to a jury instruction on the doctrine of no retreat where, on cross examination, the prosecution elicited evidence that defendant had other choices besides killing her husband, implying that she could have retreated rather than kill him. Also, in closing, the prosecution argued that defendant had many choices besides using force upon her husband, including withdrawal from the situation. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd*, 28 P.3d 340 (Colo. 2001).

Self-defense is available as an affirmative defense against charge of heat of passion manslaughter. The general assembly has recognized a reasonable person, suddenly and unexpectedly confronted with potentially deadly or gravely injurious conduct does not act unreasonably by instinctively and passionately striking out at the source of such provoking conduct. *Sanchez v. People*, 820 P.2d 1103 (Colo. 1991).

Instructions on self-defense held proper. *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969); *People v. Willner*, 879 P.2d 19 (Colo. 1994).

In a case where some of the evidence indicated that defendant killed in self-defense to protect his person, an instruction to the effect that a defendant may safely act upon appearances to avoid apprehended danger even though it develops later that the appearances were false and that there was in effect no danger to do him serious injury is appropriate. *People v. Tapia*, 183 Colo. 141, 515 P.2d 453 (1973).

Instruction held denial of right of self-defense. An instruction to the effect that in order for the doctrine of self-defense to apply, the jury must believe that deceased intended to assault or kill the inmates of the house is error as a denial of the right of self-defense as defined in this section. *Bailey v. People*, 54 Colo. 337, 130 P. 832 (1913).

Instruction held denial of right to present a defense. When no evidence was presented at trial that defendant intended to provoke a fight with the victims or their friend for the purpose of inflicting injury upon them under a guise of provocation, an instruction on the issue of provoking the victim as an exception to self-defense violated the defendant's right to present a defense. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Instruction on self-defense held deficient because it only stated that self-defense is an affirmative defense to the crime of manslaughter if the defendant had reasonable grounds to believe, and did believe, that he or another person was in imminent danger or being killed or receiving great bodily injury; the instruction failed to inform the jury that self-defense is an affirmative defense if the deceased had been committing or reasonably appeared about to commit first or second degree assault. *People v. Janes*, 982 P.2d 300 (Colo. 1999).

An instruction that defendant must retreat to the wall is erroneous. Where the jury is instructed that the defendant in every case must retreat to the wall before he is entitled to resort to self-defense, the error is manifest. *Ritchey v. People*, 23 Colo. 314, 47 P. 272 (1896); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

Instruction on combat by agreement held deficient because it provided no guidelines as to elements which must be proved by prosecution. *People v. Cuevas*, 740 P.2d 25 (Colo. App. 1987).

Self-defense may be asserted as a defense to attempted heat of passion manslaughter. *Thomas v. People*, 820 P.2d 656 (Colo. 1991).

Defendant charged with heat of passion manslaughter may assert a claim of self-defense. Evidence of low IQ and physical and sexual abuse of the defendant in the past is admissible to prove the claim of self defense. *People v. Young*, 825 P.2d 1004 (Colo. App. 1991).

Self-defense is an available defense against a charge of obstructing a peace officer when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer. *People v. Barrus*, 232 P.3d 264 (Colo. App. 2009).

As is instruction that slayer must have had no other probable means of escape. It was error to charge the jury to the effect that to justify homicide on the plea of self-defense it must appear that the slayer had no other possi-

ble, or at least probable, means of escaping. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889); *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).

When the "make-my-day" statute (§18-1-704.5) is being used as an affirmative defense, it is error for a jury instruction to place the burden on the defendant to prove the affirmative defense. *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

Assertion of error for failure to give instruction not well taken. Where the record discloses that the defendant did not tender nor request the giving of an instruction on self-defense, nor did he assign the court's failure to give the instruction as a ground for new trial, nor was there evidence to support the giving of such an instruction, for all these reasons the assertion of error for failure to give such instruction is not well taken. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Instruction on provocation of the victim given over defense objection held reversible error because the court failed to determine which issues were raised by the evidence prior to giving the instruction; accordingly, the error was not harmless because the giving of the instruction created a situation that could have been misleading and confusing to the jury. *People v. Silva*, 987 P.2d 909 (Colo. App. 1999).

Limitation of right to emergencies is erroneous. In a prosecution for murder an instruction on self-defense which advised the jury that the right of self-defense is based upon the law of necessity, and is only given in emergencies to persons who are attacked, was erroneous. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Limitation right of self-defense to persons who do not bring on the difficulty themselves is too broad a statement. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Defendant is entitled to present evidence of prior violent act of victim if: (1) The defendant contends that he acted in self-defense and there is competent evidence to support the contention; (2) either the act occurred or the defendant became aware of its occurrence within a reasonable time of the homicide; and (3) the defendant knew of the victim's prior violence at the time of the homicide. *People v. Ferrell*, 200 Colo. 128, 613 P.2d 324 (1980).

Spouse justified in aiding victimized spouse. A wife is clearly justified in attempting to aid her husband when he is the victim of an assault, and the husband's assailant who, as a result, then assaults the wife cannot claim that his actions were justified on the basis of self-defense. *People v. Schliesser*, 671 P.2d 993 (Colo. App. 1983).

Self-defense instruction is not appropriate where defendant presents evidence of "battered woman syndrome" but is on trial for contract-for-hire murder of her husband. *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1991).

Self-defense instruction based on battered woman syndrome is not available in murder for-hire cases, regardless of the definition of "imminent" under this section. A defendant is entitled to an instruction embodying the defendant's theory of the case only if there is evidence to support the theory. In case where a wife hired her husband's killers, the wife's evidence that she suffered from battered woman syndrome was insufficient as a matter of law to support her theory that she was in imminent danger at the time her husband was killed. The trial court, therefore, erred in allowing a self-defense instruction. *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1992).

Lay witness may offer opinion testimony on intent of victim if witness had sufficient opportunity to observe the person and draw a rational conclusion about the person's state of mind. *People v. Jones*, 907 P.2d 667 (Colo. App. 1995).

Whether use of knife in defense is excessive force is a jury question. *People v. Smith*, 682 P.2d 493 (Colo. App. 1983).

No error in refusing to instruct the jury regarding felony menacing where the record was devoid of any evidence or indication that the defendant could have held a reasonable belief that the man he threatened with a knife was engaged in the imminent use of unlawful physical force against defendant's brother. *People v. Williams*, 827 P.2d 612 (Colo. App. 1992).

Applied in *Hardy v. People*, 133 Colo. 201, 292 P.2d 973 (1956); *Maes v. People*, 166 Colo. 15, 441 P.2d 1 (1968); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Jones*, 675 P.2d 9 (Colo. 1984); *People v. Reed*, 695 P.2d 806 (Colo. App. 1984), cert. denied, 701 P.2d 603 (Colo. 1985).

18-1-704.5. Use of deadly physical force against an intruder. (1) The general assembly hereby recognizes that the citizens of Colorado have a right to expect absolute safety within their own homes.

(2) Notwithstanding the provisions of section 18-1-704, any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant

reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.

(3) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force.

(4) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from any civil liability for injuries or death resulting from the use of such force.

Source: L. 85: Entire section added, p. 662, § 1, effective June 6.

Cross references: For limitations on civil suits against persons using physical force in defense of a person or to prevent the commission of a felony, see § 13-80-119.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995).

Prerequisite for immunity under this section is an unlawful entry into the dwelling, meaning a knowing, criminal entry. *People v. McNeese*, 892 P.2d 304 (Colo. 1995).

To be immune from prosecution under this section a defendant must establish by a preponderance of the evidence that he or she had a reasonable belief that the intruder was committing or intended to commit a crime against a person or property in addition to the uninvited entry. This inquiry focuses on the reasonable belief of the occupant, not on the actual conduct of the intruder. *People v. McNeese*, 892 P.2d 304 (Colo. 1995).

Sufficient evidence existed to support trial court's denial of defendant's pre-trial motion to dismiss on the basis defendant had not met his burden as established by the supreme court. *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

Trial court is authorized to dismiss criminal prosecution at pretrial stage when conditions of statute are satisfied, and this does not infringe upon prosecution's discretion to file charges. *People v. Guenther*, 740 P.2d 971 (Colo. 1987); *Young v. District Court*, 740 P.2d 982 (Colo. 1987).

Defendant bears burden of establishing right to immunity by preponderance of evidence when issue of immunity is raised at pretrial stage. *People v. Guenther*, 740 P.2d 971 (Colo. 1987); *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Fact that a homicide victim was on the defendant's porch does not permit the defendant to claim immunity from prosecution for unlawful entry to defendant's dwelling unless the court finds that defendant believed that the victim intended to commit a crime or use physical force against the defendant. *People v. Young*, 825 P.2d 1004 (Colo. App. 1991).

Defendant may still raise immunity as defense at trial when pretrial motion to dismiss is denied. *People v. Guenther*, 740 P.2d 971 (Colo. 1987).

For purposes of this section, the common areas of an apartment building do not constitute a dwelling. *People v. Cushinberry*, 855 P.2d 18 (Colo. App. 1993).

Where pretrial motion to dismiss on grounds of statutory immunity provided in this section is denied, defendant may raise it as an affirmative defense at trial. In such case, the burden of proof which is generally applicable to affirmative defenses would apply. *People v. Malczewski*, 744 P.2d 62 (Colo. 1987).

Section does not authorize an appeal from a pretrial order denying immunity. An order denying defendant's pretrial motion to dismiss under the "make-my-day" statute is not a final judgment and therefore not subject to appeal. In general, the jury's verdict subsumes the trial court's pretrial ruling. A defendant may, however, seek review prior to trial under C.A.R. 21. *Wood v. People*, 255 P.3d 1136 (Colo. 2011).

Because this section creates an immunity defense as well as an affirmative defense, and because the burden of proof for each defense is different, when raised at trial, this section poses special problems when instructing a jury. In such a case, instruction based on language from *People v. McNeese*, which dealt with pretrial immunity, must be put into context so as not to confuse or mislead the jury about the burden of proof with respect to an affirmative defense raised at trial. *People v. Janes*, 982 P.2d 300 (Colo. 1999).

Defendant did not establish by a preponderance of the evidence that he was entitled to immunity under this section where he could not show the struggle and wounding of the victim took place in defendant's bedroom of the house he shared with the victim. *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Trial court did not commit reversible error by refusing to instruct the jury that it need only determine whether the victim made an unlawful entry into a part of a dwelling that was occupied by defendant, as defendant failed to show that the bedroom was exclusively his province and

that the victim's entry into the bedroom was unlawful. *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Instruction requiring jury to find that defendant had a reasonable belief that victim "had committed" a crime and omitting "was committing or intended to commit" a crime was erroneous but did not constitute plain error. There was no evidence that the victim's entry into defendant's house was unlawful and, therefore, no basis on which a reasonable jury could have otherwise acquitted defendant under this section. *People v. Phillips*, 91 P.3d 476 (Colo. App. 2004).

Jury instructions in error. Jury instruction that states that entry into a dwelling "must have been made in knowing violation of the law" could mislead the jury and thus is in error. Language is misleading in that it could be taken to mean that an intruder must know his or her conduct violates a criminal statute rather than that the intruder must not have a reasonable belief that his or her entry is licensed, invited, or otherwise privileged. *People v. Zukowski*, 260 P.3d 339 (Colo. App. 2010).

Jury instruction that states "[a]n entry made in the good faith belief that it is lawful, is not an entry made in knowing violation of the criminal law" allows an interpretation that the entry would not be unlawful under the make-my-day statute, and, thus, the instruction is also in error. An intruder may act under a mistaken belief of fact that he or she was lawfully on the premises

and that this type of entry would not be unlawful under the make-my-day statute. A mistaken belief that an entry, although uninvited, is lawful does not make it lawful. *People v. Zukowski*, 260 P.3d 339 (Colo. App. 2010).

Trial court erred in interpreting subsection (2) as including the concept of "remain lawfully" within the statutory phrase "unlawful entry". Defendant failed to establish the legal elements of this section to bar prosecution where the victim was initially invited into defendant's residence and, after arguing, was later asked to leave. *People v. Drennon*, 860 P.2d 589 (Colo. App. 1993).

The reference to "uninvited entry" in subsection (2) refers back to the term "unlawful entry" used in the same subsection. *People v. McNeese*, 892 P.2d 304 (Colo. 1995).

Victim's entry was unlawful and uninvited for the purposes of statute providing immunity for use of force where wife of murder victim did not have authority to invite the decedent into defendant's apartment and was staying with the defendant on the condition that she not invite the victim into defendant's apartment. *People v. McNeese*, 865 P.2d 881 (Colo. App. 1993).

When this section is being used as an affirmative defense, it is error for a jury instruction to place the burden on the defendant to prove the affirmative defense. *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

Applied in *People v. Arellano*, 743 P.2d 431 (Colo. 1987).

18-1-705. Use of physical force in defense of premises. A person in possession or control of any building, realty, or other premises, or a person who is licensed or privileged to be thereon, is justified in using reasonable and appropriate physical force upon another person when and to the extent that it is reasonably necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of an unlawful trespass by the other person in or upon the building, realty, or premises. However, he may use deadly force only in defense of himself or another as described in section 18-1-704, or when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit first degree arson.

Source: L. 71: R&RE, p. 409, § 1. C.R.S. 1963: § 40-1-805.

Cross references: For first degree arson, see § 18-4-102.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995).

Common-law doctrine of retreat not applicable. Where the jury was told that though the defendant was in his place of business, and was in no way the aggressor, a deadly and unprovoked assault was made upon him by one armed with a loaded pistol, he was under duty to flee unless it was more dangerous to retreat than to fight, it was held a pernicious application of the

common-law doctrine of retreat to the wall long since abrogated in this jurisdiction. *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919) (decided under R.S. 08, § 1634).

One cannot instantly kill in defense of property. While a man may use all reasonable and necessary force to defend his real and personal estate, of which he is in the actual possession, against another who comes to dispossess him without right, he cannot instantly carry his

defense to the extent of killing the aggressor. If no other way is open, he must yield and get himself righted by resort to the law. *Bush v. People*, 10 Colo. 566, 16 P. 290 (1887) (decided under G. S. § 721).

This section is not, by its terms, inapplicable to unlawful entries where the trespassers happen to be police officers. *People v. Lutz*, 762 P.2d 715 (Colo. App. 1988).

18-1-706. Use of physical force in defense of property. A person is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the other person to commit theft, criminal mischief, or criminal tampering involving property, but he may use deadly physical force under these circumstances only in defense of himself or another as described in section 18-1-704.

Source: L. 71: R&RE, p. 409, § 1. C.R.S. 1963: § 40-1-806.

Cross references: For theft, see part 4 of article 4 of this title; for criminal mischief, see § 18-4-501; for criminal tampering, see §§ 18-4-505 and 18-4-506.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995).

One cannot instantly kill in defense of property. While a man may use all reasonable and necessary force to defend his real and personal estate, of which he is in the actual possession, against another who comes to dispossess him without right, he cannot instantly carry his defense to the extent of killing the aggressor. If no other way is open, he must yield and get

himself righted by resort to the law. *Bush v. People*, 10 Colo. 566, 16 P. 290 (1887) (decided under G. S. § 721).

When instruction on defense appropriate. A defendant is entitled to a jury instruction on an affirmative defense only if evidence in the record supports it. Here record does not support entitlement to instruction. *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986).

18-1-707. Use of physical force in making an arrest or in preventing an escape.

(1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To effect an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon; or

(III) Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

(3) Nothing in subsection (2) (b) of this section shall be deemed to constitute justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

(4) For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody. A peace officer who is effecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subsections (1) and (2) of this section unless the warrant is invalid and is known by the officer to be invalid.

(5) Except as provided in subsection (6) of this section, a person who has been directed by a peace officer to assist him to effect an arrest or to prevent an escape from custody is justified in using reasonable and appropriate physical force when and to the extent that he reasonably believes that force to be necessary to carry out the peace officer's direction, unless he knows that the arrest or prospective arrest is not authorized.

(6) A person who has been directed to assist a peace officer under circumstances specified in subsection (5) of this section may use deadly physical force to effect an arrest or to prevent an escape only when:

(a) He reasonably believes that force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by the peace officer to use deadly physical force and does not know, if that happens to be the case, that the peace officer himself is not authorized to use deadly physical force under the circumstances.

(7) A private person acting on his own account is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest, or to prevent the escape from custody of an arrested person who has committed an offense in his presence; but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

(8) A guard or peace officer employed in a detention facility is justified:

(a) In using deadly physical force when he reasonably believes it necessary to prevent the escape of a prisoner convicted of, charged with, or held for a felony or confined under the maximum security rules of any detention facility as such facility is defined in subsection (9) of this section;

(b) In using reasonable and appropriate physical force, but not deadly physical force, in all other circumstances when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner from a detention facility.

(9) "Detention facility" as used in subsection (8) of this section means any place maintained for the confinement, pursuant to law, of persons charged with or convicted of an offense, held pursuant to the "Colorado Children's Code", held for extradition, or otherwise confined pursuant to an order of a court.

Source: L. 71: R&RE, p. 410, § 1. C.R.S. 1963: § 40-1-807. L. 75: (2)(b) R&RE, p. 616, § 2, effective July 21.

Cross references: For the "Colorado Children's Code", see title 19.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995). For article, "Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers", see 33 Colo. Law. 55 (March 2004). For article, "Police Use of Force Standards Under Colorado and Federal Law", see 36 Colo. Law. 47 (May 2007).

Annotator's note. Since § 18-1-707 is similar to former § 40-2-16, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Officer may use reasonable force to protect himself or detain offender. An officer who is making a lawful arrest, or has made an arrest, is

justified in using such force as is reasonably necessary to secure and detain the offender, overcome his resistance, prevent his escape, recapture him if he escapes, and to protect himself from bodily harm; but he is never justified in using unnecessary force or treating his prisoner with wanton violence, or in resorting to dangerous means when the arrest could be effected otherwise. *People ex rel. Little v. Hutchinson*, 9 F.2d 275 (8th Cir. 1925).

Officer cannot use excessive force in making an arrest or bringing one into submission. *McDaniel v. People*, 179 Colo. 153, 499 P.2d 613, cert. denied, 409 U.S. 1060, 93 S. Ct. 558, 34 L. Ed.2d 512 (1972).

Officer is not required to retreat. A police officer who is assaulted by one whom he is lawfully attempting to arrest is not required to retreat to the wall before resorting to such defensive measures as may reasonably seem necessary to protect himself against loss of life or great bodily injury. *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896).

Authority to take life based on apparent necessity. This section does not clothe an officer with authority to judge arbitrarily that it is necessary to take life in order to prevent the rescue of his prisoner. He is not warranted in taking life unless there is an apparent necessity for it and if he does so he is not permitted to take shelter behind his official character. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

Use of force is ordinarily a question for jury. An officer who intentionally uses more

force than is reasonably necessary in making an arrest is oppressively discharging the duties of his office. What amounts to reasonable force depends upon the facts of each particular case and is ordinarily a question of fact for the jury. *People ex rel. Little v. Hutchinson*, 9 F.2d 275 (8th Cir. 1925); *People v. Fuller*, 756 P.2d 390 (Colo. App. 1987), aff'd in part and rev'd in part on other grounds, 781 P.2d 647 (Colo. 1989).

The question of the absence or existence of the necessity to take the life of a prisoner is finally for the jury. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

Police officer's actions were not within section. Where complaining witness remarked that the police officer was "some kind of a pig" when the officer twice refused to tell the complaining witness why he was being arrested and the officer reacted by pulling his revolver on the complaining witness, the officer's actions were not within the statute authorizing the use of deadly physical force. *Johns v. District Court*, 192 Colo. 462, 561 P.2d 1 (1977).

Before a private person can use physical force to effect an arrest pursuant to subsection (7), the arrest must first be authorized under § 16-3-201. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

In addition, the person on whom physical force is used under subsection (7) must have either committed a crime in the presence of or attempted escape from custody in the presence of the person using the physical force. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

18-1-708. Duress. A person may not be convicted of an offense, other than a class 1 felony, based upon conduct in which he engaged at the direction of another person because of the use or threatened use of unlawful force upon him or upon another person, which force or threatened use thereof a reasonable person in his situation would have been unable to resist. This defense is not available when a person intentionally or recklessly places himself in a situation in which it is foreseeable that he will be subjected to such force or threatened use thereof. The choice of evils defense, provided in section 18-1-702, shall not be available to a defendant in addition to the defense of duress provided under this section unless separate facts exist which warrant its application.

Source: L. 71: R&RE, p. 411, § 1. C.R.S. 1963: § 40-1-808. L. 88: Entire section amended, p. 712, § 15, effective July 1.

ANNOTATION

Defense of choice of evils is very similar to duress and the foundation requirements set forth in the choice of evils statute was intended as a safeguard against abuse of the defense. *People v. Strock*, 623 P.2d 42 (Colo. 1981).

Defense available where imminent threat of use of unlawful force. Generally, where the threat of unlawful use of force is alleged, this defense is available only if the threat is one of present, impending, and imminent use of force,

and a threat of future injury is not enough. *People v. Maes*, 41 Colo. App. 75, 583 P.2d 942 (1978).

Defendant must show specific and imminent threat. The defense of duress is unavailable unless a defendant shows a specific and imminent threat of injury to his person under circumstances which leave him no reasonable alternative other than the violation of the law for which he stands charged; mere speculation that

injury may occur is not sufficient. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981); *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

A defendant must make a threshold showing of: (1) An immediate threat of death or bodily injury; (2) a well-grounded fear the threat will be carried out; and (3) no reasonable opportunity to escape the threatened harm. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002); *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

Any threat must be more than mere speculation or a veiled threat of unspecified future harm. *People v. Trujillo*, 586 P.2d 235 (Colo. App. 1978); *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

Prosecution to establish lack of duress. Because duress is an affirmative defense, the prosecution must establish, beyond a reasonable doubt, the defendant's guilt as to that issue. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

When an accused presents some credible evidence on the issue of duress, the prosecution must establish beyond a reasonable doubt the defendant's guilt as to that issue as well as all other elements of the offense. *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

Whether threat is imminent is question of fact. The question whether a threat is imminent is, in all but the clearest of cases, to be decided by the trier of fact after considering all of the surrounding circumstances, including the defendant's opportunity and ability to avoid the harm. *People v. Maes*, 41 Colo. App. 75, 583 P.2d 942 (1978); *People v. Speer*, 216 P.3d 18 (Colo. App. 2007).

Where defendant improperly denied opportunity to present evidence on issue. Where a defendant was allowed to testify only about the most recent of a series of events occurring over a five-month period, he was unreasonably deprived of the opportunity to detail the evidence that would lend credence to his affirmative defense under this section. *People v. Trujillo*, 41 Colo. App. 223, 586 P.2d 235 (1978).

18-1-709. Entrapment. The commission of acts which would otherwise constitute an offense is not criminal if the defendant engaged in the proscribed conduct because he was induced to do so by a law enforcement official or other person acting under his direction, seeking to obtain evidence for the purpose of prosecution, and the methods used to obtain that evidence were such as to create a substantial risk that the acts would be committed by a person who, but for such inducement, would not have conceived of or engaged in conduct of the sort induced. Merely affording a person an opportunity to commit an offense is not entrapment even though representations or inducements calculated to overcome the offender's fear of detection are used.

Where evidence goes to defendant credibility rather than submissibility of defense.

Where a defendant testifies that he was specifically threatened with injury to himself and to his family if he refused to hold contraband or if he reported the incident to the authorities, his failure to identify the person who threatened him goes to the credibility of the explanation, rather than to the submissibility of the defense to the jury. *People v. Maes*, 41 Colo. App. 75, 583 P.2d 942 (1978).

Defense not available to escapee unless he immediately reports duress, or choice of evils, which he faced to the proper authorities when a position of safety is reached. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

The trial court erred in allowing jury instruction on the affirmative defense of duress in a contract for murder case where a wife claiming that she suffered from battered woman syndrome hired her husband's killers. There was no evidence that the defendant acted at the direction of another person. Although this section did not require that person act at the direction of another person at the time of the murder, case law required such a condition to exist. *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1992).

No error in district court's rejection of defendant's proffered jury instruction concerning duress. Where it was undisputed that defendant had a gun and drove himself to the scene of the crime, the court found that there was no evidence from which a reasonable jury could conclude that defendant acted under duress. *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

The common-law theory that control by the husband is presumed was abolished by statute. The law of this state requires the coercion by the husband to be proved. *Dalton v. People*, 68 Colo. 44, 189 P. 37 (1920) (decided under R. S. 08, § 1616).

Applied in *People v. DeJesus*, 184 Colo. 230, 519 P.2d 944 (1974); *People v. Bailey*, 41 Colo. App. 385, 590 P.2d 508 (1978).

ANNOTATION

Law reviews. For article, "Criminal Law", which discusses a Tenth Circuit decision dealing with the entrapment defense, see 61 Den. L.J. 272 (1984). For article, "The Entrapment Defense in Colorado", see 40 Colo. Law. 47 (January 2011).

Entrapment may be asserted as an affirmative defense only to acts that would otherwise constitute an offense and is not applicable to sentencing provisions such as the sentence enhancing provisions of § 18-18-107, which merely impact the degree of punishment imposed. *Vega v. People*, 893 P.2d 107 (Colo. 1995).

The defense of entrapment has long been recognized in Colorado when the prosecution, through its agents, in fact, induces, instigates, and causes a criminal offense to be committed. *People v. Bucher*, 182 Colo. 211, 511 P.2d 895 (1973).

States are free to define defense of entrapment as they choose, since it is not of constitutional stature. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

This section is patterned upon § 40.05 of article 40 N.Y. Penal Law Consol. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

Detection of crime distinguished from entrapment. A suspected person may be tested by being offered the opportunity to transgress the law in such a manner as is usual in the activity alleged to be unlawful. However, law enforcement officers may not induce persons, who would not otherwise have committed the crime, to violate the law. The former is legitimate "detection" of crime. The latter is "entrapment" to commit the crime in which the officer's conduct instigates the offense, the commission of which was nonexistent in the mind of the intended victim of the entrapment. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

To prove entrapment, the defense must show that the prosecution played the primary role. *People v. Bucher*, 182 Colo. 211, 511 P.2d 895 (1973).

Test of entrapment focuses on defendant's conduct. In determining whether the affirmative defense of entrapment exists, the court focuses on the conduct of the defendant. An examination is made of the circumstances surrounding the sale to see whether the officers merely afforded the defendant the opportunity to commit the offense, or whether the defendant had been improperly induced to do something he otherwise would not have done. *People v. Williams*, 654 P.2d 319 (Colo. App. 1982).

Entrapment is a subjective test that focuses on a defendant's state of mind. This section does not set forth general standards for police conduct. Thus, evidence of federal drug enforcement agency's system for rewarding and pro-

moting agents was irrelevant to a narcotics case where entrapment issue was raised. *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993); *Vega v. People*, 893 P.2d 107 (Colo. 1995).

While police methods are relevant to the defense of entrapment, police motives are not relevant because they do not impact the subjective state of mind of the defendant. However, such motives may be relevant for the purpose of establishing bias in DEA agents' testimony. *Vega v. People*, 893 P.2d 107 (Colo. 1995).

This section codifies subjective test, as the defendant's predisposition to commit the crime, rather than the conduct of the government agent, remains the dispositive factor in determining whether entrapment has occurred. *People v. Sanchez*, 40 Colo. App. 552, 580 P.2d 1270 (1978); *People v. Bailey*, 41 Colo. App. 385, 590 P.2d 508 (1978), *aff'd*, 630 P.2d 1062 (Colo. 1981).

However, the carefully crafted requirements of the entrapment statute are swept aside by a jury instruction which selectively excerpted the statement from *Bailey v. People* (630 P.2d 1062 (Colo. 1981)) that "the defendant's predisposition to commit the crime, rather than the conduct of the [police, is] the dispositive factor.", because statements from opinions do not necessarily translate with clarity into jury instructions. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

This section creates a subjective test which is concerned with the state of mind of a particular defendant; it does not set general standards for police conduct. Thus, evidence of a law enforcement agency's internal reward system generally would not be relevant to whether a particular defendant was entrapped. *People v. Vega*, 870 P.2d 549 (Colo. App. 1993).

Section requires the defendant to admit committing the acts before being entitled to assert the defense of entrapment. The court did not err in refusing to give an instruction on the defense when the defendant denied committing the acts. *People v. Hendrickson*, 45 P.3d 786 (Colo. App. 2001); *People v. Grizzle*, 140 P.3d 224 (Colo. App. 2006).

Elements of the defense: (1) The defendant must be a person who, but for the offered inducement offered, would not have conceived of or engaged in conduct of the sort induced; (2) the defendant must in fact have engaged in the proscribed conduct because he was induced to do so by a law enforcement official or other person acting under his direction, seeking to obtain evidence for the purpose of prosecution, and not as a result of the defendant's own predisposition; (3) the methods used to obtain such evidence must have been such as to create a substantial risk that this particular defendant would engage in the sort of conduct induced;

and (4) the methods used must have been more persuasive than merely affording the defendant an opportunity to commit an offense, even when such an opportunity was coupled with representations or inducements calculated to overcome the defendant's fear of detection. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Predisposition and inducement are inextricably interwoven within the first three elements of the defense. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Existence of any predisposition on the part of the defendant must be determined first; then the extent of any such predisposition must be considered in relation to the character of the inducements to determine whether the second and third elements have been satisfied. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Prosecution must prove defendant not entrapped. The prosecution must prove beyond a reasonable doubt that the defendant was not entrapped. *People v. Williams*, 654 P.2d 319 (Colo. App. 1982).

Prosecution may rely solely on the defendant's predisposition only if they are able to prove that the defendant would have committed the crime even if the police had offered no inducement more persuasive than merely affording the defendant an opportunity to commit the crime. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

In reviewing the sufficiency of predisposition evidence, courts may rely upon evidence obtained after the government's initial contact with the defendant, so long as such evidence is relevant to the defendant's state of mind as it existed prior to the government's suggestion of the crime. *People v. Sprouse*, 983 P.2d 771 (Colo. 1999).

Intent to commit the crime must originate with the defendant. *People v. Walker*, 44 Colo. App. 249, 615 P.2d 57 (1980).

Entrapment operates where police originate criminal intent. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials, that is, only where the criminal design originates in the mind of the police officer and not with the accused. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969); *People v. Hankin*, 179 Colo. 70, 498 P.2d 1116 (1972).

One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of entrapment. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

Notwithstanding aim of capturing old offenders. When detectives suggest the commission of a crime and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to

capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked rather than encouraged by the courts. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

And not where officer merely supplies opportunity for crime. Defense of entrapment is not available where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969); *People v. Bailey*, 41 Colo. App. 385, 590 P.2d 508 (1978), *aff'd*, 630 P.2d 1062 (Colo. 1981).

The Colorado courts have drawn a strong distinction between the seduction by a government agent of an innocent person into doing an unlawful act not contemplated by him, and a government agent affording an opportunity to one who has the intent and design to commit a criminal offense to do so. The first situation affords a complete defense to one charged with a crime under those circumstances, but the second is a perfectly proper tool in the arsenal of law enforcement agents. *People v. Simmons*, 179 Colo. 431, 501 P.2d 119 (1972).

Entrapment does not occur when government agent merely offers person the opportunity to commit the offense. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

When an undercover police agent merely provides one with the opportunity to transgress the law, there is no entrapment. *People v. Ross*, 182 Colo. 267, 512 P.2d 1154 (1973).

There is no entrapment when the representations of a government agent merely afford an opportunity for the defendant to commit a criminal act in the belief that the representations were true. *People v. Adler*, 629 P.2d 569 (Colo. 1981).

There is no entrapment if the police agent merely furnishes an opportunity for the criminal act to one ready and willing to commit it. *People v. Walker*, 44 Colo. App. 249, 615 P.2d 57 (1980).

The plain wording of this section indicates that the defense of entrapment cannot be established in those cases where the police merely furnish the defendant with an opportunity to commit a crime. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

The mere use of an undercover agent does not prove that the prosecution induced the crime and thereby vitiated any subsequent conviction of the crime. *People v. Bucher*, 182 Colo. 211, 511 P.2d 895 (1973).

Question of fact. Where many of the elements of entrapment are in the record in a libel case, but on the issue of good faith and belief in the truth of the statements made there is at least a doubt, summary judgment should not be

granted. *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

Entrapment defense available where agent induced, instigated, and caused commission of offense. The defense of entrapment is available only where the defendant shows that law enforcement agents, in fact, induced, instigated, and caused a criminal offense to be committed. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

Entrapment not present simply because defendant initially approached victim with humanitarian intentions. When the defendant testified that although he approached the apparent drunk (decoy police officer) with humanitarian intentions, he later decided that if dead the drunk would have no further use of his money, the police agents provided only an opportunity for a thief who was ready and willing and thus entrapment was not present as a matter of law. *People v. Walker*, 44 Colo. App. 249, 615 P.2d 57 (1980).

Entrapment in narcotics cases. Where released narcotics suspect agrees to make arrangements for undercover police agents to purchase dangerous drugs, and where he notifies police that defendant has LSD for sale and arranges a meeting which results in defendant's selling LSD to police, entrapment is not established. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

Entrapment does not consist of mere act of making sale to person who has offered to purchase narcotics. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

Defense of entrapment is not intended to be escape hatch for those who mistakenly sell narcotics to police officer. When person who has narcotics for sale is ready, willing, and able to effect sale with no more than ordinary persua-

sion, he has not been entrapped and must suffer consequences for dispensing or selling narcotics. *People v. Lee*, 180 Colo. 376, 506 P.2d 136 (1973).

Encouragement by police informant for a defendant to import cocaine into this state did not amount to outrageous conduct. *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993).

Even if undercover police agent sought out drugs and asked defendant if she had any or knew where she could get some, this behavior did not constitute entrapment. *People v. Ross*, 182 Colo. 267, 512 P.2d 1154 (1973); *People v. Bailey*, 41 Colo. App. 385, 590 P.2d 508 (1978), *aff'd*, 630 P.2d 1062 (Colo. 1981).

Fourteenth amendment violated when a jury instruction could lead a jury to believe that it was enough for the prosecution to prove that the defendant has some predisposition to commit the crime. *Evans v. People*, 706 P.2d 795 (Colo. 1985).

Court did not err in refusing to instruct jury on entrapment as an affirmative defense. Since entrapment is an affirmative defense, it only applies if the defendant admits to committing the crime. In this case, the only contested issue was whether the substance was a controlled substance. Since defendant had to distribute a controlled substance to commit the crime, by disputing that the substance was a controlled substance, defendant did not admit to all elements of the crime. Thus, defendant was not entitled to an entrapment defense instruction. *People v. Santana*, 240 P.3d 302 (Colo. App. 2009), *rev'd on other grounds*, 255 P.3d 1126 (Colo. 2011).

Evidence held insufficient to establish entrapment. *People v. Simmons*, 179 Colo. 431, 501 P.2d 119 (1972).

18-1-710. Affirmative defense. The issues of justification or exemption from criminal liability under sections 18-1-701 to 18-1-709 are affirmative defenses.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-810.

Cross references: For the affirmative defense of impaired mental condition, see §§ 16-8-103.5 and 18-1-803; for other provisions concerning affirmative defenses generally, see §§ 18-1-407 and 18-1-805; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 to 18 of this title.

ANNOTATION

Law reviews. For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995).

If evidence is intended to show entrapment, it should be presented in defendant's case-in-chief, since entrapment is an affirmative defense. *People v. McKay*, 191 Colo. 381, 553 P.2d 380 (1976).

Heat of passion is not an affirmative defense to first-degree or second-degree murder

and no jury instruction regarding heat of passion needs to be given. *People v. Carrier*, 791 P.2d 1204 (Colo. App. 1989).

Applied in *Bailey v. People*, 630 P.2d 1062 (Colo. 1981); *People v. Rex*, 636 P.2d 1282 (Colo. App. 1981).

18-1-711. Immunity for persons who suffer or report an emergency drug or alcohol overdose event - definitions. (1) A person shall be immune from criminal prosecution for an offense described in subsection (3) of this section if:

(a) The person reports in good faith an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider;

(b) The person remains at the scene of the event until a law enforcement officer or an emergency medical responder arrives or the person remains at the facilities of the medical provider until a law enforcement officer arrives;

(c) The person identifies himself or herself to, and cooperates with, the law enforcement officer, emergency medical responder, or medical provider; and

(d) The offense arises from the same course of events from which the emergency drug or alcohol overdose event arose.

(2) The immunity described in subsection (1) of this section also extends to the person who suffered the emergency drug or alcohol overdose event if all of the conditions of subsection (1) are satisfied.

(3) The immunity described in subsection (1) of this section shall apply to the following criminal offenses:

(a) Unlawful possession of a controlled substance, as described in section 18-18-403.5 (2) (a) (I), (2) (b) (I), or (2) (c);

(b) Unlawful use of a controlled substance, as described in section 18-18-404;

(c) Unlawful possession of two ounces or less of marijuana, as described in section 18-18-406 (1); or more than two ounces of marijuana but no more than six ounces of marijuana, as described in section 18-18-406 (4) (a); or more than six ounces of marijuana but no more than twelve ounces of marijuana or three ounces or less of marijuana concentrate as described in section 18-18-406 (4) (b);

(d) Open and public display, consumption, or use of less than two ounces of marijuana as described in section 18-18-406 (3) (a) (I);

(e) Transferring or dispensing two ounces or less of marijuana from one person to another for no consideration, as described in section 18-18-406 (5);

(f) Use or possession of synthetic cannabinoids or salvia divinorum, as described in section 18-18-406.1;

(g) Possession of drug paraphernalia, as described in section 18-18-428; and

(h) Illegal possession or consumption of ethyl alcohol by an underage person, as described in section 18-13-122.

(4) Nothing in this section shall be interpreted to prohibit the prosecution of a person for an offense other than an offense listed in subsection (3) of this section or to limit the ability of a district attorney or a law enforcement officer to obtain or use evidence obtained from a report, recording, or any other statement provided pursuant to subsection (1) of this section to investigate and prosecute an offense other than an offense listed in subsection (3) of this section.

(5) As used in this section, unless the context otherwise requires, “emergency drug or alcohol overdose event” means an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, and that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.

Source: L. 2012: Entire section added, (SB 12-020), ch. 225, p. 986, § 2, effective May 29.

Cross references: For the legislative declaration in the 2012 act adding this section, see section 1 of chapter 225, Session Laws of Colorado 2012.

PART 8

RESPONSIBILITY

18-1-801. Insufficient age. The responsibility of a person for his conduct is the same for persons between the ages of ten and eighteen as it is for persons over eighteen except

to the extent that responsibility is modified by the provisions of the "Colorado Children's Code", title 19, C.R.S. No child under ten years of age shall be found guilty of any offense.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-901.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For comment, "Arrested Development: An Alternative to Juveniles Serving LIFE Without Parole in Colorado", see 78 U. Colo. L. Rev. 1059 (2007).

Annotator's note. Since § 18-1-801 is similar to former § 40-1-4, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

An infant is presumed incapable of committing crime because he is presumed not to possess criminal intent. Calkins v. Albi, 163 Colo. 370, 431 P.2d 17 (1967).

An infant under the age of 10 years shall not be found guilty of any offense. Gallegos v. Tinsley, 139 Colo. 157, 337 P.2d 386 (1959); LeCoq ex rel. LeCoq v. Klemme, 28 Colo. App. 590, 476 P.2d 280 (1970).

Although a child under the age of 10 cannot be charged with an offense, it does not necessarily follow that the child cannot violate the law. In enacting the statute, the general assembly determined those persons who could be held responsible for their criminal acts, not that such persons could not commit the acts. People v. Miller, 830 P.2d 1092, (Colo. App. 1991).

18-1-802. Insanity. (1) (a) A person who is insane, as defined in section 16-8-101, C.R.S., is not responsible for his or her conduct defined as criminal. Insanity as a defense shall not be an issue in any prosecution unless it is raised by a plea of not guilty by reason of insanity as provided in section 16-8-103, C.R.S.

(b) This subsection (1) applies to offenses committed before July 1, 1995.

(2) (a) A person who is insane, as defined in section 16-8-101.5, C.R.S., is not responsible for his or her conduct defined as criminal. Insanity as a defense shall not be an issue in any prosecution unless it is raised by a plea of not guilty by reason of insanity as provided in section 16-8-103, C.R.S.

(b) This subsection (2) shall apply to offenses occurring on or after July 1, 1995.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-902. L. 72: p. 268, § 7. L. 96: Entire section amended, p. 5, § 4, effective January 31.

Cross references: (1) For pleading the defense of insanity, see Crim. P. 11(e).

(2) For the legislative intent of the 1996 amendments to this section, see §16-8-101.3.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L.

Minor who is over 14 years of age is accountable for crimes committed by him. Gallegos v. Tinsley, 139 Colo. 157, 337 P.2d 386 (1959).

Though the children's code may not in so many words raise the age below which there can be no criminal responsibility as concerns a felony from 10 to 14 years, in effect, that is exactly what it did. People ex rel. Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967).

Incapacity is a defense. The incapacity of a party, by reason of his tender years, to commit the crime charged may be a good defense on the trial, as it may effectually negative the charge. Mitchell v. People, 24 Colo. 532, 52 P. 671 (1898).

Capacity is not required to be stated in the indictment, and its omission furnishes no ground for arresting the judgment after a verdict against the accused. Mitchell v. People, 24 Colo. 532, 52 P. 671 (1898).

This section is not relevant to a determination of liability for the commission of an intentional tort. LeCoq ex rel. LeCoq v. Klemme, 28 Colo. App. 590, 476 P.2d 280 (1970).

Applied in People v. Gallegos, 628 P.2d 999 (Colo. 1981).

Rev. 167 (1981). For article, "Trauma, Crime and the Affirmative Defense", see 11 Colo. Law.

2401 (1982). For article, "Checklists to Evaluate Vietnam Vet Stress Disorders", see 12 Colo. Law. 273 (1983).

Annotator's note. Since § 18-1-803 is similar to former § 40-1-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

By asserting insanity defense, defendant admits the act charged but denies criminal responsibility for the act. *Leick v. People*, 322 P.2d 674 (Colo.), cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed.2d 1366 (1958); *People v. Gilliland*, 769 P.2d 477 (Colo. 1989).

One insane when he commits act prohibited by law cannot be held guilty of a crime. A statute providing that insanity shall be no defense to a criminal charge would be unconstitutional. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

No matter how brutal a homicide may be, a person who is insane at the time of committing it cannot lawfully be convicted of murder, but if found guilty of committing the act must be confined in a state institution under the laws governing that institution. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934).

At commencement of the trial defendant is presumed to have been sane at the time of the alleged commission of the crime charged. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Accused must produce evidence raising reasonable doubt as to sanity. The killing being admitted or proven, an accused who relies upon the absence of sanity as a defense must produce evidence which will at least raise a reasonable doubt of its existence. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Burden is on the state to prove sanity. When the question of defendant's sanity is properly raised, the burden is upon the people to prove beyond a reasonable doubt that he was sane at the time he committed the act charged. If the evidence raises in the minds of the jury a reasonable doubt of defendant's sanity at the time of the commission of the crime charged, they must find him not guilty. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

The people are not required in the first instance to offer proof of sanity, sanity being presumed in the absence of evidence tending to show the contrary. But when evidence is introduced tending to show insanity, the people have the burden of proving beyond a reasonable doubt the sanity of the defendant. *Graham v. People*, 95 Colo. 544, 38 P.2d 87 (1934).

Every criminal defendant is presumed sane, but once any evidence of insanity is introduced at trial, the burden of proof is on the people to prove sanity beyond a reasonable doubt. *People v. Wright*, 648 P.2d 665 (Colo. 1982).

Question of reasonable doubt as to sanity is for jury. In a homicide case the question of

reasonable doubt as to defendant's sanity is for the jury, and its finding thereon, based on conflicting evidence, is not reviewable. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

The question of sanity in a criminal case is an issue of fact to be determined by the trier of fact. *People v. Wright*, 648 P.2d 665 (Colo. 1982).

Accused is entitled to have jury pass on question of his sanity. One accused of a crime is entitled to raise and have a jury pass upon the question of whether he was sane or insane when he committed the act with which he is charged. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Upon the trial for murder, evidence of the insanity of a grandfather and of an aunt of the defendant is competent to show hereditary insanity in the family and proper for the jury to consider with the other evidence in the case as an aid in passing upon the mental condition of the defendant at the time of the homicide. When such evidence has been introduced, an instruction the effect of which is to deprive the defendant of its benefit is erroneous. *Jones v. People*, 23 Colo. 276, 47 P. 275 (1896).

Where in the trial of an indictment there is evidence tending to show that the accused in committing the act was not mentally accountable, an instruction that withdraws this defense from the jury, or from which the jury may reasonably infer that in the opinion of the court this defense is not in the case, is error. *Pribble v. People*, 49 Colo. 210, 112 P. 220 (1910).

Defendant's status as a ward of the state was not conclusive evidence of insanity. It does not follow from a commitment to such an institution that one necessarily is incapable of forming an intent to commit a crime. *McConnell v. People*, 157 Colo. 235, 402 P.2d 75 (1965).

Defendant found sane in separate sanity hearing. The argument that the defendant was incapable of forming the requisite mens rea and, therefore, could not be criminally responsible for his acts, is unpersuasive where the defendant was found sane in a separate sanity hearing prior to trial, and no objection was raised as to the propriety of the proceedings. *Johnson v. People*, 174 Colo. 413, 484 P.2d 110 (1971).

Insanity adjudication results in a presumptive continuation of a state of mental incapacity until it is shown that sanity has been restored. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

Committed person not incapable of committing crime. An insanity adjudication represents a judicial determination that an accused is not legally responsible for a past criminal act by reason of a mental disease or defect which existed at the time the act was committed. It is simply not true, however, that an insanity adjudication renders a committed person legally incapable of committing future crimes during the period of commitment. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

Insanity is an affirmative defense to a crime. People v. Serravo, 823 P.2d 128 (Colo. 1992); People v. Hill, 934 P.2d 821 (Colo. 1997).

The “deific-decree” delusion is recognized in Colorado; a defendant may be judged legally insane if the defendant’s cognitive ability to distinguish right from wrong with respect to the

act has been destroyed as a result of a psychotic delusion that God has decreed the act. People v. Serravo, 823 P.2d 128 (Colo. 1992).

Applied in Gould v. People, 167 Colo. 113, 445 P.2d 580 (1968); People v. Gallegos, 628 P.2d 999 (Colo. 1981); People v. Chavez, 629 P.2d 1040 (Colo. 1981).

18-1-803. Impaired mental condition. (1) Evidence of an impaired mental condition, as defined in section 16-8-102 (2.7), C.R.S., though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form the culpable mental state which is an element of the offense charged.

(2) An intention to assert the affirmative defense of impaired mental condition shall be made pursuant to section 16-8-103.5, C.R.S.

(3) When the affirmative defense of impaired mental condition has been raised, the jury will be given special verdict forms containing interrogatories. The trier of fact shall decide first the question of guilt as to felony charges which are before the court. If the trier of fact concludes that guilt has been proven beyond a reasonable doubt as to one or more of the felony charges submitted for consideration, the special interrogatories shall not be answered. Upon completion of its deliberations on the felony charges as previously set forth in this subsection (3), the trier of fact shall consider any other charges before the court in a similar manner; except that it shall not answer the special interrogatories regarding such charges if it has previously found guilt beyond a reasonable doubt with respect to one or more felony charges. The interrogatories shall provide for specific findings of the jury with respect to the affirmative defense of impaired mental condition in accordance with the Colorado rules of criminal procedure. When the court sits as the trier of fact, it shall enter appropriate specific findings with respect to the affirmative defense of impaired mental condition. If the trier of fact finds that the defendant is not guilty by reason of the affirmative defense of impaired mental condition, the court shall commit the defendant to the department of human services pursuant to section 16-8-103.5 (5), C.R.S.

(4) This section shall apply to offenses committed before July 1, 1995.

Source: **L. 71:** R&RE, p. 412, § 1. **C.R.S. 1963:** § 40-1-903. **L. 83:** Entire section amended, p. 677, § 11, effective July 1. **L. 94:** (3) amended, p. 2654, § 136, effective July 1. **L. 96:** (4) added, p. 5, § 5, effective January 31.

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407 and 18-1-710; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 to 18 of this title.

(2) For the legislative declaration contained in the 1994 act amending subsection (3), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Law reviews. For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981). For article, “Trauma, Crime and the Affirmative Defense”, see 11 Colo. Law. 2401 (1982). For article, “Insanity Defense Reform”, see 11 Colo. Law. 3006 (1982). For article, “Checklists to Evaluate Vietnam Vet Stress Disorders”, see 12 Colo. Law. 273 (1983).

Limitation of defense to specific intent crimes constitutional. Former section which limited the affirmative defense of impaired mental condition to specific intent crimes was a reasonable exercise of legislative power and did

not infringe upon a defendant’s due process protections. People v. Morgan, 637 P.2d 338 (Colo. 1981).

Procedure for submitting defense of impaired mental condition to jury does not violate due process. This section does not prohibit the jury from considering the affirmative defense of impaired mental condition individually with respect to each charge, and instructions requiring such consideration are proper. People v. Collins, 752 P.2d 93 (Colo. 1988).

Former section was premised on the proposition that a mental disease or defect may be less than legal insanity but nonetheless sufficient

to negate the requisite mens rea of specific intent. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

No presumption of culpability nor derogation of due process rights. Former section neither created a presumption of culpability for general intent crimes nor derogated an accused's due process right to prosecutorial proof of guilt beyond a reasonable doubt. *People v. Gallegos*, 628 P.2d 999 (Colo. 1981).

General assembly may establish statutory constituents of criminal culpability. The constitutional mandate requiring the prosecution to establish all essential elements of a crime beyond a reasonable doubt does not impair the general assembly's competence to establish the statutory constituents of criminal culpability for various offenses and to formulate particular rules of justification or excuse for acts that otherwise might be criminally punishable. *People v. Ledman*, 622 P.2d 534 (Colo. 1981) (decided under former section).

Evidence not restricted to specific intent crimes. Former section did not restrict evidence of impaired mental condition to specific intent crimes. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

Mental impairment evidence is evidence of a mental disease or defect which affects the defendant's cognitive or volitional faculties to the point of rendering him incapable of entertaining the mens rea for the crime charged against him. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983); *People v. Aragon*, 653 P.2d 715 (Colo. 1982) (decided under former section).

Issue of responsibility due to an impaired mental condition is an affirmative defense. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Unless prosecution raises mental condition issue, defendant must present evidence. Un-

less the prosecution's evidence raises the issue involving the defendant's impaired mental condition, the defendant must present some credible evidence to raise it. *People v. Ledman*, 622 P.2d 534 (Colo. 1981) (decided under former section).

Former section did not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Once mental impairment is raised, prosecution must prove defendant's guilt beyond a reasonable doubt. Once the issue of the defendant's impaired mental condition is raised, the prosecution must prove beyond a reasonable doubt the guilt of the defendant as to that issue — the defendant's capacity to form the requisite intent — as well as all other elements of the offense. *People v. Ledman*, 622 P.2d 534 (Colo. 1981) (decided under former section).

Instruction on mental condition required if any evidence tends to establish impairment.

An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980) (decided under former section).

No affirmative defense to second degree murder. Under former section, the affirmative defense of diminished responsibility due to impaired mental condition was not an affirmative defense to the general intent crime of second degree murder. *People v. Gallegos*, 628 P.2d 999 (Colo. 1981).

Applied in *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Stitt*, 40 Colo. App. 355, 575 P.2d 446 (1978); *People v. Campbell*, 196 Colo. 390, 589 P.2d 1360 (1978); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Mann*, 646 P.2d 352 (Colo. 1982).

18-1-804. Intoxication. (1) Intoxication of the accused is not a defense to a criminal charge, except as provided in subsection (3) of this section, but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant when it is relevant to negate the existence of a specific intent if such intent is an element of the crime charged.

(2) Intoxication does not, in itself, constitute mental disease or defect within the meaning of section 18-1-802.

(3) A person is not criminally responsible for his conduct if, by reason of intoxication that is not self-induced at the time he acts, he lacks capacity to conform his conduct to the requirements of the law.

(4) "Intoxication", as used in this section means a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.

(5) "Self-induced intoxication" means intoxication caused by substances which the defendant knows or ought to know have the tendency to cause intoxication and which he

knowingly introduced or allowed to be introduced into his body, unless they were introduced pursuant to medical advice or under circumstances that would afford a defense to a charge of crime.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-904.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-1-804 is similar to former § 40-1-9, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is declaratory of the common law. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906); *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Involuntary intoxication and insanity are legally separate and distinct defenses with significantly distinct consequences. *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

The accountability of one who becomes drunk voluntarily is defined by this section. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Intoxication is not an excuse for crime. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906); *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970); *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

This section provides that drunkenness will not be an excuse for any crime where only the general intent is necessary for its commission. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Impaired mental state resulting from voluntary intoxication is not a defense to a general intent crime. *People v. Roark*, 643 P.2d 756 (Colo. 1982).

The mental culpability requirement of both second-degree kidnapping and first-degree sexual assault is "knowingly"; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

Voluntary intoxication may serve to establish an affirmative defense to specific intent crimes. *People v. Barnhart*, 638 P.2d 814 (Colo. App. 1981) (disapproved of by supreme court in *People v. Harlan*, 8 P.3d 448 (Colo. 2000)).

Voluntary intoxication does not constitute an affirmative defense. To the extent that prior decisions indicate otherwise, they are disapproved. *People v. Harlan*, 8 P.3d 448 (Colo. 2000); *People v. Lucas*, 232 P.3d 155 (Colo. App. 2009).

A criminal defendant who maintains his or her innocence at trial is not automatically

barred from seeking jury instructions for a voluntary intoxication defense. If an instruction is given in that case, there must be a rational basis for it in the evidence presented at trial. After a review of the record, there was no rational basis in the evidence for the voluntary intoxication instruction. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

Claim of innocence does not disentitle defendant to voluntary intoxication offense. The instruction, however, must be supported by evidence at trial. There was no error in failing to instruct the jury on voluntary intoxication because there was no evidence that defendant was intoxicated while committing the crime. Defendant's testimony that he passed out drunk would have made it physically impossible for him to commit the offense. *People v. Brown*, 218 P.3d 733 (Colo. App. 2009), *aff'd*, 239 P.3d 764 (Colo. 2010).

Subsection (1) is an evidentiary rule permitting the introduction of evidence of voluntary intoxication to negate the requisite specific intent of the charged offense. *People v. Harlan*, 8 P.3d 448 (Colo. 2000); *People v. Lucas*, 232 P.3d 155 (Colo. App. 2009).

"After deliberation" is part of the culpable mental state required by first degree murder and may be negated by evidence of voluntary intoxication. *People v. Miller*, 113 P.3d 743 (Colo. 2005).

Use of term "negate" instead of "negative" in jury instruction concerning voluntary intoxication and specific intent not erroneous. Although "negative" is the term contained in subsection (1), the two terms may be used interchangeably in this context. *People v. Souva*, 141 P.3d 845 (Colo. App. 2005).

Section applicable in analysis of "voluntary act". This section applies not only to the mental state of a defendant in general intent crimes but is also applicable in the analysis of a "voluntary act", as that phrase is used in the definition of criminal liability in § 18-1-502. *People v. Huskey*, 624 P.2d 899 (Colo. App. 1980).

Intoxication does not negate culpability element of "knowingly". Evidence of self-induced intoxication is not admissible to negate the culpability element of "knowingly". *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Breland*, 728 P.2d 763 (Colo. App. 1986).

Trial court did not err in instructing the jury that it should not consider evidence of

intoxication in determining whether the prosecution had proved the mental state of knowingly beyond a reasonable doubt. *People v. Vanrees*, 80 P.3d 840 (Colo. App. 2003), rev'd on other grounds, 125 P.3d 403 (Colo. 2005).

If evidence of intoxication is presented at trial and the jury is given an instruction on the effect of the evidence, the instruction must incorporate the complete provision in subsection (1) not just the first clause. *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004).

Consumption of heroin by an addict causes self-induced, not involuntary, intoxication. *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981).

Voluntary intoxication sufficient to support general intent for crime. One who voluntarily drinks himself into unconsciousness intends whatever the foreseeable consequences or inevitable results of such intoxication are, and that intent is sufficient to supply general intent for second degree murder. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Alcohol idiosyncratic intoxication not a defense to general intent crime because, although the result of the ingestion of alcohol may be more severe, the ingestion is still voluntary. *People v. Matthews*, 717 P.2d 970 (Colo. App. 1985).

"Settled insanity" arising from the long-term use of intoxicants cannot be maintained as a defense. The settled insanity doctrine conflicts with the state's statutory scheme regarding insanity and self-induced intoxication. *Bieber v. People*, 856 P.2d 811 (Colo. 1993), cert. denied, 510 U.S. 1054, 114 S. Ct. 716, 126 L. Ed.2d 680 (1994).

Voluntary intoxication not to be considered as a defense or mitigating factor to the crime of extreme indifference murder. Voluntary intoxication only a defense to specific intent crimes such as homicide with deliberation. Extreme indifference murder requires only that defendant have the general intent to act "knowingly". *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991); *People v. Harlan*, 8 P.3d 448 (Colo. 2000).

Or to any other crime having as an element the mental state of "knowingly" or "recklessly". *People v. Quintana*, 996 P.2d 146 (Colo. App. 1998).

It is admissible to show absence of specific intent. When a particular intent forms the gist of the offense, as distinguished from the intent necessarily entering into every crime, and is made to depend on the state and condition of the mind of the accused at the time with reference to acts committed, intoxication, as a fact affecting the control of the mind, is proper for the consideration of the jury in determining whether the accused was capable of entertaining the positive and particular intent requisite to make out the offense. *Brennan v. People*, 37 Colo. 256, 86 P.

79 (1906); *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Voluntary drunkenness is no legal excuse for a crime perpetrated under the influence of intoxicating liquor unless its effect is to destroy the ability of the accused to form a specific intent, the existence of which is an element of the offense charged. *Dolan v. People*, 168 Colo. 19, 449 P.2d 828 (1969).

Drunkenness can be considered only as bearing upon the ability of a defendant to form the intent necessary to commit the crime charged. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

The actor's intent is an element of the offense of escape and defendant is entitled to introduce evidence to the effect that he was too drunk to form the state of mind required for the commission of the offense. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

Under subsection (1), a defendant's voluntary intoxication may be evidence of his inability to entertain the specific intent required for conviction of second-degree murder. *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978).

And in homicide cases to show lesser offense. For the purposes of the defense in a trial for homicide, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the lesser and not the greater offense was in fact committed. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906).

It is only because of the specific intent required for first degree murder that a voluntary drunkenness is an excuse even for that crime. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Limitation on use of defense of voluntary intoxication. The policies adopted by the general assembly in refusing to permit a defense of voluntary intoxication in general intent crimes, defined in the criminal code, apply with equal force to general intent narcotics violation crimes, under part 3 of article 22, title 12. *People v. Harfmann*, 633 P.2d 500 (Colo. App. 1981).

Diminished responsibility due to self-induced intoxication is not a defense to murder in the second degree. *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006).

Self-induced intoxication involves moral culpability. Self-induced intoxication, by its very nature, involves a degree of moral culpability. The moral blameworthiness lies in the voluntary impairment of one's mental faculties with knowledge that the resulting condition is a source of potential danger to others. *Hendershott v. People*, 653 P.2d 385 (Colo.

1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

But involuntary intoxication does not. Involuntary intoxication, in contrast, is without moral culpability and, for this reason, is a complete defense to all crimes. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983); *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983).

Involuntary intoxication as an affirmative defense. Where the defendant presented evidence that he was unaware of the effect of ingesting excessive doses of a prescribed drug, it is reversible error not to submit that issue to the jury. *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983).

A person is involuntarily intoxicated when he or she takes a substance pursuant to medical advice and does not know that he or she is ingesting an intoxicant or ingests a substance which is not known to be an intoxicating substance. *People v. Low*, 732 P.2d 622 (Colo. 1987); *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

The medical condition of insulin-induced hypoglycemia may, depending on the particular facts and circumstances involved, constitute the affirmative defense of involuntary intoxication. *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

Evidence held not to show excuse within terms of this section. *Seiwald v. People*, 66 Colo. 332, 182 P. 20 (1919); *Nieto v. People*, 152 Colo. 526, 383 P.2d 321 (1963).

Evidence of addiction not sufficient to support a finding that defendant's drug use was involuntary, therefore defendant could not avail himself of the defense of involuntary intoxication. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

Question for jury. Where there was evidence tending to prove drunkenness, it was for the jury to determine whether the defendant was so intoxicated as to be unable to form the deliberate intent necessary. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

While intoxication may be relevant to a determination of whether the defendant did form or had the capacity to form the requisite specific intent, the issue of intoxication is one for the jury. *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976).

Jury decision on intoxication affirmed. Where the jury was properly instructed on specific intent and on defendant's affirmative defense of intoxication and where evidence is sufficient to support the jury's conclusion that defendant was not too intoxicated to form a

specific intent to commit a crime that decision must be affirmed. *People v. Barnhart*, 638 P.2d 814 (Colo. App. 1981).

In order to warrant submission of the defense of involuntary intoxication to the jury, the defendant must introduce some credible evidence of involuntary intoxication. *People v. Somerville*, 703 P.2d 615 (Colo. App. 1985).

Requested instructions covered by given instructions. There is no error in the refusal of the trial court to give a requested instruction as to drunkenness when the law therein contained is fully covered by the instructions given. *McPhee v. People*, 105 Colo. 539, 100 P.2d 148 (1940), distinguishing *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906).

Court may be required to give instruction. Under some circumstances, a court's failure to instruct sua sponte on intoxication may result in reversible error. *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

The district court committed reversible error in refusing to instruct the jury on defendant's affirmative defense of voluntary intoxication as allowed by this section in a prosecution of second-degree murder. *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977).

Trial court's failure to instruct the jury that voluntary intoxication may apply to sexual assault on a child does not constitute plain error for there is doubt whether the issue is yet settled. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

The trial court properly instructed the jury that "any mental illness suffered by defendant is not a defense in this case". Defendant's mental illness does not support the defense of involuntary intoxication since the defense of involuntary intoxication involves a temporary condition, and bipolar is not a temporary condition. Defendant's bipolar condition would have provided evidence for an insanity defense, but defendant did not plead insanity, which requires a special pleading. Therefore, the court properly instructed the jury that mental illness was not a defense in this case. *People v. Sommers*, 200 P.3d 1089 (Colo. App. 2008).

Applied in *People v. Norwood*, 37 Colo. App. 157, 547 P.2d 273 (1975); *People v. Lundborg*, 39 Colo. App. 498, 570 P.2d 1303 (1977); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Frysig* 628 P.2d 1004 (Colo. 1981); *People v. Brown*, 632 P.2d 1025 (Colo. 1981); *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. Bartowskeski*, 661 P.2d 235 (Colo. 1983); *People v. Rivers*, 727 P.2d 394 (Colo. App. 1986); *People v. Low*, 732 P.2d 622 (Colo. 1987).

18-1-805. Responsibility - affirmative defense. The issue of responsibility under sections 18-1-801 to 18-1-804 is an affirmative defense.

Source: L. 71: R&RE, p. 412, § 1. C.R.S. 1963: § 40-1-905.

Cross references: For other provisions concerning affirmative defenses generally, see §§ 18-1-407 and 18-1-710; for affirmative defenses to particular crimes, see specific criminal provisions in articles 2 to 18 of this title.

ANNOTATION

Law reviews. For article, "Trauma, Crime and the Affirmative Defense", see 11 Colo. Law. 2401 (1982). For article, "Checklists to Evaluate Vietnam Vet Stress Disorders", see 12 Colo. Law. 273 (1983).

628 P.2d 999 (Colo. 1981); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

Applied in *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977); *People v. Gallegos*,

PART 9

DEFINITIONS

18-1-901. Definitions. (1) Definitions set forth in any section of this title apply wherever the same term is used in the same sense in another section of this title unless the definition is specifically limited or the context indicates that it is inapplicable.

(2) The terms defined in section 18-1-104 and in section 18-1-501, as well as the terms defined in subsection (3) of this section, are terms which appear in various articles of this code. Other terms which need definition but which are used only in a limited number of sections of this code are defined in the particular section or article in which the terms appear.

(3) (a) "To aid" or "to assist" includes knowingly to give or lend money or extend credit to be used for, or to make possible or available, or to further the activity thus aided or assisted.

(b) "Benefit" means any gain or advantage to the beneficiary including any gain or advantage to another person pursuant to the desire or consent of the beneficiary.

(c) "Bodily injury" means physical pain, illness, or any impairment of physical or mental condition.

(d) "Deadly physical force" means force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death.

(e) "Deadly weapon" means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury:

(I) A firearm, whether loaded or unloaded;

(II) A knife;

(III) A bludgeon; or

(IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

(f) "Deface" means to alter the appearance of something by removing, distorting, adding to, or covering all or a part of the thing.

(g) "Dwelling" means a building which is used, intended to be used, or usually used by a person for habitation.

(h) "Firearm" means any handgun, automatic, revolver, pistol, rifle, shotgun, or other instrument or device capable or intended to be capable of discharging bullets, cartridges, or other explosive charges.

(i) "Government" includes the United States, any state, county, municipality, or other political unit, any branch, department, agency, or subdivision of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function.

(j) "Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of government.

(k) "Motor vehicle" includes any self-propelled device by which persons or property may be moved, carried, or transported from one place to another by land, water, or air,

except devices operated on rails, tracks, or cables fixed to the ground or supported by pylons, towers, or other structures.

(l) Repealed.

(m) "Pecuniary benefit" means benefit in the form of money, property, commercial interests, or anything else, the primary significance of which is economic gain.

(n) "Public place" means a place to which the public or a substantial number of the public has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, playgrounds, and the common areas of public and private buildings and facilities.

(o) "Public servant" means any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses.

(o.5) "Restorative justice practices" means practices that emphasize repairing the harm caused to victims and the community by offenses. Restorative justice practices include victim-initiated victim-offender conferences, family group conferences, circles, community conferences, and other similar victim-centered practices. Restorative justice practices are facilitated meetings attended voluntarily by the victim or victim's representatives, the victim's supporters, the offender, and the offender's supporters and may include community members. By engaging the parties to the offense in voluntary dialogue, restorative justice practices provide an opportunity for the offender to accept responsibility for the harm caused to the victim and community, promote victim healing, and enable the participants to agree on consequences to repair the harm, to the extent possible, including but not limited to apologies, community service, reparation, restoration, and counseling. Restorative justice practices may be used in addition to any other conditions, consequences, or sentence imposed by the court.

(p) "Serious bodily injury" means bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.

(q) "Tamper" means to interfere with something improperly, to meddle with it, or to make unwarranted alterations in its condition.

(r) "Thing of value" includes real property, tangible and intangible personal property, contract rights, choses in action, services, confidential information, medical records information, and any rights of use or enjoyment connected therewith.

(s) "Utility" means an enterprise which provides gas, sewer, electric, steam, water, transportation, or communication services, and includes any carrier, pipeline, transmitter, or source, whether publicly or privately owned or operated.

Source: **L. 71:** R&RE, p. 413, § 1. **C.R.S. 1963:** § 40-1-1001. **L. 73:** p. 534, § 1. **L. 75:** (3)(l) amended, p. 1315, § 8, effective July 14. **L. 77:** (3)(l) amended, p. 949, § 11, effective August 1. **L. 79:** (3)(l) amended, p. 1212, § 1, effective June 21; (3)(r) amended, p. 726, § 2, effective July 1; (3)(e) amended, p. 731, § 1, effective October 1. **L. 80:** (3)(l) amended, p. 531, § 1, effective January 29. **L. 81:** (3)(e) and (3)(l) amended, p. 972, §§ 2, 3, effective July 1. **L. 82:** (3)(l) amended, p. 384, § 2, effective April 30. **L. 84:** (3)(l) amended, p. 921, § 8, effective January 1, 1985. **L. 85:** (3)(p) amended, p. 664, § 1, effective March 1. **L. 86:** (3)(l) R&RE, p. 773, § 1, effective July 1; (3)(l)(III) amended, p. 1236, § 45, effective July 1. **L. 87:** (3)(l)(III) amended, p. 1489, § 1, effective April 30; (3)(l)(IV) amended, p. 817, § 20, effective October 1. **L. 88:** (3)(l)(II) and (3)(l)(IV) amended and (3)(l)(IV.5) added, pp. 664, 720, §§ 5, 1, effective July 1. **L. 89:** (3)(l)(II) and (3)(l)(III) amended, p. 888, § 1, effective April 6; (3)(l)(II) amended, p. 890, § 1, effective April 8. **L. 90:** (3)(l)(IV) and (3)(l)(IV.5)(C) amended, pp. 1613, 565, §§ 8, 38, effective July 1. **L. 91:** (3)(l)(III) amended, p. 1582, § 7, effective June 4; (3)(p) amended, p. 405, § 8, effective June 6. **L. 92:** (3)(l)(I), (3)(l)(II), and IP(3)(l)(IV.5) amended, p. 1097, § 6, effective March 6; (3)(l)(II) and (3)(l)(III) amended, p. 431, § 1, effective April 23. **L. 93:** (3)(l)(IV.5)(A) and (3)(l)(IV.5)(B) amended, p. 56, § 1, effective March 22; (3)(l)(II)(B) amended, p. 1776, § 38, effective June 6; (3)(l)(IV) amended, p. 1236, § 5, effective July 1. **L. 94:** (3)(l)(III) amended, p. 1731, § 11, effective May 31; (3)(l)(II)(A) amended, p.

1716, § 6, effective July 1; (3)(I)(IV) amended, p. 1311, § 11, effective July 1. **L. 95:** (3)(I)(II)(A) and (3)(I)(III) amended, p. 870, § 1, effective May 24; (3)(I)(III) amended, p. 109, § 1, effective July 1. **L. 96:** (3)(I)(III) and (3)(I)(IV) amended, p. 1004, § 10, effective May 23; (3)(I)(IV.5) and (3)(I)(V) amended and (3)(I)(IV.7) added, p. 1574, § 6, effective June 3; (3)(I)(IV) amended, p. 1691, § 24, effective January 1, 1997. **L. 97:** (3)(I)(III) amended, p. 301, § 12, effective July 1. **L. 98:** (3)(I)(III) amended, p. 1186, § 3, effective July 1. **L. 99:** (3)(I)(II)(A) and (3)(I)(III) amended, p. 424, § 4, effective April 30. **L. 2000:** (3)(I)(II)(A) amended, p. 42, § 1, effective March 10; (3)(I)(II)(A) amended, p. 230, § 4, effective March 29. **L. 2002:** (3)(I)(I) and (3)(I)(III) amended, p. 839, § 1, effective May 30; (3)(I)(II)(A) amended, p. 1212, § 8, effective June 3; (3)(I)(III) amended, p. 71, § 4, effective August 7; (3)(I)(III) amended, p. 1511, § 181, effective October 1. **L. 2003:** (3)(I) repealed, p. 1605, § 1, effective August 6. **L. 2011:** (3)(o.5) added, (HB 11-1032), ch. 296, p. 1402, § 6, effective August 10.

Editor's note: Amendments to subsection (3)(I)(II) in House Bill 89-1236 and Senate Bill 89-66 were harmonized. Amendments to subsection (3)(I)(II) in House Bill 92-1192 and House Bill 92-1276 were harmonized. Amendments to subsection (3)(I)(III) in House Bill 95-1087 and House Bill 95-1280 were harmonized. Amendments to subsection (3)(I)(IV) in Senate Bill 96-176 and House Bill 96-1005 were harmonized, effective January 1, 1997. Amendments to subsection (3)(I)(II)(A) in Senate Bill 00-077 and House Bill 00-1421 were harmonized. Amendments to subsection (3)(I)(III) by House Bill 02-1313, House Bill 02-1046, and Senate Bill 02-005 were harmonized.

Cross references: For the legislative declaration contained in the 1992 act amending subsections (3)(I)(I), (3)(I)(II), and IP(3)(I)(IV.5), see section 12 of chapter 167, Session Laws of Colorado 1992. For the legislative declaration contained in the 2002 act amending subsection (3)(I)(III), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986).

The term "serious bodily injury" is not facially unconstitutionally vague. Defendant's challenge that "serious bodily injury" included subjective undefined terms making it constitutionally infirm did not show the term was so vague that a person of ordinary intelligence must guess at its meaning and may differ as to its application. The term was also constitutional as applied to the defendant. *People v. Summitt*, 104 P.3d 232 (Colo. App. 2004), *aff'd* in part and *rev'd* in part on other grounds, 132 P.3d 320 (Colo. 2006).

The terms "serious bodily injury" and "bodily injury" do not suffer from an equal protection problem, because they only overlap if serious bodily injury is given an unreasonably broad interpretation. *People v. Summitt*, 104 P.3d 232 (Colo. App. 2004), *aff'd* in part and *rev'd* in part on other grounds, 132 P.3d 320 (Colo. 2006).

Applicability of definition "to aid". The general definition of "to aid" in subsection (3)(a) is applicable to the definition of professional gambling in § 18-10-102(8). *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

Deadly weapon. A knife is a deadly weapon, as is any weapon which is likely to produce death or great bodily injury from the manner in

which it is used. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Ordinarily hands or fists are not means likely to produce death unless used in such manner and under such circumstances as are reasonably calculated to produce death. *Smith v. People*, 142 Colo. 523, 351 P.2d 457 (1960).

A dangerous weapon is an article of offense which in its intended or easily adaptable use is likely to produce death or serious bodily injury. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

A simulated pistol, not per se dangerous, may become so factually because of its substance, size, and weight as a bludgeon wielded within striking distance of the person to be robbed. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

A quart bottle of whiskey is not a bludgeon but it may satisfy the statutory test defining a deadly weapon as a "device, instrument, material, or substance, ... which in the manner it is used ... is capable of producing death or serious bodily injury". *Bowers v. People*, 617 P.2d 560 (Colo. 1980).

Under the felony menacing statute an unloaded firearm is a deadly weapon. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980).

A fist may be considered a deadly weapon in circumstances where the manner of its use is capable of producing death or serious bodily injury. *People v. Pennese*, 830 P.2d 1085 (Colo.

App. 1991) (declining to follow *People v. Ross*, 819 P.2d 507 (Colo. App. 1991)).

Fists may be a deadly weapon if in the manner they are used or intended to be used they are capable of producing death or serious bodily injury. Defendant used his fist in a manner capable of producing death or serious bodily injury where defendant admitted striking the victim, as a result of the blow, the victim was admitted to a hospital and treated for major trauma, and the treating physician testified that the victim sustained multiple facial fractures and was at great risk of sustaining severe permanent damage. *People v. Ross*, 831 P.2d 1310 (Colo. 1992).

In some circumstances, fists may be considered a deadly weapon based on facts at issue, and statute that specifies that a deadly weapon may be any device, material, or substance which in the manner of its use is capable of producing death or serious bodily injury. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

BB gun can be a deadly weapon. Testimony that if a person hit with a BB in a vulnerable area of the body, such as the eyes, the BB could cause serious bodily injury was sufficient to prove that the BB gun was a deadly weapon. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

The issue in evaluating whether a device is a deadly weapon is whether, in the manner it was used, the device could have caused death or serious bodily injury. The fact that in this particular case death or serious bodily injury did not occur is irrelevant. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

To be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended opponent or adversary. *People v. Esparza-Treto*, __ P.3d __ (Colo. App. 2011).

Any object, including a foot, may be a deadly weapon when used to start an unbroken, foreseeable chain of events capable of producing serious bodily injury or death. The object does not have to be the direct cause of the injury. Where defendant kicked the victim in the back, causing her to fall down a flight of stairs, it was irrelevant that her injuries were caused by the stairs rather than the defendant's foot. The defendant's foot qualified as a deadly weapon because he used it to set in motion a sequence of events causing a serious bodily injury. *People v. Saleh*, 45 P.3d 1272 (Colo. 2002).

Where there is doubt as to whether an article is a deadly weapon, the question should be left to the jury under an instruction as to what constitutes a deadly weapon. *J.D.C. v. District Court 18th Jud. Dist.*, 910 P.2d 684 (Colo. 1996).

Question of whether automobile constitutes a deadly weapon in the context of the case is a factual question to be determined by a factfinder. *J.D.C. v. District Court 18th Jud. Dist.*, 910 P.2d 684 (Colo. 1996).

The intention to cause death or serious injury is not part of the definition of a deadly weapon; rather, this section requires only that in its actual or intended use the object is capable of producing death or serious injury. *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977).

Subsection (3)(e) prescribes test to determine whether certain items constitute deadly weapons. Subsection (3)(e) expressly prescribes a test to determine whether items other than firearms, knives, and bludgeons are deadly weapons, based not on the intrinsic nature of the items but upon their use or intended use. *Bowers v. People*, 617 P.2d 560 (Colo. 1980).

A knife is not a deadly weapon per se. A knife is only a deadly weapon when it is used or intended to be used during the commission of another crime. *People ex rel. J.W.T.*, 93 P.3d 580 (Colo. App. 2004).

Certain weapons deadly as matter of law. Certain weapons are by their very design and make so lethal in nature that a trial court should rule as a matter of law that they are deadly weapons. Other instruments or things, though perhaps not deadly weapons per se, are within the meaning of statutory provisions, depending upon the nature of the instrument and the manner in which the instrument or thing is used in accomplishing the assault. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

Otherwise, nature of weapon question for jury. Whether an article used as a weapon is dangerous may be, because of its very character or the circumstances of its use, a matter of doubt, and in such case the question should be left to the jury under an instruction as to what constitutes a dangerous weapon. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

The trial court did not err in generally instructing the jury that a shoe was not in and of itself a deadly or dangerous weapon, and that in determining whether an instrument, not inherently deadly or dangerous, assumes the characteristics of a deadly weapon the jury should consider the nature of the instrument or thing, the manner of its use, the location on the body of the injuries inflicted, and the extent of such injuries. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

There is an intent element in the consideration of "deadly" physical force. Since defendant's testimony created a dispute about whether he intended to produce death by use of force, defendant is entitled to self-defense instructions related to both ordinary physical force and deadly physical force. *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006).

“Dwelling” construed. The statutory definition of “dwelling” in this section comprehends an entire building. There is no room to exclude from the meaning of “dwelling” those parts of a residence that are not “usually used by a person for habitation”. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

A garage attached to a residence is part of a “dwelling” within the meaning of § 18-4-203 (2), burglary of a dwelling. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

“Dwelling” encompasses the entire residential structure, including an attached garage, within the meaning of § 18-4-502, first degree criminal trespass. *People v. Hanna*, 981 P.2d 627 (Colo. App. 1998).

“[C]apable or intended to be capable” modifies only “other instrument or device” and, therefore, under subsection (3)(h), a pistol, no matter what its condition, no matter what a defendant’s intent may be with respect to it, is a per se firearm. *People v. O’Neal*, 228 P.3d 211 (Colo. App. 2009).

Because subsection (3)(h) was enacted prior to § 2-4-214, the court must look to the rules of statutory construction in effect when subsection (3)(h) was enacted in 1971 and, therefore, it is appropriate to rely upon the last antecedent rule. *People v. O’Neal*, 228 P.3d 211 (Colo. App. 2009).

Under subsection (3)(h), handguns, automatics, revolvers, pistols, rifles, and shotguns qualify as per se firearms, without need of any further inquiry into whether they are capable or intended to be capable of discharging bullets, cartridges, or other explosive charges. *People v. O’Neal*, 228 P.3d 211 (Colo. App. 2009).

General definition of “government” in subsection (3)(i) is limited by subsection (1). *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

Government includes urban renewal effort. The general definition of “government” in subsection (3)(i) includes corporations such as the Colorado Springs urban renewal effort. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

Employee of the Colorado Springs urban renewal effort is not a “public servant” performing a “governmental function” on behalf of a “government” as defined in this section. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

And defendant cannot be convicted of bribing effort’s employee. A defendant cannot be convicted of the bribery of a public servant under § 18-8-302 where the alleged public servant was an employee of the Colorado Springs urban renewal effort. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

Difference between “serious bodily injury” and “bodily injury”. At least one difference between “serious bodily injury” and “bodily

injury” is that of degree. *People v. Benjamin*, 197 Colo. 188, 591 P.2d 89 (1979).

Serious bodily injury. “Substantial risk” applies only to death, and not to permanent disfigurement or protracted loss or impairment of any part or organ of the body. *People v. Sheldon*, 198 Colo. 519, 602 P.2d 869 (1979).

“Fractures” carries its common and ordinary meaning of “the breaking of hard tissue (as a bone, tooth, or cartilage)”. Thus, fractures include fractured cartilage under the definition of serious bodily injury. *People v. Jaramillo*, 183 P.3d 665 (Colo. App. 2008).

Any break or fracture is sufficient to establish “serious bodily injury”. The term “of the second or third degree” refers only to burns and not to breaks or fractures. *People v. Daniels*, 240 P.3d 409 (Colo. App. 2009).

“Protracted loss or impairment of the function of any part or organ of the body” is applied in *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Determination that injury falls within the meaning of “serious bodily injury” must be made at the time of injury, not at the time of trial. *People v. Thompson*, 748 P.2d 793 (Colo. 1988).

Whether injury at the time it occurred involved a substantial risk of protracted loss or impairment of the function of any part or organ of the body is a question for the jury. *People v. Thompson*, 748 P.2d 793 (Colo. 1988).

The fact that a victim healed well and made a good recovery is not relevant to the determination that he suffered a serious bodily injury. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Evidence sufficient to prove “serious bodily injury”. Gunshot wounds to the leg that involve substantial risk of disfigurement and infection and require surgery satisfy “serious bodily injury”. *People v. Whittiker*, 181 P.3d 264 (Colo. App. 2006).

Criminal code’s definition of “bodily injury” not applicable to term as used in automobile insurance policy. *Lampton v. United Servs. Auto. Ass’n*, 835 P.2d 532 (Colo. App. 1992).

Applied in *People v. Rice*, 37 Colo. App. 346, 551 P.2d 1081 (1976), rev’d on other grounds, 193 Colo. 270, 565 P.2d 940 (1977); *People v. Dominguez*, 193 Colo. 468, 568 P.2d 54 (1977); *People v. Hines*, 194 Colo. 331, 572 P.2d 467 (1977); *People v. Walters*, 39 Colo. App. 119, 568 P.2d 61 (1977); *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978); *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978); *People v. Bailey*, 41 Colo. App. 252, 595 P.2d 252 (1978); *People v. Brake*, 196 Colo. 575, 588 P.2d 869 (1979); *City & County of Denver v. Waits*, 197 Colo. 563, 595 P.2d 248 (1979); *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979); *People v. Noble*, 635 P.2d 203 (Colo.

1981); *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *Stroup v. People*, 656 P.2d 680 (Colo. 1982); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Reed*, 695 P.2d 806 (Colo. App.

1985), cert. denied, 701 P.2d 603 (Colo. 1985); *People v. Manley*, 707 P.2d 1021 (Colo. App. 1985); *People v. Tyler*, 728 P.2d 314 (Colo. 1986).

PART 10

ORDERS AND PROCEEDINGS AGAINST DEFENDANT

Law reviews: For article, “1994 Legislature Strengthens Domestic Violence Protective Orders”, see 23 Colo. Law. 2327 (1994); for article, “Dissolution of Marriage and Domestic Violence: Considerations for the Family Law Practitioner”, see 37 Colo. Law. 43 (October 2008).

18-1-1001. Protection order against defendant. (1) There is hereby created a mandatory protection order against any person charged with a violation of any of the provisions of this title, which order shall remain in effect from the time that the person is advised of his or her rights at arraignment or the person’s first appearance before the court and informed of such order until final disposition of the action. Such order shall restrain the person charged from harassing, molesting, intimidating, retaliating against, or tampering with any witness to or victim of the acts charged. The protection order issued pursuant to this section shall be on a standardized form prescribed by the judicial department and a copy shall be provided to the protected parties.

(2) At the time of arraignment or the person’s first appearance before the court, the court shall inform the defendant of the protection order effective pursuant to this section and shall inform the defendant that a violation of such order is punishable by contempt.

(3) Nothing in this section shall preclude the defendant from applying to the court at any time for modification or dismissal of the protection order issued pursuant to this section or the district attorney from applying to the court at any time for further orders, additional provisions under the protection order, or modification or dismissal of the same. The trial court shall retain jurisdiction to enforce, modify, or dismiss the protection order until final disposition of the action. Upon motion of the district attorney or on the court’s own motion for the protection of the alleged victim or witness, the court may, in cases involving domestic violence as defined in section 18-6-800.3 (1) and cases involving crimes listed in section 24-4.1-302, C.R.S., except those listed in paragraphs (cc.5) and (cc.6) of subsection (1) of that section, enter any of the following further orders against the defendant:

(a) An order to vacate or stay away from the home of the alleged victim or witness and to stay away from any other location where the victim or witness is likely to be found;

(b) An order to refrain from contact or direct or indirect communication with the alleged victim or witness;

(c) An order prohibiting possession or control of firearms or other weapons;

(d) An order prohibiting possession or consumption of alcohol or controlled substances; and

(e) Any other order the court deems appropriate to protect the safety of the alleged victim or witness.

(4) Any person failing to comply with a protection order issued pursuant to this section commits the crime of violation of a protection order and may be punished as provided in section 18-6-803.5.

(5) Before a defendant is released on bail pursuant to article 4 of title 16, C.R.S., the court shall, in cases involving domestic violence as defined in section 18-6-800.3 (1), or in cases of stalking pursuant to section 18-3-602, state the terms of the protection order issued pursuant to this section, including any additional provisions added pursuant to subsection (3) of this section, to the defendant on the record, and the court shall further require the defendant to acknowledge the protection order as a condition of any bond for the release of the defendant. The prosecuting attorney shall, in such domestic violence cases or stalking cases, notify the alleged victim, the complainant, and the protected person of the order if such persons are not present at the time the protection order is issued.

(6) The defendant or, in cases involving domestic violence as defined in section 18-6-800.3 (1), or in cases of stalking pursuant to section 18-3-602, the prosecuting attorney may request a hearing before the court to modify the terms of a protection order issued pursuant to this section. Upon such a request, the court shall set a hearing and the prosecuting attorney shall send notice of the hearing to the defendant and the alleged victim. At the hearing the court shall review the terms of the protection order and any further orders entered and shall consider the modifications, if any, requested by the defendant or the prosecuting attorney.

(7) The duties of peace officers enforcing orders issued pursuant to this section shall be in accordance with section 18-6-803.5 and any rules adopted by the Colorado supreme court pursuant to said section.

(8) For purposes of this section:

(a) “Court” means the trial court or a designee of the trial court.

(a.5) “Protection order” shall include a restraining order entered pursuant to this section prior to July 1, 2003.

(b) “Until final disposition of the action” means until the case is dismissed, until the defendant is acquitted, or until the defendant completes his or her sentence. Any defendant sentenced to probation or incarceration shall be deemed to have completed his or her sentence upon discharge from probation or incarceration, as the case may be.

Source: **L. 84:** Entire part added, p. 500, § 3, effective July 1. **L. 85:** (1) and (2) amended, p. 617, § 10, effective July 1. **L. 91:** Entire section amended, p. 419, § 3, effective May 31. **L. 94:** (1) and (3) amended, p. 2023, § 3, effective June 3; (3) amended and (5) and (6) added, p. 2041, § 24, effective July 1; (1) amended and (7) added, p. 2009, § 6, effective January 1, 1995. **L. 98:** (1) and IP(3) amended and (8) added, p. 1442, § 28, effective July 1. **L. 2003:** (1), (2), IP(3), (4), (5), and (6) amended and (8)(a.5) added, pp. 1002, 1003, §§ 4, 5, effective July 1. **L. 2011:** IP(3), (3)(a), (3)(b), and (3)(e) amended, (HB 11-1267), ch. 273, p. 1234, § 1, effective June 2. **L. 2012:** (5) and (6) amended, (HB 12-1114), ch. 176, p. 632, § 3, effective May 11.

Editor’s note: Amendments to subsection (1) in House Bill 94-1092 and House Bill 94-1090 were harmonized. Amendments to subsection (3) in House Bill 94-1092 and House Bill 94-1253 were harmonized.

Cross references: For protection orders against children under the “Colorado Children’s Code”, see § 19-2-707; for additional provisions concerning protection orders, see the “Colorado Victim and Witness Protection Act of 1984”, part 7 of article 8 of this title.

ANNOTATION

Classifying a violation of a criminal restraining order as a crime more serious than the offense of violating a domestic abuse restraining order does not violate equal protection of the laws. This section seeks to protect those who must present evidence in the criminal justice system while § 14-4-102 is designed to protect persons in a volatile domestic setting. *People v. Brockelman*, 862 P.2d 1040 (Colo. App. 1993).

Section 16-4-105 (1)(o) permits a court to designate persons to prepare information concerning the accused in order to assist the judge in deciding whether to order release on personal recognizance. Pursuant to this statutory

authority, the judges of the first judicial district authorized the pretrial service officers, as bond commissioners, to implement the bond schedule of the district. Although the bond schedule did not address temporary restraining orders specifically, in cases involving allegations of domestic violence, the pretrial service officers, acting as bond commissioners, were expected to deliver to the defendant a temporary restraining order pursuant to this section. The court concluded that, as a matter of law, these are judicial acts integral to the judicial process and therefore are cloaked in absolute quasi-judicial immunity. *Whitesel v. Sengenberger*, 222 F.3d 861 (10th Cir. 2000).

18-1-1002. Criminal contempt proceedings - notice to district attorney. Before a criminal contempt proceeding is heard before the court, notice of the proceedings shall be provided to the district attorney for the district of the court where the proceedings are to be

heard and the district attorney for the district of the court where the alleged act of criminal contempt occurred. The district attorney for either district shall be allowed to appear and argue for the imposition of contempt sanctions.

Source: L. 94: Entire section added, p. 1717, § 7, effective July 1.

ANNOTATION

District attorney need not be notified of criminal contempt hearing against father in arrears in child support. While the general assembly may limit jurisdiction, no statute will be held to limit court power unless the limitation is explicit in the statute. There was no prejudice to the party's substantial rights as the statute was enacted to protect state's interest in prosecution, not for the protection of fathers in arrears in

child support. In re Helmich, 937 P.2d 897 (Colo. App. 1997).

Prisoner incarcerated in county jail for punitive contempt is entitled to the benefit of earned good time credit. To the extent that the language of an order purports to limit "good time" credit, it is beyond the power of the court to do so. In re Helmich, 937 P.2d 897 (Colo. App. 1997).

PART 11

PRESERVATION OF DNA EVIDENCE

Editor's note: This part 11 was added in 2008 and was not amended prior to 2009. The substantive provisions of this part 11 were repealed and reenacted in 2009, resulting in the addition, relocation, and elimination of sections as well as subject matter. For the text of this part 11 prior to 2009, consult the 2008 Colorado Revised Statutes. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

18-1-1101. Definitions. As used in this part 11, unless the context otherwise requires:

(1) "Disposed of" means evidence is destroyed, thrown away, or returned to the owner or his or her designee.

(2) "DNA" means deoxyribonucleic acid.

(3) "DNA evidence" means all evidence collected by law enforcement in a criminal investigation, which evidence may be reasonably believed to contain DNA that is relevant to a disputed issue in the investigation and prosecution of the case.

(4) "DNA profile" means an identifier obtained as a result of a specific DNA analysis.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 97, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1101 as it existed prior to 2009.

18-1-1102. Scope. (1) The provisions of this part 11 shall apply to the preservation of DNA evidence only when:

(a) The investigation of a felony does not result in or has not resulted in charges being filed; or

(b) The filed charges resulted in a conviction for a class 1 felony or for a sex offense that carries an indeterminate sentence pursuant to section 18-1.3-1004; or

(c) The filed charges resulted in a conviction for a felony not covered by paragraph (b) of this subsection (1); or

(d) The filed charges resulted in a conviction for any offense not covered by paragraphs (b) and (c) of this subsection (1), and at least one of the charges filed involved a sex offense as defined in section 18-1.3-1003 (5).

(2) For purposes of subsection (1) of this section, conviction shall include a verdict of guilty by a judge or jury, a plea of guilty or nolo contendere, or a deferred judgment and sentence. For purposes of paragraph (d) of subsection (1) of this section, conviction shall also include a juvenile delinquent adjudication or deferred adjudication.

(3) This part 11 does not impose a statutory duty to retain or store evidence other than in the situations described in this section.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 97, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1102 as it existed prior to 2009.

18-1-1103. Duty to preserve DNA evidence. (1) A law enforcement agency that collects DNA evidence in conducting a criminal investigation of a felony that does not result in or has not resulted in charges being filed shall preserve the DNA evidence for the length of the statute of limitations for the felony crime that was investigated.

(2) Except as provided in sections 18-1-1105 to 18-1-1107, a law enforcement agency that collects DNA evidence in conducting a criminal investigation that results in a conviction listed in section 18-1-1102 (1) shall preserve the DNA evidence for the life of the defendant who is convicted.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 98, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1102 as it existed prior to 2009.

18-1-1104. Manner and location of preservation of DNA evidence. (1) When DNA evidence that is subject to preservation pursuant to section 18-1-1103 is processed for the development of a DNA profile, the DNA profile shall be preserved by the accredited laboratory in Colorado that develops the DNA profile. If the DNA profile is not developed by an accredited laboratory in Colorado, the laboratory that processes the DNA profile shall send the DNA profile to an accredited laboratory in Colorado for preservation.

(2) A law enforcement agency that has custody of DNA evidence that is subject to preservation pursuant to section 18-1-1103 shall preserve the evidence in an amount and manner sufficient to develop a DNA profile, based on the best scientific practices at the time of collection, from the biological material contained in or included on the evidence. If DNA evidence is of such a size, bulk, or physical character as to render retention impracticable, the law enforcement agency shall remove and preserve portions of the evidence likely to contain DNA related to the offense in a quantity sufficient, based on the best scientific practices at the time of collection, to permit future DNA testing. The preserved DNA evidence shall, whenever possible, include a sample sufficient to allow for independent testing by the defendant. After preserving the necessary amount of the DNA evidence, the law enforcement agency may dispose of the remainder of the evidence.

(3) If a law enforcement agency is asked to produce DNA evidence that is subject to preservation pursuant to section 18-1-1103 and cannot produce the evidence, the chief evidence custodian for the law enforcement agency shall provide an affidavit in which he or she describes, under penalty of perjury, the efforts taken to locate the DNA evidence and affirms that the DNA evidence could not be located.

(4) If upon request a law enforcement agency cannot produce DNA evidence that is subject to preservation pursuant to section 18-1-1103, the court shall determine whether the disposal of the DNA evidence violated the defendant's due process rights, and, if so, the court shall order an appropriate remedy.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 98, § 1, effective March 18.

Editor's note: This section is similar to former § 18-1-1102 as it existed prior to 2009.

18-1-1105. Law enforcement agency request for permission to dispose of evidence - procedures. (1) A law enforcement agency may not request permission to dispose of DNA evidence in cases described in section 18-1-1102 (1) (a) and (1) (b).

(2) In cases described in section 18-1-1102 (1) (c) and (1) (d), a law enforcement agency may seek to dispose of DNA evidence by providing notice, in the form developed pursuant to section 18-1-1108, to the district attorney that prosecuted the charges arising out of the investigation.

(3) Upon receipt of the notice described in subsection (2) of this section, the district attorney shall determine whether to object to the disposal of the DNA evidence. The district attorney may determine that a portion of the DNA evidence may be disposed of and a portion of the DNA evidence shall be preserved.

(4) (a) If the district attorney determines that the DNA evidence should not be disposed of, the district attorney shall provide notice to the law enforcement agency that the DNA evidence shall be preserved. Upon the receipt of the notice from the district attorney to preserve the DNA evidence, the law enforcement agency shall preserve the DNA evidence until such time as the law enforcement agency is permitted by a court order to dispose of the DNA evidence.

(b) (I) If the district attorney determines that all or a portion of the DNA evidence may be disposed of, he or she shall send notice to the defendant and the law enforcement agency specifying which DNA evidence may be disposed of. Notice to the defendant shall include a copy of the notice form prepared by the law enforcement agency pursuant to subsection (2) of this section.

(II) The defendant shall have ninety-eight days from the date the notice was sent by the district attorney to file a motion to preserve DNA evidence in the court in which the defendant was convicted. The motion shall state specific grounds supporting the preservation of the DNA evidence, and the defendant shall provide copies of the motion to the district attorney and the law enforcement agency.

(III) If no motion is filed within the ninety-eight-day period, the district attorney or the law enforcement agency requesting disposal of the evidence shall file with the court a copy of the notice sent to the defendant pursuant to subparagraph (I) of this paragraph (b), and the court shall forthwith, without hearing, enter an order authorizing disposal of the DNA evidence and provide copies of the order to the defendant, district attorney, and law enforcement agency.

(IV) If the defendant files a motion, the court shall follow the procedure set forth in subsection (6) of this section.

(c) (I) If the law enforcement agency does not receive notice from the district attorney as described in paragraph (a) or (b) of this subsection (4) within a reasonable amount of time or does receive timely notice from the district attorney pursuant to paragraph (a) of this subsection (4), the law enforcement agency may file a motion with the court that entered the conviction in the case in which the evidence was collected, asking for a court order to dispose of the DNA evidence. The motion shall include a copy of the notice the law enforcement agency provided to the district attorney. The law enforcement agency shall provide a copy of the disposal motion to the district attorney and the defendant contemporaneously with the filing of the motion. The law enforcement agency shall specify the DNA evidence for which disposal is requested in the motion.

(II) The defendant or the district attorney shall have ninety-eight days after the disposal motion is sent to file an objection in the court in which the disposal motion was filed. The objection shall state specific grounds supporting the preservation of the DNA evidence. If the district attorney files an objection, the district attorney shall provide copies of the objection to the defendant and the law enforcement agency. If the defendant files an objection, the defendant shall provide copies of the objection to the district attorney and the law enforcement agency.

(5) The defendant, through legal counsel, shall have a reasonable right to review the DNA evidence to prepare the filing of a timely objection to the disposal motion or the district attorney's notice received pursuant to paragraph (b) of subsection (4) of this section.

(6) (a) Upon receipt pursuant to subparagraph (II) of paragraph (c) of subsection (4) of this section of a timely filed objection, the court may deny the objection without a hearing if it finds on the face of the objection no grounds supporting the request to preserve the DNA evidence. The court shall then enter an order authorizing disposal of the DNA

evidence and provide copies of the order to the defendant, district attorney, and law enforcement agency.

(b) If the court determines that a timely filed objection or motion to preserve states adequate grounds to require preservation of the DNA evidence, the court may set a hearing on the objection or motion to preserve, with notice to the district attorney, the law enforcement agency, and the defendant, or the court may deny the disposal motion without a hearing.

(c) In considering an objection or motion to preserve pursuant to this subsection (6), the court shall consider the following factors in determining whether to order preservation of the DNA evidence:

- (I) Whether identification was a disputed issue;
- (II) Whether the evidence contains known DNA;
- (III) Whether it is possible to perform DNA testing on the evidence that has not previously been performed;
- (IV) Whether the defendant has served all of his or her sentence; and
- (V) Whether the defendant has state appellate or collateral attack rights that have not been exhausted, in which case there shall be a presumption that the DNA evidence should be preserved.

(d) Following a hearing on a disposal motion or motion to preserve, the court shall enter an order either authorizing disposal of the DNA evidence or ordering the DNA evidence to be preserved. If the court orders preservation, the order may state the length of time the DNA evidence shall be preserved or establish a condition precedent for the disposition of the DNA evidence.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 99, § 1, effective March 18. L. 2012: (4)(b)(II), (4)(b)(III), and (4)(c)(II) amended, (SB 12-175), ch. 208, p. 863, § 104, effective July 1.

Editor's note: (1) This section is similar to former § 18-1-1103 as it existed prior to 2009.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (4)(b)(II), (4)(b)(III), and (4)(c)(II) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

18-1-1106. Defendant request for disposition of or waiver of preservation of DNA evidence - procedures. (1) In a case described in section 18-1-1102 (1), a defendant may petition the court on his or her own behalf for the disposal of DNA evidence in his or her case. The defendant shall provide a copy of the petition to the district attorney, who may join with or object to the defendant's petition. Upon the filing of the petition, the timing and procedures of section 18-1-1105 shall apply. By filing a petition for disposition of DNA evidence, the defendant waives any right to preservation of that evidence under this part 11. However, a defendant may not be compelled to file a motion under this section in order to obtain a plea or sentence agreement.

(2) In a case described in section 18-1-1102 (1), a defendant may waive his or her right to preservation of DNA evidence under this part 11 at any stage of the proceeding by making a knowing and voluntary waiver. A waiver executed as a part of a plea bargain or sentencing agreement shall be voluntarily agreed to by all parties and shall include a written list describing all evidence to be disposed of.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 101, § 1, effective March 18.

18-1-1107. Victim request for disposition of DNA evidence - procedures. In a case described in section 18-1-1102 (1), if DNA evidence is being held that is the property of the victim, as defined in section 24-4.1-302 (5), C.R.S., of the crime, the victim may request the district attorney to review whether the DNA evidence may be returned. If the district attorney determines the DNA evidence may be returned, the district attorney may file a

petition with the court for the return of the DNA evidence. The district attorney shall provide notice to the defendant of the petition. Upon the filing of the petition, the timing and procedures of section 18-1-1105 shall apply.

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 102, § 1, effective March 18.

18-1-1108. Notice - form and sufficiency. (1) Notice to the defendant as required by this part 11 shall be proper if it is sent by United States mail or hand-delivered to the attorney of record for the defendant as defined in rule 44 of the Colorado rules of criminal procedure. If there is no attorney of record, notice to the defendant shall be proper if it is sent by United States mail to the last-known address of the defendant as reflected in the current motor vehicle records or, if no such record exists, the last-known address in the court file. Prior to sending notice by United States mail, however, the district attorney shall first review the department of corrections records to determine whether the defendant is in the physical custody of the department of corrections or on parole. If the defendant is in the physical custody of the department of corrections or on parole, the district attorney shall send notice by United States mail to the correctional facility in which, according to the department's records, the defendant is housed or to the address to which the defendant has been paroled. If the letter is returned because the defendant has been transferred to a different correctional facility, the district attorney shall send notice to the new facility in which the defendant is housed.

(2) The department of public safety, in consultation with state and local law enforcement agencies, shall develop a form to be used by all law enforcement agencies for providing notice to the district attorney and the defendant as described in section 18-1-1105 (2).

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 102, § 1, effective March 18.

18-1-1109. Court data collection - DNA evidence cases - repeal. (Repealed)

Source: L. 2009: Entire part R&RE, (HB 09-1121), ch. 20, p. 102, § 1, effective March 18.

Editor's note: (1) This section was similar to former § 18-1-1104 as it existed prior to 2009.

(2) Subsection (4) provided for the repeal of this section, effective July 1, 2010. (See L. 2009, p. 102.)

ARTICLE 1.3

Sentencing in Criminal Cases

Editor's note: (1) This article was added with relocations in 2002 containing provisions of some sections formerly located in title 16. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

(2) Amendments made by House Bills 02-1141, 02-1223, 02-1225, 02-1229, 02-1258, and 02-1352 and Senate Bills 02-010, 02-018, 02-019, 02-036, and 02-057 to sections containing criminal sentencing provisions have been harmonized with the provisions of this article pursuant to section 398 of House Bill 02-1046. See the former sections as contained in titles 16, 17, and 18 of the 2001 Colorado Revised Statutes. See the comparative table located in the back of the index.

Cross references: For the legislative declaration contained in the 2002 act enacting this article, see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 1			community corrections programs.
ALTERNATIVES IN SENTENCING		18-1.3-302.	Legislative declaration - offenders who may be sentenced to the specialized restitution and community service program.
18-1.3-101.	Deferred prosecution.		
18-1.3-102.	Deferred sentencing of defendant.		
18-1.3-103.	Deferred sentencing - drug offenders - legislative declaration - demonstration program - repeal. (Repealed)		PART 4
18-1.3-104.	Alternatives in imposition of sentence.	18-1.3-401.	Felonies classified - presumptive penalties.
18-1.3-105.	Authority of sentencing courts to utilize home detention programs.	18-1.3-402.	Felony offenses not classified.
18-1.3-106.	County jail sentencing alternatives - work, educational, and medical release - home detention - day reporting.	18-1.3-403.	Penalty for felony not fixed by statute - punishment.
PART 2		18-1.3-404.	Duration of sentences for felonies.
PROBATION		18-1.3-405.	Credit for presentence confinement.
18-1.3-201.	Application for probation.	18-1.3-406.	Mandatory sentences for violent crimes.
18-1.3-202.	Probationary power of court.	18-1.3-407.	Sentences - youthful offenders - legislative declaration - powers and duties of district court - authorization for youthful offender system - powers and duties of department of corrections - definitions.
18-1.3-203.	Criteria for granting probation.		
18-1.3-204.	Conditions of probation - interstate compact probation transfer cash fund - creation.	18-1.3-407.5.	Sentences - young adult offenders - youthful offender system - repeal. (Repealed)
18-1.3-205.	Restitution as a condition of probation.	18-1.3-408.	Determinate sentence of imprisonment imposed by court.
18-1.3-206.	Repayment of crime stopper reward as a condition of probation.		
18-1.3-207.	Work and education release programs.		PART 5
18-1.3-208.	Intensive supervision probation programs - legislative declaration.		MISDEMEANOR AND PETTY OFFENSE SENTENCING
18-1.3-209.	Substance abuse assessment required.	18-1.3-501.	Misdemeanors classified - penalties.
18-1.3-210.	Counseling or treatment for alcohol or drug abuse.	18-1.3-502.	Duration of sentences for misdemeanors.
18-1.3-211.	Sentencing of felons - parole of felons - treatment and testing based upon assessment required.	18-1.3-503.	Petty offenses classified - penalties.
18-1.3-212.	Drug testing of offenders by judicial department - pilot program.	18-1.3-504.	Misdemeanors and petty offenses not classified.
PART 3		18-1.3-505.	Penalty for misdemeanor not fixed by statute - punishment.
COMMUNITY CORRECTIONS AND SPECIALIZED RESTITUTION AND COMMUNITY SERVICE PROGRAMS		18-1.3-506.	Payment and collection of fines for class 1, 2, or 3 misdemeanors and class 1 or 2 petty offenses - release from incarceration.
18-1.3-301.	Authority to place offenders in	18-1.3-507.	Community or useful public service - misdemeanors.
		18-1.3-508.	Definite sentence not void.
		18-1.3-509.	Credit for time served on misdemeanor sentences.

PART 6

RESTITUTION

- 18-1.3-601. Legislative declaration.
- 18-1.3-602. Definitions.
- 18-1.3-603. Assessment of restitution - corrective orders.

PART 7

FINES AND COSTS

- 18-1.3-701. Judgment for costs and fines.
- 18-1.3-702. Fines - methods of payment.

PART 8

SPECIAL PROCEEDINGS -
SENTENCING OF
HABITUAL CRIMINALS

- 18-1.3-801. Punishment for habitual criminals.
- 18-1.3-802. Evidence of former convictions - identity.
- 18-1.3-803. Verdict of jury.
- 18-1.3-804. Habitual burglary offenders - punishment - legislative declaration.

PART 9

SENTENCING OF
SEX OFFENDERS

- 18-1.3-901. Short title.
- 18-1.3-902. Applicability of part.
- 18-1.3-903. Definitions.
- 18-1.3-904. Indeterminate commitment.
- 18-1.3-905. Requirements before acceptance of a plea of guilty.
- 18-1.3-906. Commencement of proceedings.
- 18-1.3-907. Defendant to be advised of rights.
- 18-1.3-908. Psychiatric examination and report.
- 18-1.3-909. Report of probation department.
- 18-1.3-910. Termination of proceedings.
- 18-1.3-911. Evidentiary hearing.
- 18-1.3-912. Findings of fact and conclusions of law.
- 18-1.3-913. Appeal.
- 18-1.3-914. Time allowed on sentence.
- 18-1.3-915. Costs.
- 18-1.3-916. Diagnostic center as receiving center.

PART 10

LIFETIME SUPERVISION
OF SEX OFFENDERS

- 18-1.3-1001. Legislative declaration.
- 18-1.3-1002. Short title.
- 18-1.3-1003. Definitions.
- 18-1.3-1004. Indeterminate sentence.
- 18-1.3-1005. Parole - intensive supervision program.
- 18-1.3-1006. Release from incarceration - parole - conditions.
- 18-1.3-1007. Probation - intensive supervision program.
- 18-1.3-1008. Probation - conditions - release.
- 18-1.3-1009. Criteria for release from incarceration, reduction in supervision, and discharge.
- 18-1.3-1010. Arrest of parolee or probationer - revocation.
- 18-1.3-1011. Annual report.
- 18-1.3-1012. Applicability of part.

PART 11

SPECIAL PROCEEDINGS - PRETRIAL
MOTIONS IN CLASS 1 FELONY
CASES ALLEGING THAT A
DEFENDANT IS A MENTALLY
RETARDED DEFENDANT

- 18-1.3-1101. Definitions.
- 18-1.3-1102. Pretrial motion by defendant in class 1 felony case - determination whether defendant is mentally retarded - procedure.
- 18-1.3-1103. Mentally retarded defendant - death penalty not imposed thereon.
- 18-1.3-1104. Evaluation and report.
- 18-1.3-1105. Evaluation at insistence of defendant.

PART 12

SPECIAL PROCEEDINGS -
SENTENCING IN
CLASS 1 FELONIES

- 18-1.3-1201. Imposition of sentence in class 1 felonies - appellate review.
- 18-1.3-1202. Death penalty inflicted by lethal injection.
- 18-1.3-1203. Genetic testing prior to execution.
- 18-1.3-1204. Implements - sentence executed by executive director.
- 18-1.3-1205. Week of execution - warrant.
- 18-1.3-1206. Execution - witnesses.
- 18-1.3-1207. Record and certificate of execution.

PART 13		PART 14	
SPECIAL PROCEEDINGS - APPLICABILITY OF PROCEDURE IN CLASS 1 FELONY CASES FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1988, AND PRIOR TO SEPTEMBER 20, 1991		COMPETENCY OF PERSONS TO BE EXECUTED	
18-1.3-1301.	Applicability of procedure for the imposition of sentences in class 1 felony cases.	18-1.3-1401.	Definitions.
18-1.3-1302.	Imposition of sentences in class 1 felonies for crimes committed on or after July 1, 1988, and prior to September 20, 1991 - appellate review.	18-1.3-1402.	Mental competency to be executed - presumptions.
		18-1.3-1403.	Mental incompetency to be executed - filing of motion.
		18-1.3-1404.	Mental incompetency to be executed - examination.
		18-1.3-1405.	Mentally incompetent to be executed - untimely or successive motions.
		18-1.3-1406.	Persons mentally incompetent to be executed - restoration to competency.
		18-1.3-1407.	Appeal of determination of mental incompetency to be executed.

PART 1

ALTERNATIVES IN SENTENCING

18-1.3-101. Deferred prosecution. (1) Except as otherwise provided in section 18-6-801 (4), in any case, the court may, prior to trial or entry of a plea of guilty and with the consent of the defendant and the prosecution, order the prosecution of the offense to be deferred for a period not to exceed two years; except that the period of deferred prosecution may be extended for an additional time up to one hundred eighty-two days if the failure to pay the amounts specified in subsection (2) of this section is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has shown a future ability to pay. During that time, the court may place the defendant under the supervision of the probation department and may require the defendant to undergo counseling or treatment for the defendant’s mental condition, or for alcohol or drug abuse, or for both such conditions.

(2) Upon the defendant’s satisfactory completion of and discharge from supervision, the charge against the defendant shall be dismissed with prejudice. If the conditions of supervision are violated, the defendant shall be tried for the offense for which he or she is charged. The violation of conditions of supervision shall be determined by a hearing before the court which granted the deferred prosecution. The burden in such hearing shall be upon the district attorney by a preponderance of the evidence to show that a violation has in fact occurred. However, if the alleged violation is the failure to pay court-ordered compensation to appointed counsel, probation fees, court costs, restitution, or reparations, evidence of the failure to pay shall constitute prima facie evidence of a violation. The presiding judge at the hearing may temper the rules of evidence in the exercise of sound judicial discretion.

(3) Upon consenting to a deferred prosecution as provided in this section, the defendant shall execute a written waiver of his or her right to a speedy trial. Consent to a deferred prosecution under this section shall not be construed as an admission of guilt, nor shall such consent be admitted in evidence in a trial for the offense for which he or she is charged.

Source: L. 2002: Entire article added with relocations, p. 1365, § 2, effective October 1.

L. 2012: (1) amended, (SB 12-175), ch. 208, p. 863, § 105, effective July 1.

Editor’s note: (1) This section is similar to former § 16-7-401 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-101 is similar to § 16-7-401 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

The obvious legislative intent in passing the deferred prosecution statute was to delay prosecution for a probationary period, which, if completed satisfactorily, would then require that the charge against a defendant be dismissed with prejudice by the trial court. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

Defendant alone benefits. In those cases where the trial court approves a defendant's application for deferred prosecution, it is the defendant alone who benefits by this procedure which may result in the dismissal of charges against him. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

And the period of any delay in the prosecution of a case is obviously at the instance of the defendant. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

Under § 18-1-405(6)(f) of the speedy trial statute, it specifically states that the period of any delay in the prosecution of a case "caused at the instance of the defendant" shall be excluded in computing the time within which the defendant shall be brought to trial. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

18-1.3-102. Deferred sentencing of defendant. (1) (a) In any case in which the defendant has entered a plea of guilty, the court accepting the plea has the power, with the written consent of the defendant and his or her attorney of record and the district attorney, to continue the case for the purpose of entering judgment and sentence upon the plea of guilty for a period not to exceed four years for a felony or two years for a misdemeanor or petty offense or traffic offense. The period shall begin to run from the date that the court continues the case.

(b) The period may be extended for an additional time:

(I) Up to one hundred eighty-two days if the failure to pay restitution is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has shown a future ability to pay. During such time, the court may place the defendant under the supervision of the probation department; or

(II) Up to two years if the deferred judgment is for an offense listed in section 16-11.7-102 (3), C.R.S., good cause is shown, and the district attorney and defendant consent to the extension.

(2) Prior to entry of a plea of guilty to be followed by deferred judgment and sentence, the district attorney, in the course of plea discussion as provided in sections 16-7-301 and 16-7-302, C.R.S., is authorized to enter into a written stipulation, to be signed by the defendant, the defendant's attorney of record, and the district attorney, under which the defendant is obligated to adhere to such stipulation. The conditions imposed in the stipulation shall be similar in all respects to conditions permitted as part of probation. Any person convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), shall stipulate to the conditions specified in section 18-1.3-204 (2) (b). In addition, the stipulation may require the defendant

Thus failure to execute waiver does not inure to defendant's benefit. The fact that the defendant did not execute a written waiver of her right to a speedy trial as required in the deferred prosecution statute and as she agreed to do in open court does not inure to her benefit. *People v. Ybarra*, 190 Colo. 409, 547 P.2d 925 (1976).

The prosecutor's consent is a matter of prosecutorial discretion just as is the choice of several possible charges to press or the decision to move for the dismissal of a criminal charge. *People v. District Court*, 186 Colo. 335, 527 P.2d 50 (1974).

Which is limited by pragmatic factors. A prosecutor's discretion in charging, deferring, or requesting dismissal is limited by pragmatic factors, but not by judicial intervention. *People v. District Court*, 186 Colo. 335, 527 P.2d 50 (1974).

District court cannot require prosecutor to give reasons for refusing to consent. Because of the doctrine of separation of powers and because the district attorney is a part of the executive branch, the district court can no more require the district attorney to give his reasons for refusing to consent to a deferred prosecution than a court can require a Colorado governor to give his reasons for failing to grant a pardon. *People v. District Court*, 186 Colo. 335, 527 P.2d 50 (1974).

to perform community or charitable work service projects or make donations thereto. Upon full compliance with such conditions by the defendant, the plea of guilty previously entered shall be withdrawn and the charge upon which the judgment and sentence of the court was deferred shall be dismissed with prejudice. Such stipulation shall specifically provide that, upon a breach by the defendant of any condition regulating the conduct of the defendant, the court shall enter judgment and impose sentence upon such guilty plea. When, as a condition of the deferred sentence, the court orders the defendant to make restitution, evidence of failure to pay the said restitution shall constitute prima facie evidence of a violation. Whether a breach of condition has occurred shall be determined by the court without a jury upon application of the district attorney or a probation officer and upon notice of hearing thereon of not less than seven days to the defendant or the defendant's attorney of record. Application for entry of judgment and imposition of sentence may be made by the district attorney or a probation officer at any time within the term of the deferred judgment or within thirty-five days thereafter. The burden of proof at such hearing shall be by a preponderance of the evidence, and the procedural safeguards required in a revocation of probation hearing shall apply.

(3) When a defendant signs a stipulation by which it is provided that judgment and sentence shall be deferred for a time certain, he or she thereby waives all rights to a speedy trial, as provided in section 18-1-405.

(4) A warrant for the arrest of any defendant for breach of a condition of a deferred sentence may be issued by any judge of a court of record upon the report of a probation officer, or upon the verified complaint of any person, establishing to the satisfaction of the judge probable cause to believe that a condition of the deferred sentence has been violated and that the arrest of the defendant is reasonably necessary. The warrant may be executed by any probation officer or by a peace officer authorized to execute warrants in the county in which the defendant is found.

Source: L. 2002: Entire article added with relocations, p. 1366, § 2, effective October 1. L. 2012: (1) amended, (HB 12-1310), ch. 268, p. 1396, § 11, effective June 7; (1) and (2) amended, (SB 12-175), ch. 208, p. 863, § 106, effective July 1.

Editor's note: (1) This section is similar to former § 16-7-403 as it existed prior to 2002.

(2) Amendments to subsection (1) by House Bill 12-1310 and Senate Bill 12-175 were harmonized.

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-102 is similar to § 16-7-403 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Probation-like supervision of a defendant by adult diversion program in a district attorney's office was not a violation of separation of powers. Probation is not a necessary function of the judiciary, and there is no constitutional requirement that defendants on deferred judgment be supervised by the judicial branch. *People v. Method*, 900 P.2d 1282 (Colo. App. 1994).

The diversion program does not constitute an unconstitutional delegation of power to

the district attorney because the probation statutes set forth adequate guidelines for imposing conditions of probation and provide adequate standards and safeguards for imposing conditions of deferred judgment. *People v. Bishop*, 7 P.3d 184 (Colo. App. 1999).

This section does not limit the broad grant of power to the courts under the probation statutes. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

Prohibiting a sex offender from having contact with children including his or her own without approval of the court as a condition of a deferred judgment is permissible. The condition falls under "any other conditions reasonably related to his or her rehabilitation and the purpose of the supervisory period imposed by the court" provision. The condition does not infringe upon the parent's liberty inter-

est in raising his or her children when children are potential victims of the offender. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Beyond reasonable doubt standard of proof. An adult charged with a violation of his deferred sentencing which constitutes a criminal offense has the right to demand that the charge be proven "beyond a reasonable doubt". *People v. Van Deusen*, 677 P.2d 402 (Colo. App. 1983).

Under the provisions of subsection (2), a defendant who enters into a deferred sentencing agreement "is obligated to adhere to such stipulation." *People v. Ward-Garrison*, 72 P.3d 423 (Colo. App. 2003); *Walker-Lawrence v. District Court of Teller County*, 74 P.3d 521 (Colo. App. 2003).

Thus, the general assembly has determined as a matter of public policy that the terms of stipulations are to be enforced. *People v. Ward-Garrison*, 72 P.3d 423 (Colo. App. 2003).

Because a defendant who enters into a deferred sentencing agreement is obligated to adhere to the stipulation, the trial court must be permitted to review the terms of the agreement to determine whether the defendant is in compliance with those terms. *Walker-Lawrence v. District Court of Teller County*, 74 P.3d 521 (Colo. App. 2003).

Purpose of the written stipulation is to ensure that the defendant knows prior to the entry of a guilty plea the consequences of violating the conditions of the deferred judgment and sentence. *People v. Widhalm*, 642 P.2d 498 (Colo. 1982).

District court has jurisdiction to order a deferred judgment and sentence even when defendant appears pro se. The written authorization requirement set forth is not jurisdictional in nature. *People v. Loveall*, 231 P.3d 408 (Colo. 2010).

Appeal dismissed for lack of jurisdiction. A guilty plea entered pursuant to a deferred judgment and sentence agreement is not subject to review in the same manner as a guilty plea that results in a final conviction or delinquency adjudication. *People ex rel. K.W.S.*, 192 P.3d 579 (Colo. App. 2008).

When a defendant has received the benefit of a bargain made and has at no time objected to any term of the subsequent judgment and stipulation, there is no basis in public policy to permit the defendant to renege on that portion of the agreement expressly waiving the right to request the sealing of the record. *People v. Ward-Garrison*, 72 P.3d 423 (Colo. App. 2003); *Walker-Lawrence v. District Court of Teller County*, 74 P.3d 521 (Colo. App. 2003).

Permitting defendant to do so would contravene the language and policy of the statute and could greatly reduce the use of such stipulations in practice. *People v. Ward-Garrison*, 72 P.3d 423 (Colo. App. 2003).

Trial court lacks authority under this section to act unilaterally to modify the terms of a stipulation without the district attorney's consent. *People v. Ward-Garrison*, 72 P.3d 423 (Colo. App. 2003); *Walker-Lawrence v. District Court of Teller County*, 74 P.3d 521 (Colo. App. 2003).

Trial court had no authority to order a deferred sentence in absence of written consent of defendant, defendant's attorney, and district attorney under plain language of subsection (1). *People v. Appelhanz*, 738 P.2d 1182 (Colo. 1987).

Subsection (1) requires the written consent of defense counsel only if the defendant is represented. *People v. Loveall*, 203 P.3d 540 (Colo. App. 2008), *aff'd* on other grounds, 231 P.3d 408 (Colo. 2010).

Trial court does not have authority to act unilaterally with deferred sentence agreements, including shortening a stipulated length of a deferred sentence and a sentence agreement without the district attorney's consent. *People v. C.G.*, 12 P.3d 861 (Colo. App. 2000).

Court has authority to consider a plea of nolo contendere in circumstances involving plea agreements that contemplate deferred sentences under the statute. *People v. Darlington*, 105 P.3d 230 (Colo. 2005).

There is no distinction between a plea of nolo contendere and a plea of guilty for sentencing purposes. *People v. Darlington*, 105 P.3d 230 (Colo. 2005).

Trial court has authority to impose an aggravated range sentence even though it had previously imposed a deferred sentence. Nothing in the plain language of this section suggests that the sentencing range upon imposition of a previously deferred sentence differs in any way from the range that would have applied absent deferral. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

Evidence from a dismissed revocation complaint of a deferred judgment may not form the basis of a subsequent revocation complaint. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Section mandates that court impose sentence and does not leave such imposition to the court's discretion. *People v. Adair*, 44 Colo. App. 423, 620 P.2d 46 (1980), *aff'd* in part and *rev'd* in part on other grounds, 651 P.2d 389 (Colo. 1982).

"Sentence" does not mean imprisonment. A "sentence" generally refers to that part of a judgment which describes the punishment imposed by the court following the defendant's conviction for a criminal offense. To constitute a "sentence", the punishment need not take the form of imprisonment. *People v. Turner*, 644 P.2d 951 (Colo. 1982).

Although the defendant's sentence to imprisonment and mandatory parole was not

inevitable at the time of his pleas and, in fact, could not have been lawfully imposed prior to his subsequent breach of the terms of his deferred sentencing agreement, it was a direct consequence of his plea to burglary and, therefore, the defendant should have been advised of the mandatory parole. *People v. Marez*, 39 P.3d 1190 (Colo. 2002).

Discretion implicit in sentencing decision is not unrestricted discretion devoid of reason or principle. *People v. Watkins*, 613 P.2d 633 (Colo. 1980).

Extension of deferred judgment discretionary. While there is not express statutory authority which permits the court to extend the period of a deferred judgment and sentence beyond that initially imposed, such authority is encompassed in the broad discretionary power of the court. *People v. Blackorby*, 41 Colo. App. 251, 583 P.2d 949 (1978) (decided prior to 1985 amendment to subsection (1)).

However, the court has no jurisdiction to extend the deferral to more than the two-year period in the statute. *People v. Perkins*, 676 P.2d 711 (Colo. App. 1983) (decided prior to 1985 amendment to subsection (1)); *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

A deferred judgment is created and authorized by statute and a trial court lacks authority to impose a deferred judgment outside of the statute's limitations. The trial court exceeded its jurisdiction by extending defendant's deferred judgment beyond the statutory limits. *People v. Carbajal*, 198 P.3d 102 (Colo. 2008).

Once the court imposes a deferred judgment, the four-year time period starts the day defendant entered his or her plea. Judgment and sentence must be entered within four years unless the deferred judgment is revoked or extended for restitution. The statute divests the court of its authority to hear revocation petitions filed more than 30 days after the deferred judgment expires. *People v. Carbajal*, 198 P.3d 102 (Colo. 2008).

Because the court lacks the authority to enforce an agreed-upon extension of the deferred judgment beyond the statutory time limitations, it also lacks authority to enforce such an extension framed as a stipulation to new supervision requirements. *People v. Carbajal*, 198 P.3d 102 (Colo. 2008).

The court has discretion to extend the deferral period, subject to the time limitations in this section, in order to give the defendant additional time to pay restitution. *People v. Nichols*, 140 P.3d 198 (Colo. App. 2006).

Trial court had no authority to revoke a deferred judgment sua sponte. In absence of an application by the district attorney, specifically required by subsection (2), revocation was improper. *People v. Berquist*, 916 P.2d 629 (Colo. App. 1996).

District court did not exceed its jurisdiction in granting district attorney's application, entering judgment against defendant for sexual assault on a child by one in a position of trust, and sentencing defendant to six years of probation. Because the district attorney's application was only withdrawn on condition that the court continue the case for an additional four-year period, which it lacked the authority to do, the application was never abandoned. *People v. Simonds*, 113 P.3d 762 (Colo. 2005).

Time limit for filing of application for entry of judgment not tolled by order of revocation. Where district attorney did not file application "within the term of the deferred judgment or within thirty days thereafter," as required by subsection (2), such application would not be permitted upon remand. *People v. Berquist*, 916 P.2d 629 (Colo. App. 1996).

Constitutional rights somewhat limited. Persons alleged to have violated a condition of a deferred sentence are not entitled to the full panoply of constitutional rights accorded persons who have not admitted guilt of criminal conduct. *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981).

But adequate notice deemed minimum right. Consistent with principles of due process, persons alleged to have violated a condition of a deferred sentence must, at a minimum, be given adequate notice of the charges against which they must defend. *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981); *People v. Allen*, 952 P.2d 764 (Colo. App. 1997), rev'd on other grounds, 973 P.2d 620 (Colo. 1999).

Trial court advising defendant and counsel three days before revocation hearing held to be adequate notice of charge against which person had to defend. *People v. Galloway*, 677 P.2d 1380 (Colo. App. 1983).

Proceedings to revoke deferred judgment are conducted according to procedures used to revoke probation. Thus, the defendant is not entitled to the full range of constitutional rights in a criminal trial. The right to confront witnesses is satisfied by the right to cross examine hearsay statements and presentation of evidence to the contrary. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Corroboration of a confession is not required in deferred judgment. *People v. Manzanares*, 85 P.3d 604 (Colo. App. 2003).

Nothing in this section or the state or federal constitutions requires the trial court to advise the defendant of his or her right to testify at a deferred judgment revocation proceeding. *People v. Allen*, 973 P.2d 620 (Colo. 1999).

Counsel not necessary where defendant makes request for extension. Where the defendant requests an extension of the supervisory period, the granting of the extension does not

violate due process because he was not represented by counsel, or because the trial court did not make a determination as to whether fundamental fairness required that counsel be appointed to represent him. *People v. Blackorby*, 41 Colo. App. 251, 583 P.2d 949 (1978).

Revocation hearing is trial-type procedure.

A revocation hearing under this section is a trial-type procedure conducted by the trial court for the purpose of making a factual determination as to whether there has been a failure to abide by the conditions of a deferred sentence. *Hallman v. People*, 652 P.2d 173 (Colo. 1982).

And 15-day limitation for hearing applies.

Since the 15-day limitation imposed by § 16-11-206 (4) is a procedural safeguard required for probation revocation hearings, it applies to a deferred sentence revocation pursuant to this section. *People v. Schoonover*, 654 P.2d 1340 (Colo. App. 1982); *People v. Allen*, 952 P.2d 764 (Colo. App. 1997), *rev'd* on other grounds, 973 P.2d 620 (Colo. 1999).

Since the five-day limitation specified in § 16-11-205 (4) is not a procedural safeguard required in a probation revocation hearing pursuant to § 16-11-206, but rather is a prehearing requirement imposed on the probation officer, it is not within the contemplation of subsection (2). *People v. Schoonover*, 654 P.2d 1340 (Colo. App. 1982).

Conviction entered upon finding that defendant violated condition. This section requires the court to enter a judgment of conviction upon finding at a revocation hearing that the defendant has violated the condition of a deferred judgment. *People v. Widhalm*, 642 P.2d 498 (Colo. 1982); *People v. Wilder*, 687 P.2d 451 (Colo. 1984); *People v. Nichols*, 140 P.3d 198 (Colo. App. 2006).

Once the trial court finds that a violation has been proven by a preponderance of the evidence, the deferred sentence must be revoked. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Scope of revocation hearing. In a revocation hearing, the court need only apprise itself of facts which convince it that the conditions of the deferred sentence have been breached. *People v. Adair*, 44 Colo. App. 423, 620 P.2d 46 (1980), *aff'd* in part, *rev'd* in part on other grounds, 651 P.2d 389 (Colo. 1982).

Standard of proof for violation of deferred sentence. To support a revocation, a violation of the deferred sentence need only be proven by a preponderance of the evidence. Once the proof has been made and the court finds that the terms of the deferred judgment were violated the court must act to revoke the deferred judgment status, enter judgment, and impose sentence upon the defendant's guilty plea. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Beyond reasonable doubt standard of proof. An adult charged with a violation of his deferred sentencing which constitutes a criminal

offense has the right to demand that the charge be proven "beyond a reasonable doubt". *People v. Van Deusen*, 677 P.2d 402 (Colo. App. 1983).

Question of whether the defendant failed to cooperate in a treatment program which was a condition of the deferred judgment is one of fact for the trial court. *People v. Galloway*, 677 P.2d 1380 (Colo. App. 1983).

Statutory standard that defendant had ability to pay restitution but failed to do so was satisfied by the district court finding that defendant had money during the deferral period which he could have paid to the probation department, but which he chose, instead, to pay to his mother. *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

Defendant's financial ability to pay restitution is a defense to a charge of violating restitution requirement of deferred sentence. *People v. Afentul*, 773 P.2d 1081 (Colo. 1989).

Procedures and burden of proof established by court for resolving prosecutorial application for entry of judgment and imposition of sentence based on defendant's failure to pay full restitution as part of a deferred sentence. *People v. Afentul*, 773 P.2d 1081 (Colo. 1989).

Defendant must prove his or her financial inability to pay restitution. Once the prosecution presents evidence of the defendant's failure to pay restitution, the burden shifts to the defendant to prove his or her financial inability to pay restitution. *People v. Rivera-Bottzeck*, 119 P.3d 546 (Colo. App. 2004).

Court may grant probation upon revocation of deferred judgment and sentence. As long as a defendant is otherwise eligible for probation, a court may grant him probation upon the revocation of a deferred judgment and sentence. *People v. Turner*, 644 P.2d 951 (Colo. 1982).

Evidence of defendant's failure to pay restitution is *prima facie* evidence that defendant has violated the conditions of his deferred sentencing which, if not rebutted or contradicted, will sustain the entry of a judgment of conviction and the imposition of sentence. *People v. McPherson*, 897 P.2d 923 (Colo. App. 1995).

Defendant's two-year deferred sentence for a traffic violation in Colorado could not be used to enhance his criminal history category under the federal sentencing guidelines for a later conviction involving distribution of cocaine. *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993).

Battery, in violation of Aurora Municipal Code, was an "offense" in violation of stipulation for deferred judgment and sentence. *People v. Slayton*, 878 P.2d 106 (Colo. App. 1994).

Absence of defendant's signature on joint motion immaterial where defendant received benefits under deferred judgment, signed con-

sent form in interview with probation officer, and made initial payment of restitution. *People v. McPherson*, 897 P.2d 923 (Colo. App. 1995).

This section does not limit the broad grant of power to the courts under the probation statutes. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

As sentence imposed following revocation is within trial court's discretion. When a deferred judgment is revoked in a felony case, sentencing to the penitentiary is not mandatory. The type of sentence to be imposed after the revocation of the deferred sentence is a matter within the discretion of the trial court, and a defendant is entitled to a consideration of all statutory sentencing alternatives at the time the deferred sentence is revoked and judgment of conviction is entered against him. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Appeal or review of revocation of deferred sentence available. A defendant may either appeal an order revoking a deferred sentence, pursuant to C.A.R. 1 or file a motion for post-conviction review, pursuant to Crim. P. 35(c). *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981).

When revocation of deferred sentence reviewable. The provisions of Crim. P. 33(a), precluding appellate review absent a motion for a new trial, apply to the revocation of a deferred sentence. *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980), *aff'd*, 652 P.2d 173 (Colo. 1982).

Where two-year limitation on revocation of deferred sentence tolled. Where a complaint and arrest warrant are issued within the statutory period and the defendant is voluntarily absent from the jurisdiction, or is imprisoned on another offense, the two-year limitation on revocation of a deferred sentence is tolled. *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980).

A revocation petition must be filed within the term of the deferred judgment or within 30 days thereafter, unless the time limitation is tolled. A letter from the investigator to the court and the issuance of a bench warrant during the term of the deferred judgment was not sufficient to toll the time limitation. *People v. Guerrero*, 26 P.3d 537 (Colo. App. 2001).

Amended revocation petition filed after expiration of the deferred judgment term is proper if initial petition is filed before expiration and effectively tolls the time limitation of this section. *People v. Nichols*, 140 P.3d 198 (Colo. App. 2006).

Motion for new trial is prerequisite for appellate review of revocation of probation except when the propriety of a sentence is being appealed as provided in C.A.R. 4(c). *People v. Hallman*, 44 Colo. App. 530, 624 P.2d 347 (1980), *aff'd*, 652 P.2d 173 (Colo. 1982).

Compliance with the motion for a new trial requirement of Crim. P. 33(a) is a prerequisite for appellate review of a trial court's judgment revoking a deferred sentence and imposing a sentence. *Hallman v. People*, 652 P.2d 173 (Colo. 1982).

And procedural considerations governing section are analogous to those governing probation. *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980); *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

Therefore, filing of the revocation petition by the probation department in no way prejudiced the defendant. *People v. Zabala*, 706 P.2d 807 (Colo. App. 1985).

No double jeopardy prohibition was implicated when deferred judgment and sentence for possession of a controlled substance was revoked, where the trial court based its sentencing decision, in part, on the facts of the later vehicular homicide offense. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

Application for deferred sentencing does not constitute waiver of right to preliminary hearing. *Celestine v. District Court*, 199 Colo. 514, 610 P.2d 1342 (1980).

Guilty plea accepted by court constitutes jeopardy. A plea of guilty under this section, when accepted by the court, resolves the issue of guilt and constitutes jeopardy. *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981).

So withdrawal or cancellation of deferred sentence affects sentence not conviction. Where the trial court withdraws or cancels the imposition of the deferred sentence, its order affects only the sentence and does not touch the conviction. *People v. Peretsky*, 44 Colo. App. 270, 616 P.2d 170 (1980).

Deferred judgment revoked but reinstated. Where the commission of a crime charged and the conviction thereof is the sole basis of the revocation of a previous deferred judgment and subsequent imposition of sentence, the validity of the revocation must be tested by the validity of the conviction. Where the conviction is then reversed, and a judgment of acquittal was entered on the criminal charges, defendant is entitled to have the deferred judgment reinstated. *People v. Anzures*, 670 P.2d 1258 (Colo. App. 1983).

Section not applicable to mandatory sentence. The sentence requirement in § 42-2-206 remains mandatory and is not subject to plea bargaining to obtain a deferred sentence as generally allowed by this section. *Walker v. District Court*, 199 Colo. 128, 606 P.2d 70 (1980).

Prosecution dismissed under this section not basis for civil action. As a matter of public policy, one who acknowledges his guilt of a criminal act, even though the case is subsequently dismissed under the deferred judgment plan, may not use that criminal prosecution as a

basis for a civil malicious prosecution action. Land v. Hill, 644 P.2d 43 (Colo. App. 1981).

Applied in People v. Vollentine, 643 P.2d 800 (Colo. App. 1982); People v. Martinez, 657 P.2d

967 (Colo. App. 1982); Corr v. District Court, 661 P.2d 668 (Colo. 1983); Hafelfinger v. District Court, 674 P.2d 375 (Colo. 1984).

18-1.3-103. Deferred sentencing - drug offenders - legislative declaration - demonstration program - repeal. (Repealed)

Source: L. 2002: Entire article added with relocations, p. 1367, § 2, effective October 1.

Editor's note: (1) This section was similar to former § 16-7-403.7 as it existed prior to 2002.
(2) Subsection (6) provided for the repeal of this section, effective July 1, 2006. (See L. 2002, p. 1367.)

18-1.3-104. Alternatives in imposition of sentence. (1) Within the limitations of the applicable statute pertaining to sentencing and subject to the provisions of this title, the trial court has the following alternatives in entering judgment imposing a sentence:

(a) The defendant may be granted probation unless any provision of law makes him or her ineligible for probation. The granting or denial of probation and the conditions of probation including the length of probation shall not be subject to appellate review unless probation is granted contrary to the provisions of this title.

(b) Subject to the provisions of section 18-1.3-401, in class 2, class 3, class 4, class 5, and class 6 felonies, the defendant may be sentenced to imprisonment for a definite period of time.

(b.5) (I) Except as otherwise provided by subparagraph (II) of this paragraph (b.5), any defendant who, in the determination of the court, is a candidate for an alternative sentencing option and who would otherwise be sentenced to imprisonment pursuant to paragraph (b) of this subsection (1) may, as an alternative, be sentenced to a specialized restitution and community service program pursuant to section 18-1.3-302, which may include restorative justice practices, as defined in section 18-1-901 (3) (o.5), if such defendant is determined eligible and is accepted into such program. To be eligible for restorative justice practices, the defendant shall not have been convicted of unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., a crime in which the underlying factual basis involves domestic violence, as defined in section 18-6-800.3 (1), stalking as defined in section 18-3-602, or violation of a protection order as defined in section 18-6-803.5. If the court orders the defendant to attend a restorative justice practices victim-offender conference, the facilitator of the conference shall provide his or her services for a fee of no more than one hundred twenty-five dollars, based on a sliding scale; however, the fee may be waived by the court. Any statements made during the conference shall be confidential and shall not be used as a basis for charging or prosecuting the defendant unless the defendant commits a chargeable offense during the conference.

(II) (A) The court shall consider and may sentence any defendant who is a nonviolent offender as defined in sub-subparagraph (B) of this subparagraph (II) pursuant to subsection (2) of this section.

(B) As used in this section, "nonviolent offender" means a person convicted of a felony other than a crime of violence as defined in section 18-1.3-406 (2), one of the felonies set forth in section 18-3-104, 18-4-203, 18-4-301, or 18-4-401 (2) (c), (2) (d), or (5), or a felony offense committed against a child as set forth in articles 3, 6, and 7 of this title, and who is not subject to the provisions of section 18-1.3-801.

(c) The defendant shall be sentenced to death in those cases in which a death sentence is required under section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102.

(d) The defendant may be sentenced to the payment of a fine or to a term of imprisonment or to both a term of imprisonment and the payment of a fine; except that a person who has been twice convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction for which he or she is being sentenced is not eligible to receive a fine in lieu of imprisonment. No fine shall be imposed for conviction

of a felony except as provided in sections 18-1.3-401 and 25-15-310, articles 22 to 29 of title 39, or article 3 of title 42, C.R.S.

(e) The defendant may be sentenced to comply with any other court order authorized by law.

(f) The defendant may be sentenced to payment of costs.

(g) The defendant may be sentenced pursuant to part 4 or 5 of this article.

(h) (I) If the defendant is eligible pursuant to section 18-1.3-407.5 or section 19-2-517 (6), C.R.S., the defendant may be sentenced to the youthful offender system in accordance with section 18-1.3-407.

(II) Repealed.

(i) Notwithstanding any provision of this subsection (1) to the contrary, the court shall sentence any person convicted of a sex offense, as defined in section 18-1.3-1003 (5), committed on or after November 1, 1998, pursuant to the provisions of part 10 of this article.

(2) (a) The sentencing court shall consider the following factors in sentencing nonviolent offenders:

(I) The nature and character of the offense;

(II) The character and record of the nonviolent offender, including whether the offender is a first-time offender;

(III) The offender's employment history;

(IV) The potential rehabilitative value of the sentencing alternatives available to the court;

(V) Any potential impact on the safety of the victim, the victim's family, and the general public based upon sentencing alternatives available to the court; and

(VI) The offender's ability to pay restitution to the victim or the victim's family based upon the sentencing alternatives available to the court.

(b) A nonviolent offender may be granted probation pursuant to paragraph (a) of subsection (1) of this section and, as a condition of probation, be required to participate in an intensive supervision program pursuant to section 18-1.3-208.

(c) The court shall consider and may sentence a nonviolent offender to any one or any combination of the sentences described in this paragraph (c) if, upon consideration of the factors described in paragraph (a) of this subsection (2), the court does not grant probation pursuant to paragraph (b) of this subsection (2) or does not sentence the offender to the department of corrections as provided under paragraph (d) of this subsection (2):

(I) A community corrections program pursuant to section 18-1.3-301;

(II) A home detention program pursuant to section 18-1.3-105; or

(III) A specialized restitution and community service program pursuant to section 18-1.3-302.

(d) Nothing in this subsection (2) shall be construed as prohibiting a court from exercising its discretion in sentencing a nonviolent offender to the department of corrections based upon, but not limited to, any one or more factors described in paragraph (a) of this subsection (2).

(3) (a) In determining the appropriate sentencing alternative for a defendant who has been convicted of unlawful sexual behavior as defined in section 16-22-102 (9), the sentencing court shall consider the defendant's previous criminal and juvenile delinquency records, if any, set forth in the presentence investigation report prepared pursuant to section 16-11-102 (1) (a), C.R.S.

(b) For purposes of this subsection (3), "convicted" means a conviction by a jury or by a court and shall also include a deferred judgment and sentence, a deferred adjudication, an adjudication, and a plea of guilty or nolo contendere.

Source: L. 2002: Entire article added with relocations, p. 1368, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1)(c) amended, p. 32, § 24, effective October 1. **L. 2003:** IP(1), (1)(a), and (1)(b) amended, p. 975, § 12, effective April 17. **L. 2004:** (1)(h)(II) repealed, p. 243, § 1, effective April 5. **L. 2009:** (1)(h)(I) amended, (HB 09-1122), ch. 77,

p. 280, § 3, effective October 1. **L. 2010:** (1)(h)(I) amended, (HB 10-1413), ch. 264, p. 1204, § 4, effective August 11. **L. 2011:** (1)(b.5)(I) amended, (HB 11-1032), ch. 296, p. 1402, § 7, effective August 10.

Editor's note: This section is similar to former § 16-11-101 as it existed prior to 2002.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(c), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to increased sentence after retrial, see 15 Colo. Law. 1604 (1986). For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with questions of criminal sentencing, see 63 Den. U.L. Rev. 291 (1986).

Annotator's note. Since § 18-1.3-104 is similar to § 16-11-101 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Only the general assembly may define crimes and prescribe punishments. *People v. Hinchman*, 196 Colo. 526, 589 P.2d 917 (1978), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed.2d 311 (1979).

It is the general assembly's prerogative to define crimes and prescribe punishments; the courts have no jurisdiction to impose sentences not in accord with the minimum and maximum terms specified by statute. *People v. Trujillo*, 631 P.2d 146 (Colo. 1981).

Trial court had no authority to order alternate sentence in the event that death penalty statute was later found unconstitutional and, therefore, alternate sentence is illegal and void. *People v. Corbett*, 713 P.2d 1337 (Colo. App. 1985).

The purpose of this section is to give greater flexibility in sentencing. *Nugent v. District Court*, 184 Colo. 353, 520 P.2d 592 (1974).

Probation is accorded only to a defendant who seeks it or is willing to accept it as a sentence. *People v. Rollins*, 771 P.2d 32 (Colo. App. 1989).

The court may impose a fine in lieu of incarceration or probation without the consent of the prosecutor where defendant is convicted of a class 2 felony not involving violence or an assault on a firefighter or a peace officer. *People v. Thompson*, 897 P.2d 857 (Colo. App. 1994).

Under this section, the trial court may grant probation, if a defendant is eligible for probation, or the trial court may impose a sentence of imprisonment for a definite period of time. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Under parole procedures an indeterminate sentence usually results in an earlier release.

It cannot be said to be harsh or excessive so as to require the scrutiny of an appellate court. *Nugent v. District Court*, 184 Colo. 353, 520 P.2d 592 (1974).

Convicted defendant entitled to indeterminate sentence where act effective prior to conviction. A defendant convicted in a criminal proceeding which was not yet final was entitled to indeterminate sentencing in a Crim. P. 35 proceeding since this section and § 16-11-304 requiring such sentencing became effective after the commission of the crime but prior to the date of conviction and sentencing. *People v. Griswold*, 190 Colo. 136, 543 P.2d 1251 (1975).

Section 18-1-409 entitled defendant to benefit of this section. Defendant, who was sentenced prior to the effective date of the 1973 amendments to this section and § 16-11-304 — which legislation provided for the imposition of indeterminate sentences for class 4 and class 5 felonies — was entitled to the benefit of this legislation under relief sought by § 18-1-409. *People v. Thornton*, 187 Colo. 202, 529 P.2d 628 (1974).

A defendant who was sentenced to a term with a fixed minimum and fixed maximum for conviction of a class 4 felony was entitled under § 18-1-409 to the benefits of this section and § 16-11-304. *People v. Race*, 187 Colo. 204, 529 P.2d 629 (1974).

Repeal of subsection (1)(d) after sentence no ground for relief. Where the effective date (July 1, 1979) of the repeal of § 16-11-101 (1)(d) was more than three months after the defendant was sentenced under its provisions, the repeal did not entitle the defendant to relief under § 18-1-410 (1)(f)(I). *People v. Steelman*, 200 Colo. 177, 613 P.2d 334 (1980).

Supreme court was without power to alter minimum sentence to indeterminate sentence. Where defendant, who was sentenced to a minimum term of three years for the crime of manslaughter, sought a declaration that he was immediately eligible for parole consideration on the ground that this section and § 16-11-304, enacted subsequent to his sentencing, required that a maximum sentence be imposed but eliminated the minimum sentence for the crime of

manslaughter, the supreme court held that it did not have the power to alter defendant's minimum sentence to make the sentence indeterminate. *People v. Davis*, 186 Colo. 186, 526 P.2d 312 (1974).

Duration of period of probation is limited to maximum term of imprisonment specified for the offense in question, and the provision of § 16-11-202 permitting the court to grant probation "for such a period and upon such terms and conditions as it deems best", does not give the court the authority to extend the terms of probation beyond the maximum term of imprisonment. *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980); *People v. Benavidez*, 58 P.3d 1142 (Colo. App. 2002).

For the period of probation allowable for offenses within the presumptive ranges established by § 18-1-105, see *People v. Flenniken*, 749 P.2d 395 (Colo. 1988) and *People v. Hunter*, 757 P.2d 631 (Colo. 1988).

A trial court may not impose a probationary term that is greater than the longest possible period of incarceration for the underlying misdemeanor. *People v. Kennaugh*, 80 P.3d 315 (Colo. 2003).

The maximum sentences established in § 18-1-105 for imprisonment periods do not apply to probation periods to which a defendant may be sentenced. *People v. Flenniken*, 749 P.2d 395 (Colo. 1988).

District court possessed jurisdiction to sentence defendant to a term of probation which did not exceed the maximum term of imprisonment in the aggravated range for the crime committed; the term of probation was not limited to the presumptive range for the crime committed. *Hunter v. People*, 757 P.2d 631 (Colo. 1988).

Incarceration a possible condition of probation. Incarceration, while a sentencing alternative, is also a possible specific condition of probation. *People v. Horton*, 628 P.2d 117 (Colo. App. 1980).

Sentencing following revocation of deferred judgment. When a deferred judgment is revoked in a felony case, sentencing to the penitentiary is not mandatory. The type of sentence to be imposed after the revocation of the deferred sentence is a matter within the discretion of the trial court, and a defendant is entitled to a consideration of all statutory sentencing alternatives at the time the deferred sentence is revoked and judgment of conviction is entered against him. *Adair v. People*, 651 P.2d 389 (Colo. 1982).

Court cannot suspend portion of sentence to alter limits of sentence. The court may not circumvent legislative dictates by first sentencing within legislatively prescribed parameters, and then suspending a portion of the minimum and maximum, for to do so would be an invasion of the general assembly's exclusive province to set punishments. *People v. Hinchman*, 196 Colo.

526, 589 P.2d 917 (1978), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed.2d 311 (1979).

Trial court may not suspend sentence after denying probation. There are no provisions in this article authorizing the suspension of imposition or execution of sentence apart from a concomitant grant of probation, and a trial court may not circumvent the statutory requirements by denying probation and thereafter undertaking to suspend a sentence validly imposed. *People v. Patrick*, 38 Colo. App. 103, 555 P.2d 182 (1976).

A trial court, having rejected probation, cannot circumvent legislative dictates by sentencing within prescribed parameters, suspending the sentence, and then imposing conditions which are authorized only in connection with probation. *People v. District Court*, 673 P.2d 991 (Colo. 1983); *People v. Flenniken*, 749 P.2d 395 (Colo. 1988).

District court had no statutory authority to suspend the sentence of imprisonment and to impose conditions on that suspension. *Chae v. People*, 780 P.2d 481 (Colo. 1989).

Decision to deny probation is not subject to appellate review where trial court considered all circumstances and available evidence. *People v. Godwin*, 679 P.2d 1095 (Colo. App. 1983); *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed.2d 366 (1984); *People v. Robinson*, 713 P.2d 1333 (Colo. App. 1985); *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

Appellate court has jurisdiction to review conditions of probation. The appellate court has jurisdiction under subsection (1)(a) to review the conditions of defendant's probation where the argument is that the conditions of probation are contrary to the provisions of this title. *People v. Cera*, 673 P.2d 807 (Colo. App. 1983); *People v. Brockelman*, 916 P.2d 592 (Colo. App. 1995), aff'd on other grounds, 933 P.2d 1315 (Colo. 1997).

However, the appellate court has no jurisdiction under subsection (1)(a) to review the conditions of probation where the argument is that the conditions of probation are contrary to the provisions of title 17. *People v. Smith*, 681 P.2d 525 (Colo. App. 1983).

When credit for presentence confinement presumed. Credit for presentence confinement must be presumed when the sentence imposed, plus the presentence confinement, does not exceed the maximum possible sentence. *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977).

Having initially taken into consideration the presentence confinement, it was not necessary for a court in resentencing to again recite what had been expressly stated before — that presentence confinement had been considered by the court. *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977).

This section defines the sentencing alternatives that are within a court's jurisdiction which do not include the authority to enter orders modifying parole eligibility. People v. Anaya, 894 P.2d 28 (Colo. App. 1994).

The substance of the principles articulated in the American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 3.5, insofar as they are consistent with the stated general purposes of the Colorado code of criminal procedure, may be deemed to

be "authorized by law" within the meaning of paragraph (f) of subsection (1) of this section and Crim. P. 32(b). People v. Lewis, 193 Colo. 203, 564 P.2d 111 (1977).

Applied in People v. Sandoval, 36 Colo. App. 403, 541 P.2d 105 (1975); People v. Soper, 628 P.2d 604 (Colo. 1981); People v. Hotopp, 632 P.2d 600 (Colo. 1981); People v. Quintana, 634 P.2d 413 (Colo. 1981); People v. Madonna, 651 P.2d 378 (Colo. 1982); People v. Manley, 707 P.2d 1021 (Colo. App. 1985).

18-1.3-105. Authority of sentencing courts to utilize home detention programs.

(1) (a) A sentencing judge is authorized to sentence any offender, as defined in subsection (5) of this section, to a home detention program operated pursuant to a contractual agreement with the department of public safety pursuant to this article for all or part of such offender's sentence.

(b) Prior to sentencing any offender directly to a home detention program, the sentencing judge shall consider the following factors:

- (I) The safety of victims and witnesses of the offender's criminal acts;
- (II) The safety of the public at large;
- (III) The seriousness of any offense committed by the offender together with any information relating to the original charge against the offender;
- (IV) The offender's prior criminal record; and
- (V) The ability of the offender to pay for the costs of home detention and any restitution to victims of his or her criminal acts.

(c) The sentencing judge shall make every reasonable effort to notify the victims of crime that the offender has been sentenced to a home detention program. Such notice shall be sent to the last address in the possession of the court, and the victim of the crime has the duty to keep the court informed of his or her most current address.

(d) An offender who has been convicted of a crime, the underlying factual basis of which was found by the court to include an act of domestic violence, as defined in section 18-6-800.3 (1), shall not be eligible for home detention in the home of the victim pursuant to this article.

(2) Any offender who is directly sentenced to a home detention program pursuant to subsection (1) of this section and fails to carry out the terms and conditions prescribed by the sentencing court in his or her sentence to a home detention program shall be returned to the court and resentenced as soon as possible.

(3) A sentencing judge is authorized to require any offender, as defined in subsection (5) of this section, as a condition of probation, to serve an appropriate period of time extending from ninety days to one year in a home detention program operated directly by the judicial department, or in a home detention program operated pursuant to a contractual agreement with the department of public safety.

(4) The general assembly hereby declares that this section shall be effective July 1, 1990, only in the counties of Boulder, Larimer, and Pueblo in order to facilitate a pilot program in Boulder, Larimer, and Pueblo counties which shall extend from July 1, 1990, until July 1, 1992.

(5) As used in this section, unless the context otherwise requires:

(a) "Home detention" means an alternative correctional sentence or term of probation supervision wherein a defendant convicted of any felony, other than a class 1 or violent felony, is allowed to serve his or her sentence or term of probation, or a portion thereof, within his or her home or other approved residence. Such sentence or term of probation shall require the offender to remain within his or her approved residence at all times except for approved employment, court-ordered activities, and medical needs.

(b) "Offender" means any person who has been convicted of or who has received a deferred sentence for a felony, other than a class 1 or violent felony.

Source: L. 2002: Entire article added with relocations, p. 1371, § 2, effective October 1.

Editor's note: This section is similar to former § 17-27.8-102 as it existed prior to 2002.

18-1.3-106. County jail sentencing alternatives - work, educational, and medical release - home detention - day reporting. (1) (a) Any county may provide a program whereby any person sentenced to the county jail upon conviction for a crime, nonpayment of any fine or forfeiture, or contempt of court may be granted by the court the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:

- (I) Seeking employment;
- (II) Working at his or her employment;
- (III) Conducting his or her own business or other self-employed occupation including housekeeping and attending to the needs of the family;
- (IV) Attendance at an educational institution;
- (V) Medical treatment;
- (VI) Home detention; or
- (VII) Day reporting.

(b) A court may order a person who would otherwise be sentenced to the county jail upon conviction of a crime to be sentenced directly to an available day reporting program if the court deems such a sentence to be appropriate for the offender.

(1.1) For purposes of this section, "home detention" means an alternative correctional sentence or term of legal supervision wherein a defendant charged or convicted of a misdemeanor, felony, nonpayment of any fine, or contempt of court is allowed to serve his or her sentence or term of supervision, or a portion thereof, within his or her home or other approved residence. Such sentence or term of supervision shall cause the defendant to remain within such defendant's approved residence at all times except for approved employment, court-ordered activities, and medical needs. Supervision of the defendant shall include personal monitoring by an agent or designee of the referring unit of government and monitoring by electronic or global positioning devices that are capable of detecting and reporting the defendant's absence or presence within the approved residence.

(1.3) Before a court may grant a person sentenced to the county jail the privilege of leaving the jail to attend a postsecondary educational institution, the court shall first notify the prosecuting attorney and the postsecondary educational institution of its intention to grant the privilege and requesting their comments thereon. The notice shall include all relevant information pertaining to the person and the crime for which he or she was convicted. Both the prosecuting attorney and the postsecondary institution shall reply to the court in writing within fourteen days after receipt of the notification or within such other reasonable time in excess of fourteen days as specified by the court. The postsecondary educational institution's reply shall include a statement of whether or not it will accept the person as a student. Acceptance by a state postsecondary educational institution shall be pursuant to section 23-5-106, C.R.S.

(2) Unless directly sentenced to a day reporting program pursuant to paragraph (b) of subsection (1) of this section or unless such privilege is otherwise expressly granted by the sentencing court, the prisoner shall be confined as sentenced. The prisoner may petition the court for such privilege at the time of sentencing or thereafter and, in the discretion of the court, may renew his or her petition. The court may withdraw the privilege at any time by order entered with or without notice.

(3) The sheriff may endeavor to secure employment for unemployed prisoners under this section. If a prisoner is employed for wages or salary, the sheriff may collect the same or require the prisoner to turn over his or her wages or salary in full when received, and the sheriff shall deposit the same in a trust checking account and shall keep a ledger showing the status of the account of each prisoner.

(4) Every prisoner gainfully employed shall be liable for the cost of his or her board in the jail or the cost of the supervision and administrative services if he or she is home-detained, as fixed by the board of county commissioners. If necessarily absent from jail at mealtime, he or she shall, at his or her request, be furnished with an adequate nourishing

lunch to carry to work. The sheriff shall charge his or her account, if he or she has one, for such board. If the prisoner is gainfully self-employed, he or she shall pay the sheriff for such board, in default of which his or her privilege under this section shall be automatically forfeited. If the jail food is furnished directly by the county, the sheriff shall account for and pay over such board payments to the county treasurer. The board of county commissioners may, by resolution, provide that the county furnish or pay for the transportation of prisoners employed under this section to and from the place of employment. The sheriff shall reimburse the county or other disbursing agent for all such expenses incurred in accordance with this section and article 26 of title 17, C.R.S., as soon as adequate funds are available in the prisoner's account and in accordance with paragraph (b) of subsection (5) of this section.

(5) By order of the court, the wages or salaries of employed prisoners shall be disbursed by the sheriff for the following purposes, in the order stated:

- (a) Payment of any current child support order;
 - (b) Payment of any child support arrearage;
 - (b.3) Payment of any child support debt order;
 - (c) Payment of any spousal maintenance;
 - (d) Payment of costs for the crime victim compensation fund, pursuant to section 24-4.1-119, C.R.S.;
 - (e) Payment of surcharges for the victims and witnesses assistance and law enforcement fund, pursuant to section 24-4.2-104, C.R.S.;
 - (f) Payment of restitution;
 - (g) Payment of a time payment fee;
 - (h) Payment of late fees;
 - (i) Payment of any other fines, fees, or surcharges;
 - (j) Payment of the board of the prisoner;
 - (k) Payment of the supervision and administrative services provided to the prisoner during his or her home detention;
 - (l) Payment of necessary travel expense to and from work and other incidental expenses of the prisoner;
 - (m) Payment, either in full or ratably, of the prisoner's obligations acknowledged by him or her in writing or which have been reduced to judgment; and
 - (n) The balance, if any, to the prisoner upon his or her discharge.
- (6) The court may by order authorize the sheriff to whom the prisoner is committed to arrange with another sheriff for the employment or home detention of the prisoner in the other's county and, while so employed or so detained, for the prisoner to be in the other's custody but in other respects to be and continue subject to the commitment.

(7) If the prisoner was convicted in a court in another county, the court of record having criminal jurisdiction may, at the request or with the concurrence of the committing court, make all determinations and orders under this section which might otherwise be made by the sentencing court after the prisoner is received at the jail.

(8) The board of county commissioners may, by resolution, direct that functions of the sheriff under either subsection (3) or (5) of this section, or both, be performed by the county department of social services; or, if the board of county commissioners has not so directed, a court of record may order that the prisoner's earnings be collected and disbursed by the clerk of the court. Such order shall remain in force until rescinded by the board or the court, whichever made it.

(9) The county department of social services shall at the request of the court investigate and report to the court the amount necessary for the support of the prisoner's dependents.

(10) The sheriff may refuse to permit the prisoner to exercise his or her privilege to leave the jail as provided in subsection (1) of this section for any breach of discipline or other violation of jail regulations. Any such breach of discipline or other violation of jail regulations shall be reported to the sentencing court.

(11) A prisoner who has been convicted of one of the crimes of violence as defined in section 18-1.3-406 (2), who has been convicted of a sex offense as defined in sections 18-1.3-903 (5) and 18-3-411, who has been convicted of a crime, the underlying factual basis of which was found by the court to include an act of domestic violence, as defined in

section 18-6-800.3 (1), or who has been convicted of a class 1 misdemeanor in which a deadly weapon is used shall not be eligible for home detention pursuant to this section.

(12) Persons sentenced to the county jail as a direct sentence or sentenced to the county jail as a condition of probation who are permitted to participate in work, educational, medical release, home detention, or day reporting programs pursuant to subsection (1) of this section shall receive one day credit against their sentences for each day spent in such programs. As used in this section, “day reporting program” means an alternative correctional sentence wherein a defendant is allowed to serve his or her sentence by reporting daily to a central location wherein the defendant is supervised in court-ordered activities.

Source: **L. 2002:** Entire article added with relocations, p. 1372, § 2, effective October 1. **L. 2006:** (1.1) amended, p. 18, § 2, effective March 8. **L. 2008:** (5)(d) amended, p. 1888, § 51, effective August 5. **L. 2012:** (1.3) amended, (SB 12-175), ch. 208, p. 864, § 107, effective July 1.

Editor’s note: (1) This section is similar to former § 17-26-128 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1.3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Subsection (4) requires sheriff to charge the trust checking account of an inmate on work release for board only if the inmate has such an account, which is not required. People v. Gallegos, 260 P.3d 15 (Colo. App. 2010).

Sheriff did not take any public moneys or public property pursuant to this section where trust checking accounts are not required. People v. Gallegos, 260 P.3d 15 (Colo. App. 2010).

PART 2

PROBATION

18-1.3-201. Application for probation. (1) (a) A person who has been convicted of an offense, other than a class 1 felony or a class 2 petty offense, is eligible to apply to the court for probation.

(b) Repealed.

(2) (a) The provisions of this subsection (2) shall apply to any person whose application for probation is based on a conviction for a felony, which conviction occurred before May 25, 2010.

(a.5) A person who has been twice or more convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction on which his or her application is based shall not be eligible for probation.

(b) Notwithstanding any other provision of law except the provisions of paragraph (c) of this subsection (2), a person who has been convicted of one or more felonies under the laws of this state, any other state, or the United States within ten years prior to a class 1, 2, or 3 felony conviction on which his or her application is based shall not be eligible for probation.

(c) Notwithstanding the provisions of paragraph (a.5) of this subsection (2) and subsection (4) of this section, an offender convicted of a violation of section 18-18-403.5 may be eligible for probation upon recommendation of the district attorney.

(d) Repealed.

(2.1) Repealed.

(2.5) (a) The provisions of this subsection (2.5) shall apply to any person whose application for probation is based on a conviction for a felony, which conviction occurred on or after May 25, 2010.

(b) Except as described in paragraph (a) of subsection (4) of this section, a person who has been twice or more convicted of a felony upon charges separately brought and tried and

arising out of separate and distinct criminal episodes under the laws of this state, any other state, or the United States prior to the conviction on which his or her application is based shall not be eligible for probation if the current conviction or a prior conviction is for:

- (I) First or second degree murder, as described in section 18-3-102 or 18-3-103;
- (II) Manslaughter, as described in section 18-3-104;
- (III) First or second degree assault, as described in section 18-3-202 or 18-3-203;
- (IV) First or second degree kidnapping, as described in section 18-3-301 or 18-3-302;
- (V) A sexual offense as described in part 4 of article 3 of this title;
- (VI) First degree arson, as described in section 18-4-102;
- (VII) First or second degree burglary, as described in section 18-4-202 or 18-4-203;
- (VIII) Robbery, as described in section 18-4-301;
- (IX) Aggravated robbery, as described in section 18-4-302 or 18-4-303;
- (X) Theft from the person of another, as described in section 18-4-401 (5);
- (XI) Any felony offense committed against a child, as described in article 3, 6, or 7 of this title; or
- (XII) Any criminal attempt or conspiracy to commit any of the offenses specified in this paragraph (b).

(c) Failure to register as a sex offender, as described in section 18-3-412.5, shall not constitute a sexual offense for the purposes of subparagraph (V) of paragraph (b) of this subsection (2.5).

(3) An application for probation shall be in writing upon forms furnished by the court, but, when the defendant has been convicted of a misdemeanor or a class 1 petty offense, the court, in its discretion, may waive the written application for probation.

(4) (a) (I) The restrictions upon eligibility for probation in subsections (2) and (2.5) of this section may be waived by the sentencing court regarding a particular defendant upon recommendation of the district attorney approved by an order of the sentencing court.

(II) Repealed.

(b) Upon entry of an order pursuant to this subsection (4) regarding a particular defendant, such defendant shall be deemed to be eligible to apply to the court for probation pursuant to this section.

(5) For purposes of paragraph (a.5) of subsection (2) of this section and paragraph (a) of subsection (2.5) of this section, “conviction” means a verdict of guilty or the entry of a plea of guilty or nolo contendere. “Conviction” does not include a plea to a deferred judgment and sentence pursuant to section 18-1.3-102 until the deferred judgment and sentence is revoked.

Source: **L. 2002:** Entire article added with relocations, p. 1375, § 2, effective October 1. **L. 2003:** (2) amended and (2.1) added, p. 2689, § 7, effective July 1. **L. 2007:** (2)(d) and (2.1) repealed, p. 1689, § 10, effective July 1. **L. 2010:** (1)(b) and (4)(a)(II) repealed, (2) and (4)(a)(I) amended, and (2.5) added, (HB 10-1338), ch. 257, pp. 1147, 1145, §§ 2, 1, effective May 25; (2)(c) amended, (HB 10-1352), ch. 259, p. 1173, § 16, effective August 11. **L. 2012:** (5) added, (HB 12-1310), ch. 268, p. 1396, § 12, effective June 7.

Editor’s note: (1) This section is similar to former § 16-11-201 as it existed prior to 2002.

(2) Amendments to subsections (2) and (2)(c) by House Bill 10-1338 and House Bill 10-1352 were harmonized.

Cross references: (1) For procedures relevant to application for probation, see Crim. P. 32.

(2) For the legislative intent contained in the 2003 act amending subsection (2) and enacting subsection (2.1), see section 1 of chapter 424, Session Laws of Colorado 2003.

ANNOTATION

Law reviews. For article, “Colorado Felony Sentencing”, see 11 Colo. Law. 1478 (1982). For article, “Review of New Legislation Relating to Criminal Law”, see 11 Colo. Law. 2148 (1982). For article, “Criminal Law”, which dis-

cusses a Tenth Circuit decision dealing with probation proceedings, see 61 Den. L.J. 274 (1984).

Annotator’s note. Since § 18-1.3-201 is similar to § 16-11-201 as it existed prior to the

2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

This section is general in nature, and expects only class one felonies and class two petty offenses. *People v. Burke*, 185 Colo. 19, 521 P.2d 783 (1974).

Misdemeanant may apply for probation. An offense specifically designated by statute as a misdemeanor, although for some purposes might be characterized as a petty offense, comes plainly within the law permitting application for probation. *Coffey v. County Court*, 177 Colo. 81, 492 P.2d 839 (1972) (decided under repealed § 39-16-3, C.R.S. 1963).

The general assembly did not intend to repeal the mandatory sentencing provision of § 42-2-130, sub silentio, by implication, or otherwise by enactment of this section. *People v. Burke*, 185 Colo. 19, 521 P.2d 783 (1974).

Subsection (2) cannot be read to exclude persons convicted of two prior felonies from community correctional programs, since such programs are not purely probationary. *People ex rel. VanMeveren v. District Court*, 195 Colo. 34, 575 P.2d 4 (1978).

Court may not disregard legislative sentencing mandates. A court is not free to disregard the legislative mandate of §§ 16-11-301 and 16-11-308 and this section, even when it appears to dictate a sentence which the court considers inappropriate to a particular case. *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

Unconstitutionally obtained conviction cannot be considered for eligibility for probation. *People v. McIntosh*, 695 P.2d 795 (Colo. App. 1984).

Subsection (2) prohibits judge from utilizing suspended sentence as means for granting probation. The legislative mandate of subsection (2) is intended to prohibit a trial judge from circumventing the clear wording of the statute by utilizing a suspended sentence as a means for granting probation. The statutory command requires incarceration when any defendant, before the court for imposition of sentence, has been previously convicted of two felonies. *Herrman v. District Court*, 186 Colo. 350, 527 P.2d 1168 (1974).

Trial court may not suspend sentence after denying probation. There are no provisions in this article authorizing the suspension of imposition or execution of sentence apart from a concomitant grant of probation, and a trial court may not circumvent the statutory requirements by denying probation and thereafter undertaking to suspend a sentence validly imposed. *People v. Patrick*, 38 Colo. App. 103, 555 P.2d 182 (1976).

Two felonies need not be separately brought and tried for purposes of determining

eligibility for probation. *People v. Nicholas*, 700 P.2d 921 (Colo. App. 1984).

The more restrictive provisions of subsection (4)(a)(II) for placing a defendant twice convicted of a felony on probation do not prevent the court from placing any defendant twice convicted of a felony on probation under the provisions of subsection (4)(a)(I). *Chism v. People*, 80 P.3d 293 (Colo. 2003).

To interpret subsection (4)(a)(II) as prescribing the exclusive conditions for waiver of the two-felony rule would repeal by implication subsection (4)(a)(I), which clearly permits a broader class of waivers. Constructions that work a repeal by implication are not favored unless unavoidable. *Chism v. People*, 80 P.3d 293 (Colo. 2003).

The court's duty to fix the amount of restitution is not confined to sentences to probation but applies equally to sentences to imprisonment. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

Court agreed with defendant's construction that "conviction" referenced in subsection (2)(a.5) refers to defendant's guilty plea, not the subsequent revocation of defendant's deferred judgment and sentence. Therefore, other felony convictions that occurred before the revocation cannot be considered "prior" felonies under this section, thus allowing probation to be an option. *People v. Kiniston*, 262 P.3d 942 (Colo. App. 2011).

Defendant who had two prior convictions at the time a third conviction was handed down was ineligible for probation. Defendant's argument that he had only one conviction at the time of commission of the underlying third crime must fail. This section clearly sets the cut-off point for determining the existence of prior convictions at the time of the third conviction. *People v. Harvey*, 819 P.2d 1087 (Colo. App. 1991).

If prosecution recommends waiver of the two-felony rule prior to sentencing, court may resentence defendant to probation after the revocation hearing without a second recommendation of prosecution to waive the two-felony rule. *People v. Nance*, 221 P.3d 428 (Colo. App. 2009).

Length of probation term not subject to statutes governing length of prison term. Imposition of prison term of six years is not controlling of length of probation term. *People v. Martinez*, 844 P.2d 1203 (Colo. App. 1992).

The court may impose a fine in lieu of incarceration or probation without the consent of the prosecutor where the defendant is convicted of a class 2 felony not involving violence or an assault on a firefighter or a peace officer. *People v. Thompson*, 897 P.2d 857 (Colo. App. 1994).

Applied in *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975); *People v. Crandall*, 37

Colo. App. 220, 544 P.2d 411 (1975); *People v. Turner*, 644 P.2d 951 (Colo. 1982).

18-1.3-202. Probationary power of court. (1) When it appears to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be served thereby, the court may grant the defendant probation for such period and upon such terms and conditions as it deems best. The length of probation shall be subject to the discretion of the court and may exceed the maximum period of incarceration authorized for the classification of the offense of which the defendant is convicted but shall not exceed five years for any misdemeanor or petty offense. If the court chooses to grant the defendant probation, the order placing the defendant on probation shall take effect upon entry and, if any appeal is brought, shall remain in effect pending review by an appellate court unless the court grants a stay of probation pursuant to section 16-4-201, C.R.S. Unless an appeal is filed that raises a claim that probation was granted contrary to the provisions of this title, the trial court shall retain jurisdiction of the case for the purpose of adjudicating complaints filed against the defendant that allege a violation of the terms and conditions of probation. In addition to imposing other conditions, the court has the power to commit the defendant to any jail operated by the county or city and county in which the offense was committed during such time or for such intervals within the period of probation as the court determines. The aggregate length of any such commitment whether continuous or at designated intervals shall not exceed ninety days for a felony, sixty days for a misdemeanor, or ten days for a petty offense unless it is a part of a work release program pursuant to section 18-1.3-207. That the defendant submit to commitment imposed under this section shall be deemed a condition of probation.

(2) The probation department in each judicial district may enter into agreements with any state agency or other public agency, any corporation, and any private agency or person to provide supervision or other services for defendants placed on probation by the court.

Source: L. 2002: Entire article added with relocations, p. 1376, § 2, effective October 1. L. 2003: (1) amended, p. 976, § 13, effective April 17.

Editor's note: This section is similar to former § 16-11-202 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-202 is similar to § 16-11-202 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed § 39-16-6, C.R.S. 1963, relevant cases construing those provisions have been included in the annotations to this section.

No equal protection violation. This section and the work release statute, § 16-11-212, establish general statutory probation dispositions for all defendants eligible for probation and do not create classifications resulting in disparate treatment. *People v. Garberding*, 787 P.2d 154 (Colo. 1990).

Probation is a creature of statute. *People v. Ray*, 192 Colo. 391, 560 P.2d 74 (1977).

Probation is a privilege, not a right, and an order of probation may be revoked if a probationer violates any condition of probation. *People v. Colabello*, 948 P.2d 77 (Colo. App. 1997).

This section is similar to the original federal probation law. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

Probation is accorded only to a defendant who seeks it or is willing to accept it as a sentence. *People v. Rollins*, 771 P.2d 32 (Colo. App. 1989).

Subject to the requirement that any conditions imposed as terms of probation must be authorized by the general assembly, trial courts are given wide discretion in imposing conditions upon a sentence of probation. *People v. Richards*, 795 P.2d 1343 (Colo. 1990).

Trial court has statutory authority to order that a sentence to probation be served consecutively to another sentence. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

Subsection (1) does not preclude deferring commencement of a probationary sentence. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

The trial court has the authority to order domestic violence treatment as a condition of defendant's probation without a jury finding that the defendant committed an "act of domestic violence". Because the court had the author-

ity to attach whatever conditions to probation the court deemed appropriate, the U.S. supreme court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not require a jury finding of an act of domestic violence before domestic violence treatment was ordered as a condition of probation. *People v. Goldfuss*, 98 P.3d 935 (Colo. App. 2004).

A trial court has jurisdiction to grant probation either by suspending imposition of sentence or suspending execution of the sentence. *Coffey v. County Court*, 177 Colo. 81, 492 P.2d 839 (1972).

It acts upon probation report. The court acts pursuant to this section upon all data relating to the applicant for probation submitted to a court in the form of a written report. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

A trial court shall give careful consideration to the information supplied by the probation officer. *Wolford v. People*, 178 Colo. 203, 496 P.2d 1011 (1972).

No automatic stay of probation order pending appeal. Under subsection (1), the trial court retains jurisdiction to modify and terminate probation during the pendency of an appeal unless a stay has been granted. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

The broad grant of power under this section encompassed a deferred judgment procedure. *People v. Ray*, 192 Colo. 391, 560 P.2d 74 (1977).

Inapplicable to delinquent child. The plain intent of the Colorado Children's Code militates against the application of this section via § 16-11-210 to a delinquent child under the age of 18 years. *People in Interest of A.F.*, 37 Colo. App. 185, 546 P.2d 972 (1975), *aff'd*, 192 Colo. 207, 557 P.2d 418 (1976).

A juvenile court does not have the statutory authority to impose a limited or partial confinement in county jail as a condition of probation for a juvenile under 18 years of age. *People v. A.F.*, 192 Colo. 207, 557 P.2d 418 (1976).

Although this section does grant courts the authority to condition probation upon service of sentences in city or county jails, such conditions are clearly contravention of numerous expressions of legislative intent in the Children's Code. *People v. A.F.*, 192 Colo. 207, 557 P.2d 418 (1976).

This section applies to sex offender intensive supervision program (SOISP) sentences except where the language conflicts with more

specific provisions contained in the statutes governing SOISP sentences. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

Trial court had authority to direct that defendant's SOISP would commence consecutively at the end of his incarceration on another conviction. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

Trial court had jurisdiction to grant probation. *Coffey v. County Court*, 177 Colo. 81, 492 P.2d 839 (1972).

The maximum sentences in the presumptive ranges established in § 18-1-105 for imprisonment periods do not apply to probation periods to which a defendant may be sentenced. *People v. Flenniken*, 749 P.2d 395 (Colo. 1988).

The decision of the supreme court in *People v. Flenniken* will be given retroactive effect. *People v. Cagle*, 780 P.2d 13 (Colo. App. 1989).

The minimum sentences established in § 18-1-105 do not establish the minimum period of probation to which a defendant may be sentenced. The length of probation is at the sentencing judge's discretion. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

Probationary sentence is not illegal because it exceeds the maximum length authorized for a sentence to incarceration. *People v. Salas*, 42 P.3d 68 (Colo. App. 2001).

But the provisions of this section authorizing a court to grant "probation for such period and upon such terms and conditions as it deems best" does not give the court unlimited discretion to determine the probationary period. A trial court thus exceeds its authority if it sentences a defendant to a probationary term longer than the maximum sentence to incarceration allowed for a misdemeanor offense. *People v. Benavidez*, 58 P.3d 1142 (Colo. App. 2002).

A trial court may not impose a probationary term that is greater than the longest possible period of incarceration for the underlying misdemeanor. *People v. Kennaugh*, 80 P.3d 315 (Colo. 2003).

The specific statutory provisions of § 42-4-1301 that contain a mandatory sentencing scheme for alcohol-related driving offenses and which provide for extended treatment of the underlying cause of the criminal conduct, prevail over the general provisions of this section. *People v. Martinillie*, 940 P.2d 1090 (Colo. App. 1996).

Applied in *People v. Sandoval*, 36 Colo. App. 403, 541 P.2d 105 (1975); *People v. Horton*, 628 P.2d 117 (Colo. App. 1980); *People v. Martinez*, 657 P.2d 967 (Colo. App. 1982).

18-1.3-203. Criteria for granting probation. (1) The court, subject to the provisions of this title and title 16, C.R.S., and having considered the purposes of sentencing described in section 18-1-102.5, in its discretion may grant probation to a defendant unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the

protection of the public because:

(a) There is undue risk that during a period of probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment as authorized by section 18-1.3-104; or

(c) A sentence to probation will unduly depreciate the seriousness of the defendant's crime or undermine respect for law; or

(d) His or her past criminal record indicates that probation would fail to accomplish its intended purposes; or

(e) The crime, the facts surrounding it, or the defendant's history and character when considered in relation to statewide sentencing practices relating to persons in circumstances substantially similar to those of the defendant do not justify the granting of probation.

(2) The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations called for by subsection (1) of this section:

(a) The defendant's criminal conduct neither caused nor threatened serious harm to another person or his or her property;

(b) The defendant did not plan or expect that his or her criminal conduct would cause or threaten serious harm to another person or his or her property;

(c) The defendant acted under strong provocation;

(d) There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) The victim of the defendant's conduct induced or facilitated its commission;

(f) The defendant has made or will make restitution or reparation to the victim of his or her conduct for the damage or injury which was sustained;

(g) The defendant has no history of prior criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) The defendant's conduct was the result of circumstances unlikely to recur;

(i) The character, history, and attitudes of the defendant indicate that he or she is unlikely to commit another crime;

(j) The defendant is particularly likely to respond affirmatively to probationary treatment;

(k) The imprisonment of the defendant would entail undue hardship to himself or herself or his or her dependents;

(l) The defendant is elderly or in poor health;

(m) The defendant did not abuse a public position of responsibility or trust;

(n) The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise.

(3) Nothing in this section shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

Source: L. 2002: Entire article added with relocations, p. 1377, § 2, effective October 1. L. 2011: IP(1) amended, (HB 11-1180), ch. 96, p. 283, § 3, effective August 10.

Editor's note: This section is similar to former § 16-11-203 as it existed prior to 2002.

Cross references: For provisions concerning the presentence or probation investigation, see § 16-11-102 and Crim. P. 32(a).

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-203 is similar to § 16-11-203 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed § 39-16-6, C.R.S 1963,

and § 39-16-6, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

The granting of probation involves the exercise of discretion on the part of a trial judge. Logan v. People ex rel. Alamosa County,

138 Colo. 304, 332 P.2d 897 (1958).

It is not a matter of right for a defendant.

It is a matter of grace and suspends conditionally what otherwise would be a harsher decree. *Gehl v. People*, 161 Colo. 535, 423 P.2d 332 (1967).

Probation is a privilege rather than a right. It suspends conditionally what might be a harsher judgment. It is, in effect, a contract made by the court and sanctioned by the statute with the convicted person. *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969).

Judge considers community, offense, and offender. A trial judge in the exercise of his discretion in a probation matter considers three facets of the problem - the community, the offense, and the offender, in that order - and if upon consideration of these factors he concludes that the applicant is a worthy risk for probation, he has the power to grant it. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

The setting, nature, and circumstances of an offense, particularly as they furnish a clue to the personality of an offender, whether an offense is violent or nonviolent, and the motives actuating a defendant in committing an offense are components which a trial court will evaluate when considering the offense as a factor in the question of granting probation, as well as the background of a defendant and information corroborating or denying the defendant's will to reform and his ability to adjust himself to community life. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

The public interest in safety and deterrence, when considered in isolation, might well justify an alternative to sentencing in the case of a first-time offender, at least in crimes not causing or threatening serious harm to the person or

property of others. *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980).

Although the absence of a prior felony conviction or significant criminal involvement, by itself, certainly may constitute a mitigating factor worthy of consideration, it is only one factor and is not conclusive on the sentencing decision. *People v. Scott*, 200 Colo. 402, 615 P.2d 35 (1980).

Trial court did not err in stating that it had considered the factors set forth in this section prior to imposing sentence. This section requires the court to consider factors similar to those allowed under the sentencing statute, and the court did not abuse its discretion in doing so. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Power to suspend sentence not affected by failure to grant probation. So long as the circumstances would have justified a grant of probation and the defendant was eligible for probation, the fact that the judge did not impose it does not vitiate his power to suspend sentences. *People v. Henderson*, 196 Colo. 441, 586 P.2d 229 (1978), overruled on other grounds, *People v. District Court*, 673 P.2d 991 (Colo. 1983).

Surrounding circumstances of defendant's alien status may be relevant to a sentencing court's decision whether to grant or deny probation. Although consideration of defendant's status as a foreign national, in and of itself, is improper, the fact that defendant is in the United States illegally may, under certain circumstances, provide substantial and compelling reasons to depart from sentencing guidelines and deny probation. *People v. Hernandez-Clavel*, 186 P.3d 96 (Colo. App. 2008).

Applied in *People v. Martinez*, 657 P.2d 967 (Colo. App. 1982).

18-1.3-204. Conditions of probation - interstate compact probation transfer cash fund - creation. (1) The conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so. The court shall provide as explicit conditions of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation, that the defendant make restitution pursuant to part 6 of this article and article 18.5 of title 16, C.R.S., that the defendant comply with any court orders regarding substance abuse testing and treatment issued pursuant to sections 18-1.3-209 and 18-1.3-211 and article 11.5 of title 16, C.R.S., and that the defendant comply with any court orders regarding the treatment of sex offenders issued pursuant to article 11.7 of title 16, C.R.S. The court shall provide as an explicit condition of every sentence to probation that the defendant not harass, molest, intimidate, retaliate against, or tamper with the victim of or any prosecution witnesses to the crime, unless the court makes written findings that such condition is not necessary.

(1.5) If the defendant is being sentenced to probation as a result of a conviction of a felony offense or a qualifying misdemeanor offense pursuant to the "Interstate Compact for Adult Offender Supervision", part 28 of article 60 of title 24, C.R.S., a condition of probation shall be that the court shall require the defendant to execute or subscribe a written prior waiver of extradition stating that the defendant consents to extradition to this state and waives all formal proceedings in the event that he or she is arrested in another state while

at liberty on such bail bond and acknowledging that he or she shall not be admitted to bail in any other state pending extradition to this state. If the offender is returned to the state pursuant to the "Interstate Compact for Adult Offender Supervision", part 28 of article 60 of title 24, C.R.S., a court may not impose the cost of the offender's return on the offender.

(2) (a) When granting probation, the court may, as a condition of probation, require that the defendant:

(I) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip the defendant for suitable employment;

(II) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose. In any case where inpatient psychiatric treatment is indicated, the court shall proceed in accordance with article 65 of title 27, C.R.S., and require the defendant to comply with the recommendation of the professional person in charge of the evaluation required pursuant to section 27-65-105 or 27-65-106, C.R.S.

(III) Attend or reside in a facility established for the instruction, recreation, or residence of persons on probation;

(III.5) Participate in restorative justice practices, as defined in section 18-1-901 (3) (o.5), if available in the jurisdiction, requested by the victim who has been informed about restorative justice practices pursuant to section 24-4.1-303 (11) (g), C.R.S., and the defendant is determined suitable by a designated restorative justice practices facilitator. To be eligible for restorative justice practices, the defendant shall not have been convicted of unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S., a crime in which the underlying factual basis involves domestic violence, as defined in section 18-6-800.3 (1), stalking as defined in section 18-3-602, or violation of a protection order as defined in section 18-6-803.5. Any statements made during a restorative justice conference shall be confidential and shall not be used as a basis for charging or prosecuting the defendant unless the defendant commits a chargeable offense during the conference. Failure to complete the requirements arising from a restorative justice conference may be considered a violation of probation. Nothing in this subparagraph (III.5) shall be construed to require a victim to participate in a restorative justice victim-offender conference.

(IV) Support the defendant's dependents and meet other family responsibilities, including arranging and fulfilling a payment plan for current child support, child support arrearages, and child support debt due under a court or administrative order through any delegate child support enforcement unit that may have a child support case with the defendant;

(V) Pay reasonable costs of the court proceedings or costs of supervision of probation, or both. The probation supervision fee shall be fifty dollars per month for the length of ordered probation. Notwithstanding the amount specified in this subparagraph (V), the court may lower the costs of supervision of probation to an amount the defendant will be able to pay. The court shall fix the manner of performance for payment of the fee. If the defendant receives probation services from a private provider, the court shall order the defendant to pay the probation supervision fee directly to the provider. The fee shall be imposed for the length of ordered probation.

(VI) Pay any fines or fees imposed by the court;

(VI.5) Repay all or part of any reward paid by a crime stopper organization that led to the defendant's arrest and conviction in accordance with article 15.7 of title 16, C.R.S.;

(VII) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the court or probation officer;

(VIII) Refrain from excessive use of alcohol or any unlawful use of controlled substances, as defined in section 18-18-102 (5), or of any other dangerous or abusable drug without a prescription;

(IX) Report to a probation officer at reasonable times as directed by the court or the probation officer;

(X) Permit the probation officer to visit the defendant at reasonable times at the defendant's home and elsewhere;

(XI) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer;

(XII) Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;

(XIII) Be subject to home detention as defined in section 18-1.3-106 (1.1);

(XIV) Be restrained from contact with the victim or the victim's family members in cases in which the defendant was convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1);

(XIV.5) Be subject to electronic or global position monitoring;

(XV) Satisfy any other conditions reasonably related to the defendant's rehabilitation and the purposes of probation.

(b) When granting probation, in addition to the consideration of the provisions set forth in paragraph (a) of this subsection (2), the court shall order as a condition of probation in cases in which the defendant was convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), that the defendant:

(I) Comply with existing court orders regarding family support;

(II) Comply with any existing court orders concerning a proceeding to determine paternity, custody, the allocation of decision-making responsibility, parenting time, or support;

(III) Comply with the terms of any protection order in effect against the defendant during the probation period;

(IV) Refrain from possessing a firearm, destructive device, or other dangerous weapon, unless granted written permission by the court or probation officer which shall not be granted in such domestic violence cases unless:

(A) It is required by the defendant's employment; and

(B) The court finds that the defendant's possession of the weapon does not endanger the victim or the victim's children; and

(C) The weapon is stored away from the home and the yard surrounding the home.

(c) If the court orders counseling or treatment as a condition of probation, unless the court makes a specific finding that treatment in another facility or with another person is warranted, the court shall order that such treatment or counseling be at a facility or with a person:

(I) Approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S., if the treatment is for alcohol or drug abuse;

(II) Certified or approved by the sex offender management board, established in section 16-11.7-103, C.R.S., if the offender is a sex offender;

(III) Certified or approved by the domestic violence offender management board created in section 16-11.8-103, C.R.S., if the offender was convicted of or the underlying factual basis of the offense included an act of domestic violence as defined in section 18-6-800.3; or

(IV) Licensed or certified by the division of adult parole in the department of corrections, the department of regulatory agencies, the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, the state board of nursing, or the Colorado medical board, whichever is appropriate for the required treatment or counseling.

(d) Notwithstanding the provisions of paragraph (c) of this subsection (2), if the court orders counseling or treatment as a condition of probation for an offender convicted of an offense involving unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., the court shall order such treatment or counseling be at a facility or with a person listed in paragraph (c) of this subsection (2), and the court may not make a specific finding that treatment in another facility or with another person is warranted.

(e) If the defendant is convicted of an offense that subjects the defendant to genetic testing pursuant to section 16-11-102.4, C.R.S., the court shall assess to the defendant the cost of collecting and testing a biological substance sample from the defendant as required in section 16-11-102.4, C.R.S.

(2.3) (a) When granting probation, the court may, as a condition of probation, require any defendant who is less than eighteen years of age at the time of sentencing to attend school or an educational program or to work toward the attainment of a high school diploma or a GED, as that term is defined in section 22-33-102 (7), C.R.S.; except that the court shall not require any such juvenile to attend a school from which he or she has been expelled without the prior approval of that school's local board of education.

(b) Following specification of the terms and conditions of probation for a defendant who is less than eighteen years of age at the time of sentencing, where the conditions of probation include the requirement that the defendant attend school, the court shall notify the school district in which the defendant will be enrolled of such requirement.

(2.5) The order of priority for any payments required of a defendant pursuant to subparagraph (IV), (V), (VI), or (VI.5) of paragraph (a) of subsection (2) of this section shall be as follows:

- (a) Payment of a current child support order;
- (b) Payment of child support arrearage;
- (c) Payment of child support debt order;
- (d) Payment of spousal maintenance;
- (e) Payment of costs for the crime victim compensation fund, pursuant to section 24-4.1-119, C.R.S.;

- (f) Payment of surcharges for the victims and witnesses assistance and law enforcement fund, pursuant to section 24-4.2-104, C.R.S.;

- (g) Payment of restitution;
- (h) Payment of a time payment fee;
- (i) Payment of late fees;
- (i.2) Payment of probation supervision fees;
- (i.4) Payment of a drug offender surcharge pursuant to article 19 of this title;
- (i.6) Payment of a sex offender surcharge pursuant to article 21 of this title;
- (i.7) Payment of a surcharge for a crime against an at-risk person pursuant to section 18-6.5-107;

- (i.8) Payment of collection and chemical testing of a biological substance to determine the genetic markers thereof;

- (i.9) Payment of a surcharge related to the address confidentiality program pursuant to section 24-30-2114, C.R.S.;

- (j) Payment of any other fines, fees, or surcharges; and
- (k) Repayment of all or part of any reward paid by a crime stopper organization that led to the defendant's arrest and conviction.

(3) When a defendant is granted probation, he or she shall be given a written statement explicitly setting forth the conditions on which he or she is being released.

(4) (a) For good cause shown and after notice to the defendant, the district attorney, and the probation officer, and after a hearing if the defendant or the district attorney requests it, the judge may reduce or increase the term of probation or alter the conditions or impose new conditions.

(b) (I) If an offender applies to transfer his or her probation to another state, the offender shall pay a filing fee of one hundred dollars, unless the offender is indigent.

(II) (A) The clerk of the court shall transmit all moneys collected pursuant to this paragraph (b) to the state treasurer, who shall credit the same to the interstate compact probation transfer cash fund, which fund is hereby created and referred to in this paragraph (b) as the "fund". Beginning January 1, 2013, the moneys in the fund are subject to annual appropriation by the general assembly to the judicial department for the direct and indirect costs associated with returning probationers to Colorado. The state treasurer may invest any moneys in the fund not expended for the purpose of this paragraph (b) as provided by law. The state treasurer shall credit all interest and income derived from the investment and deposit of moneys in the fund to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year remain in the fund and shall not be credited or transferred to the general fund or another fund.

(B) On or after January 1, 2013, a law enforcement agency may submit to the state court administrator a request to be reimbursed for the costs of returning a probationer

pursuant to the “Interstate Compact for Adult Offender Supervision”, part 28 of article 60 of title 24, C.R.S., incurred on or after January 1, 2013. The state court administrator shall, to the extent that funds are available, reimburse reasonable costs incurred by a law enforcement agency for the return of the probationer.

Source: **L. 2002:** Entire article added with relocations, p. 1378, § 2, effective October 1. **L. 2003:** (2)(a)(V) amended, p. 2016, § 116, effective May 22; (2)(b)(III) amended, p. 1014, § 21, effective July 1. **L. 2006:** (2)(a)(XIV.5) added, p. 19, § 3, effective March 8; (1.5) added, p. 342, § 4, effective July 1; (2)(e) amended p. 1690, § 9, effective July 1, 2007. **L. 2007:** (2.5)(i.9) added, p. 1700, § 3, effective July 1. **L. 2008:** (2)(c)(III) and (2.5)(e) amended, p. 1889, § 52, effective August 5. **L. 2010:** (2)(a)(II) and (2)(c)(I) amended, (SB 10-175), ch. 188, p. 785, § 28, effective April 29; (2)(c)(IV) amended, (HB 10-1260), ch. 403, p. 1987, § 77, effective July 1. **L. 2011:** (2.5)(i.9) amended, (HB 11-1080), ch. 256, p. 1123, § 6, effective June 2; (2)(a)(III.5) added, (HB 11-1032), ch. 296, p. 1403, § 8, effective August 10; (2)(c)(IV) amended, (HB 11-1303), ch. 264, p. 1157, § 32, effective August 10. **L. 2012:** (2.3)(a) amended, (HB 12-1345), ch. 188, p. 748, § 37, effective May 19; (1.5) and (4) amended, (HB 12-1310), ch. 268, p. 1396, § 13, effective June 7; (2)(a)(VIII) amended, ch. 281, p. 1618, § 37, effective July 1; (2.5)(i.7) added, (HB 12-1226), ch. 279, p. 1489, § 3, effective August 15.

Editor’s note: (1) This section is similar to former § 16-11-204 as it existed prior to 2002.

(2) Section 5 of chapter 279, Session Laws of Colorado 2012, provides that the act adding subsection (2.5)(i.7) applies to convictions on or after August 15, 2012.

Cross references: (1) For the legislative declaration contained in the 2007 act adding subsection (2.5)(i.9), see section 4 of chapter 385, Session Laws of Colorado 2007. For the legislative declaration in the 2012 act amending subsection (2.3)(a), see section 21 of chapter 188, Session Laws of Colorado 2012.

(2) For the legislative declaration stating the purpose of and the provision directing legislative staff agencies to conduct a post-enactment review pursuant to § 2-2-1201 scheduled in 2009, see sections 4 and 6 of chapter 385, Session Laws of Colorado 2007. To obtain a copy of the review, once completed, view Colorado Legislative Council’s web site.

(3) For the legislative declaration stating the purpose of and the provision directing legislative staff agencies to conduct a post-enactment review pursuant to § 2-2-1201 scheduled in 2016, see sections 21 and 46 of chapter 188, Session Laws of Colorado 2012. To obtain a copy of the review, once completed, view Colorado Legislative Council’s web site.

ANNOTATION

Law reviews. For article, “The Problem of Compelling Fathers to Support their Dependent Children”, see 27 Dicta 442 (1950). For article, “New Legislation Concerning the Mentally Disabled”, see 11 Colo. Law. 2131 (1982). For article, “Review of New Legislation Relating to Criminal Law”, see 11 Colo. Law. 2148 (1982). For article, “Criminal Procedure”, which discusses a Tenth Circuit decision dealing with extension of probation, see 62 Den. U.L. Rev. 187 (1985).

Annotator’s note. Since § 18-1.3-204 is similar to § 16-11-204 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed §§ 39-16-6 and 39-16-7, C.R.S 1963, and §§ 39-16-6 and 39-16-7, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

The purpose of probation is educational and reconstructive rather than primarily punitive or oppressive. *Logan v. People ex rel. Alamosa*

County, 138 Colo. 304, 332 P.2d 897 (1958); *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

The basic purpose of probation is to provide a program which offers an offender the opportunity to rehabilitate himself without confinement, under the tutelage of a probation officer and under the continuing power of the court to impose a sentence for the original offense. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

By its very nature and definition, probation means and signifies liberty under certain imposed conditions. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

Probationary conditions serve the dual purpose of enhancing the reintegration of the offender into a responsible life style and affording society a measure of protection against recidivism. *People v. Ressin*, 620 P.2d 717 (Colo. 1980).

Void for vagueness doctrine applies to conditions of probation. Court will apply the same

constitutional standards to conditions of probation as to statutes. There was nothing vague in the requirement that defendant actively participate and successfully complete treatment to the satisfaction of the probation officer and treatment provider. *People v. Firth*, 205 P.3d 445 (Colo. App. 2008).

Surrounding circumstances of defendant's alien status may be relevant to a sentencing court's decision whether to grant or deny probation. Although consideration of defendant's status as a foreign national, in and of itself, is improper, the fact that defendant is in the United States illegally may, under certain circumstances, provide substantial and compelling reasons to depart from sentencing guidelines and deny probation. *People v. Hernandez-Clavel*, 186 P.3d 96 (Colo. App. 2008).

Trial courts have a wide discretion in imposing certain conditions upon a probationer. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

Psychosexual evaluation may be required as a condition of probation. Defendant charged with attempted first degree sexual assault who pleads guilty to the lesser offense of third degree misdemeanor assault may be required to undergo a psychosexual evaluation as a condition of probation. *People v. Fleming*, 3 P.2d 449 (Colo. App. 1999).

A court may impose a variety of monetary conditions in connection with granting probation, including a requirement to make a charitable contribution. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

Probation supervision fee need not be refunded. Unlike fines and surcharges, which are primarily punitive in nature, probation supervision fees are part of the rehabilitative process, from which a defendant benefits. *People v. Noel*, 134 P. 3d 484 (Colo. App. 2005).

The trial court's power to revoke an individual's probation for failure to pay restitution does not extend beyond the expiration of the probation term imposed. The restitution statute cannot be read as automatically extending a probation term for collection of restitution checks. *People v. Gore*, 774 P.2d 877 (Colo. 1989).

Clear purpose of subsection (3) is to provide criminal defendant with notice of terms of his probation. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

But failure to comply with subsection (3) did not require reversal of revocation in and of itself. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

Noncompliance with subsection (4), by failing to provide defendant notice of changes in probation conditions, is improper. *People v. Frye*, 997 P.2d 1223 (Colo. App. 1999).

The terms of probation must be derived from this section, as probation is purely a stat-

utory creation. *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

The program of probation should envisage only such terms and conditions as are clearly and specifically spelled out in the statutes, and such other conditions as fit the probationer by education and rehabilitation to take his place in society. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958); *People v. Ledford*, 173 Colo. 194, 477 P.2d 374 (1970).

If an applicant is worthy, his release on probation should not be weighted with terms and conditions having nothing to do with the purpose and policy of probation laws. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

Condition of making charitable contribution was reasonably related to defendant's rehabilitation and to general purposes of probation. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

Conditions of probation may impinge on defendant's constitutional right to freedom of association when those conditions bear a reasonable relationship to the goals of probation. Trial court was within its discretion in imposing conditions that prohibited defendant, convicted of second degree assault on a client by a psychotherapist, not only from continuing to practice as a psychotherapist, but also from engaging in any type of counseling of at-risk persons or contacting former psychotherapy clients. *People v. Bolt*, 984 P.2d 1181 (Colo. App. 1999).

Condition of probation imposed by probation officer that limited defendant's discussion in therapy, when defendant was not a therapist or a psychologist licensed to ascertain the appropriate subject matter for sex offender treatment, was not reasonably related to defendant's rehabilitation. *People v. Harmon*, 3 P.3d 480 (Colo. App. 2000).

The absence of an authorizing law or condition of probation does not necessarily render unconstitutional a warrantless search of a probationer's residence if based on a reasonable suspicion. The totality of all other relevant circumstances may render such a search reasonable. The defendant's status as a probationer on intensive supervised probation greatly reduced his reasonable expectation of privacy in his residence, and, combined with the other circumstances of the situation, justified the search by his probation officer. *People v. Samuels*, 228 P.3d 229 (Colo. App. 2009).

Defendant presumed to know that violation may result in revocation. Probation is a privilege, and a criminal defendant is presumed to know that the violation of any term of his probation may result in revocation. *People v. Zimmerman*, 616 P.2d 997 (Colo. App. 1980).

A court may require a defendant to make restitution or reparation to the victim of his

transgression, and to pay court costs and expenses of supervision by the probation office. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

Defendant must have ability to pay restitution. The reason for requiring that ability to pay restitution be established before probation can be revoked is to allow revocation only where the probationer unreasonably or willfully fails to comply with the terms of his probation, because before revocation of probation for failure to make ordered restitution payments can be effected, the trial court must find that the defendant had the ability to pay at the time the payments should have been made. *Strickland v. People*, 197 Colo. 488, 594 P.2d 578 (1979).

Before revoking probation the court must make a finding of present ability to pay under subsection (2)(e). *People v. Romero*, 192 Colo. 106, 559 P.2d 1101 (1976); *Strickland v. People*, 197 Colo. 488, 594 P.2d 578 (1979).

It is required that one have the present ability to pay which contemplates that: (1) A job for which the probationer is qualified is available; (2) the job would produce an income adequate to meet his obligations; and (3) the probationer unjustifiably refuses to take it. *People v. Romero*, 192 Colo. 106, 559 P.2d 1101 (1976); *Strickland v. People*, 197 Colo. 488, 594 P.2d 578 (1979).

Absent such finding, probation to be reinstated. If the court finds that the defendant did not have the ability to pay at the time of the revocation hearing, it shall reinstate defendant's probation. *People v. Romero*, 196 Colo. 102, 559 P.2d 1101 (1976).

Court may require defendant to make child support payments. *People v. Silcott*, 177 Colo. 451, 494 P.2d 835 (1972).

But may not require posting of appearance bond. Nothing in the statutory law on probation expressly or implicitly clothes a trial court with the discretionary power to require the posting of an appearance bond as a condition of probation. Whether a prisoner is worthy of probation should not hinge on his ability to furnish a bond. To permit a court to require such a bond as a condition of probation would enlarge the punitive powers of a court beyond that contemplated by the laws of this state. *Logan v. People ex rel. Alamosa County*, 138 Colo. 304, 332 P.2d 897 (1958).

Probation cannot be contingent upon partial service of sentence in penitentiary. Since this section does not include a provision for service of a portion of a sentence in the state penitentiary as a condition of probation, a court is not free to impose as a condition of probation any period of incarceration in the state penitentiary nor may any period of incarceration in a county jail exceed the prescribed time limits. *People ex rel. Gallagher v. District Court*, 197 Colo. 481, 593 P.2d 1372 (1979).

The court may not change the conditions of probation, including the payment of restitution, without notice and an opportunity for a hearing. *People v. Stephenson*, 12 P.3d 266 (Colo. App. 1999).

Court cannot order as a condition of probation that a qualified retirement plan be liquidated to pay restitution. *People v. Stephenson*, 12 P.3d 266 (Colo. App. 1999).

To read this section harmoniously with § 16-11-206, the proper standard of proof is a preponderance of the evidence when it is alleged that a condition of probation has been breached, even though the breaching conduct also may have constituted a criminal offense. *People v. Moses*, 64 P.3d 904 (Colo. App. 2002).

The costs of probation supervision assessed against the defendant should be for the period actually served before revocation, and not based on the probationary period originally imposed. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Where supervisory period extended by defendant's request. Although this section requires notice, a hearing, and a showing of good cause before a supervisory period is increased, the provisions of this section in this respect are not applicable when an extension of the period of supervision is granted at the defendant's own request. *People v. Blackorby*, 41 Colo. App. 251, 583 P.2d 949 (1978).

When a defendant agrees to an extension of probation, the defendant does not have a due process right to be advised of or receive the right to counsel before signing the extension. *People v. Hotle*, 216 P.3d 68 (Colo. App. 2008).

When a defendant agrees to an extension of probation, the defendant does not have a sixth amendment right to be advised of or receive the right to counsel before signing the extension. A motion to extend probation is not a critical stage of the proceeding requiring the right to counsel because the defendant is not faced with a consequential significant deprivation of liberty and is not entitled to a hearing in the absence of such a request. *People v. Hotle*, 216 P.3d 68 (Colo. App. 2008).

When a defendant agrees to an extension of probation, the statutory provisions concerning notice, a hearing, and a showing of good cause are not applicable. *People v. Hotle*, 216 P.3d 68 (Colo. App. 2008).

Where defendant consents to an extension of the period of probation, there is no requirement for a hearing or other proceeding designed to assure that defendant is making a knowing and voluntary decision. The due process protections afforded in a probation revocation hearing do not apply to an extension of probation. *People v. Conner*, 148 P.3d 235 (Colo. App. 2006).

Trial court did not lose jurisdiction over defendant's case when it did not enter the order extending defendant's probation until

one day after defendant's probation term had ended. The procedures to extend defendant's probationary period were initiated before defendant's probationary term ended, which included the filing of a motion with the court that satisfied the requirements of subsection (4) while defendant was still on probation. *People v. Romero*, 198 P.3d 1209 (Colo. App. 2007).

No presentence confinement credit for time spent in halfway house. Where residency in a community corrections facility is imposed as a condition of probation, it does not involve confinement as contemplated by § 16-11-306; thus no presentence confinement credit may be given for time spent at a community corrections halfway house. *People v. Radar*, 652 P.2d 1085 (Colo. App. 1982).

Condition that probationer not impose his religious beliefs on other people while performing public service during probationary period is neither necessary to ensure that the defendant lead a law-abiding life, nor does it enhance the probationer's rehabilitation. *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), *rev'd* on other grounds, 807 P.2d 570 (Colo. 1991).

The trial court has broad discretion in setting the terms and conditions of restitution orders, and it did not abuse its discretion in ordering that restitution include the amount paid by the victim in reward money. The court found that payment of the reward was reasonable under the circumstances and would not have occurred but for the defendant's actions. The fact that the victim had no legal obligation to offer a reward and may not have been contractually bound to pay the award was immaterial. *People v. Dillingham*, 881 P.2d 440 (Colo. App. 1994).

To determine whether a specific geographic restriction is reasonably related to the statutory purposes of probation, the following factors should be considered: (1) Whether the

restriction is reasonably related to the underlying offense; (2) whether the restriction is punitive to the point of being unrelated to rehabilitation; (3) whether the restriction is unduly severe and restrictive because the defendant resides in the area and is forced to relocate or is employed or anticipates employment in the area; (4) whether the defendant may petition the court to lift the restriction temporarily when necessary; and (5) whether less restrictive means are available. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997).

These factors are not exhaustive but are helpful tools which, at a minimum, should form a basis to guide trial courts in imposing a geographic restriction as a condition of probation. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997).

Factors applied and a nexus found to exist between the underlying offense and the probation condition imposed. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997); *People v. Bolt*, 984 P.2d 1181 (Colo. App. 1999).

A district court may, as a condition of probation, prohibit a defendant from having unsupervised contact with his or her children. The court properly considered defendant's parenting history, the severity of her offense, and the necessity to assist her in leading a law-abiding life while affording society and her young children a measure of protection against recidivism. *People v. Forsythe*, 43 P.3d 652 (Colo. App. 2001).

Trial court had the authority under former §§ 16-11-204 (4) and 17-27-105 (1)(h) (now §§ 18-1.3-204 (4) and 18-1.3-301 (1)(h)) to modify defendant's community corrections sentence before it expired. The court retained this authority after defendant's release date passed because re-sentencing proceedings were initiated prior to that date. *People v. Knott*, 83 P.3d 1147 (Colo. App. 2003).

18-1.3-205. Restitution as a condition of probation. As a condition of every sentence to probation, the court shall order that the defendant make full restitution pursuant to the provisions of part 6 of this article and article 18.5 of title 16, C.R.S. Such order shall require the defendant to make restitution within a period of time specified by the court. Such restitution shall be ordered by the court as a condition of probation.

Source: L. 2002: Entire article added with relocations, p. 1382, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-204.5 as it existed prior to 2002.

Cross references: For administrative proceedings to compensate victims of crime, see article 4.1 of title 24; for restitution as a condition of parole, see § 17-2-201 (5)(c); for restitution to victims of crime generally, see article 28 of title 17; for charges for bad checks received as a restitution payment ordered as a condition of a plea agreement, see § 16-7-304; for charges for bad checks received as a restitution payment ordered as a condition of a deferred prosecution or deferred sentence, see § 16-7-404; for restitution by delinquent children under the "Colorado Children's Code", see § 19-2-918.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-205 is similar to § 16-11-204.5 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

The legislative purpose underlying the statutory scheme is obvious from the statutory test: In all cases in which a convicted defendant's criminal conduct causes pecuniary damages to a victim, the sentencing court is obliged to order the defendant to pay restitution to the victim or the victim's immediate family and to fix the amount of such restitution as part of the judgment, whether the sentence be to probation or to a term of incarceration. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

Restitution is intended to make the victim whole. *People v. King*, 648 P.2d 173 (Colo. App. 1982); *People v. Catron*, 678 P.2d 1 (Colo. App. 1983); *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Replacement value should be the measure of restitution when the plaintiff demonstrates that they will have to replace an item that is not readily available at fair market value. Where restitution is sought for "anticipated future expense" there is the possibility that the plaintiff will reap a windfall. Nonetheless, a victim who anticipates incurring future expenses is entitled to be placed in the same financial position he or she would have been in had the wrong not been committed. *People v. Stafford*, 93 P.3d 572 (Colo. App. 2004).

Restitution is not a substitute for a civil action to recover damages. *People v. King*, 648 P.2d 173 (Colo. App. 1982); *People v. Catron*, 678 P.2d 1 (Colo. App. 1983).

Mere pendency of civil suit between criminal and victim does not vitiate trial court's duty to order restitution. *People v. Smith*, 754 P.2d 1168 (Colo. 1988).

A release from liability obtained in a civil settlement cannot limit a criminal court's authority to order restitution equivalent to actual pecuniary damages. A contrary conclusion would violate the plain language of this section and would frustrate the rehabilitative purposes of probation by permitting criminal defendants to avoid financial responsibility for their conduct. *People v. Maxich*, 971 P.2d 268 (Colo. App. 1998).

Application of 1985 amendment at 1994 restitution hearing not additional punishment within meaning of ex post facto prohibition of state constitution. *People v. Stewart*, 926 P.2d 105 (Colo. App. 1996).

Restitution provisions of this section do not apply where defendant, who pleaded guilty to theft by receiving, was not sentenced to probation, but trial court could impose restitution under statutes requiring restitution as a condition of parole (§§ 16-11-104 (4) and 17-2-201 (5)(c)(I)). *People v. Schmidt*, 700 P.2d 925 (Colo. App. 1985).

The court's duty to fix the amount of restitution is not confined to sentences to probation but applies equally to sentences to imprisonment. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

The fact that the victim might have filed a civil claim for damages against the convicted offender, or intends to do so in the future does not dispense with the courts obligation to order the offender to pay restitution and to fix the amount of the restitution at the time of sentencing. *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

"Victim" construed. The term "victim", as it appears in this section, refers to the party immediately and directly aggrieved by the criminal act, and not to others who suffer loss because of some relationship, contractual or otherwise, to the directly aggrieved party. *People v. King*, 648 P.2d 173 (Colo. App. 1982); *People v. Catron*, 678 P.2d 1 (Colo. App. 1983); *People v. Jones*, 701 P.2d 868 (Colo. App. 1984) (all cases decided prior to 1985 amendment).

Towing company is a "victim" for purposes of restitution because it sustained a pecuniary loss as a result of defendant's criminal conduct and is therefore a person aggrieved by the offender's conduct. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003).

A decedent's minor children are not "victims" within the meaning of the statute even though it is obvious that minor children suffer a loss at the death of a parent. *People v. Catron*, 678 P.2d 1 (Colo. App. 1983); *People v. Quinonez*, 701 P.2d 74 (Colo. App. 1984), aff'd in part, rev'd in part on other grounds, 735 P.2d 159 (Colo. 1987) (both cases decided prior to 1985 amendment).

Where the crime results in death, the "victim" for purposes of restitution is the decedent. The decedent's personal representative may properly be designated to receive, as restitution, such damages suffered by the victim as the trial court may order to be paid as a condition of probation. *People v. Catron*, 678 P.2d 1 (Colo. App. 1983) (decided prior to 1985 amendment).

The term "victim" refers to the person named in the charge of which defendant was convicted and not to persons named in charges which were dismissed. *People v. Canseco*, 689 P.2d 673 (Colo. App. 1984); *People v. Quinonez*, 701 P.2d 74 (Colo. App. 1984), aff'd in part, rev'd in part on other grounds, 735 P.2d 159 (Colo. 1987).

County department of human services is not a "victim" for purposes of restitution because an essential element of the underlying crime in the case requires wrongful conduct against a child pursuant to § 18-6-401 (1)(a) and (7)(b)(I). Accordingly, the court erred in imposing restitution to the county department, and any expenses the department incurred were incidental to its duties. *People v. Padilla-Lopez*, ___ P.3d ___ (Colo. App. 2010).

An insurance carrier may be considered a victim pursuant to this section since it includes within the definition of "victim" parties "who have suffered losses because of a contractual relationship". *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Lunsford*, 43 P.3d 629 (Colo. App. 2001).

If a party sustains damages as a result of defendant's conduct, the damages are recoverable regardless of whether the party was named as a victim in the prosecution. *People v. Lunsford*, 43 P.3d 629 (Colo. App. 2001).

The defendant's son was a victim of the crime of contributing to the delinquency of a minor where the defendant was convicted of using her son to shoplift video games. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

The minor child is the victim of the crime of contributing to the delinquency of a minor. Therefore, he is entitled to restitution. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

Under the definition of "victim" in effect when the crime took place, an insurance company could not be reimbursed. Court order allocating restitution payments to insurance company under new definition of "victim" did not violate ex post facto clause. Under either version of the statute the court was authorized to order full restitution, therefore, there is no change in the quantum of punishment. *People v. Woodward*, 11 P.3d 1090 (Colo. 2000).

This statute does not limit monetary conditions of probation only to restitution and a court may impose a variety of monetary conditions in connection with granting probation, including a requirement to make a charitable contribution. *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986).

This section specifically provides for restitution to be made for the actual pecuniary damage incurred by the victim as the direct result of the defendant's conduct. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Restitution is part of the criminal sentence rather than merely a debt between the defendant and the victim. Trial courts are required to impose restitution in an amount equal to the actual pecuniary damages sustained by the victim, regardless of the defendant's ability to pay. *People v. Salas*, 42 P.3d 68 (Colo. App. 2001).

Section contemplates restitution for losses resulting only from criminal conduct by the

defendant. *People v. Estes*, 923 P.2d 358 (Colo. App. 1996).

Because post-judgment interest on the restitution amount awarded has the statutory purpose to encourage speedy payment of the restitution order, which is different from the purpose of pre-judgment interest, a trial court must impose both pre-judgment interest and post-judgment interest in probationary restitution orders. *Roberts v. People*, 130 P.3d 1005 (Colo. 2006).

The trial court is prohibited from ordering restitution for losses attributed to conduct that was not prosecuted because of the applicable statute of limitations. *People v. Davalos*, 30 P.3d 841 (Colo. App. 2001).

Restitution order should not include payment for future counseling for victim where nothing in the victim impact statement justified the need for future counseling. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

Absent evidence supporting the need for future counseling, the trial court erred in entering an order for undetermined future counseling expenses. *People v. Estes*, 923 P.2d 358 (Colo. App. 1996).

Payment of restitution is authorized only as to the victim of a defendant's conduct and only for the actual pecuniary damage the victim sustained as the direct result of the defendant's conduct. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

Because this section authorizes payment of restitution in the amount of the actual pecuniary damages sustained by the victim, an order of restitution in the amount paid by the victim to repair the stolen vehicle was reasonable even though it exceeded the fair market value of the vehicle before it was stolen. *People v. Courtney*, 868 P.2d 1126 (Colo. App. 1993).

An order of restitution should be limited to the difference between the total amount of the victim's actual, pecuniary damages and any proceeds attributable to those damages received by the victim from the settlement of the civil claim. *People v. Acosta*, 860 P.2d 1376 (Colo. App. 1993).

"Actual pecuniary damages" are not limited to out-of-pocket expenditures, but encompass other losses or injuries that can be reasonably calculated and recompensed in money. Thus, the value of employees' time spent in conducting inventories for missing goods and installing and using security devices was recompensable under this section, regardless of whether any funds in addition to regular salaries were expended by the victim company. *People v. Duvall*, 908 P.2d 1178 (Colo. App. 1995).

Restitution is not limited to the value of the damaged item. It may include repair costs, even if those costs exceed the damage object's value. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Defendant's financial ability to pay restitution is a defense to a charge of violating restitution requirement of deferred sentence. *People v. Afentul*, 773 P.2d 1081 (Colo. 1989).

If the victim has suffered a pecuniary loss, full restitution is to be ordered regardless of the defendant's ability to pay. Ordering restitution regardless of the defendant's ability to pay is not imposing an excessive fine, because restitution is not a fine. A fine is solely a monetary penalty where restitution is to make the victim whole. *People v. Stafford*, 93 P.3d 572 (Colo. App. 2004).

Interest on the unpaid balance of the restitution amount does not constitute actual pecuniary loss caused by the defendant's conduct. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Defendant has the right to an opportunity to ascertain the amount of the injury sustained as a result of his conduct. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Where a defendant's conduct requires a victim to borrow funds to cover losses, both the principal and the interest constitute actual pecuniary damage and are properly includable in a restitution order. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Victim's loss of the use of money can be, under appropriate circumstances, pecuniary damage and interest may be awarded as compensation for that damage. *People v. Acosta*, 860 P.2d 1376 (Colo. App. 1993); *People v. Stewart*, 926 P.2d 105 (Colo. App. 1996).

Payments may be ordered to cover costs incurred by nonsurviving victims. Expenses relating to items such as medical care, funeral arrangements, and property damage caused by the defendant's criminal conduct may be the basis for an order of restitution to the estate or appropriate representatives of a decedent. *People v. Deadmond*, 683 P.2d 763 (Colo. 1984); *People v. Quinonez*, 735 P.2d 159 (Colo. 1987).

Trial court properly included in restitution to be paid to insurer the costs incurred by the insurer in processing the case, including adjustment expenses, investigation costs, and attorney fees. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Noneconomic damages may be included in restitution as long as the damages are actual pecuniary damages sustained by a party entitled to restitution. An insurance company may recover pain and suffering damages as a part of a restitution order. *People v. Lunsford*, 43 P.3d 629 (Colo. App. 2001).

Section does not prescribe a maximum restitution amount. Therefore, the rule set forth in *Apprendi* and *Blakely* concerning prescribed statutory maximum sentences does not apply to restitution orders in Colorado. Restitution is not limited by the jury's findings, but rather includes any pecuniary losses suffered by the victim as a proximate cause of the offender's con-

duct. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Awarding interest is compensation for actual, pecuniary damage suffered by the victim incidental to the defendant's crime of fraudulently obtaining funds because the victim loses the use of the money involved. Interest is awarded as restitution to compensate the victim for such loss of use, it is not intended to reimburse the victim for interest that otherwise would have been earned on the funds. *Valenzuela v. People*, 893 P.2d 97 (Colo. 1995).

Interest payable for fraudulently obtained food stamps accrues from the time the state reimburses the federal government for the fraudulently obtained food stamps. Interest should accrue only from the time of the actual injury and the state suffer actual loss only when it reimburses the federal government. *Valenzuela v. People*, 893 P.2d 97 (Colo. 1995).

As part of restitution for fraudulently obtained AFDC funds, court properly included interest from the time of the theft. *Valenzuela v. People*, 893 P.2d 97 (Colo. 1995).

When viewed in its entirety, the statute requires pre-judgment interest as part of the restitution amount to compensate fully the victim, and it also requires post-judgment interest for as long as the victim has not been paid in full. Nothing in the post-judgment interest provision precludes imposing pre-judgment interest. *Roberts v. People*, 130 P.3d 1005 (Colo. 2006).

Trial court did not abuse its discretion in ordering that restitution include the amount paid by the victim in reward money. The court found that payment of the reward was reasonable under the circumstances and would not have occurred but for the defendant's actions. The fact that the victim had no legal obligation to offer a reward and may not have been contractually bound to pay the award was immaterial. *People v. Dillingham*, 881 P.2d 440 (Colo. App. 1994).

As part of restitution for fraudulently obtained food stamps in violation of § 26-2-128, the court properly included interest calculated in accordance with § 5-12-102. *People v. Valenzuela*, 874 P.2d 420 (Colo. App. 1994), *aff'd* in part and *rev'd* in part on other grounds, 893 P.2d 97 (Colo. 1995).

A governmental entity may qualify as a victim to whom restitution is payable. *People v. Cera*, 673 P.2d 807 (Colo. App. 1983); *People v. Witt*, 15 P.3d 1109 (Colo. App. 2000).

Costs incurred by the county department of social services in investigating fraudulently obtained food stamps constituted out-of-pocket losses resulting from that conduct and were properly includable in restitution. *People v. Witt*, 15 P.3d 1109 (Colo. App. 2000).

Fact that victim's loss was partially covered by insurance was irrelevant to a determi-

nation of the defendant's restitution obligation imposed as a condition of parole. *People v. Jewett*, 693 P.2d 381 (Colo. App. 1984).

Trial court erred in ordering defendant mother to pay restitution for her son's future counseling sessions where mother was found guilty of contributing to the delinquency of her minor son but there was no testimony in the record at sentencing about the need for future counseling sessions. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

Terms and conditions of probation are statutory. *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980); *People v. Deadmond*, 683 P.2d 763 (Colo. 1984).

This section mandates that the court provide that the defendant make restitution as a condition of every sentence to probation, therefore insurer's contractual waiver of its right to recover pursuant to the insurance policy had no effect on insurer's statutory right to criminal restitution. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986).

Victim's injury must result from defendant's conduct. This section requires that the injury of the victim be sustained as a result of the conduct of the defendant. *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980).

Restitution, which is intended to make the victim whole, means that a defendant should not be forced to repay a victim when there has been no indication that the damage or injury sustained by the victim was inflicted by the defendant. *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980).

Defendant can be subject to criminal liability only for the loss that was the result of his criminal conduct. *People v. Brigner*, 978 P.2d 163 (Colo. App. 1999).

And more than speculation is required for defendant to bear responsibility for the injury the victim sustained. *Cumhuriyet v. People*, 200 Colo. 466, 615 P.2d 724 (1980).

The people bear the burden of proving that the restitution sought is attributable to the defendant's conduct. *People v. Engel*, 746 P.2d 60 (Colo. App. 1987).

Sentencing court not barred by collateral estoppel and double jeopardy principles from considering acquitted conduct in determining an award of restitution. *People v. Pagan*, 165 P.3d 724 (Colo. App. 2006).

Preponderance of the evidence is the proper burden of persuasion to establish restitution in criminal cases. *People v. Carpenter*, 885 P.2d 334 (Colo. App. 1994).

Burden of proof for establishing amount of restitution owed is a preponderance of the evidence. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Victim need not be specifically named as party in criminal indictment or information. If there is sufficient evidence in the record to

determine that an individual is directly and immediately aggrieved by the defendant's conduct, then restitution shall be paid to that individual. *People v. Jones*, 701 P.2d 868 (Colo. App. 1984).

Where defendant agrees to pay restitution to "victims" named in dismissed counts but not named in counts to which the defendant pleads guilty as part of a plea bargain, a restitution order issued as a condition of sentence is valid. However, a defendant who did not agree to pay restitution to victims of counts other than those to which he pled guilty until after his plea has been taken could not be ordered to pay restitution to unnamed victims. *People v. Quinonez*, 735 P.2d 159 (Colo. 1987).

Payments not dischargeable in bankruptcy. The purpose evidenced by the statutory language in this section is rehabilitative. The general assembly did not intend restitution to be a method of debt collection and did not intend to create a debtor-creditor relationship between the victim and the defendant or the state and the defendant. Therefore, restitution payments ordered by the court cannot be discharged under a federal Chapter 13 plan. In *re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983).

The fact that a debtor will remain obligated to make restitution payments does not make his bankruptcy plan nonconfirmable under 11 U.S.C. § 1325, provided that all the statutory requirements, especially good faith and feasibility, are satisfied. In *re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983).

Restitution is appropriately imposed following a conviction for selling securities without a license, and is not precluded by the discharge in bankruptcy of defendant's liability on any civil claim arising out of the discharged debt. *People v. Milne*, 690 P.2d 829 (Colo. 1984).

Failure of trial court to make express findings regarding the defendant's ability to pay restitution is not reversible error where defendant's own testimony during trial and the presentence report showed the defendant was in a sufficient financial position to meet the restitution obligation imposed. *People v. Phillips*, 732 P.2d 1226 (Colo. App. 1986); *People v. Estes*, 923 P.2d 358 (Colo. App. 1996).

In ordering a defendant to pay restitution to the state for fraudulently obtained food stamps, it was error for a court to consider only the victim's pecuniary loss and not the defendant's ability to pay. *People v. Valenzuela*, 874 P.2d 420 (Colo. App. 1994), *aff'd in part and rev'd in part* on other grounds, 893 P.2d 97 (Colo. 1995).

When the record was unclear as to whether the defendant had or had not been ordered to pay restitution as a condition of his probation, the defendant's refusal to acknowledge such a non-specific condition did not provide

sufficient grounds for the revocation of his probation. *People v. Dirgo*, 773 P.2d 621 (Colo. App. 1989).

When, at the time of the revocation hearing, there was no order directing defendant to make any installment payments of restitution in any specific amount, other than for the first six months and the evidence was undisputed that defendant complied with that order, a revocation order based upon defendant's failure to comply with the court's order to pay restitution cannot be affirmed. *People v. Frye*, 997 P.2d 1223 (Colo. App. 1999).

In setting amount of restitution, trial court should consider the factors set out in subsection (1) but need not make express findings with respect to such factors. *People v. Powell*, 748 P.2d 1355 (Colo. App. 1987).

Defendant was appropriately ordered to pay restitution for thefts that were not specifically included in her guilty plea. *People v. Borquez*, 814 P.2d 382 (Colo. 1991).

A codefendant is jointly responsible for restitution when he is also a complicitor in the crime. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

Codefendants were participants and complicitors in the same criminal acts, therefore, each is responsible for the damage he caused and also for the damage caused by the other. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

Subsection (2) provides no right to offender to present evidence of ability to pay restitution during revocation hearing when hearing is based on other grounds. *People v. McCarty*, 851 P.2d 181 (Colo. App. 1992), *aff'd*, 874 P.2d 394 (Colo. 1994).

Defendant's act of stealing a vehicle was the proximate cause of the towing company's losses because, without it, such losses would not have been sustained. While the police department's failure to impound the vehicle on its own lot and the vehicle owner's failure to retrieve the vehicle earlier may have contributed to the towing company's losses, there is no evidence that these events were not reasonably foreseeable. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003).

Applied in *Cross v. District Court*, 643 P.2d 39 (Colo. 1982); *People v. Cheek*, 734 P.2d 654 (Colo. App. 1987).

18-1.3-206. Repayment of crime stopper reward as a condition of probation.

(1) As a condition of every sentence to probation where information received through a crime stopper organization led to the arrest and felony conviction of a defendant, the court may require such defendant, as a condition of probation, to repay all or part of any reward paid by such organization. The amount of such repayment shall not exceed the actual reward paid by any crime stopper organization and shall be used solely for paying rewards. The court shall fix the manner and time of repayment.

(2) In the event the defendant fails to repay the crime stopper reward in accordance with an order of the court, the defendant shall be returned to the sentencing court and the court, upon proof of failure to pay, may:

- (a) Modify the amount of the repayment;
- (b) Extend the period of probation;
- (c) Order the defendant committed to jail with work release privileges; or
- (d) Revoke probation and impose the sentence otherwise required by law.

(3) When, as a result of a plea bargain agreement, a defendant is ordered to repay a reward pursuant to subsection (1) of this section, the department or agency supervising the collection of such repayment may assess a charge of fifteen dollars to the defendant for collection of each bad check or each bad check received as a repayment.

(4) Any order for the repayment of all or part of a crime stopper reward as a condition of probation shall be prioritized in accordance with section 18-1.3-204 (2.5).

(5) As used in this section, unless the context otherwise requires:

(a) "Bad check" has the same meaning provided in section 16-7-404.

(b) "Crime stopper organization" has the same meaning provided in section 16-15.7-102 (1), C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1382, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-204.6 as it existed prior to 2002.

18-1.3-207. Work and education release programs. (1) As a specific condition of probation for a person convicted of a felony or misdemeanor, the court may require the

probationer to participate for a period not to exceed two years or the term to which he or she might be sentenced for the offense committed, whichever is less, in a supervised work release or education release program. Utilization of the county jail, a municipal jail, or any other facility may be used for the probationer's full-time confinement, care, and maintenance, except for the time he or she is released for scheduled work or education.

(1.1) Before a final ruling by the court authorizing a probationer to participate in a supervised education release program, the court shall notify the prosecuting attorney and the postsecondary educational institution requesting their comments on the pending release. The notice shall include all relevant information pertaining to the probationer and to the nature of the crime for which he or she was convicted. Both the prosecuting attorney and the postsecondary educational institution shall reply to the court in writing within fourteen days after receipt of the notification or within such other reasonable time in excess of fourteen days as specified by the court. The postsecondary educational institution's reply shall include a statement of whether or not it will accept the probationer as a student. Acceptance by a state postsecondary educational institution shall be pursuant to section 23-5-106, C.R.S.

(2) All employment income of a probationer participating in a work release program shall be received and deposited by the probation officer in the registry of the court. The court shall order disbursement of the funds so deposited in payment of the following items which are listed in the order of their priority:

- (a) Any current child support order;
- (b) Any child support arrearage;
- (c) Any child support debt order;
- (d) Any spousal maintenance;
- (e) Costs for the crime victim compensation fund, pursuant to section 24-4.1-119, C.R.S.;
- (f) Surcharges for the victims and witnesses assistance and law enforcement fund, pursuant to section 24-4.2-104, C.R.S.;
- (g) Restitution;
- (h) A time payment fee;
- (i) Late fees;
- (j) Any other fines, fees, or surcharges;
- (k) Room, board, and work supervision inside and outside the county jail or other facility; and
- (l) The probationer.

(3) Any acts by the probationer in violation of the conditions of probation under subsection (1) of this section may be asserted as a basis for revocation of probation as provided in sections 16-11-205 and 16-11-206, C.R.S., and any willful failure to return to the jail or other facility may be punishable as an escape under section 18-8-208.

Source: **L. 2002:** Entire article added with relocations, p. 1383, § 2, effective October 1. **L. 2008:** (2)(e) amended, p. 1889, § 53, effective August 5. **L. 2012:** (1.1) amended, (SB 12-175), ch. 208, p. 865, § 108, effective July 1.

Editor's note: (1) This section is similar to former § 16-11-212 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1.1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-1.3-207 is similar to § 16-11-212 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Illegal sentences. The combination of a sen-

tence for a definite period with a work-release program which is only permitted as a condition of probation results in an illegal sentence. *People v. District Court*, 673 P.2d 991 (Colo. 1983).

Probation cannot be contingent upon partial service of sentence in penitentiary. This section does not include a provision for service

of a portion of a sentence in the state penitentiary as a condition of probation. A court, therefore, is not free to impose as a condition of probation any period of incarceration in the state penitentiary nor may any period of incarceration in a county jail exceed the prescribed time limits. *People ex rel. Gallagher v. District Court*, 197 Colo. 481, 593 P.2d 1372 (1979).

Where trial court commits a probationer to a county or municipal jail as a facility utilized in conjunction with a work release program, upon revocation of probation, the probationer is entitled to presentence confinement credit for the actual time confined to the county or municipal jail. *People v. Lee*, 678 P.2d 1030 (Colo. App. 1983).

No equal protection violation. This section and § 16-11-202, relating to probation establish general statutory probation dispositions for all defendants eligible for probation and do not create classifications resulting in disparate treatment. *People v. Garberding*, 787 P.2d 154 (Colo. 1990).

Imposition of a two-year jail term as part of a work release program is not contingent upon an offender having compensated employment or being enrolled in educational courses at the time of sentencing. *People v. Simpson*, 969 P.2d 751 (Colo. App. 1998).

Applied in *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981).

18-1.3-208. Intensive supervision probation programs - legislative declaration.

(1) The general assembly finds and declares that intensive supervision probation programs are an effective and desirable alternative to sentences to imprisonment or community corrections. It is the purpose of this section to encourage the judicial department to establish programs for the intensive supervision of selected probationers. It is the intent of the general assembly that such programs be formulated so that they protect the safety and welfare of the public in the community where the programs are operating and throughout the state of Colorado.

(2) The judicial department may establish an intensive supervision probation program in any judicial district or combination of judicial districts in order to provide an alternative to the sentencing of selected offenders to the department of corrections. When establishing such programs, the judicial department shall seek the counsel of the chief judge of the district court, the office of the district attorney, the state public defender or his or her designee, the county sheriff, the chief probation officer in the judicial district, the department of corrections, the local community corrections board, and members of the public at-large.

(3) The judicial department shall require that offenders in the program receive at least the highest level of supervision that is provided to probationers. Such programs are to include highly restricted activities, daily contact between the offender and the probation officer, monitored curfew, home visitation, employment visitation and monitoring, drug and alcohol screening, treatment referrals and monitoring, and restitution and community service and shall minimize any risk to the public.

(4) The court may sentence any offender who is otherwise eligible for probation and who would otherwise be sentenced to the department of corrections to an intensive supervision probation program if the court determines that such offender is not a threat to society. For purposes of this section, "offender" shall have the same meaning as that set forth in section 17-27-102 (6), C.R.S.

(5) The judicial department shall have the power to establish and enforce standards and criteria for the administration of intensive supervision probation programs.

(6) (a) It is the intent of the general assembly in enacting this subsection (6) to address a portion of the projected state inmate bedspace requirements through expansion of intensive supervision probation programs authorized by this section.

(b) The judicial department is directed to implement a three-phase expansion of intensive supervision probation programs in fiscal years 1995-96 and 1996-97 to include an additional seven hundred fifty participants over the number of participants in such programs on July 1, 1995.

Source: L. 2002: Entire article added with relocations, p. 1384, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-213 as it existed prior to 2002.

18-1.3-209. Substance abuse assessment required. (1) Each person convicted of a felony committed on or after July 1, 1992, and each person convicted of a misdemeanor or petty offense on or after July 1, 2008, who is to be considered for probation or a deferred judgment and sentence that includes supervision by the probation department, shall be required to submit to an assessment for the use of controlled substances or alcohol developed pursuant to section 16-11.5-102 (1) (a), C.R.S., as part of the presentence or probation investigation required pursuant to section 16-11-102, C.R.S., or, if the investigation is waived pursuant to section 16-11-102 (4), C.R.S., and the person is sentenced to probation or supervised by a probation officer, then as a part of intake.

(2) The court shall order each person required to submit to an assessment pursuant to subsection (1) of this section to comply with the recommendations of the alcohol and drug assessment. If the person is sentenced to probation, a deferred judgment and sentence that includes supervision by the probation department, or any other sentence except a sentence only to jail, the person shall be ordered to comply with the recommendations as a condition or as part of the sentence imposed, at the person's own expense, unless the person is indigent.

(3) The assessment required by subsection (1) of this section shall be at the expense of the person assessed, unless the person is indigent.

Source: L. 2002: Entire article added with relocations, p. 1385, § 2, effective October 1. L. 2008: Entire section amended, p. 1714, § 1, effective July 1. L. 2011: (1) amended, (HB 11-1200), ch. 158, p. 544, § 1, effective August 10.

Editor's note: This section is similar to former § 16-11.5-103 as it existed prior to 2002.

18-1.3-210. Counseling or treatment for alcohol or drug abuse. (1) In any case in which treatment or counseling for alcohol or drug abuse is authorized in connection with a deferred prosecution, deferred judgment and sentence, or probation, the court may require the defendant to obtain counseling or treatment for the condition. If the court orders the counseling or treatment, the court shall order that the counseling or treatment be obtained from a treatment facility or person approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S., unless the court makes a finding that counseling or treatment in another facility or with another person is warranted. If the defendant voluntarily submits himself or herself for such treatment or counseling, the district attorney and the court may consider his or her willingness to correct his or her condition as a basis for granting deferred prosecution or deferred judgment and sentence.

(2) Notwithstanding the provisions of subsection (1) of this section, in any case in which treatment or counseling for alcohol or drug abuse is authorized and ordered by the court in connection with a deferred prosecution, deferred judgment and sentence, or probation for an offense involving unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., the court shall order that the counseling or treatment be obtained from a treatment facility or person approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1385, § 2, effective October 1. L. 2008: Entire section amended, p. 1715, § 2, effective July 1. L. 2010: Entire section amended, (SB 10-175), ch. 188, p. 785, § 29, effective April 29.

Editor's note: This section is similar to former § 16-7-402 as it existed prior to 2002.

Cross references: For the duties of the division of alcohol and drug abuse in the department of human services concerning alcohol and drug abuse, see article 80 of title 27.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

18-1.3-211. Sentencing of felons - parole of felons - treatment and testing based upon assessment required. (1) Each person sentenced by the court for a felony committed on or after July 1, 1992, shall be required, as a part of any sentence to probation, community corrections, or incarceration with the department of corrections, to undergo periodic testing and treatment for substance abuse that is appropriate to such felon based upon the recommendations of the assessment made pursuant to section 18-1.3-209, or based upon any subsequent recommendations by the department of corrections, the judicial department, or the division of criminal justice of the department of public safety, whichever is appropriate. Any such testing or treatment shall be at a facility or with a person approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S., and at such felon's own expense, unless such felon is indigent.

(2) Each person placed on parole by the state board of parole on or after July 1, 1992, shall be required, as a condition of such parole, to undergo periodic testing and treatment for substance abuse that is appropriate to such parolee based upon the recommendations of the assessment made pursuant to section 18-1.3-209 or any assessment or subsequent reassessment made regarding such parolee during his or her incarceration or any period of parole. Any such testing or treatment shall be at a facility or with a person approved by the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S., and at such parolee's own expense, unless such parolee is indigent.

Source: L. 2002: Entire article added with relocations, p. 1385, § 2, effective October 1. **L. 2010:** Entire section amended, (SB 10-175), ch. 188, p. 786, § 30, effective April 29.

Editor's note: This section is similar to former § 16-11.5-104 as it existed prior to 2002.

18-1.3-212. Drug testing of offenders by judicial department - pilot program. The judicial department is hereby authorized and directed to develop as soon as possible a pilot program for the drug testing of persons during presentence investigation and on probation. Such program shall include testing of persons during presentence investigation and may include random drug testing when an offender is assigned to specialized treatment and rehabilitation programs.

Source: L. 2002: Entire article added with relocations, p. 1386, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-102.5 as it existed prior to 2002.

PART 3

COMMUNITY CORRECTIONS AND
SPECIALIZED RESTITUTION AND
COMMUNITY SERVICE PROGRAMS

18-1.3-301. Authority to place offenders in community corrections programs. (1) (a) Any judge of a district court may refer any offender convicted of a felony to a community corrections program unless such offender is required to be sentenced pursuant to section 18-1.3-406 (1) or a sentencing provision that requires a sentence to the department of corrections. If an offender who is sentenced pursuant to section 18-1.3-406

(1) has such sentence modified upon the finding of unusual and extenuating circumstances pursuant to such section, such offender may be referred to a community corrections program if such offender is otherwise eligible for such program and is approved for placement pursuant to section 17-27-103 (5), C.R.S., and section 17-27-104 (3), C.R.S. For the purposes of this article, persons sentenced pursuant to the provisions of sections 19-2-908 (1) (a) (I) and (1) (c) (I) (B) and 19-2-910 (2), C.R.S., shall be deemed to be offenders.

(b) In making a direct sentence to a community corrections program, the sentencing court may impose a sentence to community corrections which includes terms, lengths, and conditions pursuant to section 18-1.3-401. The sentencing court may also refer any offender to a community corrections program as a condition of probation pursuant to section 18-1.3-202. Any placement of offenders referred as a direct sentence or as a condition of probation shall be subject to approval pursuant to section 17-27-103 (5), C.R.S., and section 17-27-104 (3), C.R.S.

(b.5) As a condition of every placement in a community corrections program, the court shall require the offender, as a condition of placement, to execute or subscribe a written prior waiver of extradition stating that the offender consents to extradition to this state and waives all formal procedures incidental to extradition proceedings in the event that the offender is arrested in another state upon an allegation that the offender has violated the terms of his or her community corrections placement, and acknowledging that the offender shall not be admitted to bail in any other state pending extradition to this state.

(c) A probation officer, in making a presentence report to the court pursuant to section 16-11-102, C.R.S., or in making a report to the court after a probation violation, may recommend the utilization of a community corrections program in sentencing or resentencing an offender.

(d) If an offender is rejected by a community corrections board or a community corrections program before placement in a program, the court shall promptly resentence the offender. If a sentence to the department of corrections was imposed upon the offender prior to the referral of the offender to community corrections, the resentence shall not exceed the sentence which was originally imposed upon the offender.

(e) If an offender is rejected after acceptance by a community corrections board or a community corrections program, the court may resentence the offender without any further hearing so long as the offender's sentence does not exceed the sentence which was originally imposed upon the offender.

(f) The probation department of the judicial district in which a community corrections program is located shall have jurisdiction over all offenders sentenced directly to a community corrections program. Such probation department shall initiate arrest warrants, process reports or other official documents regarding offenders at the direction of the court, coordinate with community corrections boards and community corrections programs, review offender supervision and treatment, authorize offender transfers between residential and nonresidential phases of placement, and carry out such other duties as the court directs.

(g) The sentencing court may make appropriate orders for the detention, transfer, or resentencing of any offender whose placement in a community corrections program is terminated pursuant to section 17-27-103 (7), C.R.S., or section 17-27-104 (5), C.R.S. As to any offender held pursuant to section 17-27-104 (6), C.R.S., in a jail operated by a unit of local government in a county other than where the offender's original conviction occurred, the sentencing court shall order the transfer of the offender to the jail of the county where the original conviction occurred as soon as possible. The sentencing court is not required to provide the offender with an evidentiary hearing pertaining to the rejection of placement in a community corrections program prior to resentencing.

(h) (I) The sentencing court shall have the authority to modify the sentence of an offender who has been directly sentenced to a community corrections program in the same manner as if the offender had been placed on probation.

(II) A defendant who successfully completes the residential phase of a community corrections sentence, has paid the costs of the residential program in full, and is being supervised on nonresidential status at either a minimum or administrative level is eligible for consideration for early termination of his or her community corrections sentence by the court.

(III) When the defendant has met the eligibility criteria enumerated in subparagraph (II) of this paragraph (h), the defendant's probation officer shall submit a petition for early termination of sentence to the court and notify the district attorney and the defendant.

(IV) If victim notification is required, the probation officer shall provide victim notification pursuant to part 3 of article 4.1 of title 24, C.R.S.

(V) In determining whether to grant or deny the petition, the court may consider the following factors:

- (A) The defendant's assessed risk of reoffense;
- (B) Victim input, if any;
- (C) The defendant's compliance with the terms and conditions of the sentence or community corrections program;
- (D) Completion of any treatment required by the court or community corrections program; and
- (E) Other factors deemed relevant by the court.

(VI) The fact that the defendant owes restitution, costs, fees, fines, or surcharges shall not prohibit the court from granting the motion for early termination if the court finds the motion otherwise appropriate.

(i) (I) An offender sentenced directly to a community corrections program by the sentencing court pursuant to this subsection (1) shall be eligible for time credit deductions from the offender's sentence not to exceed ten days for each month of placement upon a demonstration to the program administrator by the offender that the offender has made consistent progress in the following categories:

- (A) Maintenance of employment, education, or training, including attendance, promptness, performance, cooperation, care of materials, and safety;
- (B) Development and maintenance of positive social and domestic relations;
- (C) Compliance with rules, regulations, and requirements of residential or nonresidential program placement;
- (D) Completion and compliance with components of the individualized program plan; and
- (E) Demonstration of financial responsibility and accountability.

(II) The administrator of each community corrections program shall develop objective standards for measuring progress in the categories listed in subparagraph (I) of this paragraph (i), shall apply such standards consistently to evaluations of all such offenders, and shall develop procedures for recommending the award of time credits to such offenders.

(III) The administrator of each community corrections program shall review the performance record of each offender directly sentenced to such program. Such review shall be conducted at intervals to be determined by each program administrator. Such reviews shall be conducted at least once every six months, but may be conducted at more frequent intervals as determined by the program administrator. If the program administrator determines that the offender engaged in criminal activity during the time period for which the time credits were granted, the program administrator may withdraw the time credits granted during such period. Prior to the time of the offender's release, the program administrator shall submit to the sentencing court the time credit deductions granted, withdrawn, or restored consistent with the provisions of this paragraph (i). Such time credit deductions shall be submitted on standardized forms prepared by the division of criminal justice of the department of public safety that include verification by the program administrator that the time credit deductions are true and accurate. The sentencing court shall certify such time credit deductions as part of the offender's permanent record. Any time credits authorized under this paragraph (i) shall vest upon certification of time credit deductions by the sentencing court at the time of the offender's release from the program.

(IV) An offender shall not be credited with more than one-half the allowable time credits for any month or portion thereof unless the offender was employed, was unable to be employed due to a disability waiver, or was participating in training, education, or treatment programs which precluded the ability to remain employed. This subparagraph (IV) shall not apply to those offenders excused from such employment or training by the program administrator or for medical reasons.

(V) No time credit deductions shall be granted to any offender for time spent in jail, whether awaiting sentencing, placement in the program, disciplinary action, or as a result of a subsequent arrest, unless such time spent in jail was a prearranged component of the offender's individualized program plan and the offender has made consistent progress in the categories listed in subparagraph (I) of this paragraph (i).

(VI) (Deleted by amendment, L. 2011, (SB 11-254), ch. 274, p. 1236, § 1, effective June 2, 2011.)

(j) Except as otherwise provided in paragraph (k) of this subsection (1), any offender sentenced to the department of corrections subsequent to placement in a community corrections program is entitled to credit against the term of confinement as described in section 17-27-104 (9), C.R.S. The court shall make a finding of the amount of such time credits and include such finding in the mittimus that orders the offender to be placed in the custody of the department of corrections. The department of corrections shall apply credits for residential and nonresidential time completed in a community corrections program in the same manner as credits for time served in a department of corrections facility.

(k) Any offender who escapes from a residential community corrections program or who absconds from a nonresidential community corrections program shall forfeit any time credit deductions earned pursuant to paragraph (i) of this subsection (1) and shall not be credited with any time on escape or absconder status. Within thirty-five days after an offender's escape or abscondment, the program administrator shall submit to the sentencing court a statement on the form described in subparagraph (III) of paragraph (i) of this subsection (1) of the time credit deductions that would have been earned by the offender.

(2) (a) **Initial referral.** The executive director of the department of corrections may transfer any offender who is eligible pursuant to this subsection (2) to a community corrections program if such offender is accepted for placement by a community corrections board pursuant to section 17-27-103, C.R.S., and a community corrections program pursuant to section 17-27-104, C.R.S.

(b) Unless the offender has an active felony warrant or detainer or has refused community placement, the executive director of the department of corrections shall refer an offender who has displayed acceptable institutional behavior for placement in a community corrections program according to the following timeline:

(I) No more than twenty-eight months prior to the offender's parole eligibility date for any offender who successfully completes a regimented inmate discipline program pursuant to article 27.7 of title 17, C.R.S.;

(II) No more than sixteen months prior to the offender's parole eligibility date for any offender who is not serving a sentence for an offense referred to in section 18-1.3-406; and

(III) No more than one hundred eighty days prior to the parole eligibility date for any other offender not described in subparagraph (I) or (II) of this paragraph (b).

(c) Prior to placement of an offender in any community corrections program, the executive director of the department of corrections shall give the first right to refuse placement of such offender to the community corrections board and community corrections programs in the community where the offender intends to reside after release from custody of the department of corrections or parole by the state board of parole.

(d) As to any offender held in a county jail pursuant to section 17-27-104 (6), C.R.S., the executive director of the department of corrections shall order transfer of such offender to a facility of the department of corrections as soon as possible.

(e) **Subsequent referrals.** For an offender who is serving a sentence for a class 1 or 2 felony that constitutes a crime of violence under section 18-1.3-406, excluding escape, and whose parole hearing has been deferred for at least thirty-six months, the executive director of the department of corrections shall not refer the offender for placement in community corrections earlier than six months prior to the date of the offender's second or any subsequent parole hearing.

(3) The state board of parole may refer any parolee for placement in a community corrections program. Such placement, if approved by the community corrections board pursuant to section 17-27-103, C.R.S., and the community corrections program pursuant to section 17-27-104, C.R.S., may be made a condition of release on parole or as a modifi-

cation of the conditions of an offender's parole after release or upon temporary revocation of parole pursuant to section 17-2-103 (11), C.R.S.

(4) District courts, county courts, and other local criminal justice officials may enter into agreements with community corrections programs which include the use of such programs to supervise offenders awaiting trial for felony or misdemeanor offenses, offenders convicted of misdemeanors, or offenders under deferred judgments. Such agreements are subject to review and approval by the community corrections board of the jurisdiction in which any community corrections program making such agreement is located. Any such use of a community corrections program may be supported with funding from local governments, public or private grants, offender fees, and other sources other than the state general fund.

Source: L. 2002: Entire article added with relocations, p. 1386, § 2, effective October 1. **L. 2003:** (1)(a) amended, p. 1429, § 14, effective April 29. **L. 2006:** (1)(b.5) added, p. 342, § 6, effective July 1. **L. 2011:** (1)(h), IP(1)(i)(I), (1)(i)(IV), (1)(i)(VI), (1)(j), and (1)(k) amended, (SB 11-254), ch. 274, pp. 1237, 1236, §§ 3, 1, effective June 2; (2)(b) amended and (2)(e) added, (HB 11-1085), ch. 48, p. 124, § 1, effective August 10. **L. 2012:** (1)(k) amended, (SB 12-175), ch. 208, p. 865, § 109, effective July 1.

Editor's note: (1) This section is similar to former § 17-27-105 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(k) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Annotator's note. Since § 18-1.3-301 is similar to § 17-27-105 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Two prior felony convictions do not foreclose a court from sentencing a defendant to a community correctional program. People ex rel. VanMeveren v. District Court, 195 Colo. 34, 572 P.2d 483 (1977) (decided under repealed § 27-27-105).

Individual sentenced pursuant to § 42-2-206 (1) may be considered for community correctional program. People v. Scott, 200 Colo. 365, 615 P.2d 680 (1980).

Where defendant is serving three concurrent sentences, one of which is for a violent crime, the defendant is not eligible for community corrections placement more than six months before his parole eligibility date. People v. Santisteven, 868 P.2d 415 (Colo. App. 1993).

The parole board, not a parole officer, has the authority to direct that an offender attend a community corrections program as a condition of parole. People v. Lanzieri, 996 P.2d 156 (Colo. App. 1999), rev'd on other grounds, 25 P.3d 1170 (Colo. 2001).

Sentence to community correctional facil-

ity is not the same as a sentence to probation. People v. Johnson, 42 Colo. App. 350, 594 P.2d 601 (1979); People v. Kastning, 738 P.2d 807 (Colo. App. 1987).

"Original sentence" construed. Where court suspended the execution, but not the imposition, of a four-year term in the department of corrections on condition that defendant serve two years in a community corrections facility, the court was not thereafter precluded from re-sentencing defendant to four years in the department because the "original sentence" was four years, not two. People v. Seals, 899 P.2d 359 (Colo. App. 1995).

Court cannot increase original sentence. There is nothing in this article which authorizes the court to increase the length of the original sentence. People v. Johnson, 42 Colo. App. 350, 594 P.2d 601 (1979).

For this reason, a defendant is entitled to credit for time served in community corrections on direct sentence if he is later rejected. People v. Washington, 709 P.2d 100 (Colo. App. 1985).

Trial court is without jurisdiction to reimpose a sentence that extends beyond the length of the original sentence. People v. Herrera, 734 P.2d 136 (Colo. App. 1986); Downing v. People, 895 P.2d 1046 (Colo. 1995).

Where the defendant originally received a sentence to three years of probation, which was revoked, followed by a sentence to six years of community corrections, from which the defendant was rejected, the "original sentence" referred to in subsection (1)(e) means

the sentence to community corrections. Since this section deals only with resentencing following the failure of community corrections placement, the sentence “originally imposed”, referred to in subsection (1)(e), is the sentence to community corrections, not any prior sentence to probation. Because the defendant received a hearing and representation of counsel when he was resentenced to community corrections, he was not entitled to a further hearing or counsel when the community corrections sentence was revoked and he received a sentence to the department of corrections, which did not exceed the length of the sentence to community corrections. *People v. McPherson*, 53 P.3d 679 (Colo. App. 2001).

Effect of changing a sentence from concurrent to consecutive because of defendant's escape was not extending the sentence beyond the length originally ordered. Defendant who escaped from community corrections program while serving concurrent sentences, who subsequently completed one sentence but failed to clear the second arrest warrant, was subject to being sentenced to the department of corrections for the length of the original sentence. *People v. Taylor*, 7 P.3d 1030 (Colo. App. 2000).

When the court revokes an offender's sentence to community corrections, subsection (1)(e) read in conjunction with subsection (1)(h) authorizes the sentencing court to increase the offender's sentence, provided that the court holds a hearing. *Romero v. People*, 179 P.3d 984 (Colo. 2007).

Imposing a sentence increase under subsection (1)(e) does not violate the double jeopardy clauses of the United States and Colorado constitutions because defendant lacked a legitimate expectation of finality in the sentence. *Romero v. People*, 179 P.3d 984 (Colo. 2007).

Because subsection (1)(h) authorizes the trial court, following defendant's termination from community corrections, to sentence him or her in the “same manner as if [he or she] had been placed on probation”, the trial court, under such circumstances, is authorized to run a defendant's sentence consecutively to the sentence in the other case. *People v. Adams*, 128 P.3d 260 (Colo. App. 2005).

Term “offender's sentence” in subsection (1)(e) refers to the length of time the trial court sentences an offender to the department of corrections and does not include any period of mandatory parole that attaches to that sentence by operation of § 18-1-105 (1)(a)(V). *People v. Johnson*, 13 P.3d 309 (Colo. 2000).

The mandatory period of parole is not included in calculating the length of a defendant's term of imprisonment to which he is resentenced after termination from community corrections and, therefore, does not exceed the original sentence. *People v. Snare*, 7 P.3d 1025 (Colo. App. 1999).

Trial court did not violate this section when it imposed the six-year department of corrections sentence, even though that sentence requires an additional mandatory three-year period of parole. *People v. McGraw*, 30 P.3d 835 (Colo. App. 2001).

Trial court had the authority under former §§ 16-11-204 (4) and 17-27-105 (1)(h) (now §§ 18-1.3-204 (4) and 18-1.3-301 (1)(h)) to modify defendant's community corrections sentence before it expired. The court retained this authority after defendant's release date passed because re-sentencing proceedings were initiated prior to that date. *People v. Knott*, 83 P.3d 1147 (Colo. App. 2003).

Because defendant's post-release supervisory period was imposed at a sentence reduction hearing and not at original sentencing, such period is not counted as part of the original sentence for the purpose of resentencing a person pursuant to this section. *People v. Carroll*, 779 P.2d 1375 (Colo. App. 1989).

The reference to “time credits” in subsection (1)(j) is intended to include both “earned time” and “good time” credits. *People v. McCreadie*, 938 P.2d 528 (Colo. 1997).

Subsection (1)(j) requires the sentencing court to include the written summary prepared by the administrator of a community corrections program in the mittimus or attach it thereto. *People v. Lopez*, 961 P.2d 602 (Colo. App. 1998).

If an offender violates a rule or condition of community corrections placement while on nonresidential status, the offender is not entitled upon resentencing to credit for time served while on nonresidential status. *People v. Hoecher*, 822 P.2d 8 (Colo. 1991) (overruling *People v. Herrera*, 734 P.2d 136 (Colo. App. 1986)); *People v. Galvin*, 835 P.2d 603 (Colo. App. 1992).

Time served on direct sentence to community corrections is the equivalent of time served in the custody of the department of corrections, therefore once the defendant is sentenced to a state correctional facility, all time served in residential community corrections must be credited to the defendant's sentence. *People v. Galvin*, 835 P.2d 603 (Colo. App. 1992).

Defendant has no statutory right to a mandatory resentencing hearing after termination from a direct placement at community corrections, as the legislative history supports the conclusion that general assembly intended to prevent duplication of the sentencing hearing. The legislative history also indicates that the term “evidentiary” was added to distinguish judicial hearing from any administrative hearings conducted by community corrections. *People v. Abdul*, 935 P.2d 4 (Colo. 1997) (decided under law in effect prior to the 1993 repeal and reenactment of this article).

Defendant's due process claim was without merit since subsection (1)(g) expressly states that the sentencing court is not required to provide the offender with an evidentiary hearing prior to resentencing and, therefore, there is no right or justifiable expectation created by state law. The defendant could have had no reasonable expectation that he would be transferred only for misbehavior because the statute very clearly gives the community correctional facility discretion to reject the defendant before or after acceptance for any reason. *People v. Wilhite*, 817 P.2d 1017 (Colo. 1991); *People v. Abdul*, 935 P.2d 4 (Colo. 1997) (decided under law in effect prior to the 1993 repeal and reenactment of this article).

Direct placement offender who was denied an evidentiary hearing was not treated differently from transitional offenders and thereby denied equal protection of the laws since subsection (1)(g) does not deny such a hearing but makes it discretionary rather than mandatory; and direct placement offenders and transitional offenders are not similarly situated for purposes of equal protection analysis. *People v. Wilhite*, 817 P.2d 1017 (Colo. 1991).

The denial of a resentencing hearing under subsection (1)(e) has been found to be constitutional under Wilhite, and this section does

not violate defendant's right to due process and specifically, his rights to confrontation and to assistance of counsel. *People v. James*, 940 P.2d 1092 (Colo. App. 1996).

Subsection (2) does not allow for a hearing or other determination as to whether an individual poses a flight risk notwithstanding the existence of a detainer. *Rivera-Bottzeck v. Ortiz*, 134 P.3d 517 (Colo. App. 2006).

The word "felony" does not modify the word "detainer" in the phrase "felony warrant or detainer" in subsection (2)(b); thus, an inmate with an active immigration and naturalization service detainer cannot be referred for placement in a community corrections program under subsection (2)(b). *Rivera-Bottzeck v. Ortiz*, 134 P.3d 517 (Colo. App. 2006).

Trial court did not err in summarily resentencing defendant to the custody of the department of corrections since, although the trial court retains its discretion to grant a hearing at the time of resentencing, and such may be the better practice in appropriate cases, the granting of a hearing is not constitutionally required. *People v. James*, 940 P.2d 1092 (Colo. App. 1996).

Applied in *People v. Abila*, 670 P.2d 432 (Colo. App. 1983); *People v. Patrick*, 683 P.2d 801 (Colo. App. 1983); *People v. Rodriguez*, 55 P.3d 173 (Colo. App. 2002).

18-1.3-302. Legislative declaration - offenders who may be sentenced to the specialized restitution and community service program. (1) The general assembly hereby finds that:

(a) The taxpayer costs to incarcerate nonviolent offenders, most of whom have committed property-related offenses, usually outbalances the need to incarcerate such persons to protect the public's safety and that imprisonment generally renders offenders less able to compensate their victims. Therefore, the general assembly declares that the purpose for enacting this article regarding specialized restitution and community service programs is to increase the cost-efficiency and the effectiveness of Colorado corrections. This article authorizes the establishment of an intermediate sanction whereby nonviolent offenders, at less taxpayer cost than imprisonment, would be required to work under strict supervision in a highly structured program in order to compensate their victims and society for the damage they have caused; and

(b) Using incarceration as a routine punishment for nonviolent offenders, either upon sentencing or upon the revocation of parole or probation, punishes Colorado's taxpayers. The general assembly finds that limiting the pool of offenders eligible for the specialized restitution and community service program to first-time offenders unreasonably restricts entrance into the program and that the level of supervision mandated for repeat offenders by this article is adequate to ensure public safety from such offenders. The general assembly further finds that the vast majority of repeat offenders do not possess the requisite skills to obtain legitimate employment and that the specialized restitution and community service program will train such repeat offenders for legitimate employment. Therefore, it is in the best interests of the people of the state of Colorado to allow nonviolent repeat offenders and offenders with technical violations of parole or probation into such program.

(2) Any offender shall be eligible to be placed in a specialized restitution and community service program if:

(a) The offender is not eligible for probation pursuant to section 18-1.3-201, and has been convicted of an offense other than a crime of violence, as described in section 18-1.3-406 (2) (a), or any felony offense committed against a child set forth in articles 3,

6, and 7 of this title, or an offense that requires incarceration or imprisonment in the department of corrections or community corrections, or any sexual offense as defined in section 18-1.3-1003; and

(b) (I) A determination is made by the court that the offender would be incarcerated, either pursuant to section 18-1.3-104 (1) (b) or pursuant to a probation revocation, if such offender is not placed in the specialized restitution and community service program; or

(II) A determination is made by the parole board that the offender would be incarcerated pursuant to a parole violation.

(3) Prior to sentencing an eligible offender to a specialized restitution and community service program pursuant to this section, the court shall make the determinations required in subsection (2) of this section and such offender must have been accepted by both of the following:

(a) The provider of the specialized restitution and community service program in which it is proposed that the offender be placed; and

(b) The community corrections board, as defined in section 17-27-102 (2), C.R.S., of the community in which the program is located.

(4) If an eligible offender is accepted by a provider pursuant to subsection (3) of this section, the court may sentence an offender to pay restitution or perform community service, or both, in an amount commensurate with the seriousness of the crime and to the custody of any specialized restitution and community service program adopted pursuant to this section or article 27.9 of title 17, C.R.S. Notwithstanding any other provision of law to the contrary, a minimum of full restitution may be imposed in an amount that exceeds any actual losses or damages suffered by a victim of the crime. An offender shall be supervised in accordance with and subject to the provisions of article 27 of title 17, C.R.S.

(5) The parole board may place parole violators who meet the eligibility criteria of subsection (2) of this section and who have been accepted pursuant to paragraphs (a) and (b) of subsection (3) of this section in specialized restitution and community service programs. Such parole violators shall be supervised in accordance with and subject to the provisions of article 27 of title 17, C.R.S.

Source: **L. 2002:** Entire article added with relocations, p. 1390, § 2, effective October 1. **L. 2003:** (2)(a) amended, p. 1430, § 15, effective April 29.

Editor's note: This section is similar to former §§ 17-27.9-101 and 17-27.9-103 as they existed prior to 2002.

PART 4

SENTENCES TO IMPRISONMENT

18-1.3-401. Felonies classified - presumptive penalties. (1) (a) (I) As to any person sentenced for a felony committed after July 1, 1979, and before July 1, 1984, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years plus one year of parole
3	Four to eight years plus one year of parole
4	Two to four years plus one year of parole
5	One to two years plus one year of parole

(II) As to any person sentenced for a felony committed on or after July 1, 1984, and before July 1, 1985, felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Presumptive Range
1	Life imprisonment or death
2	Eight to twelve years
3	Four to eight years
4	Two to four years
5	One to two years

(III) (A) As to any person sentenced for a felony committed on or after July 1, 1985, except as otherwise provided in sub-subparagraph (E) of this subparagraph (III), in addition to, or in lieu of, any sentence to imprisonment, probation, community corrections, or work release, a fine within the following presumptive ranges may be imposed for the specified classes of felonies:

Class	Minimum Sentence	Maximum Sentence
1	No fine	No fine
2	Five thousand dollars	One million dollars
3	Three thousand dollars	Seven hundred fifty thousand dollars
4	Two thousand dollars	Five hundred thousand dollars
5	One thousand dollars	One hundred thousand dollars
6	One thousand dollars	One hundred thousand dollars

(A.5) Notwithstanding any provision of law to the contrary, any person who attempts to commit, conspires to commit, or commits against an elderly person any felony set forth in part 4 of article 4 of this title, part 1, 2, 3, or 5 of article 5 of this title, article 5.5 of this title, or section 11-51-603, C.R.S., shall be required to pay a mandatory and substantial fine within the limits permitted by law. However, all moneys collected from the offender shall be applied in the following order: Costs for crime victim compensation fund pursuant to section 24-4.1-119, C.R.S.; surcharges for victims and witnesses assistance and law enforcement fund pursuant to section 24-4.2-104, C.R.S.; restitution; time payment fee; late fees; and any other fines, fees, or surcharges. For purposes of this sub-subparagraph (A.5), an “elderly person” or “elderly victim” means a person sixty years of age or older.

(B) Failure to pay a fine imposed pursuant to this subparagraph (III) is grounds for revocation of probation or revocation of a sentence to community corrections, assuming the defendant’s ability to pay. If such a revocation occurs, the court may impose the maximum sentence allowable in the given sentencing ranges.

(C) Each judicial district shall have at least one clerk who shall collect and administer the fines imposed under this subparagraph (III) and under section 18-1.3-501 in accordance with the provisions of sub-subparagraph (D) of this subparagraph (III).

(D) All fines collected pursuant to this subparagraph (III) shall be deposited in the fines collection cash fund, which fund is hereby created. The general assembly shall make annual appropriations out of such fund for administrative and personnel costs incurred in the collection and administration of said fines. All unexpended balances shall revert to the general fund at the end of each fiscal year.

(E) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (III), a person who has been twice convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction for which he or she is being sentenced shall not be eligible to receive a fine in lieu of any sentence to imprisonment, community corrections, or work release but shall be sentenced to at least the minimum sentence specified in subparagraph (V) of this paragraph (a) and may receive a fine in addition to said sentence.

(IV) As to any person sentenced for a felony committed on or after July 1, 1985, but prior to July 1, 1993, felonies are divided into six classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Minimum Sentence	Maximum Sentence
1	Life imprisonment	Death
2	Eight years imprisonment	Twenty-four years imprisonment
3	Four years imprisonment	Sixteen years imprisonment
4	Two years imprisonment	Eight years imprisonment
5	One year imprisonment	Four years imprisonment
6	One year imprisonment	Two years imprisonment

(V) (A) As to any person sentenced for a felony committed on or after July 1, 1993, felonies are divided into six classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Minimum Sentence	Maximum Sentence	Mandatory Period of Parole
1	Life imprisonment	Death	None
2	Eight years imprisonment	Twenty-four years imprisonment	Five years
3	Four years imprisonment	Twelve years imprisonment	Five years
4	Two years imprisonment	Six years imprisonment	Three years
5	One year imprisonment	Three years imprisonment	Two years
6	One year imprisonment	Eighteen months imprisonment	One year

(B) Any person who is paroled pursuant to section 17-22.5-403, C.R.S., or any person who is not paroled and is discharged pursuant to law, shall be subject to the mandatory period of parole established pursuant to sub-subparagraph (A) of this subparagraph (V). Such mandatory period of parole may not be waived by the offender or waived or suspended by the court and shall be subject to the provisions of section 17-22.5-403 (8), C.R.S., which permits the state board of parole to discharge the offender at any time during the term of parole upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision.

(C) Notwithstanding sub-subparagraph (A) of this subparagraph (V), the mandatory period of parole for a person convicted of a felony offense committed prior to July 1, 1996, pursuant to part 4 of article 3 of this title, or part 3 of article 6 of this title, shall be five years. Notwithstanding sub-subparagraph (A) of this subparagraph (V), and except as otherwise provided in sub-subparagraph (C.5) of this subparagraph (V), the period of parole for a person convicted of a felony offense committed on or after July 1, 1996, but prior to July 1, 2002, pursuant to part 4 of article 3 of this title, or part 3 of article 6 of this title, shall be set by the state board of parole pursuant to section 17-2-201 (5) (a.5), C.R.S., but in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court.

(C.3) (Deleted by amendment, L. 2002, p. 124, § 1, effective March 26, 2002.)

(C.5) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (V), any person sentenced for a sex offense, as defined in section 18-1.3-1003 (5), committed on or after November 1, 1998, shall be sentenced pursuant to the provisions of part 10 of this article.

(C.7) Any person sentenced for a felony committed on or after July 1, 2002, involving unlawful sexual behavior, as defined in section 16-22-102 (9), C.R.S., or for a felony, committed on or after July 1, 2002, the underlying factual basis of which involved unlawful sexual behavior, and who is not subject to the provisions of part 10 of this article, shall be subject to the mandatory period of parole specified in sub-subparagraph (A) of this subparagraph (V).

(D) The mandatory period of parole imposed pursuant to sub-subparagraph (A) of this subparagraph (V) shall commence immediately upon the discharge of an offender from imprisonment in the custody of the department of corrections. If the offender has been granted release to parole supervision by the state board of parole, the offender shall be deemed to have discharged the offender's sentence to imprisonment provided for in sub-subparagraph (A) of this subparagraph (V) in the same manner as if such sentence were discharged pursuant to law; except that the sentence to imprisonment for any person sentenced as a sex offender pursuant to part 10 of this article shall not be deemed discharged on release of said person on parole. When an offender is released by the state board of parole or released because the offender's sentence was discharged pursuant to law, the mandatory period of parole shall be served by such offender. An offender sentenced for nonviolent felony offenses, as defined in section 17-22.5-405 (5), C.R.S., may receive earned time pursuant to section 17-22.5-405, C.R.S., while serving a mandatory parole period in accordance with this section, but not while such offender is reincarcerated after a revocation of the mandatory period of parole. An offender who is sentenced for a felony committed on or after July 1, 1993, and paroled on or after January 1, 2009, shall be eligible to receive any earned time while on parole or after reparole following a parole revocation. The offender shall not be eligible for earned time while the offender is reincarcerated after revocation of the mandatory period of parole pursuant to this subparagraph (V).

(E) If an offender is sentenced consecutively for the commission of two or more felony offenses pursuant to sub-subparagraph (A) of this subparagraph (V), the mandatory period of parole for such offender shall be the mandatory period of parole established for the highest class felony of which such offender has been convicted.

(VI) Any person sentenced for a class 2, 3, 4, or 5 felony, or a class 6 felony that is the offender's second or subsequent felony offense, committed on or after July 1, 1998, regardless of the length of the person's sentence to incarceration and the mandatory period of parole, shall not be deemed to have fully discharged his or her sentence until said person has either completed or been discharged by the state board of parole from the mandatory period of parole imposed pursuant to subparagraph (V) of this paragraph (a).

(b) (I) Except as provided in subsection (6) and subsection (8) of this section and in section 18-1.3-804, a person who has been convicted of a class 2, class 3, class 4, class 5, or class 6 felony shall be punished by the imposition of a definite sentence which is within the presumptive ranges set forth in paragraph (a) of this subsection (1). In imposing the sentence within the presumptive range, the court shall consider the nature and elements of the offense, the character and record of the offender, and all aggravating or mitigating circumstances surrounding the offense and the offender. The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct, shall not be considered in determining the length of sentence to be imposed.

(II) As to any person sentenced for a felony committed on or after July 1, 1985, a person may be sentenced to imprisonment as described in subparagraph (I) of this paragraph (b) or to pay a fine that is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of this subsection (1) or to both such fine and imprisonment; except that any person who has been twice convicted of a felony under the laws of this state, any other state, or the United States prior to the conviction for which he or she is being sentenced shall not be eligible to receive a fine in lieu of any sentence to imprisonment as described in subparagraph (I) of this paragraph (b) but shall be sentenced to at least the minimum sentence specified in subparagraph (V) of paragraph (a) of this subsection (1) and may receive a fine in addition to said sentence.

(II.5) Notwithstanding anything in this section to the contrary, any person sentenced for a sex offense, as defined in section 18-1.3-1003 (5), committed on or after November 1, 1998, may be sentenced to pay a fine in addition to, but not instead of, a sentence for imprisonment or probation pursuant to section 18-1.3-1004.

(III) Notwithstanding anything in this section to the contrary, as to any person sentenced for a crime of violence, as defined in section 18-1.3-406, committed on or after July 1, 1985, a person may be sentenced to pay a fine in addition to, but not instead of, a sentence for imprisonment.

(IV) If a person is convicted of assault in the first degree pursuant to section 18-3-202 or assault in the second degree pursuant to section 18-3-203 and the victim is a peace officer or firefighter engaged in the performance of his or her duties, as defined in section 18-1.3-501 (1.5) (b), notwithstanding the provisions of subparagraph (III) of paragraph (a) of this subsection (1) and subparagraph (II) of this paragraph (b), the court shall sentence the person to the department of corrections. In addition to a term of imprisonment, the court may impose a fine on such person pursuant to subparagraph (III) of paragraph (a) of this subsection (1).

(c) Except as otherwise provided by statute, felonies are punishable by imprisonment in any correctional facility under the supervision of the executive director of the department of corrections. Nothing in this section shall limit the authority granted in part 8 of this article to increase sentences for habitual criminals. Nothing in this section shall limit the authority granted in parts 9 and 10 of this article to sentence sex offenders to the department of corrections or to sentence sex offenders to probation for an indeterminate term. Nothing in this section shall limit the authority granted in section 18-1.3-804 for increased sentences for habitual burglary offenders.

(2) (a) A corporation which has been found guilty of a class 2 or class 3 felony shall be subject to imposition of a fine of not less than five thousand dollars nor more than fifty thousand dollars. A corporation which has been found guilty of a class 4, class 5, or class 6 felony shall be subject to imposition of a fine of not less than one thousand dollars nor more than thirty thousand dollars.

(b) A corporation which has been found guilty of a class 2, class 3, class 4, class 5, or class 6 felony, for an act committed on or after July 1, 1985, shall be subject to imposition of a fine which is within the presumptive ranges set forth in subparagraph (III) of paragraph (a) of subsection (1) of this section.

(3) Every person convicted of a felony, whether defined as such within or outside this code, shall be disqualified from holding any office of honor, trust, or profit under the laws of this state or from practicing as an attorney in any of the courts of this state during the actual time of confinement or commitment to imprisonment or release from actual confinement on conditions of probation. Upon his or her discharge after completion of service of his or her sentence or after service under probation, the right to hold any office of honor, trust, or profit shall be restored, except as provided in section 4 of article XII of the state constitution.

(4) (a) A person who has been convicted of a class 1 felony shall be punished by life imprisonment in the department of corrections unless a proceeding held to determine sentence according to the procedure set forth in section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, results in a verdict that requires imposition of the death penalty, in which event such person shall be sentenced to death. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, and before July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

(b) (I) Notwithstanding the provisions of sub-subparagraph (A) of subparagraph (V) of paragraph (a) of subsection (1) of this section and notwithstanding the provisions of paragraph (a) of this subsection (4), as to a person who is convicted as an adult of a class 1 felony following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., the district court judge shall sentence the person to a term of life imprisonment with the possibility of parole after serving a period of forty calendar years. Regardless of whether the state board of parole releases the person on parole, the person shall remain in the legal custody of the department of corrections for the remainder of the person's life and shall not be discharged.

(II) The provisions of this paragraph (b) shall apply to persons sentenced for offenses committed on or after July 1, 2006.

(5) In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of a crime punishable by death under the laws of this state shall be

punished by life imprisonment. In such circumstance, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment.

(6) In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

(7) In all cases, except as provided in subsection (8) of this section, in which a sentence which is not within the presumptive range is imposed, the court shall make specific findings on the record of the case, detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence.

(8) (a) The presence of any one or more of the following extraordinary aggravating circumstances shall require the court, if it sentences the defendant to incarceration, to sentence the defendant to a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of a felony:

(I) The defendant is convicted of a crime of violence under section 18-1.3-406;

(II) The defendant was on parole for another felony at the time of commission of the felony;

(III) The defendant was on probation or was on bond while awaiting sentencing following revocation of probation for another felony at the time of the commission of the felony;

(IV) The defendant was under confinement, in prison, or in any correctional institution as a convicted felon, or an escapee from any correctional institution for another felony at the time of the commission of a felony;

(V) At the time of the commission of the felony, the defendant was on appeal bond following his or her conviction for a previous felony;

(VI) At the time of the commission of a felony, the defendant was on probation for or on bond while awaiting sentencing following revocation of probation for a delinquent act that would have constituted a felony if committed by an adult.

(b) In any case in which one or more of the extraordinary aggravating circumstances provided for in paragraph (a) of this subsection (8) exist, the provisions of subsection (7) of this section shall not apply.

(c) Nothing in this subsection (8) shall preclude the court from considering aggravating circumstances other than those stated in paragraph (a) of this subsection (8) as the basis for sentencing the defendant to a term greater than the presumptive range for the felony.

(d) (I) If the defendant is convicted of the class 2 or the class 3 felony of child abuse under section 18-6-401 (7) (a) (I) or (7) (a) (III), the court shall be required to sentence the defendant to the department of corrections for a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of that class felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (d) be eligible for suspension of sentence or for probation or deferred prosecution.

(e) (I) If the defendant is convicted of the class 2 felony of sexual assault in the first degree under section 18-3-402 (3), commission of which offense occurs prior to November 1, 1998, the court shall be required to sentence the defendant to a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of that class of felony.

(II) In no case shall any defendant sentenced pursuant to subparagraph (I) of this paragraph (e) be eligible for suspension of sentence or probation.

(III) As a condition of parole under section 17-2-201 (5) (e), C.R.S., a defendant sentenced pursuant to this paragraph (e) shall be required to participate in a program of mental health counseling or receive appropriate treatment to the extent that the state board of parole deems appropriate to effectuate the successful reintegration of the defendant into the community while recognizing the need for public safety.

(e.5) If the defendant is convicted of the class 2 felony of sexual assault under section 18-3-402 (5) or the class 2 felony of sexual assault in the first degree under section 18-3-402 (3) as it existed prior to July 1, 2000, commission of which offense occurs on or after November 1, 1998, the court shall be required to sentence the defendant to the department of corrections for an indeterminate sentence of at least the midpoint in the presumptive range for the punishment of that class of felony up to the defendant's natural life.

(f) The court may consider aggravating circumstances such as serious bodily injury caused to the victim or the use of a weapon in the commission of a crime, notwithstanding the fact that such factors constitute elements of the offense.

(g) If the defendant is convicted of class 4 or class 3 felony vehicular homicide under section 18-3-106 (1) (a) or (1) (b), and while committing vehicular homicide the defendant was in immediate flight from the commission of another felony, the court shall be required to sentence the defendant to the department of corrections for a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of the class of felony vehicular homicide of which the defendant is convicted.

(9) The presence of any one or more of the following sentence-enhancing circumstances shall require the court, if it sentences the defendant to incarceration, to sentence the defendant to a term of at least the minimum in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of a felony:

(a) At the time of the commission of the felony, the defendant was charged with or was on bond for a felony in a previous case and the defendant was convicted of any felony in the previous case;

(a.5) At the time of the commission of the felony, the defendant was charged with or was on bond for a delinquent act that would have constituted a felony if committed by an adult;

(b) At the time of the commission of the felony, the defendant was on bond for having pled guilty to a lesser offense when the original offense charged was a felony;

(c) The defendant was under a deferred judgment and sentence for another felony at the time of the commission of the felony;

(c.5) At the time of the commission of the felony, the defendant was on bond in a juvenile prosecution under title 19, C.R.S., for having pled guilty to a lesser delinquent act when the original delinquent act charged would have constituted a felony if committed by an adult;

(c.7) At the time of the commission of the felony, the defendant was under a deferred judgment and sentence for a delinquent act that would have constituted a felony if committed by an adult;

(d) At the time of the commission of the felony, the defendant was on parole for having been adjudicated a delinquent child for an offense which would constitute a felony if committed by an adult.

(10) (a) The general assembly hereby finds that certain crimes which are listed in paragraph (b) of this subsection (10) present an extraordinary risk of harm to society and therefore, in the interest of public safety, for such crimes which constitute class 3 felonies, the maximum sentence in the presumptive range shall be increased by four years; for such crimes which constitute class 4 felonies, the maximum sentence in the presumptive range shall be increased by two years; for such crimes which constitute class 5 felonies, the maximum sentence in the presumptive range shall be increased by one year; for such crimes which constitute class 6 felonies, the maximum sentence in the presumptive range shall be increased by six months.

(b) Crimes that present an extraordinary risk of harm to society shall include the following:

(I) to (VIII) Repealed.

(IX) Aggravated robbery, as defined in section 18-4-302;

(X) Child abuse, as defined in section 18-6-401;

(XI) Unlawful distribution, manufacturing, dispensing, sale, or possession of a controlled substance with the intent to sell, distribute, manufacture, or dispense, as defined in section 18-18-405;

(XII) Any crime of violence, as defined in section 18-1.3-406;

(XIII) Stalking, as described in section 18-9-111 (4), as it existed prior August 11, 2010, or section 18-3-602;

(XIV) Sale or distribution of materials to manufacture controlled substances, as described in section 18-18-412.7; and

(XV) Felony invasion of privacy for sexual gratification, as described in section 18-3-405.6.

(c) Repealed.

(11) When it shall appear to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be best served thereby, the court shall have the power to suspend the imposition or execution of sentence for such period and upon such terms and conditions as it may deem best; except that in no instance shall the court have the power to suspend a sentence to a term of incarceration when the defendant is sentenced pursuant to a sentencing provision that requires incarceration or imprisonment in the department of corrections, community corrections, or jail. In no instance shall a sentence be suspended if the defendant is ineligible for probation pursuant to section 18-1.3-201, except upon an express waiver being made by the sentencing court regarding a particular defendant upon recommendation of the district attorney and approval of such recommendation by an order of the sentencing court pursuant to section 18-1.3-201 (4).

(12) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

(13) (a) The court, if it sentences a defendant who is convicted of any one or more of the offenses specified in paragraph (b) of this subsection (13) to incarceration, shall sentence the defendant to a term of at least the midpoint, but not more than twice the maximum, of the presumptive range authorized for the punishment of the offense of which the defendant is convicted if the court makes the following findings on the record:

(I) The victim of the offense was pregnant at the time of commission of the offense; and

(II) The defendant knew or reasonably should have known that the victim of the offense was pregnant.

(III) (Deleted by amendment, L. 2003, p. 2163, § 3, effective July 1, 2003.)

(b) The provisions of this subsection (13) shall apply to the following offenses:

(I) Murder in the second degree, as described in section 18-3-103;

(II) Manslaughter, as described in section 18-3-104;

(III) Criminally negligent homicide, as described in section 18-3-105;

(IV) Vehicular homicide, as described in section 18-3-106;

(V) Assault in the first degree, as described in section 18-3-202;

(VI) Assault in the second degree, as described in section 18-3-203;

(VII) Vehicular assault, as described in section 18-3-205.

(c) Notwithstanding any provision of this subsection (13) to the contrary, for any of the offenses specified in paragraph (b) of this subsection (13) that constitute crimes of violence, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(14) The court may sentence a defendant to the youthful offender system created in section 18-1.3-407 if the defendant is an eligible young adult offender pursuant to section 18-1.3-407.5.

Source: L. 2002: Entire article added with relocations, p. 1392, § 2, effective October 1. L. 2002, 3rd Ex. Sess.: (4) amended, p. 15, § 8, effective October 1. L. 2003: (1)(b)(IV), (4), (8)(d)(I), (8)(e.5), (8)(g), (10)(c), and (11) amended, pp. 1425, 1435, 1429, §§ 4, 32, 13, effective April 29; (1)(a)(VI) amended, p. 2679, § 5, effective July 1; (8)(a)(VI), (9)(a.5), (9)(c.5), and (9)(c.7) amended, p. 1431, § 18, effective July 1;

(13)(a)(II) and (13)(a)(III) amended, p. 2163, § 3, effective July 1; (10)(b)(XII) and (10)(b)(XIII) amended and (10)(b)(XIV) added, p. 2387, § 3, effective July 1, 2004. **L. 2004:** (10)(b)(I) to (10)(b)(VIII) and (10)(c) repealed, p. 633, § 1, effective August 4. **L. 2006:** (4) amended, p. 1052, § 2, effective May 25. **L. 2008:** (1)(a)(V)(D) amended, p. 1757, § 6, effective July 1; (1)(a)(III)(A.5) amended, p. 1889, § 54, effective August 5. **L. 2009:** (14) added, (HB 09-1122), ch. 77, p. 280, § 4, effective October 1. **L. 2010:** (10)(b)(XIII) amended, (HB 10-1233), ch. 88, p. 296, § 5, effective August 11; (10)(b)(XIII) and (10)(b)(XIV) amended and (10)(b)(XV) added, (SB 10-128), ch. 415, p. 2046, § 5, effective July 1, 2012.

Editor's note: (1) This section is similar to former § 18-1-105 as it existed prior to 2002.

(2) This section was amended in 2002 prior to its relocation on October 1, 2002. For that history, see the source note to § 18-1-105.

(3) Amendments to subsection (10)(b)(XIII) by House Bill 10-1233 and Senate Bill 10-128 were harmonized, effective July 1, 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2003 act amending subsections (10)(b)(XII) and (10)(b)(XIII) and enacting subsection (10)(b)(XIV), see section 1 of chapter 360, Session Laws of Colorado 2003. For the legislative declaration contained in the 2003 act amending subsections (13)(a)(II) and (13)(a)(III), see section 1 of chapter 340, Session Laws of Colorado 2003. For the legislative declaration contained in the 2006 act amending subsection (4), see section 1 of chapter 228, Session Laws of Colorado 2006.

ANNOTATION

Law reviews. For note, "Disbarment for Crime in Colorado", see 10 Rocky Mt. L. Rev. 203 (1938). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado Felony Sentencing an Update", see 14 Colo. Law. 2163 (1985). For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses cases relating to the death penalty, see 15 Colo. Law. 1596 (1986). For article, "Sentencing Dilemmas", see 29 Colo. Law. 67 (October 2000). For article, "Criminal Sentencing in Colorado After *Blakely v. Washington*", see 34 Colo. Law. 85 (January 2005).

Annotator's note. Since § 18-1.3-401 is similar to § 18-1-105 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and former § 39-10-17, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionality of death penalty. The imposition and carrying out of the death penalty was held to constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments of the U.S. Constitution. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972).

Subsection (6) is not unconstitutionally vague and does not deprive a defendant of due process and equal protection on the grounds that no standards are set out in the statute to guide

the trial court on what are extraordinary, aggravating or mitigating circumstances. *People v. Phillips*, 652 P.2d 575 (Colo. 1982).

Although the phrase "aggravating or mitigating circumstances" is not defined in the legislative act, that failure does not render the statute unconstitutionally vague. *People v. Phillips*, 652 P.2d 575 (Colo. 1982).

Subsection (6) is not unconstitutionally vague because it allegedly fails to indicate precise standards for imposition of an enhanced sentence. *People v. Wright*, 672 P.2d 518 (Colo. 1983).

Due process requirements for enhanced sentence imposed because of defendant's status at time of offense are met if defendant is given reasonable notice that he is subject to enhanced sentencing and the prosecution proves such status by a preponderance of the evidence if such fact is contested. *People v. Reed*, 723 P.2d 1343 (Colo. 1986); *People v. Simmons*, 723 P.2d 1350 (Colo. 1986); *People v. Anderson*, 784 P.2d 802 (Colo. App. 1989).

Discretionary aggravated range sentence imposed under subsection (6) does not violate due process requirement announced in U.S. supreme court decision, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000), if defendant was exposed to such sentence when charged with the substantive offense. Trial court, therefore, properly denied post-conviction relief as to 32-year maximum aggravated range sentence imposed for sexual assault on child. *People v. Salinas*, 55 P.3d 268 (Colo. App. 2002).

Under the mandates of the U.S. supreme court decisions *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004), and *Apprendi v. New Jersey*, a discretionary aggravated range sentence may be imposed only when a jury has determined the aggravating factors or when the defendant has admitted them. The fact that the defendant waived the right to a jury determination of the aggravating factors by pleading guilty to the charged offense is irrelevant where no aggravating factors were charged in the information and the defendant did not stipulate to any. *People v. Barton*, 121 P.3d 230 (Colo. App. 2004).

Sentence in the aggravated range proper when based upon a prior conviction even after U.S. supreme court decision in *Blakely v. Washington*. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

A defendant's failure to object to facts in a presentence report does not constitute admission for purposes of *Blakely v. Washington* unless defendant makes a constitutionally sufficient waiver of his or her right to a jury trial on the facts contained in the report. A sentencing court may not use defendant's admissions to sentence him or her in the aggravated range unless defendant knowingly, voluntarily, and intelligently waives his or her sixth amendment right to have a jury find the facts that support the aggravated sentence. *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006).

Aggravated sentence proper under *People v. Isaacks*. Defendant's guilty plea to a single count that named two victims constituted a knowing, voluntary, and intelligently waived right to a jury trial on those facts. Aggravated sentence based upon multiple victims receiving serious bodily injuries was constitutional. *People v. Watts*, 165 P.3d 707 (Colo. App. 2006).

Sentence enhancement statute not violative of procedural due process provided that defendant receives adequate notice that he is subject to enhanced punishment and the prosecution meets its burden of proof concerning defendant's status as a parolee. *People v. Henderson*, 729 P.2d 1028 (Colo. App. 1986), cert. denied, 752 P.2d 93 (Colo. 1988).

Although this section does not set forth the procedural framework that must be followed when a defendant is charged with violating the conditions of a suspended sentence, minimum due process protections must be afforded to a person facing revocation of such a suspended sentence. These requirements include: (1) Written notice of the claimed violations; (2) disclosure to the defendant of evidence against him or her; (3) a fair opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses, unless there is good cause to deny such a right; (5) a neutral and detached hearing officer or judge;

and (6) a written statement by the fact finder as to the evidence relied on and reasons for the revocation. *People v. Scura*, 72 P.3d 431 (Colo. App. 2003).

Equal protection does not require same procedural safeguards as are contained in crimes of violence statute since cases involving crimes of violence involve more complicated factual situations than the mere determination of defendant's status at the time of the offense. *People v. Simmons*, 723 P.2d 1350 (Colo. 1986).

No equal protection violation where conviction for child abuse resulting in death under this section is interpreted to preclude a sentence reduction below the mandatory minimum as compared to a reduction or modification of a mandatory crime of violence sentence. *People v. Smith*, 992 P.2d 635 (Colo. App. 1999).

No equal protection violation where person convicted of class 4 felony theft is punished more severely than a class 4 felony sex offender. Felony classes do not themselves create "classes" for purposes of equal protection analysis; defendant is only "similarly situated" with defendants who commit the same or similar acts. *People v. Friesen*, 45 P.3d 784 (Colo. App. 2001); *People v. Walker*, 75 P.3d 722 (Colo. App. 2002); *People v. Fritschler*, 87 P.3d 186 (Colo. App. 2003).

No equal protection violation where felony first degree murder carries a greater punishment than aggravated vehicular homicide. These offenses are distinguished by the level of intent, the actus reus (commission or omission), the requirement that the actor operate or drive a motor vehicle for vehicular homicide, and the predicate felonies. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

This section is not unconstitutional for lack of a provision regarding proof of probationary status by the prosecutor. Such proof is only required to be proven by a preponderance of the evidence if the defendant contests his alleged probationary status. *People v. Lacey*, 723 P.2d 111 (Colo. 1986); *People v. Murphy*, 722 P.2d 407 (Colo. 1986).

A sentence in the aggravated range under subsection (6) violates the sixth amendment right to trial by jury, unless the facts found by the trial court to support the sentence, including the ultimate finding that these facts are extraordinary: (1) Are reflected in the jury's verdict; (2) were admitted by the defendant for purposes of sentencing; or (3) involve prior criminality, to the extent permitted by *Appendi*. *People v. Moon*, 121 P.3d 218 (Colo. App. 2004).

Mandatory parole provision does not violate the constitutional protection against double jeopardy since the general assembly has mandated a period of parole for all convicted felons, in addition to a sentence to the department of corrections, and therefore the defendant has not been subjected to separate proceedings

for the imposition of his sentence. *People v. Mayes*, 981 P.2d 1106 (Colo. App. 1999); *People v. Xiong*, 10 P.3d 719 (Colo. App. 2000).

Mandatory period of parole for consecutive sentencing of two or more felony offenses pursuant to subsection (1)(a)(V)(A) not unconstitutionally overbroad, because it does not proscribe any conduct constitutionally protected and it has a rational relationship to a legitimate governmental interest of promoting the rehabilitation and reintegration of defendants while recognizing the need for public safety. *People v. Boyd*, 23 P.3d 1242 (Colo. App. 2001).

Mandatory parole is part of a sentence imposed by the court. Even though the parole board may administer the parole, that does not mean that the board imposes it; hence there is no separate penalty imposed in a separate proceeding and thus, no violation of double jeopardy. *People v. Xiong*, 10 P.3d 719 (Colo. App. 2000).

Retrospective application of mandatory parole provisions in subsection (1)(a)(V) not violative of ex post facto clause where defendant had pleaded guilty to underlying offense with stipulation that the offense occurred within a time frame that happened to include time periods both prior and subsequent to the date such provisions were enacted. *People v. Flag*, 18 P.3d 792 (Colo. App. 2000).

1988 amendment establishing lower mandatory aggravated ranged sentencing applicable to offenses committed on or after July 1, 1988 inapplicable to defendant who committed offenses in April and May of 1988, regardless of fact that the amendment had taken effect prior to the time defendant was sentenced. Defendant was properly sentenced under higher mandatory range in effect on dates offenses were committed. *Riley v. People*, 828 P.2d 254 (Colo. 1992).

1988 amendment to former subsection (1)(b)(VII) applicable to post conviction sentence reduction proceedings which provided for retroactive application of reduced sentences was applicable only to persons eligible for presumptive range sentencing. *Riley v. People*, 828 P.2d 254 (Colo. 1992) (decided under law as it existed prior to June 7, 1990 repeal of subsection).

Classification does not create substantive offense. A classification of felony does not in and of itself create a substantive offense; it merely establishes the boundaries within which a court may impose a sentence. *People v. Beigel*, 646 P.2d 948 (Colo. App. 1982).

Retroactive application. This section is to be given retroactive application because a defendant is entitled to the benefits of amendatory legislation which mitigates penalties for crimes when the relief is sought before finality has attached to the judgment of conviction. *Salas v. District Court*, 190 Colo. 447, 548 P.2d 605

(1976); *People v. Johnson*, 638 P.2d 61 (Colo. 1981).

Court should not apply *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000), retroactively to convictions that were already final when the U.S. supreme court issued its opinion. A new rule of criminal procedure is not applied retroactively unless it forbids criminal punishment of certain kinds of conduct or is a "watershed" rule. *Apprendi* does not represent a "watershed" rule, that is, a rule that implicates the fundamental fairness of the trial. *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002); *People v. Hall*, 87 P.3d 210 (Colo. App. 2003); *People v. Shepard*, 98 P.3d 905 (Colo. App. 2004); *People v. Alexander*, 129 P.3d 1051 (Colo. App. 2005).

The U.S. supreme court held in *Apprendi* that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002).

1979 amendment inapplicable where crime committed before July 1, 1979. Where acts for which defendants were convicted occurred well in advance of July 1, 1979, the effective date of H.B. 1589, it was not error to refuse to sentence under the provisions of that legislation. *People v. Lopez*, 624 P.2d 1301 (Colo. 1981).

Since the crime for which a defendant was sentenced was committed well before the effective date of either the 1977 or 1979 version of House Bill 1589, he is not entitled to be resentenced under the provisions of those acts. *People v. Stewart*, 626 P.2d 685 (Colo. 1981).

In resentencing a defendant originally convicted before the 1979 reduction in the sentencing range for class 3 felonies, the trial court may consider the new sentencing range, but is not bound by it. *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

For sentencing under H.B. 1589, see *People v. Montoya*, 647 P.2d 1203 (Colo. 1982).

1981 amendments not irreconcilable. The two 1981 amendments, S.B. 304 and H.B. 1156, are not irreconcilable. They can be harmonized by recognizing that nonadversary reviews under former § 18-1-409.5 and C.A.R. 4(d), no longer exist with respect to sentences imposed for the conviction of a felony committed on or after July 1, 1981. *People v. Rafferty*, 644 P.2d 102 (Colo. App. 1982).

Since § 16-11-802(1)(b) (now § 18-1.3-1302 (1)(b)) has a later effective date, was later enacted, and operates in an ameliorative manner for criminal defendants, it controls and that portion of § 18-1-105(4) (now § 18-1.3-401 (4)) which provides for no possibility of parole for persons sentenced to life imprisonment following conviction for class 1 felony offenses occurring during the period from July

1, 1990, until September 19, 1991, is abrogated by this later enactment. Thus, § 16-11-103(1)(b) (now § 18-1.3-1201 (1)(b)), as amended by House Bill 91S-1001, controls parole eligibility for convictions and sentences to life imprisonment based on class 1 felony offenses occurring on or after September 20, 1991, and § 16-11-802(1)(b) (now § 18-1.3-1302 (1)(b)) controls parole eligibility for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991. *People v. District Court*, 834 P.2d 236 (Colo. 1992).

Legislative intent of subsection (9)(c) is to encourage careful consideration by the trial judge of all relevant factual matters developed during the course of proceedings prior to selecting an appropriate sentence. *People v. Sanchez*, 769 P.2d 1064 (Colo. 1989).

When the court misapprehends the sentencing range, the sentence must be vacated and defendant must be re-sentenced within the correct range. Defendant's class 4 felony conspiracy conviction was subject to enhanced sentencing under subsection (8)(a)(III), requiring a sentence between four to 12 years, but the court erred in believing the range was 10 to 32 years. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Sentencing is a discretionary decision which requires weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and society's interest in safety and deterrence. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980); *People v. Reed*, 43 P.3d 644 (Colo. 2001).

The discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Sentencing is discretionary and a judge has wide latitude in arriving at a synthesis which is reflective of the interests of society and the defendant. *People v. Hotopp*, 632 P.2d 600 (Colo. 1981); *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991).

In determining an appropriate sentence, the trial court may conduct a broad inquiry, largely unlimited as to the kinds of information it may consider, and it has wide discretion in determining what sentence is appropriate, and sentences imposed within statutory limits are generally not subject to review. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed.2d 366 (1984).

Sentencing involves an exercise in judicial discretion and, accordingly, a sentencing judge has wide latitude in arriving at a final decision. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Sentencing is by its very nature a discretionary decision, and many factors must be considered in arriving at a decision that protects the

rights of society and the defendant. *People v. Horne*, 657 P.2d 946 (Colo. 1983).

In imposing a sentence, the trial court must weigh many factors, including the nature of the offense and the record of the offender, and must impose a definite sentence within the presumptive range unless it concludes that extraordinary mitigating or aggravating factors are present. *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

No abuse of discretion found. See *People v. Sellers*, 762 P.2d 749 (Colo. App. 1988).

Where trial court discussed its reasoning thoroughly and took into account a variety of factors, it did not abuse its discretion in imposing maximum aggravated sentences. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

Where trial court considered the nature of the offense, the character of the defendant, the public interest in safety and deterrence, and mitigating and aggravating circumstances, and imposed a sentence within the range prescribed by law, based on appropriate considerations and factually supported by the circumstances, there was no abuse of discretion. *People v. Martinez*, 32 P.3d 582 (Colo. App. 2001); *People v. Martinez*, 179 P.3d 23 (Colo. App. 2007).

The sentencing court's consideration of defendant's role in the crimes that later led to the murders was not tantamount to punishing him for crimes of which he was acquitted, rather the court properly evaluated the overall circumstances of the crimes of which he was convicted and of the serious risks that attend such crimes. *People v. Le*, 74 P.3d 431 (Colo. App. 2003).

It is not improper for the sentencing court, on its own volition, to sentence contrary to the district attorney's recommendation, when the court considered aggravating factors and its consideration of mitigating factors was implicit in the court's selection of a sentence to a term in the lower end of the presumptive range. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Sentencing decision should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Proper and fair sentence is one that can be reasonably explained. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

The range of punishments available to a trial court is determined by the applicable law as of the date of the offense and the factors to be considered by the court in sentencing are those factors existing on the date of sentencing. *People v. Wieghard*, 743 P.2d 977 (Colo. App. 1987).

Factors considered in sentencing. Some of the more common factors to be considered in sentencing are: The gravity of the offense in terms of harm to person or property, or in terms of the culpability requirement of the law; the

defendant's history of prior criminal conduct; the degree of danger the defendant might present to the community if released forthwith; the likelihood of future criminality in the absence of corrective incarceration or treatment; the prospects for rehabilitation under some less drastic sentencing alternative, such as probation; and the likelihood of depreciating the seriousness of the offense were a less drastic sentencing alternative chosen. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Factors to be considered in imposing sentence include the nature of the offense, the character of the offender, the public interest, and whether the record establishes a clear justification for the sentence imposed. *People v. Hotopp*, 632 P.2d 600 (Colo. 1981).

The factors which should be considered in sentencing include the nature of the offenses, the prior record of the defendant, his probability of rehabilitation, his age, and the criminal justice goals of punishment, deterrence, and protection of society. *People v. Soper*, 628 P.2d 604 (Colo. 1981).

Some factors to be considered in sentencing decision include gravity of offense, defendant's societal history, the risk of future criminal conduct, and the potential for effective rehabilitation. *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991).

Trial court did not abuse its discretion in sentencing defendant to the maximum sentence since the sentence was within the presumptive range, was based on appropriate considerations in the record, and was factually supported by the circumstances of the case. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

No abuse of discretion in sentencing defendant in the aggravated range. *People v. Heimann*, 186 P.3d 77 (Colo. App. 2007).

It was not improper for trial court to consider during sentencing that violent crimes have a greater public impact in small rural communities than in larger urban ones since a sentencing court should always consider the interests of the public involved and this factor was not decisive of the court's decision. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

Consideration of prior criminal record in sentencing. A defendant's criminal record may be considered by a court as "extraordinary mitigating or aggravating circumstances" as that term is used in subsection (6). *People v. Gonzales*, 44 Colo. App. 411, 613 P.2d 905 (1980); *People v. Cantwell*, 636 P.2d 1313 (1981); *People v. Romero*, 694 P.2d 1256 (Colo. 1985).

The trial court properly considered the defendant's prior criminal history in its determination of extraordinary circumstances. *Flower v. People*, 658 P.2d 266 (Colo. 1983); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

A defendant's record may be a basis for sentencing beyond the presumptive range. *People v. Gonzales*, 44 Colo. App. 411, 613 P.2d 905 (1980).

The lack of a prior criminal record is only one consideration in determining whether to impose a maximum sentence. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

Prior convictions are an appropriate consideration in sentencing outside the presumptive range. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

Defendant's prior criminal record is an appropriate factor in sentencing outside presumptive range. *People v. Abbott*, 690 P.2d 1263 (Colo. 1984).

There is no sixth amendment violation when the sentencing court's conclusion that an enhanced sentence is warranted is based solely upon a factual determination of the defendant's prior convictions. *People v. Orth*, 121 P.3d 256 (Colo. App. 2005).

A prior conviction in violation of a constitutional right of the accused cannot be used to enhance punishment in a subsequent criminal proceeding. *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

A court may consider the failure of a defendant to comply with a previous sentence even if such sentence may be constitutionally defective. *People v. Carabajal*, 720 P.2d 991 (Colo. App. 1986).

But, where defendant's previous conviction was under another jurisdiction's youthful offender statute which specified that a youthful offender adjudication was not a judgment of conviction for a crime, such previous conviction could not be considered an aggravating circumstance justifying sentence beyond the presumptive range. *People v. Pellien*, 701 P.2d 1244 (Colo. App. 1985).

Trial court properly considered serious criminal convictions which occurred between the original sentencing and the resentencing after appeal when the court increased the sentence of the defendant upon remand. *People v. Wieghard*, 743 P.2d 977 (Colo. App. 1987).

A trial court may properly consider an adult's juvenile record as a factor when imposing a sentence within the presumptive range. *People v. Cisneros*, 745 P.2d 262 (Colo. App. 1987); *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987).

Guilty plea constitutes a conviction within the meaning of subsection (9). Defendant, who had pled guilty to a separate offense and was out on bond, asserted that because he or she had not yet been sentenced for the prior felony at the time the trial court for the latter offense sentenced him or her, he or she was not yet "convicted". Defendant's guilt of a prior felony, not the punishment sentenced or received, is what is relevant for the purpose of defining "convic-

tion” under subsection (9)(a). *People v. French*, 141 P.3d 856 (Colo. App. 2005), cert. granted in part and denied in part, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and *People v. Huber*, 139 P.3d 628 (Colo. 2006), aff’d, 165 P.3d 836 (Colo. App. 2007).

The maximum and minimum sentences of imprisonment prescribed in subsection (1)(a)(V)(A) were clearly not intended to be sentences exclusively to the custody of the executive director of the department of corrections. The reference in any specific sentencing provision to the ranges authorized by this section, without more, therefore does not prohibit a sentence to a community corrections program. *Shipley v. People*, 45 P.3d 1277 (Colo. 2002).

Mandatory parole is a direct consequence of a guilty plea, and defendant must be advised of this requirement. However, when the total sentence imposed, including mandatory parole, was less than the potential sentence of which defendant was advised in accepting the plea, the trial court’s failure to advise defendant correctly of the mandatory parole term does not invalidate the guilty plea. *People v. Montaine*, 7 P.3d 1065 (Colo. App. 1999).

Although the defendant’s sentence to imprisonment and mandatory parole was not inevitable at the time of his pleas and, in fact, could not have been lawfully imposed prior to his subsequent breach of the terms of his deferred sentencing agreement, it was a direct consequence of his plea to burglary and, therefore, the defendant should have been advised of the mandatory parole. *People v. Marez*, 39 P.3d 1190 (Colo. 2002).

Court may not eliminate one-year parole. While subsection (1)(a)(I) authorizes a trial judge to impose a sentence below the minimum presumptive range, it does not authorize a trial court to eliminate the requirement of one year of parole. *People v. McKnight*, 628 P.2d 628 (Colo. App. 1981).

A sentencing court may not waive or suspend a period of mandatory parole under subsection (1)(a)(V)(B) and such a parole period is a required part of defendant’s sentence. *People v. Calderon*, 992 P.2d 1201 (Colo. App. 1999).

The trial court’s failure to enter the mandatory period of parole on the mittimus does not affect the requirement that it be served. The mittimus may be corrected by the sentencing court to reflect the required period of parole. *People v. Snare*, 7 P.3d 1025 (Colo. App. 1999).

Case remanded for entry of a corrected mittimus to reflect that defendant is subject to a one-year period of mandatory parole. *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002).

Court may not impose parole as part of sentence under subsection (1)(a)(II). Sentencing court exceeded its jurisdiction by imposing parole as part of the sentence for an offense committed after July 1, 1984, and before July 1, 1985. *Qureshi v. District Court*, 727 P.2d 45 (Colo. 1986); *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987); *People v. Swepton*, 822 P.2d 510 (Colo. App. 1991).

No conflict between this section and § 18-18-405. In § 18-18-405, the general assembly defined the elements of the crime of possession with intent to distribute and incorporated the presumptive range found in subsection (1)(a) of this section. Section 18-18-405 does not preclude the finding that an offense is an extraordinary risk crime and does not preclude the application of subsection (10) of this section to increase the presumptive range found in subsection (1)(a). *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), aff’d in part and rev’d in part on other grounds, 169 P.3d 662 (Colo. 2007).

The provisions of § 17-2-201 (5)(a) and subsection (1)(a)(V)(C) of this section are in conflict. Section 17-2-201 (5)(a) is a specific provision related to the parole of sex offenders while subsection (1)(a)(V)(C) of this section is the general sentencing statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, § 17-2-201 (5)(a) shall be given effect for all sex offender parole for crimes committed before July 1, 1996. *Martin v. People*, 27 P.3d 846 (Colo. 2001); *People v. Pauley*, 42 P.3d 57 (Colo. App. 2001).

Section 17-2-201(5)(a.5) is a specific provision related to the parole of sex offenders while subsection (1)(a)(V) of this section is the general sentencing statute for all felonies. As such, applying the statutory construction rule that the specific provision prevails over the general provision, § 17-2-201 (5)(a.5) shall be given effect for all sex offender parole for crimes committed between July 1, 1996, and July 1, 1998. *People v. Cooper*, 27 P.3d 348 (Colo. 2001).

Sex offenders convicted of offenses occurring between July 1, 1993, and July 1, 1998, are subject to discretionary parole pursuant to § 17-2-201 (5)(a), and not mandatory parole pursuant to subsection (1)(a)(V)(C) of this section. *People v. Koehler*, 30 P.3d 694 (Colo. App. 2000).

Habitual offenders are subject to a period of discretionary parole rather than a period of statutory mandatory parole. The provisions of § 17-2-201 (5)(a) and § 17-2-213 irreconcilably conflict with the provisions of § 17-22.5-403 (7) and subsection (1)(a)(V). Thus, the specific provision of § 17-2-201 (5)(a) and § 17-2-213 prevail over the general provisions of § 17-22.5-403 (7) and subsection (1)(a)(V). *People v. Falls*, 58 P.3d 1140 (Colo. App. 2002).

While the parole period in subsection (1)(a)(V)(A) is mandatory, the minimum and maximum sentences are “presumptive ranges.” *Bullard v. Dept. of Corr.*, 949 P.2d 999 (Colo. 1997).

Felony sex offenders who committed crimes between July 1, 1996, and November 1, 1998, and who were sentenced to a term of imprisonment were subject to discretionary parole, not mandatory parole. *People v. Jones*, 992 P.2d 710 (Colo. App. 1999).

A sentencing court may not waive or suspend a period of mandatory parole under subsection (1)(a)(V)(A) and thus the two-year period of mandatory parole was a required part of defendant's original sentence. *People v. Barth*, 981 P.2d 1102 (Colo. App. 1999); *People v. Espinoza*, 985 P.2d 68 (Colo. App. 1999).

The period of mandatory parole that attaches by operation of subsection (1)(a)(V) is an incidental and distinct element of the defendant's sentence, separate from the term of incarceration imposed by the trial court. *People v. Johnson*, 13 P.3d 309 (Colo. 2000).

While an offender subject to discretionary parole will never be confined for a period greater than the original sentence imposed, an offender subject to mandatory parole faces a sentence to prison, a period of parole, and possibly another period of confinement not necessarily limited to the original term of incarceration imposed. *People v. Hall*, 87 P.3d 210 (Colo. App. 2003).

A period of confinement attributable to parole revocation was not a “period of mandatory parole”. When a person is reincarcerated on a parole revocation, he is no longer serving his original sentence. Therefore, when a person is sentenced for the crime of escape during a period of mandatory parole for another offense, ordering such a sentence to run consecutive with the period of incarceration for the parole revocation did not violate sub-subparagraph (1)(a)(V)(E). *People v. Luther*, 58 P.3d 1013 (Colo. 2002).

Once paroled, a mandatory parolee has discharged his prison sentence as a matter of law. However, the mandatory parole period is a component of an offender's sentence. *People v. Norton*, 49 P.3d 344 (Colo. App. 2001), rev'd on other grounds, 63 P.3d 339 (Colo. 2003).

A discharge of the sentence to imprisonment under subsection (1)(a)(V)(D) is not equivalent to the satisfaction and discharge of mandatory parole. *People v. Taylor*, 74 P.3d 396 (Colo. App. 2002).

The maximum sentences in the presumptive ranges set out in this section do not establish maximum periods of probation to which a defendant may be sentenced under part 2 of article 11 of title 16. *People v. Flenniken*, 749 P.2d 395 (Colo. 1988).

The minimum sentences established under this section do not establish the minimum period of probation to which a defendant may be sentenced under § 16-11-202. The length of probation is at the sentencing judge's discretion. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

District court possessed jurisdiction to sentence defendant to a term of probation which did not exceed the maximum term of imprisonment in the aggravated range for the crime committed; the term of probation was not limited to the presumptive range for the crime committed. *Hunter v. People*, 757 P.2d 631 (Colo. 1988).

When charges against defendant are not supported by identical evidence, trial court has discretion in imposing either consecutive or concurrent sentences. *People v. Corbett*, 713 P.2d 1337 (Colo. App. 1985).

No automatic conversion of a death sentence to a life sentence when death penalty statute is held unconstitutional. *People v. Corbett*, 713 P.2d 1337 (Colo. App. 1985).

This section did not put defendants on notice that death was a possible penalty for first degree murder, where death penalty statute is found unconstitutional, this section gives notice that maximum penalty is life imprisonment. Retroactive application of new death penalty statute would violate ex post facto laws. *People v. Aguayo*, 840 P.2d 336 (Colo. 1992).

Legislatively prescribed parameters on sentencing may not be circumvented by suspending part of the sentence. *People v. Hinchman*, 196 Colo. 526, 589 P.2d 917 (1978), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed.2d 311 (1979); *People v. White*, 679 P.2d 602 (Colo. 1984).

Effect of conviction for felony. By subsection (2)(now subsection (3)), the consequences resulting from a conviction of a felony are made much more serious than those arising from a conviction of a misdemeanor. *Brooks v. People*, 14 Colo. 413, 24 P. 553 (1890).

This section declares that a person convicted of a felony shall also suffer an additional penalty therefor, namely, that he be disqualified from holding any office of honor, trust, or profit under the laws of this state, and that he be also disqualified from practicing as an attorney in any of our state courts. This latter disqualification constitutes a part of the total penalty prescribed by the general assembly for anyone convicted of a felony. *People v. Buckles*, 167 Colo. 64, 453 P.2d 404 (1968).

Section consistent with separation of powers. The statute disqualifying a convicted felon of holding an office of trust or practicing as an attorney in nowise interferes with the exclusive right of the supreme court to determine the rules and regulations which shall govern those seeking admission to our bar. Nor does the statute

impinge in any real sense the judicial right to discipline those licensed to practice law. Rather, this is an effort by the general assembly under its police power to bar convicted felons from practicing law in the courts. The general assembly has the power to do so, and this section does not violate the separation of powers doctrine. *People v. Buckles*, 167 Colo. 64, 453 P.2d 404 (1968).

For disqualification from practice of law for conviction of felony, see *People ex rel. Colo. Bar Ass'n v. Bryce*, 36 Colo. 125, 84 P. 816 (1906); *People v. Warren*, 91 Colo. 99, 12 P.2d 348 (1932); *People ex rel. Attorney Gen. v. Brayton*, 100 Colo. 92, 65 P.2d 1438 (1937).

For conviction of felony outside Colorado, see *People ex rel. Attorney Gen. v. Laska*, 101 Colo. 221, 72 P.2d 693 (1937).

Relief from a sentence validly imposed may not be obtained through the judiciary after final conviction. *People v. Rupert*, 185 Colo. 288, 523 P.2d 1406 (1974).

Court order held within power of court. Court order authorizing a sentence to run concurrently with another sentence, to be served at an out-of-state institution, was within the power and jurisdiction of the sentencing court. *People v. Lewis*, 193 Colo. 203, 564 P.2d 111 (1977).

Sentence may be imposed to run consecutively to sentence already imposed. A sentencing court has discretion to impose a sentence to be served concurrently with or consecutively to a sentence already imposed upon a defendant. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983); *People v. Martinez*, 179 P.3d 23 (Colo. App. 2007).

Multiple sentences may be imposed to run as one continuous sentence with a single period of mandatory parole where defendant is sentenced under subsection (1)(a)(V)(E), and this section is read together with § 17-22.5-101. *People v. Starcher*, 107 P.3d 1127 (Colo. App. 2004).

A trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case. *People v. Flower*, 644 P.2d 64 (Colo. App. 1981), *aff'd*, 658 P.2d 266 (Colo. 1983).

Termination of a first sentence has no effect on a second sentence, and first court cannot modify sentence of second, where sentences are concurrent. *Bullard v. Dept. of Corr.*, 949 P.2d 999 (Colo. 1997).

When offender's mandatory parole is revoked, the offender is no longer serving parole, but rather incarceration, therefore imposing a consecutive sentence plus another period or mandatory parole does not violate subsection (1)(a)(V)(E). The mandatory parole from the first conviction is extinguished so there are no longer two sentences of mandatory pa-

role. *People v. Perea*, 74 P.3d 326 (Colo. App. 2002).

Plain language of subsection (1)(a)(V)(E) requires a defendant sentenced to consecutive felony offenses to serve the period of mandatory parole for the highest class felony; the order that the defendant serves the consecutive sentences is irrelevant to the determination of the period of mandatory parole. *People v. Boyd*, 23 P.3d 1242 (Colo. App. 2001).

Credit required for presentence confinement. A sentencing judge is constitutionally required to give an indigent defendant credit for time served in presentence confinement, even where the total of the presentence confinement and the sentence imposed after trial is less than the maximum sentence allowed for the offense. *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981).

However, trial court's consideration of the effect of presentence confinement credit on defendant's actual incarceration time does not constitute an infringement on defendant's constitutional rights to due process and fundamental fairness. *People v. Reed*, 43 P.3d 644 (Colo. 2001).

Applicability of requirement of specific findings. The requirement to have specific findings on the record of the case in justification of a sentence outside the presumptive range is applicable to all sentences which do not come under the exceptions listed in subsection (9). *People v. Rafferty*, 644 P.2d 102 (Colo. App. 1982).

Trial court has obligation under subsection (7) to make specific findings when the sentence-enhancing factors contained in subsection (9.5) are present. *People v. Blackmon*, 20 P.3d 1215 (Colo. App. 2000).

Trial court did not erroneously apply the general sentence enhancer in subsection (8)(a)(IV) of this section to defendant's assault conviction under § 18-3-203 (1)(f.5). Application of the sentence enhancement provisions of this section did not have the effect of raising the class of felony for which defendant was convicted. Plus, the elemental statute under which defendant was charged did not contain specific sentencing requirements that would have superseded the provisions of the sentencing statute. *People v. Wylie*, 260 P.3d 57 (Colo. App. 2010).

"Prior criminal conduct", as used in this section, does not require proof of a prior criminal conviction, but may consist of a record of juvenile offenses or other criminal conduct which has not been the subject of prior prosecution. *People v. McGregor*, 757 P.2d 1082 (Colo. App. 1987).

Subsection (1)(b)(I) does not limit consideration of "criminal conduct" to felony convictions. *People v. McGregor*, 757 P.2d 1082

(Colo. App. 1987); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Trial court did not abuse its discretion in determining defendant's sentence by relying on facts from another case before the same court in which defendant was acquitted of first and second degree murder. A trial court may consider a wide range of evidence in determining a defendant's sentence, including facts relating to charges of which the defendant has been acquitted. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Where record contains no indication of prior criminal conduct by defendant, trial court improperly predicted potential for future criminality of defendant. *People v. Garciadealba*, 736 P.2d 1240 (Colo. App. 1986).

Sentence must be supported by reasons in record. When the maximum or near-maximum sentence is imposed, it must be supported by sound reasons in the record. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

In felony convictions involving the imposition of a sentence to a correctional facility, the sentencing judge must state on the record the basic reasons for the imposition of sentence. The statement need not be lengthy, but should include the primary factual considerations bearing on the judge's sentencing decision. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

Where a sentence is imposed for an extended term, the record must clearly justify the action of the sentencing judge. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980); *People v. Tijerina*, 632 P.2d 570 (Colo. 1981).

There must be sufficient facts in the record to support the trial court's final decision. *People v. Walters*, 632 P.2d 566 (Colo. 1981).

When sentence is in presumptive range, court need only set forth the basic reasons and primary factual considerations bearing on the court's sentencing decision. *People v. Hughes*, 946 P.2d 509 (Colo. App. 1997).

The trial court is required to state on the record the basic reasons for imposing a sentence in a particular case. There is no ritualistic format for placing in the record the trial court's justification of the imposed sentence; however, appellate review of the propriety of a sentence outside the presumptive range requires sufficient findings by the trial court to demonstrate a threshold consideration of the factors set forth in subsection (1)(b), supplemented by sufficient findings pursuant to subsection (6). *People v. Piro*, 671 P.2d 1341 (Colo. App. 1983).

When a court imposes an aggravated sentence that is not based on a factor set forth in subsection (9)(a), the court must make specific findings, supported by evidence in the record of the sentencing hearing or the presentence report, detailing the extraordinary aggravating factors present. *People v. O'Dell*, 53 P.3d 655 (Colo. App. 2001).

When a sentence outside the presumptive range is imposed, the court is required to place on the record its findings as to the aggravating or mitigating circumstances that justify variation from the presumptive range. *People v. Vela*, 716 P.2d 150 (Colo. App. 1985); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

However, it is not necessary for the sentencing court to refer explicitly to each of the factors. To the extent that *People v. Piro* (671 P.2d 1341) may suggest otherwise, it is disapproved. *People v. Walker*, 724 P.2d 666 (Colo. 1986); *People v. Powell*, 748 P.2d 1355 (Colo. App. 1987); *People v. Sudduth*, 991 P.2d 315 (Colo. 1999); *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002).

A plea agreement that does not constrain the sentencing court's discretion cannot be construed to limit the possible sentence to the presumptive range. *People v. Moriarity*, 8 P.3d 566 (Colo. App. 2000).

The court's statutory authority to sentence a defendant to the department of corrections does not expressly include the authority to dictate the conditions of confinement. The management, supervision, and control of department facilities are exclusively vested in its director. *People v. Harris*, 934 P.2d 882 (Colo. App. 1997).

A trial court may impose a sentence outside the applicable presumptive range only if extraordinary aggravating and mitigating circumstances are present based on evidence in the record of the sentencing hearing and the presentence report. *People v. Walker*, 724 P.2d 666 (Colo. 1986); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994); *People v. O'Dell*, 53 P.3d 655 (Colo. App. 2001).

Subsection (5) conflicts with the provisions of § 18-1.4-102 (8) and (9). Subsection (5) of this section requires the court to impose a life sentence on a defendant sentenced to death under an unconstitutional death penalty scheme. In contrast, § 18-1.4-102 (8) and (9) allow the supreme court to review the death sentence or remand for a new sentencing hearing. Subsection (5) is a mandatory provision and therefore it applies over the discretionary provision. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

Subsection (6), properly applied, is constitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). A constitutional aggravated sentence based on subsection (6) must rely on one of four kinds of facts: (1) Facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by the judge after the defendant stipulates to judicial fact-finding for sentencing purposes; (4) facts regarding prior convictions. The first three are "Blakely-compliant" facts, and the fourth is a "Blakely-exempt" fact. Defendant's aggravated sentence was based in part on a prior

conviction; therefore, the sentence was constitutional. *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *People v. Huber*, 139 P.3d 628 (Colo. 2006); *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

A conviction for an offense that occurs after the offense that the court is applying aggravated sentencing to may be a “prior conviction” for “Blakely-exempt” purposes if the conviction is entered before the sentencing on the aggravated sentence offense. *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

All convictions obtained in accordance with the sixth and fourteenth amendments of the federal constitution fall within the prior-conviction exception to Apprendi and Blakely. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

The exception extends beyond the fact of conviction to facts regarding prior convictions. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

A defendant’s prior-conviction-related probation or supervision falls within the exception. The prior-conviction exception extends to facts regarding prior convictions that are contained in conclusive judicial records. Because a defendant’s sentence to probation or supervision can be found in the judicial record, a trial court may properly consider this fact without violating the defendant’s Blakely rights. *People v. Huber*, 139 P.3d 628 (Colo. 2006).

A single “Blakely-compliant” fact or “Blakely-exempt” fact is sufficient to support an aggravated sentence. *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *DeHerrera v. People*, 122 P.3d 992 (Colo. 2005); *People v. Huber*, 139 P.3d 628 (Colo. 2006).

The sentence is constitutional even if the court relies on facts that satisfy Blakely and facts that violate Blakely. *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *DeHerrera v. People*, 122 P.3d 992 (Colo. 2005).

Court erred in aggravating the kidnapping sentence based upon the jury’s finding that defendant used a deadly weapon during the sexual assault. Because the jury did not specifically find that defendant used the weapon during the kidnapping, the weapon’s use was neither a “Blakely-compliant” nor a “Blakely-exempt” fact. *People v. Glasser*, ___ P.3d ___ (Colo. App. 2011).

Prior conviction exception includes prior misdemeanor convictions. Reliance on defendant’s prior misdemeanor convictions to enhance defendant’s sentence does not violate defendant’s constitutional rights under Apprendi v. New Jersey and Blakely v. Washington. *People v. Martinez*, 128 P.3d 291 (Colo. App. 2005).

Prior conviction exception includes prior juvenile adjudications. Under Apprendi and Blakely, a sentencing court may determine facts

regarding juvenile adjudications and use them as a basis to impose an aggravated range sentence despite the lack of a right to a jury trial in delinquency proceedings. *People v. Mazzoni*, 165 P.3d 719 (Colo. App. 2006).

Extraordinary aggravating circumstances in subsection (6) are the normal circumstances a trial court considers in imposing a sentence, including the character and history of the defendant and the particular circumstances of the offense, which become “extraordinary” because of their quantity or quality. They are not specified facts or considerations that, if found, mandate an increased penalty range or class of the offense. *People v. Allen*, 78 P.3d 751 (Colo. App. 2001); *People v. Trujillo*, 75 P.3d 1133 (Colo. App. 2003).

Sentence of twice the maximum term authorized in the presumptive range not abuse of court’s discretion pursuant to subsection (6) where trial court identified a number of extraordinary circumstances beyond those which constituted elements of the offense with which defendant was charged. *People v. Jones*, 851 P.2d 247 (Colo. App. 1993); *People v. Allen*, 78 P.3d 751 (Colo. App. 2001); *People v. Kitsmiller*, 74 P.3d 376 (Colo. App. 2002).

Sentence found excessive. Defendant’s sentence of a minimum of 32 years exceeded what is authorized by subsection (6), since the minimum sentence is greater than twice the 12-year presumptive maximum for a class 3 felony. *People v. Clark*, 214 P.3d 531 (Colo. App. 2009), *aff’d* on other grounds, 232 P.3d 1287 (Colo. 2010).

To impose a sentence beyond the presumptive range, the court must make a specific finding on the record that the Blakely-compliant or Blakely-exempt fact is extraordinarily aggravating. Although a court may rely on facts that are not Blakely-compliant or Blakely-exempt to further justify its imposition of an aggravated sentence, it may do so only if it has found a Blakely-compliant or Blakely-exempt fact to be extraordinarily aggravating. *People v. Fiske*, 194 P.3d 495 (Colo. App. 2008).

The determination whether Blakely-compliant or Blakely-exempt facts are extraordinarily aggravating circumstances remains within the discretion of the trial court. *People v. Fiske*, 194 P.3d 495 (Colo. App. 2008).

A sentence based on extraordinary aggravating factors, subsection (6), does not require an Apprendi jury finding. The sentence was based on unenumerated and unspecified factors frequently considered in sentencing decisions. Those are not the types of factors considered in Apprendi and its progeny. *People v. Rivera*, 62 P.3d 1056 (Colo. App. 2002).

Judicial finding of extraordinary aggravating circumstances not unlawful under Apprendi. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

Particularly where sentence involves restrictive form of deprivation. Requirement that sentencing judge state on the record the basic reasons for imposing a sentence is particularly essential in those cases where the sentence involves a very restrictive form of deprivation, such as a term of confinement to a correctional facility. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

If plea agreement does not acknowledge presence of aggravating factors, Apprendi is applicable, and no sentence beyond the presumptive range may be imposed unless the facts relied upon to aggravate the sentence have been submitted to and determined by a jury. *People v. Misenhelter*, 121 P.3d 230 (Colo. App. 2004).

While defendant admitted at providency hearing and in written plea agreement that prior misdemeanor conviction constituted a Blakely-exempt fact that widened the sentencing range and that the court could consider to impose an aggravated sentence, defendant did not admit that the prior misdemeanor was an extraordinary aggravating fact. Because the court imposed a sentence beyond the presumptive range without determining whether the sole Blakely-exempt fact was an extraordinarily aggravating fact that supported an aggravated sentence, the sentence was vacated and the case remanded for resentencing. *People v. Fiske*, 194 P.3d 495 (Colo. App. 2008).

Defendant's right to a jury determination of aggravating factors is not waived by pleading guilty to the charged offense. A guilty plea cannot be interpreted as a waiver of the right to have a jury determine factors exposing a defendant to greater punishment than otherwise authorized by the sentencing statute. A sentence beyond the relevant statutory maximum may be imposed only if a jury has determined the aggravating factors or the defendant has admitted them. *People v. Solis-Martinez*, 121 P.3d 215 (Colo. App. 2004).

Colorado law does not contemplate an increase in the statutory maximum sentence to which a defendant has subjected himself by pleading guilty, based on subsequent jury findings, which are the functional equivalent of elements of a greater offense than the one to which he pled. *People v. Lopez*, 148 P.3d 121 (Colo. 2006).

Allowing consideration of subsequent jury findings to increase a defendant's statutory maximum sentence would violate the requirement of Crim. P. 11 that the defendant understand the elements of the offense to which he pleads and the effects of his plea before his plea can be accepted. *People v. Lopez*, 148 P.3d 121 (Colo. 2006).

Defendant has no constitutional right to a jury trial to determine whether or not he or she has a prior conviction. That is an inquiry and finding the trial judge is entitled to make.

People v. French, 141 P.3d 856 (Colo. App. 2005), cert. granted in part and denied in part, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and *People v. Huber*, 139 P.3d 628 (Colo. 2006), aff'd, 165 P.3d 836 (Colo. App. 2007).

The statutory maximum for purposes of applying Apprendi and Blakely is the maximum in the presumptive range. *People v. Moon*, 121 P.3d 218 (Colo. App. 2004).

If the court resentences an offender to prison after rejection by community corrections, it is not a new sentence (requiring new findings for a sentence outside the presumptive range) unless the offender would suffer some substantial procedural prejudice. The court found no prejudice because the length of the original sentence was not changed and the offender received full credit for time served in community corrections. *People v. Kitsmiller*, 74 P.3d 376 (Colo. App. 2002).

Failure to state reasons creates obstacle to appellate review. The failure of a sentencing judge to state on the record the basic reasons for the selection of a particular sentence creates a burdensome obstacle to effective and meaningful appellate review of sentences. *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980).

When the defendant stipulates to a sentence in the aggravated range as part of a plea agreement, the defendant also stipulates that sufficient facts exist to warrant an aggravated sentence, thus the trial court must not make additional findings on the record to comply with subsection (7). *People v. Shepard*, 98 P.3d 905 (Colo. App. 2004).

Trial court was not required to make specific findings detailing its reasons for varying from the presumptive range. *People v. Roy*, 948 P.2d 99 (Colo. App. 1977).

Trial court not required to discuss each factor enumerated in sentencing statute. *People v. Bustamante*, 694 P.2d 879 (Colo. App. 1984).

When written findings of specific extraordinary circumstances not necessary at sentencing. The fact that the court did not enter written findings of the specific extraordinary circumstances justifying a sentence beyond the presumptive stage until a week after the sentencing did not invalidate the sentence, where the judge had stated the reasons for the sentence orally at the time it was imposed. *People v. Cantwell*, 636 P.2d 1313 (Colo. App. 1981).

The decision of the trial court to sentence consecutively for separate offenses is discretionary and, in general, courts are free to impose concurrent or consecutive sentences as the situation warrants. *People v. Wieghard*, 743 P.2d 977 (Colo. App. 1987); *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001).

And in determining the appropriateness of the sentence, the trial court relies on the sentencing factors set forth in § 18-1-102.5. *People v. King*, 765 P.2d 608 (Colo. App. 1988), aff'd, 785 P.2d 596 (Colo 1990).

No abuse of discretion in the sentence imposed under subsection (7) where trial court sufficiently separated its findings of extraordinary aggravating circumstances in the two cases and gave due consideration to all relevant sentencing factors. *People v. Lopez*, 97 P.3d 223 (Colo. App. 2004).

The aggravator for committing a felony while on probation applies to a defendant on probation in another state. *People v. Fogle*, 116 P.3d 1227 (Colo. App. 2004).

When defendant admits the fact that is the basis for the enhanced sentence, the defendant's sentence was not illegal under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Even though it was defense counsel that represented the defendant was on probation during the commission of the felony, the defendant did not object to this statement. Thus, the statement was an admission of the defendant. *People v. Fogle*, 116 P.3d 1227 (Colo. App. 2004).

Court may aggravate sentence pursuant to subsection (8)(a)(III) based on the judge-found fact that defendant was on probation at the time of the crime. *People v. Roberts*, 179 P.3d 129 (Colo. App. 2007).

If a fact admitted by a defendant is a Blakely-compliant factor, it is sufficient to support imposition of an aggravated sentence. *People v. Blinderman*, 148 P.3d 232 (Colo. App. 2006).

Imposition of an aggravated range sentence pursuant to subsection (8)(a)(II) satisfies Blakely where defense counsel admitted that defendant had been on parole at the time of the offense and defendant did not object to counsel's statement or dispute the truth of it. *People v. Scott*, 140 P.3d 98 (Colo. App. 2005); *People v. Blinderman*, 148 P.3d 232 (Colo. App. 2006).

Where controlled substance offenses were reclassified as class 2 felonies, it was proper for court to apply sentence enhancers of subsection (8)(a)(II). *People v. Robinson*, 187 P.3d 1166 (Colo. App. 2008).

The general sentence aggravator in subsection (8)(a)(IV) of this section does not apply to the crime of second degree assault on a correctional officer. Section 18-3-203 (1)(f) defines second degree assault on a correctional officer and contains its own aggravator. Therefore, the specific aggravator applies, not the general one. *People v. Willcoxon*, 80 P.3d 817 (Colo. App. 2004).

Nothing in the language of subsection (8)(g) of this section or § 18-3-106 suggests a legislative intent to preempt the felony mur-

der statute. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

An aggravated range sentence has both a qualitative and a quantitative dimension. The sentencing court makes a qualitative decision to depart from the presumptive range, which is subject to sixth amendment scrutiny under *Blakely*. The court then makes a quantitative decision of where to sentence within the aggravated range, which is not subject to further sixth amendment challenge. These two dimensions make exclusion of a constitutionally impermissible factor articulated in support of the sentence especially difficult, unless the record clearly shows that this factor was considered only to determine placement within the aggravated range. *People v. Moon*, 121 P.3d 218 (Colo. App. 2004).

A sentence within the aggravated range is mandated whenever any of the extraordinary aggravating circumstances specifically enumerated in subsection (9)(a) are present. *People v. District Court*, 713 P.2d 918 (Colo. 1986); *People v. Leonard*, 755 P.2d 447 (Colo. 1988); *People v. Chavez*, 764 P.2d 356 (Colo. 1988); *People v. French*, 141 P.3d 856 (Colo. App. 2005), cert. granted in part and denied in part, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and *People v. Huber*, 139 P.3d 628 (Colo. 2006), aff'd, 165 P.3d 836 (Colo. App. 2007).

Prior felony conviction that was the event that triggered enhanced sentencing falls within the prior conviction exception to the *Apprendi* rule. *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005).

Where defendant committed second degree kidnapping while on bond for a felony charge for which he was subsequently convicted by the time of the sentencing hearing for kidnapping, trial court was obligated to impose sentence pursuant to subsection (9)(a). *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005).

Extraordinary circumstances required in findings. Sentence vacated and case remanded for sentencing where trial court failed to make specific findings on the record detailing extraordinary circumstances to vary from the presumptive range. *People v. Leonard*, 872 P.2d 1325 (Colo. App. 1993); *People v. Blankenship*, 30 P.3d 698 (Colo. App. 2000).

Mandatory sentencing of defendant on parole status under subsection (9) is a definite, immediate, and automatic consequence of plea which defendant must understand. *People v. Chippewa*, 713 P.2d 1311 (Colo. App. 1985).

Guilty plea constitutes a conviction within the meaning of subsection (9). Defendant, who had pled guilty to a separate offense and was out on bond, asserted that because he or she had not yet been sentenced for the prior felony at the time the trial court for the latter offense sen-

tenced him or her, he or she was not yet “convicted”. Defendant’s guilt of a prior felony, not the punishment sentenced or received, is what is relevant for the purpose of defining “conviction” under subsection (9)(a). *People v. French*, 141 P.3d 856 (Colo. App. 2005), cert. granted in part and denied in part, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of *People v. Isaacks*, 133 P.3d 1190 (Colo. 2006), and *People v. Huber*, 139 P.3d 628 (Colo. 2006), aff’d, 165 P.3d 836 (Colo. App. 2007).

Escape from confinement while on probation required sentencing in aggravated range. *People v. Herman*, 767 P.2d 752 (Colo. App. 1988).

Due process requires that defendant be given reasonable notice that he is subject to enhanced sentencing under subsection (9)(a)(III) of this section. *People v. Lacey*, 723 P.2d 111 (Colo. 1986); *People v. Murphy*, 722 P.2d 407 (Colo. 1986).

Because defendant was convicted of a per se crime of violence under § 16-11-309, the trial court was required to sentence him under the enhanced sentence provisions of subsection (9) of this section. The prosecution was not required to charge a crime of violence separately and the jury was not required to determine its existence in order for the trial court to sentence defendant under the provisions of subsections (9) and (9.7). *People v. Lee*, 989 P.2d 777 (Colo. App. 1999); *People v. Hoang*, 13 P.3d 819 (Colo. App. 2000). But see *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Subsection (9)(a)(III) does not violate equal protection for lack of express provisions concerning the rights to reasonable notice and to have the prosecution prove the asserted probationary status where those rights exist independently of the statute. *People v. Lacey*, 723 P.2d 111 (Colo. 1986); *People v. Murphy*, 722 P.2d 407 (Colo. 1986); *People v. Herman*, 767 P.2d 752 (Colo. App. 1988).

Subsection (9)(a)(IV) does not violate defendant’s equal protection rights since there is a reasonable basis for the classification. *People v. Anderson*, 784 P.2d 802 (Colo. App. 1989).

Subsection (9)(a)(V) did not apply to the crime of escape and attempted escape where the general assembly had provided for enhanced punishment for the crimes of escape elsewhere, specifically in §§ 18-8-208.1 and 18-8-209, and where the general assembly did not amend this section to make it specifically applicable to escape crimes. *People v. Andrews*, 871 P.2d 1199 (Colo. 1994).

The prohibition against the suspension of a sentence for felony child abuse contained in subsection (9)(d)(II) is an exception to the general rule for suspending sentences in subsection (10). Subsection (9)(d)(II) is the more specific statute and subsection (10) is a statute of

broader scope. *People v. Smith*, 932 P.2d 830 (Colo. App. 1996).

Subsection (9)(a)(III) is a sentence enhancement statute to which procedural safeguards attach. *People v. Lacey*, 723 P.2d 111 (Colo. 1986).

Subsection (9)(a)(III) applies to persons on probation for felonies committed outside of Colorado. This provision was intended to subject all felony probationers sentenced to incarceration to a sentence in the aggravated range, regardless of the jurisdiction in which the felony conviction was entered and, if deemed a felony in another state, irrespective of the offense classification in this state. *People v. Sellers*, 762 P.2d 749 (Colo. App. 1988).

The language of subsection (9)(a)(III) is not ambiguous. The felony for which a defendant is on probation need not be the same felony offense for which he or she is being sentenced. *People v. Moltrier*, 983 P.2d 810 (Colo. App. 1999).

The provisions of subsection (9)(a)(III) that increase the minimum sentence to a point within the original presumptive range do not implicate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000). Thus the allegation of whether defendant was on probation at the time of the offenses need not be submitted to the jury and proved beyond a reasonable doubt. *People v. Gardner*, 55 P.3d 231 (Colo. App. 2002).

Subsection (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of the crime of escape under § 18-8-208. *People v. Jackson*, 703 P.2d 618 (Colo. App. 1985); *People v. Russell*, 703 P.2d 620 (Colo. App. 1985); *People v. Brewer*, 720 P.2d 583 (Colo. App. 1985).

Nor does subsection (9)(a)(V) require the imposition of such a sentence upon conviction of the crime of attempted escape under § 18-8-208. *People v. Martinez*, 703 P.2d 619 (Colo. App. 1985).

Nor does subsection (9)(a)(V) require the imposition of such a sentence upon conviction of criminal attempt to commit escape under § 18-2-101. *People v. Lobato*, 703 P.2d 623 (Colo. App. 1985).

Subsection (9)(a)(V) did not apply to the crime of second-degree burglary where defendant had been charged with, but not convicted of, another felony at the time of commission of the burglary. *People v. Nichols*, 920 P.2d 901 (Colo. App. 1996).

Phrase “at least” in § 18-1-105 (9) does not require the court to set the minimum length of the indeterminate sentence at the midpoint of the presumptive range. The court may impose a minimum length to the indeterminate sentence that is greater than the midpoint of the presumptive range. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

Sections 16-11-309 (1)(c) and 18-1-105 (9)(e.5) conflict irreconcilably with § 16-13-804 (1)(b). The phrase “up to the defendant’s natural life” in §§ 16-11-309 (1)(c) and 18-1-105 (9)(e.5) conflicts with the phrase “a maximum of the sex offender’s natural life” in § 16-13-804 (1)(b). Statutory construction calls for § 16-13-804 (1)(b) to prevail, requiring the court to set the maximum length of the indeterminate sentence at the defendant’s natural life. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

Escapee properly sentenced in the aggravated range pursuant to subsection (9.5) when the felony escape occurred while the defendant was charged with a previous felony, and was convicted of that previous felony. *People v. Phillips*, 885 P.2d 359 (Colo. App. 1994).

The intent of the general assembly in enacting subsection (9.5)(b) is to discourage the recidivism by subjecting those persons who are on bond and subsequently convicted of a felony to sentencing in the aggravated range. *People v. Saucerman*, 926 P.2d 130 (Colo. App. 1996).

A defendant who commits a felony while on bond after having pled guilty to a lesser offense is subject to the sentence-enhancing provisions of this statute. *People v. Saucerman*, 926 P.2d 130 (Colo. App. 1996).

Aggravated sentence based upon element which was also element of substantive offense did not offend equal protection or create double jeopardy. Aggravated sentence was permissible where defendant’s confinement in correctional facility was both element of controlled substances offense and circumstance requiring sentence in aggravated range under subsection (9)(a)(V). *People v. Leonard*, 755 P.2d 447 (Colo. 1988).

An aggravated sentence is allowed where the defendant’s confinement in correctional facility was both an element of attempt to introduce contraband into a detention facility and a circumstance requiring sentence in aggravated range under subsection (9)(a)(V). *People v. Chavez*, 764 P.2d 356 (Colo. 1988).

Aggravated sentence allowed where the defendant’s confinement in a detention facility was an element of unlawful possession of marihuana in a detention facility and the confinement as a convicted felon was a circumstance requiring a sentence in the aggravated range under what is now subsection (8)(a)(IV). *People v. Nitz*, 104 P.3d 240 (Colo. App. 2004).

Violent crime sentence enhancer cannot apply to first degree heat of passion assault. *People v. Harris*, 797 P.2d 816 (Colo. App. 1990).

Constitutional bar to subjecting defendant to greater penalty for causing serious bodily injury with deadly weapon than if defendant had caused death of victim. *People v. Harris*, 797 P.2d 816 (Colo. App. 1990).

The term “under confinement”, for purposes of subsection (9)(a)(V), includes a sentence to community corrections for a prior felony, even if the defendant had been transferred to nonresidential status at community corrections, and such a defendant must be sentenced within the aggravated range. *People v. Miller*, 747 P.2d 12 (Colo. App. 1987).

Parole statutes may be considered as aggravating circumstances. *People v. Romero*, 694 P.2d 1256 (Colo. 1985).

Sentence supported by finding of “aggravating circumstances”. A finding of “aggravating circumstances” justifies the imposition of a sentence at the higher end of the presumptive range, pursuant to subsection (1)(b), but cannot be the basis for a sentence outside of the presumptive range, because such a finding is not specific enough to satisfy the requirements of subsection (7). *People v. Maldonado*, 635 P.2d 240 (Colo. App. 1981).

There was ample support for the aggravated sentence imposed where the court properly considered the defendant’s prior criminal record. The fact that the court found aggravating factors more compelling than mitigating factors does not constitute an abuse of discretion or indicate that the court did not consider mitigating factors. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Sentencing error where extraordinary aggravating circumstances not found. Judge erred in sentencing a 19-year old beyond the presumptive range because extraordinary aggravating circumstances justifying the sentence were not found even though the defendant was accused of committing five felonies in a nine-month period, including an arrest while on probation. *People v. Jenkins*, 674 P.2d 981 (Colo. App. 1983).

Where the court justified variation from the presumptive sentencing range solely upon the harm done to the victim and as a deterrent to others in the community, the trial court erred and is reversed. *People v. Manley*, 707 P.2d 1021 (Colo. App. 1985).

When reviewing sentences for excessiveness, appellate courts must consider the nature of the offense, the character of the offender, and the public interest in safety and deterrence. *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002).

Appellate courts must also accord considerable deference to a sentence imposed by the trial court because of that court’s familiarity with the circumstances of the case. *People v. Fuller*, 791 P.2d 702 (Colo. 1990); *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002).

No error where trial court considered defendant’s presentation of perjured testimony in imposing the maximum aggravated sentence for his felony conviction. *People v. Ramos*, 53

P.3d 1178 (Colo. App. 2002) (citing *United States v. Dunnigan*, 507 U.S. 87, 113 S. Ct. 1111, 122 L. Ed.2d 445 (1993)).

Trial court considered defendant's presentation of perjured testimony only in determining the appropriate penalty within the sentencing range mandated by statute, rather than making any factual determination that altered the applicable sentencing range. *People v. Ramos*, 53 P.3d 1178 (Colo. App. 2002) (distinguishing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000)).

Sentencing beyond presumptive range not justified where defendant was under supervision of probation department at time of commission of felony and not under confinement or in an institution as required by statute. *People v. Wells*, 691 P.2d 361 (Colo. App. 1984).

The presumptive range for a class 6 felony could not be doubled and then the sentence quadrupled because the defendant was also considered an habitual offender. The defendant was convicted of stalking while the defendant was on parole from prison. The stalking offense qualified the defendant as an habitual offender. Stalking is a class 6 felony. This section requires the doubling of the presumptive range of the conviction for offenses that occur while on parole. Section 16-13-101 (2) requires the quadrupling of offenses committed by habitual offenders. Section 16-13-101 (2), however, does not authorize the quadrupling of a sentence that is already increased. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

Person must be convicted of same felony for which charged for court to find extraordinary aggravating circumstance. Conviction of criminal impersonation when sexual assaults were committed did not constitute an aggravating circumstance. *People v. Tuck*, 937 P.2d 810 (Colo. App. 1996).

However, for the extraordinary aggravating circumstance described in subsection (9)(a)(III) to apply, the felony for which a defendant is on probation need not be the same felony offense for which he or she is being sentenced. *People v. Moltrier*, 983 P.2d 810 (Colo. App. 1999).

Where defendant was on probation for another felony at the time of the commission of a felony, the failure of the court to sentence the defendant to a term greater than the presumptive range due to the presence of an extraordinary aggravating circumstance was error. *People v. Garcia*, 698 P.2d 801 (Colo. 1985).

Cost to the taxpayers of the defendant's trials and the fact defendant acted alone are not aggravating sentencing factors and were improperly considered in sentencing. *People v. Arguello*, 737 P.2d 436 (Colo. App. 1987).

Factor which constitutes an element of the substantive crime could not constitute an extraordinary aggravating circumstance. *Peo-*

ple v. Garciasdealba, 736 P.2d 1240 (Colo. App. 1986).

However, factual matters relevant to particular elements of an offense but that do not actually establish any elements may be considered by the trial court as extraordinary aggravating circumstances. *People v. Sanchez*, 769 P.2d 1064 (Colo. 1989); *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Subsection (9)(c) permits the sentencing court to consider aggravating factors other than those specifically set forth in statute when imposing an extraordinary aggravated sentence. *People v. Hernandez-Luis*, 879 P.2d 429 (Colo. App. 1994).

Subsection (10) does not apply to crimes of violence that are sexual offenses. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), aff'd on other grounds sub nom. *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

Aggravated sentence supported by appropriate factors and sufficient findings where the court found that the offense was extremely violent, the victim lay helpless and unconscious through most of the attack, the victim in no way provoked the attack, the defendant denied his involvement in the attack, and the defendant had consumed alcohol the night of the incident. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

Defendant's argument that the use of force in committing assault was an essential element of the crime and should not be considered as an aggravating factor was without merit. *People v. Silva*, 782 P.2d 846 (Colo. App. 1989).

Defendant's argument that, before a court can consider psychological or other adverse impacts of a crime on victims and their families as an extraordinary aggravating circumstance, there must be evidence that the impact is greater than that which is "normally" experienced by other victims of crime was found to be without merit. Such a requirement would be inconsistent with the legislative intent that sentencing courts be granted broad discretion in distinguishing between "ordinary" and "extraordinary" circumstances depending upon the specific facts of each case. *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Sentence modified on appeal only if trial court abused discretion. The trial court has great leeway in imposing sentence and, absent a clear abuse of discretion, the trial court's decision will not be modified on appeal. *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980); *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

Proof of clear abuse of discretion needed to overturn sentencing decision. The trial court's sentencing decision will not be overturned on appeal absent a showing that the trial court's wide latitude is marked by a clear abuse of

discretion. *People v. Hotopp*, 632 P.2d 600 (Colo. 1981).

Factors considered in appellate review of sentence. On review of the propriety of a sentence, the Colorado supreme court considers three factors: (1) The nature of the offense; (2) the public interest in safety and deterrence; and (3) the character of the offender. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980); *People v. Cohen*, 617 P.2d 1205 (Colo. 1980); *People v. Colasanti*, 626 P.2d 1136 (Colo. 1981); *People v. Magee*, 626 P.2d 1139 (Colo. 1981); *People v. Walters*, 632 P.2d 566 (Colo. 1981); *People v. Tijerina*, 632 P.2d 570 (Colo. 1981).

Felonies committed before July 1, 1981. The requirement for written findings survives for felonies committed before July 1, 1981. *People v. Sanchez*, 644 P.2d 95 (Colo. App. 1982).

Sentence upheld. Sentence of 15 to 30 years for second-degree murder was not an abuse of discretion. *People v. La Plant*, 670 P.2d 802 (Colo. App. 1983).

Minimum sentence within presumptive range for criminally negligent child abuse resulting in death was proper when it was supported by the evidence, reflected a proper balancing of mitigating and aggravating factors, and did not give undue weight to any one factor. *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

Fifteen-year sentence for second-degree arson committed while defendant was on parole did not constitute abuse of discretion by trial court. *People v. Swepston*, 822 P.2d 510 (Colo. App. 1991).

Sentence of 40 years' imprisonment for defendant convicted of child abuse resulting in death did not constitute abuse of discretion on the part of the trial court. The sentence was within the range required by subsection (9)(d)(I), and the trial court made extensive and detailed findings in imposing the sentence, took into consideration the sentencing factors set forth in § 18-1-102.5, and appropriately considered mitigating and aggravating factors in imposing the sentence. *People v. Garcia*, 964 P.2d 619 (Colo. App. 1998), rev'd on other grounds, 997 P.2d 1 (Colo. 2000).

The trial court did not abuse its discretion in imposing an aggravated sentence that was not based on a factor specified in subsection (9)(a) where the court made written findings that defendant posed a danger to society, that defendant had inflicted substantial emotional and psychological harm on his victims, that the victims were extremely vulnerable, that defendant was likely to reoffend, and that the jury had determined that one of the counts was a crime of violence. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

In light of the requirement that defendant receive an enhanced sentence if sentenced to a term of imprisonment, the trial court did not err in failing to consider a suspended sentence as a

sentencing option. *People v. Nastiuk*, 914 P.2d 421 (Colo. App. 1995).

Sentence vacated and case remanded for re-sentencing where defendant was sentenced in an enhanced range for being on bond for an offense which was later dismissed. *People v. Bachofer*, 192 P.3d 454 (Colo. App. 2008).

Statutory authority of court to suspend sentences applicable to both misdemeanor and felony offenses. *People v. Schwartz*, 823 P.2d 1386 (Colo. App. 1991).

When a defendant receives two convictions and challenges only one of the convictions, the trial court has no authority to alter the sentence for the unchallenged conviction. *People v. Wiegand*, 743 P.2d 977 (Colo. App. 1987).

Under subsection (6), since defendant knew that failure to meet conditions of probation might constitute extraordinary aggravating circumstances which would justify sentencing beyond the presumptive range, the court was justified in doubling of presumptive range of sentence when defendant met neither the community service nor the restitution condition of probation. *Montoya v. People*, 864 P.2d 1093 (Colo. 1993); *People v. Smith*, 183 P.3d 726 (Colo. App. 2008).

Trial court properly related aggravating factors to defendant and the circumstances of the crime for conviction as an accessory. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

Consideration of request for reduction of sentence for a crime committed after a certain date by a person sentenced after the date that sentences for that crime was increased does not require that such a sentence be reduced, but rather leaves the matter to the discretion of the trial court. *People v. Gallegos*, 789 P.2d 461 (Colo. App. 1989) (decided under law in effect prior to 1989 repeal of subsection (1)(b)(VII)).

Persons convicted of child abuse resulting in death are eligible for sentence modification pursuant to § 17-27.7-104 upon successful completion of the regimented inmate training program, but the sentencing court's discretion is limited by the relevant mandatory sentencing limits. *People v. Smith*, 971 P.2d 1056 (Colo. 1999).

"Incarceration", for purposes of subsection (9)(a), includes a direct sentence to community corrections. *People v. Saucedo*, 796 P.2d 11 (Colo. App. 1990).

Conspiracy to distribute a controlled substance is not an extraordinary risk crime. A plain reading of the statute does not include inchoate crimes. *People v. Valenzuela*, 216 P.3d 588 (Colo. 2009).

Where the defendant was convicted of "extraordinary risk of harm" crime and adjudicated as a habitual criminal, trial court properly calculated defendant's sentence by increasing the maximum presumptive range sen-

tence pursuant to subsection (9.7) and then multiplying it by three pursuant to § 16-13-101(1.5). *People v. Hoefer*, 961 P.2d 563 (Colo. App. 1998).

The trial court appropriately increased the maximum presumptive penalty based on subsection (9.7)(a) before applying the presumptive penalty provisions applicable to crimes of violence under § 16-11-309. Thus, § 16-11-309 permits a doubling of the maximum penalty that is already increased under subsection (9.7)(a) for certain extraordinary risk crimes. *People v. Greymountain*, 952 P.2d 829 (Colo. App. 1997).

The extraordinary risk sentencing provisions of subsection (9.7) do not apply unless the defendant is actually charged with and convicted of a crime of violence, as described in § 16-11-309. In situations in which the defendant is convicted of a crime, such as second degree assault against a police officer under § 18-3-203 (2)(c), that mandates the same enhanced presumptive sentencing range as applies to a crime of violence, the defendant is not subject to the additional sentence enhancing provisions specified in subsection (9.7) unless the prosecution has specifically alleged and proved the elements of a crime of violence, as described in § 16-11-309. *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Because defendant was convicted of a per se crime of violence under § 16-11-309, the defendant was subject to an increase in the sentencing range under the extraordinary risk crime provisions of subsection (9.7); the prosecution was not required to charge a crime of violence separately and the jury was not required to determine its existence in order for the trial court to sentence defendant under the provisions of subsections (9) and (9.7). *People v. Lee*, 989 P.2d 777 (Colo. App. 1999). But see *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Imposition of a 25-year sentence for second degree murder committed in the heat of passion was not abuse of discretion and was within the range prescribed by law, because it is a per se crime of violence under § 16-11-309 and an extraordinary risk of harm crime pursuant to subsection (9.7); thus, the presumptive sentencing range was 10 to 32 years and the trial court was required to sentence defendant to a term of incarceration of at least the midpoint in the presumptive range, but not more than twice the maximum presumptive term for the offense. *People v. Martinez*, 32 P.3d 582 (Colo. App. 2001).

Because defendant's sentence for felony murder was not based on the habitual criminal statutes and because defendant's conviction for robbery, which was based on habitual criminal statutes, was vacated, the habitual criminal convictions must be vacated as well. *People v. Cook*, 22 P.3d 947 (Colo. App. 2000).

Subsection (10) allows the trial court only to suspend the imposition or execution of a sentence, not the length of the sentence, and in light of the mandatory language of § 18-18-107, the trial court was required to sentence the defendant within the range set forth in the statute. *People v. Delgado*, 832 P.2d 971 (Colo. App. 1991).

Distinction between imposition and execution of a sentence under subsection (10). Where court suspended the execution, but not the imposition, of a four-year term in the department of corrections on condition that defendant serve two years in a community corrections facility, the court was not thereafter precluded from resentencing defendant to four years in the department. *People v. Seals*, 899 P.2d 359 (Colo. App. 1995).

Prison sentence originally imposed becomes final notwithstanding suspension of the sentence. Suspension does not result in withdrawal of the original sentence, but in the suspension of the execution of the sentence subject to express conditions. If a condition is violated, the suspension may be vacated, and execution of the original sentence can be carried out. In such a circumstance, the pronouncement of a new sentence is both unnecessary and improper. *People v. Frye*, 997 P.2d 1223 (Colo. App. 1999).

Amendment to subsection (10), requiring recommendation for suspended sentence, applies prospectively and is inapplicable to defendant who committed crime prior to date amendment was enacted. *People v. Munoz*, 857 P.2d 546 (Colo. App. 1993).

The court may impose a fine in lieu of incarceration or probation without the consent of the prosecutor where the defendant is convicted of a class 2 felony not involving violence or an assault on a firefighter or a peace officer. *People v. Thompson*, 897 P.2d 857 (Colo. App. 1994).

Former § 18-1-105 (10) does not authorize a court to suspend a statutorily enhanced sentence where mandatory minimum sentence was applicable to defendant who was on probation at the time of offense. *People v. Munoz*, 857 P.2d 546 (Colo. App. 1993).

Pursuant to the plain language of former § 18-1-105 (10) (now recodified with amendments under subsection (11)), if a defendant is sentenced pursuant to a mandatory sentencing provision, the sentencing court has no power to suspend either the imposition or execution of the sentence. *People v. Hummel*, 131 P.3d 1204 (Colo. App. 2006).

The statutory authority to impose a sentence is determined by the sentencing scheme in effect on the date of the offense. To the extent *People v. Hummel* annotated above suggests otherwise, the appellate court declined to follow it. *People v. Wolfe*, 213 P.3d 1035 (Colo. App. 2009).

Court not bound to apply original sentence upon revocation of probation. Because suspension of a sentence is in conjunction with, rather than contradistinction to, the imposition of a statutorily prescribed alternative to imprisonment, the sentencing court's resentencing options upon revocation were dictated by statutory provisions governing revocation of probation. *Fierro v. People*, 206 P.3d 460 (Colo. 2009).

Defendant was incorrectly sentenced under the extraordinary risk enhancement provision in subsection (10) because it is inapplicable to offenses committed after November 1, 1998. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

The presumptive sentencing range for the class 4 felony offense of attempted unlawful distribution of a schedule II controlled substance is two years to six years, pursuant to subsection (1)(a)(V)(A). Such an attempt does not constitute a crime that presents an extraordinary risk of harm to society as defined in the legislative intent stated in subsection (10)(a). Thus, the maximum sentence in the presumptive range shall neither be increased nor be subject to subsection (10)(b)(XI). *People v. Blinderman*, 148 P.3d 232 (Colo. App. 2006).

Not illegal sentence when court first increased maximum presumptive sentence for extraordinary risk enhancement pursuant to subsection (10) for felony child abuse and then applied mandatory language of subsection (8)(d). *People v. Ortega*, 266 P.3d 424 (Colo. App. 2011).

Applied in *People ex rel. Dunbar v. Moore*, 125 Colo. 571, 245 P.2d 467 (1952); *People v. Peters*, 151 Colo. 409, 378 P.2d 205 (1963); *People v. Alvarez*, 187 Colo. 290, 530 P.2d 506 (1975); *People v. Bruebaker*, 189 Colo. 219, 539 P.2d 1277 (1975); *People v. Marchese*, 37 Colo. App. 65, 541 P.2d 1264 (1975); *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978); *People v. Montoya*, 196 Colo. 111,

582 P.2d 673 (1978); *People v. Burns*, 197 Colo. 284, 593 P.2d 351 (1979); *People v. Mikkleson*, 42 Colo. App. 77, 593 P.2d 975 (1979); *People v. Toomer*, 43 Colo. App. 343, 604 P.2d 1180 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *People v. Wylie*, 605 P.2d 494 (Colo. App. 1980); *People v. Hostetter*, 606 P.2d 80 (Colo. App. 1980); *People v. Abila*, 606 P.2d 80 (Colo. App. 1980); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *People v. Hall*, 619 P.2d 492 (Colo. 1980); *People v. Marcy*, 628 P.2d 69 (Colo. 1981); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *People v. Moody*, 630 P.2d 74 (Colo. 1981); *People v. Marcis*, 630 P.2d 82 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Scott*, 630 P.2d 615 (Colo. 1981); *People v. Macias*, 631 P.2d 584 (Colo. 1981); *People v. Beland*, 631 P.2d 1130 (Colo. 1981); *People v. Lucero*, 632 P.2d 585 (Colo. 1981); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Quintana*, 634 P.2d 413 (Colo. 1981); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. Reynolds*, 638 P.2d 43 (Colo. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Mattas*, 645 P.2d 254 (Colo. 1982); *People v. Williams*, 651 P.2d 899 (Colo. 1982); *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Turman*, 659 P.2d 1368 (Colo. 1983); *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. Espinoza*, 669 P.2d 142 (Colo. App. 1983), *aff'd*, 712 P.2d 476 (Colo. 1985); *People v. Piro*, 701 P.2d 878 (Colo. App. 1985); *People v. Jenkins*, 710 P.2d 1157 (Colo. App. 1985); *People v. Lucero*, 714 P.2d 498 (Colo. App. 1985); *People v. Broga*, 750 P.2d 59 (Colo. 1988); *People v. Flores*, 757 P.2d 159 (Colo. App. 1988); *People v. Wilson*, 819 P.2d 510 (Colo. App. 1991); *Patton v. People*, 35 P.3d 124 (Colo. 2001).

18-1.3-402. Felony offenses not classified. (1) Any felony defined by state statute without specification of its class shall be punishable as provided in the statute defining it. For felony offenses committed on or after July 1, 1993, if the sentencing court sentences an offender to incarceration pursuant to the provisions of this section, the sentencing court shall also impose a mandatory period of parole of two years.

(2) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1402, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-108 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Applied in *People v. Spann*, 37 Colo. App. 152, 549 P.2d 427 (1975), rev'd on other

grounds, 193 Colo. 53, 561 P.2d 1268 (1977) (decided prior to 2002 relocation of § 18-1-108).

18-1.3-403. Penalty for felony not fixed by statute - punishment. (1) In all cases where an offense is denominated by statute as being a felony and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than five years in a correctional facility, as defined in section 17-1-102, C.R.S., or a fine of not more than fifteen thousand dollars, or both such imprisonment and fine. For offenses committed on or after July 1, 1985, a fine of not more than one hundred thousand dollars may be levied. For offenses committed on or after July 1, 1993, if the sentencing court sentences an offender to incarceration pursuant to the provisions of this section, the sentencing court shall also impose a mandatory period of parole of two years.

(2) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1402, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-109 as it existed prior to 2002.

18-1.3-404. Duration of sentences for felonies. (1) Unless otherwise provided by law and except as otherwise provided in the "Colorado Children's Code", title 19, C.R.S., courts sentencing any person for the commission of a felony to the custody of the executive director of the department of corrections shall fix a definite term as provided by section 18-1.3-401. The persons so sentenced shall be imprisoned and discharged as provided by other applicable statutes. No person sentenced to a correctional facility for the commission of a felony shall be subjected to imprisonment for a term exceeding the term provided by the statute fixing the length of the sentence for the crime of which the person was convicted and for which the person was sentenced.

(2) (a) If a court sentences a defendant to the custody of the department of corrections, the court shall, after fixing a definite term of imprisonment, read the following statement:

"The defendant may spend less time incarcerated than the term announced here today. The actual time served will be influenced by a number of factors including, but not limited to, previous criminal activities, eligibility for earned time for good behavior, correctional education program earned time, credit for time served, or community corrections eligibility."

(b) By requiring the court to read the statement contained in paragraph (a) of this subsection (2), the general assembly does not intend to grant any additional rights to the defendant. Failure of a court to comply with the requirements of paragraph (a) of this subsection (2) shall not be grounds for a defendant to withdraw a guilty plea or in any way gain a reversal of a conviction or reduction in sentence.

(3) (a) Nothing in subsection (2) of this section shall be construed to affect the duties otherwise imposed by law on the court or on the executive director of the department of corrections.

(b) Nothing in subsection (2) of this section shall be construed to limit, expand, or otherwise affect any provision of law concerning the availability, administration, entitlement, or award of good time credits and earned time credits.

Source: L. 2002: Entire article added with relocations, p. 1403, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-302 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952).

18-1.3-405. Credit for presentence confinement. A person who is confined for an offense prior to the imposition of sentence for said offense is entitled to credit against the term of his or her sentence for the entire period of such confinement. At the time of sentencing, the court shall make a finding of the amount of presentence confinement to which the offender is entitled and shall include such finding in the mittimus. The period of confinement shall be deducted from the sentence by the department of corrections. A person who is confined pending a parole revocation hearing is entitled to credit for the entire period of such confinement against any period of reincarceration imposed in the parole revocation proceeding. The period of confinement shall be deducted from the period of reincarceration by the department of corrections. If a defendant is serving a sentence or is on parole for a previous offense when he or she commits a new offense and he or she continues to serve the sentence for the previous offense while charges on the new offense are pending, the credit given for presentence confinement under this section shall be granted against the sentence the defendant is currently serving for the previous offense and shall not be granted against the sentence for the new offense.

Source: L. 2002: Entire article added with relocations, p. 1403, § 2, effective October 1. **L. 2009:** Entire section amended, (HB 09-1263), ch. 105, p. 383, § 3, effective August 5.

Editor's note: This section is similar to former § 16-11-306 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with the time credited on sentences, see 62 Den. U. L. Rev. 188 (1985). For article, "Colorado Felony Sentencing — an Update", see 14 Colo. Law 2163 (1985). For article, "Criminal Sentencing in Colorado After Blakely v. Washington", see 34 Colo. Law. 85 (January 2005).

Annotator's note. Since § 18-1.3-405 is similar to § 16-11-306 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Constitutionality. The provisions of this section, giving discretionary power to a sentencing court in granting credit for presentence confinement, are not unconstitutional. *People v. Dennis*, 649 P.2d 321 (Colo. 1982).

There is no constitutional right to receive credit for presentence confinement. *People v. Martinez*, 192 Colo. 388, 559 P.2d 228 (1977); *Godbold v. District Court*, 623 P.2d 862 (Colo. 1981) (decided under former law); *People v. Corbett*, 713 P.2d 1340 (Colo. App. 1985) (de-

cided under law in effect prior to 1979 repeal and reenactment).

Constitutional right to credit for presentence confinement. A sentencing judge is constitutionally required to give an indigent defendant credit for time served in presentence confinement, even where the total of the presentence confinement and the sentence imposed after trial is less than the maximum sentence allowed for the offense. *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981) (decided under former law).

Without legislation, credit for presentence confinement is not a matter of right, since there is no constitutional right to credit. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)); *People v. White*, 623 P.2d 868 (Colo. 1981) (decided under former law); *People v. Emig*, 676 P.2d 1156 (Colo. 1984).

This should specifically include credit for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)).

Section is applicable even though defendant was sentenced prior to the time for which he seeks credit. *People v. McGraw*, 30 P.3d 835 (Colo. App. 2001).

Defendant should advise judge of time to be credited. If, at the time of sentencing, a defendant or his counsel has any reason to believe that the trial judge is unaware of the length of time the defendant was in custody or is not considering presentence confinement in arriving at a sentence, such information should be presented to the judge, along with other mitigating factors. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)).

And record should reflect credit. A well prepared mittimus and record should reflect the actual time spent in custody prior to the imposition of sentence and should direct that credit be allowed for the time spent in custody prior to imposition of sentence. *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971) (decided under § 40-1-303 (1)).

No distinction between confinement within and without state. The statute does not distinguish between confinement within Colorado and confinement outside of the state, but instead requires credit for all presentence time that a defendant is confined on the charge for which he is ultimately sentenced. *People v. Hardman*, 653 P.2d 763 (Colo. App. 1982).

Section does not apply to offenses committed prior to July 1, 1979. *Godbold v. District Court*, 623 P.2d 862 (Colo. 1981).

Under the plain meaning of this section and § 17-22.5-104, prisoners are entitled to credit against their life sentences for time spent in presentence confinement. Inmate, therefore, was entitled to a parole eligibility date that was calculated to include 329 days of presentence confinement credit. *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999) (overruling *People v. Payseno*, 954 P.2d 631 (Colo. App. 1997)).

Section does not apply to life sentences. *People v. Payseno*, 954 P.2d 631 (Colo. App. 1997), overruled in *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999).

Section does not refer to the date of eligibility for parole. *People v. Payseno*, 954 P.2d 631 (Colo. App. 1997), overruled in *Fields v. Suthers*, 984 P.2d 1167 (Colo. 1999).

Duty to assure credit against sentence. This section removes from the trial court the discretion whether to grant or deny a defendant credit against his sentence from presentence confinement time, and imposes upon the department of corrections a duty to assure that credit is given in every case. *People v. Dempsey*, 624 P.2d 374 (Colo. App. 1981); *People v. Hardman*, 653 P.2d 763 (Colo. App. 1982); *People v. Patrick*, 683 P.2d 801 (Colo. App. 1983); *People v. Massey*, 707 P.2d 1038 (Colo. App. 1985), rev'd on other grounds, 736 P.2d 19 (Colo. 1987).

The court, when crediting a defendant for presentencing confinement, shall award the defendant full, but not duplicative, credit for time served. Court abused its discretion by awarding defendant only sixty days out of his eighty-nine days served. *People v. Smith*, __ P.3d __ (Colo. App. 2010).

Because the trial court chose to exercise its discretion to give defendant credit for the presentence confinement, the court was required to ensure that defendant received full credit for his confinement. *People v. Smith*, __ P.3d __ (Colo. App. 2010).

Confinement must result from same transaction as sentence. In order for defendant to be given credit for presentence confinement, that confinement must be a result of the same transaction for which he is to be sentenced. *People v. Saiz*, 660 P.2d 2 (Colo. App. 1982); *People v. Freeman*, 705 P.2d 528 (Colo. App. 1985), rev'd on other grounds, 735 P.2d 879 (Colo. 1987) (decided prior to 1986 amendment); *People v. Etts*, 725 P.2d 73 (Colo. App. 1986); *People v. Saathott*, 728 P.2d 367 (Colo. App. 1986).

When a defendant is confined prior to sentencing for a different transaction from that for which he is to be sentenced, he is not entitled to credit. *People v. Matheson*, 671 P.2d 968 (Colo. App. 1983).

A defendant is entitled to credit for the time served as the result of the charge for which the sentence is imposed or the time served as the result of the conduct on which such charge is based, whichever is longer. *Schubert v. People*, 698 P.2d 788 (Colo. 1985); *Torand v. People*, 698 P.2d 797 (Colo. 1985); *People v. Saathott*, 728 P.2d 367 (Colo. App. 1986).

There must be a substantial nexus between the charge or conduct and the period of confinement for which credit is sought. *Schubert v. People*, 698 P.2d 788 (Colo. 1985); *People v. Etts*, 725 P.2d 73 (Colo. App. 1986); *People v. Murray*, 805 P.2d 1175 (Colo. App. 1990); *People v. Bray*, 819 P.2d 528 (Colo. App. 1991); *People v. Finley*, 141 P.3d 911 (Colo. App. 2006).

Where defendant has not proven, and the record does not establish, that there was a substantial nexus between the first county's charges and the defendant's imprisonment in the second county jail or that the issuance of the first county's arrest warrant was the actual cause of his confinement in the second county, presentence confinement credit cannot be awarded. *People v. Freeman*, 735 P.2d 879 (Colo. 1987) (decided prior to 1986 amendment).

There was no substantial nexus, as matter of law, between the Colorado charges upon which defendant was being sentenced and defendant's confinement in an English prison prior to the date the extradition warrant was served. *People v. Bray*, 819 P.2d 528 (Colo. App. 1991).

Plain meaning of section indicates that any presentence confinement credit earned as a result of being reincarcerated on a parole violation must be applied against the previous offense. *People v. Norton*, 63 P.3d 339 (Colo. 2003); *People v. Wallin*, 167 P.3d 183 (Colo. App. 2007).

The plain language of the section coupled with legislative intent lead to the conclusion that such an application is the only means by which courts can avoid granting duplicative credit to offenders. *People v. Norton*, 63 P.3d 339 (Colo. 2003).

Mandatory parole was intended to be included in the scope of an offender's "sentence" when the sentencing scheme was amended in 1993. Parole is a clear infringement on an offender's liberty and thus logically part of his or her sentence. *People v. Norton*, 63 P.3d 339 (Colo. 2003).

"Sentence" incorporates both the incarceration component and the mandatory parole component of an offender's penalty. *People v. Norton*, 63 P.3d 339 (Colo. 2003).

Section 17-2-103 (6)(c) does not negate or change the general rule for applying presentence confinement credit set forth in this section, which provides that a defendant receive presentence confinement credit on his or her original sentence and not on the new sentence. Rather, the filing of a parole revocation complaint merely provides jurisdiction to the parole board, but once the parole board makes its decision, the time starts running again from the date of the complaint whether the complaint is dismissed or parole is revoked. *People v. Wallin*, 167 P.3d 183 (Colo. App. 2007).

Section creates a right to credit only with respect to the presentence confinement served in connection with the charge or conduct for which a particular sentence is ultimately imposed. *Santisteven v. Johnson*, 751 P.2d 621 (Colo. 1988) (decided under section as it existed prior to 1986 amendment).

Defendant, who escaped while serving concurrent sentences, was not entitled to credit for presentence confinement for serving one of the sentences while an arrest warrant was still outstanding for the other. Confinement did not result from the same transaction as the sentence. *People v. Taylor*, 7 P.3d 1030 (Colo. App. 2000).

Service in Cenikor program does not constitute "confinement" so the defendant was not entitled to credit for such service against his sentence. *People v. Beecroft*, 862 P.2d 973 (Colo. App. 1993).

Service in work release as a condition of probation is a form of "confinement" deserving of presentence confinement credit. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

"Substantial nexus" required between charges filed in one judicial district and periods of presentence confinement in another in order

for defendant to be entitled to an award of presentence confinement credit against his sentence in the first district. *Massey v. People*, 736 P.2d 19 (Colo. 1987).

"Substantial nexus" found between defendant's charges in case and presentence confinement. Although defendant had also been confined on probation violation warrant from a prior case, the defendant would have remained confined on the charges in the other case in the same judicial district in the absence of the prior case. Defendant, therefore, was entitled to presentence confinement for all incarceration time after the arrest. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Credit not mandatory where sentence is to county jail. This section does not mandate a sentencing judge to credit a defendant with time spent in presentence confinement when the sentence is to a county jail. *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982); *People v. Smith*, __ P.3d __ (Colo. App. 2010).

Additional credit not required to be awarded when sentence on menacing conviction ordered to run concurrently with a previously imposed sentence. Defendant was already serving a sentence as a result of independent criminal conduct in another case and the menacing charge was not the cause of that confinement, so he was not entitled to receive additional credit for his presentence imprisonment on the menacing charge. *People v. Taylor*, 886 P.2d 302 (Colo. App. 1994).

Credit not mandatory where sentence is to a facility not under the supervision of the department of corrections. However, the trial court must make a finding that the facility is operated by another entity if credit is denied. *People v. Lachicotte*, 713 P.2d 408 (Colo. App. 1985).

The credit for presentence confinement mandated by this section applies only where a defendant is sentenced to a facility under the supervision of the department of corrections. *People v. Garcia*, 757 P.2d 1110 (Colo. App. 1988).

Although the statute does not specifically limit its applicability to sentences to a state correctional facility, the language requiring the department of corrections to deduct the period of pre-sentence confinement from the sentence implies that credit for pre-sentence confinement is mandated only when the sentence is to be served in a state correctional facility. *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982); *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990); *People v. Smith*, __ P.3d __ (Colo. App. 2010).

If an offender violates a rule or condition of community correctional placement while on nonresidential status, the offender is not entitled upon resentencing to credit for time served

while on nonresidential status. *People v. Hoecher*, 822 P.2d 8 (Colo. 1991) (overruling *People v. Herrera*, 734 P.2d 136 (Colo. App. 1986)).

A trial court is not statutorily required to give any pre-sentence confinement credits against any misdemeanor sentence. However, a sentencing court may, in the exercise of its discretion, credit the length of any presentence confinement against a misdemeanor sentence. *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982); *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Trial court has discretion to credit presentence confinement credit to a misdemeanor sentence to county jail rather than to a consecutive felony sentence to a state correctional facility. *People v. Johnson*, 797 P.2d 1296 (Colo. 1990).

Where trial court imposed both a felony sentence to which this section was applicable and a misdemeanor sentence to which the statute did not apply, the discretion which the court might otherwise have exercised did not exist and the court was required to credit the pre-sentence confinement time against the sentence imposed upon defendant for his conviction of felony. *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Supervised period following release from community correction facility is not confinement within the meaning of this section. Thus, defendant was not entitled to presentence confinement credit. *People v. Carroll*, 779 P.2d 1375 (Colo. App. 1989).

A suspended sentence subject to the condition that an offender receive treatment for drug abuse does not constitute "confinement" under this section. Defendant was not entitled to presentence confinement credit. *Beecroft v. People*, 874 P.2d 1041 (Colo. 1994).

Duplicative credit. Where defendant was arrested based on separate felony warrants arising from both of two counties, time served in either first county jail or second county jail between date of arrest until he was placed on probation in the second county case related to both of these charges, and thus any days for which the defendant had already received presentence credit under the second county's mittimus could not also be credited against the first county offense. *People v. Massey*, 707 P.2d 1038 (Colo. App. 1985), rev'd on other grounds, 736 P.2d 19 (Colo. 1987).

Defendant not entitled to duplicative credit for time served. *People v. Etts*, 725 P.2d 73 (Colo. App. 1986); *People v. Garcia*, 757 P.2d 1110 (Colo. App. 1988); *People v. Johnson*, 776 P.2d 1141 (Colo. App. 1989), rev'd on other grounds, 797 P.2d 1296 (Colo. 1990).

Original offense and subsequent probation violation are the same transaction. When defendant is confined due to parole revocation, he is entitled to presentence confinement credit for all periods of confinement relating to the original charge, as well as time served for violation of probation terms. *People v. Myles*, 702 P.2d 292 (Colo. App. 1985).

This section requires credit to be applied to any existing continuing sentence from a prior offense, not against a sentence for a new offense committed by the same defendant, when the defendant was serving a sentence or was on parole for a previous offense at the time he committed the new offense. *People v. Ostuni*, 58 P.3d 531 (Colo. 2002); *People v. Dixon*, 133 P.3d 1176 (Colo. 2006).

A probationer is entitled to presentence confinement credit for the actual time confined to the county or municipal jail, where the trial court committed the probationer to a county or municipal jail as a facility utilized in conjunction with a work release program pursuant to § 16-11-212 (1). *People v. Lee*, 678 P.2d 1030 (Colo. App. 1983).

No statutorily mandated deduction of the period of presentence confinement from a term of probation. As with incarceration in a county jail a grant of probation does not put the defendant under the supervision of the department of correction, nor is there a statutorily mandated deduction of the period of presentence confinement from a term of probation. *People v. Freeman*, 705 P.2d 528 (Colo. App. 1985), rev'd on other grounds, 735 P.2d 879 (Colo. 1987) (decided prior to 1986 amendment).

No credit for time spent at halfway house. Where residency in a community corrections facility is imposed as a condition of probation, it does not involve confinement as contemplated by this section, thus no credit may be given for time spent at a community corrections halfway house. *People v. Radar*, 652 P.2d 1085 (Colo. App. 1982).

Confinement for first conviction not pretrial confinement for second offense. Where a pretrial defendant is incarcerated pursuant to the sentence imposed in connection with his earlier conviction and he is receiving credit on that sentence for that time period, this confinement is not attributable to a second charge and he is not entitled to pretrial confinement credit on the second offense. *People v. Loggins*, 628 P.2d 111 (Colo. 1981) (decided under former law).

Sentence for life imprisonment. When the penalty provided by statute is a sentence for life imprisonment, there is no authority in the sentencing court at the time of sentencing thereafter to make the sentence anything but life imprisonment. Consideration of presentence confinement in fixing sentence would be without purpose or result. *People v. Jones*, 198 Colo. 578,

604 P.2d 679 (1979) (decided under former law).

Where defendant is convicted under death penalty statute later held unconstitutional and court is required to resentence defendant to life imprisonment, there is no authority in sentencing court to award presentence confinement credit for time spent on death row prior to resentencing. *People v. Corbett*, 713 P.2d 1340 (Colo. App. 1985) (decided under law in effect prior to 1979 repeal and reenactment).

In the case of concurrent sentences, the period of presentence confinement should be credited against each sentence. *Schubert v. People*, 698 P.2d 788 (Colo. 1985); *People v. Etts*, 725 P.2d 73 (Colo. App. 1986); *People v. Roy*, 252 P.3d 24 (Colo. App. 2010).

When consecutive sentences are imposed, crediting the period of presentence confinement against one of the sentences will assure the defendant full credit against the total term of imprisonment. *Schubert v. People*, 698 P.2d 788 (Colo. 1985).

If only one sentence is ultimately imposed and the other concurrently filed counts or charges are dismissed, then the entire period of presentence confinement should be credited against the sentence imposed. *Schubert v. People*, 698 P.2d 788 (Colo. 1985).

But if the case on which the defendant is sentenced has been only recently filed, and the defendant has been confined for a much longer period of time on an older case which relates to a separate criminal transaction and which is to be dismissed as part of a plea agreement, then the defendant is entitled to credit only for that period of confinement attributable to the case resulting in the sentence. The parties may nevertheless agree as part of a sentence concession that credit should be given for the entire period of presentence confinement. *Schubert v. People*, 698 P.2d 788 (Colo. 1985).

If defendant's parole is revoked during presentence confinement for pending charges, and defendant thereupon resumes service of sentence unrelated to pending charges, then, with respect to such pending charges, defendant is entitled to credit for presentence confinement prior to, but not following, revocation of his parole. *Torand v. People*, 698 P.2d 797 (Colo. 1985).

An annotation of "credit for time served" on a mittimus must be construed as an order for a specific amount of credit to which the defendant is entitled by statute, not a specific method for applying that credit to the entire sentence or for calculating the defendant's ultimate parole eligibility or mandatory release dates. *People v. Ostuni*, 58 P.3d 531 (Colo. 2002).

Writ of habeas corpus not appropriate. An order of one district court concerning presentence confinement credit may not be challenged by prosecution of a writ of habeas corpus in a district court of another judicial district. *Pipkin v. Brittain*, 713 P.2d 1358 (Colo. App. 1985).

Retroactive reduction of sentence and parole date does not entitle defendant to presentence confinement credit for offenses committed in different transaction even though practical effect of such reduction was that defendant was confined beyond parole date for separate transaction. *People v. Lepine*, 744 P.2d 81 (Colo. App. 1987).

To receive presentence confinement credit, an offender must have been actually confined, and there must have been a substantial nexus between the confinement and the charge for which the sentence is ultimately imposed. *People v. Chavez*, 122 P.3d 1036 (Colo. App. 2005).

No credit is allowed where defendant not incarcerated or confined but only supervised. *People v. Winters*, 789 P.2d 1120 (Colo. App. 1990).

No credit is allowed while defendant was on bond despite being subject to electronic monitoring and a curfew do not so limit liberty as to constitute confinement under this section. *People v. Chavez*, 122 P.3d 1036 (Colo. App. 2005).

Defendant who is on parole at the time of the commission of a new offense is not entitled to receive presentence confinement credit for the new offense, and it is not necessary to revoke the defendant's parole in order for the defendant to be ineligible for such presentence confinement credit. *People v. Hays*, 817 P.2d 546 (Colo. App. 1991).

An offender who has earned presentence confinement credit is entitled to have that credit deducted from his mandatory parole if the offender is no longer serving a sentence of confinement. *Edwards v. People*, 196 P.3d 1138 (Colo. 2008).

Trial court has no authority to retain jurisdiction over a defendant after sentencing for the reason that the law may be changed by a subsequent court decision even though the court, at the time of sentencing, is aware of a case appealed to the state supreme court which may change the interpretation of statute regarding credit against the sentence for presentence confinement. *People v. Mortensen*, 856 P.2d 45 (Colo. App. 1993).

Applied in *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Lopez*, 961 P.2d 602 (Colo. App. 1998).

18-1.3-406. Mandatory sentences for violent crimes. (1) (a) Any person convicted of a crime of violence shall be sentenced pursuant to the provisions of section 18-1.3-401

(8) to the department of corrections for a term of incarceration of at least the midpoint in, but not more than twice the maximum of, the presumptive range provided for such offense in section 18-1.3-401 (1) (a), as modified for an extraordinary risk crime pursuant to section 18-1.3-401 (10), without suspension; except that, within ninety-one days after he or she has been placed in the custody of the department of corrections, the department shall transmit to the sentencing court a report on the evaluation and diagnosis of the violent offender, and the court, in a case which it considers to be exceptional and to involve unusual and extenuating circumstances, may thereupon modify the sentence, effective not earlier than one hundred nineteen days after his or her placement in the custody of the department. Such modification may include probation if the person is otherwise eligible therefor. Whenever a court finds that modification of a sentence is justified, the judge shall notify the state court administrator of his or her decision and shall advise said administrator of the unusual and extenuating circumstances that justified such modification. The state court administrator shall maintain a record, which shall be open to the public, summarizing all modifications of sentences and the grounds therefor for each judge of each district court in the state. A person convicted of two or more separate crimes of violence arising out of the same incident shall be sentenced for such crimes so that sentences are served consecutively rather than concurrently.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (1), any person convicted of a sex offense, as defined in section 18-1.3-1003 (5), committed on or after November 1, 1998, that constitutes a crime of violence shall be sentenced to the department of corrections for an indeterminate term of incarceration of at least the midpoint in the presumptive range specified in section 18-1.3-401 (1) (a) (V) (A) up to a maximum of the person's natural life, as provided in section 18-1.3-1004 (1).

(2) (a) (I) "Crime of violence" means any of the crimes specified in subparagraph (II) of this paragraph (a) committed, conspired to be committed, or attempted to be committed by a person during which, or in the immediate flight therefrom, the person:

(A) Used, or possessed and threatened the use of, a deadly weapon; or

(B) Caused serious bodily injury or death to any other person except another participant.

(II) Subparagraph (I) of this paragraph (a) applies to the following crimes:

(A) Any crime against an at-risk adult or at-risk juvenile;

(B) Murder;

(C) First or second degree assault;

(D) Kidnapping;

(E) A sexual offense pursuant to part 4 of article 3 of this title;

(F) Aggravated robbery;

(G) First degree arson;

(H) First degree burglary;

(I) Escape; or

(J) Criminal extortion.

(b) (I) "Crime of violence" also means any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim. For purposes of this subparagraph (I), "unlawful sexual offense" shall have the same meaning as set forth in section 18-3-411 (1), and "bodily injury" shall have the same meaning as set forth in section 18-1-901 (3) (c).

(II) The provisions of subparagraph (I) of this paragraph (b) shall apply only to felony unlawful sexual offenses.

(c) As used in this section, "at-risk adult" has the same meaning as set forth in section 18-6.5-102 (1), and "at-risk juvenile" has the same meaning as set forth in section 18-6.5-102 (1.5).

(3) In any case in which the accused is charged with a crime of violence as defined in subsection (2) (a) (I) of this section, the indictment or information shall so allege in a separate count, even though the use or threatened use of such deadly weapon or infliction of such serious bodily injury or death is not an essential element of the crime charged.

(4) The jury, or the court if no jury trial is had, in any case as provided in subsection (3) of this section shall make a specific finding as to whether the accused did or did not use,

or possessed and threatened to use, a deadly weapon during the commission of such crime or whether such serious bodily injury or death was caused by the accused. If the jury or court finds that the accused used, or possessed and threatened the use of, such deadly weapon or that such injury or death was caused by the accused, the penalty provisions of this section shall be applicable.

(5) In any case in which the accused is charged with a crime of violence as defined in subsection (2) (a) (II) of this section, the indictment or information shall so allege in a separate count, even though the use of threat, intimidation, or force or the infliction of bodily injury is not an essential element of the crime charged.

(6) The jury, or the court if no jury trial is had, in any case as provided in subsection (5) of this section shall make a specific finding as to whether the accused did or did not use threat, intimidation, or force during the commission of such crime or whether such bodily injury was caused by the accused. If the jury or court finds that the accused used threat, intimidation, or force or that such bodily injury was caused by the accused, the penalty provisions of this section shall be applicable.

(7) (a) In any case in which the accused is charged with a crime of violence as defined in this section and the indictment or information specifies the use of a dangerous weapon as defined in sections 18-12-101 and 18-12-102, or the use of a semiautomatic assault weapon as defined in paragraph (b) of this subsection (7), upon conviction for said crime of violence, the judge shall impose an additional sentence to the department of corrections of five years for the use of such weapon. The sentence of five years shall be in addition to the mandatory sentence imposed for the substantive offense and shall be served consecutively to any other sentence and shall not be subject to suspension or probation.

(b) For the purposes of this subsection (7), “semiautomatic assault weapon” means any semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition.

Source: **L. 2002:** Entire article added with relocations, p. 1403, § 2, effective October 1. **L. 2003:** (1), (2)(a)(II)(E), and (7)(a) amended, pp. 1424, 1432, §§ 3, 21, effective April 29. **L. 2004:** (1) amended, p. 634, § 2, effective August 4. **L. 2012:** (1)(a) amended, (SB 12-175), ch. 208, p. 865, § 110, effective July 1.

Editor’s note: (1) This section is similar to former § 16-11-309 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the sentencing of a defendant for multiple counts arising from the same act, see § 18-1-408 (3).

ANNOTATION

Law reviews. For article, “Colorado Felony Sentencing”, see 11 Colo. Law. 1478 (1982). For article, “Review of New Legislation Relating to Criminal Law”, see 11 Colo. Law. 2148 (1982). For article, “Colorado Felony Sentencing — an Update”, see 14 Colo. Law. 2163 (1985). For article, “Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986”, which discusses a case relating to mandatory sentencing, see 15 Colo. Law. 1605 (1986). For article, “The Definition of ‘Deadly Weapon’ Under the Colorado Criminal Code”, see 15 Colo. Law. 1663 (1986). For article, “Sentencing Dilemmas”, see 29 Colo. Law. 67 (October 2000). For article, “Criminal Sentencing in Colorado After *Blakely v. Washington*”, see 34 Colo. Law. 85 (January 2005).

Annotator’s note. Since § 18-1.3-406 is similar to § 16-11-309 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Under former language of subsection (1)(a) and (b) which existed prior to 1988, subsection (1)(a) and (b) was constitutional, and did not violate equal protection clause since the two paragraphs could be harmonized and the difference between the two paragraphs was rationally related to a legitimate state interest in preventing crimes of violence and crimes against the elderly and handicapped. *People v. Wells*, 775 P.2d 563 (Colo. 1989), cert. denied, 783 P.2d 1223 (Colo. 1989).

1988 amendment to subsection (1)(a), changing “two” to “two or more,” worked a substantive change in the law and did not merely clarify intent of prior version of statute. *Robles v. People*, 811 P.2d 804 (Colo. 1991).

The general assembly intended that this section define sentencing standards rather than create a substantive offense by its placement among other sections relating to sentencing. *Brown v. District Court*, 194 Colo. 45, 569 P.2d 1390 (1977).

The general assembly intended subsection (1) to authorize only one sentence reduction by the court, after its receipt of the diagnostic report filed by department of corrections upon the defendant's placement there. *People v. Belgard*, 58 P.3d 1077 (Colo. App. 2002).

More than one sentence reduction is not permitted by this section read in conjunction with Crim. P. 35. Although multiple sentence reductions are permitted under Crim. P. 35 if the sentence is reduced to a term within statutory limits, more than one sentence reduction under this section would be outside the statutory limits. *People v. Belgard*, 58 P.3d 1077 (Colo. App. 2002).

Where a person is initially sentenced pursuant to this section to a term of incarceration greater than the maximum in the presumptive range as the result of the conviction of such person of a crime of violence, such sentence may nonetheless be modified below the maximum presumptive terms if the court finds that “unusual and extenuating circumstances” justify such modification. *People v. Beyer*, 793 P.2d 644 (Colo. App. 1990) (decided under prior law).

The defendant is convicted of “separate” crimes when guilt for each crime is established by different evidence. In such case, the court must impose consecutive, rather than concurrent, sentences. *People v. Hahn*, 813 P.2d 782 (Colo. App. 1991).

When each crime is a separate crime of violence, this section requires the court to impose consecutive sentences for each offense. *People v. Trujillo*, 114 P.3d 27 (Colo. App. 2004).

In addition to consecutive sentences for separate crimes of violence, the court, pursuant to subsection (7), is required to impose an additional five-year sentence for each crime of violence involving the use of a semiautomatic assault weapon. *People v. Trujillo*, 114 P.3d 27 (Colo. App. 2004).

Trial court is required to impose consecutive sentences for defendant's convictions of first and second degree assault where convictions do not merge and the evidence supporting the respective convictions was not identical. *People v. Martinez*, 1 P.3d 192 (Colo. App. 1999).

When determining whether to sentence two crimes of violence consecutively or con-

currently in relation to § 18-4-108, the determining factor is whether the evidence supporting the convictions is identical. If the evidence supporting the convictions is not identical, the sentences are consecutive. *People v. Jurado*, 30 P.3d 769 (Colo. App. 2001).

Imposition of consecutive sentences proper when defendant shot multiple victims in one incident since each separate shot warranted separate counts of attempted first degree extreme indifference murder and defendant was convicted of two counts of attempted first degree extreme indifference murder. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

Imposition of consecutive sentences improper. The trial court erred in imposing consecutive rather than concurrent sentences when jury may have relied upon the same evidence to convict defendant on each charge. *People v. Page*, 907 P.2d 624 (Colo. App. 1995), overruled in *People v. Muckle*, 107 P.3d 380 (Colo. 2005).

When a defendant is convicted of two or more crimes of violence arising out of the same incident, the court must sentence the defendant to consecutive sentences. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

This section does not require consecutive sentences unless the defendant is convicted of two separate crimes of violence, charged and proven as separate counts. The court was not required to impose consecutive sentences when one of the crimes of violence was proven as a predicate offense for the other. *People v. Halstead*, 881 P.2d 401 (Colo. App. 1994).

Court not required to impose consecutive sentences under this section when it is unclear whether convictions for four counts of sexual assault on a child occurred during a single incident or multiple incidents. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005); *People v. Simon*, 100 P.3d 487 (Colo. App. 2004).

The imposition of concurrent sentences circumvents the requirement of this section that the sentences run consecutively. *People v. Beyer*, 793 P.2d 644 (Colo. App. 1990).

Court is not required to impose consecutive sentences under this section if the crimes do not arise out of the same incident. Where there were two different victims in offenses separated both by time and physical location, the crimes did not arise out of the same incident. *People v. Smith*, 881 P.2d 385 (Colo. App. 1994).

“Incident” refers to events that are not separated by time or an intervening event. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

The evidence tends to show the individual acts of sexual contact occurred over a long period of time, thus the court erred in finding they were part of the same incident and required

consecutive sentencing. *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Statute only requires imposition of two consecutive sentences. It is within the trial court's discretion to decide whether a defendant convicted of more than two separate crimes of violence should serve more than two of the sentences consecutively. *People v. Luu*, 813 P.2d 826 (Colo. App. 1991).

When the defendant requests a proportionality review of consecutive sentences imposed under this section, the court is required to review the proportionality of each individual sentence, not the cumulative sentence. The cumulative sentence is not reviewable in the aggregate. Since each sentence represents punishment for a distinct and separate crime, it follows that a separate proportionality review should be completed for each sentence, even though the defendant is required to serve the sentences consecutively. *Close v. People*, 48 P.3d 528 (Colo. 2002).

Where defendant was convicted of multiple crimes of violence, the court of appeals was required to conduct a proportionality review, upon the defendant's request, of the consecutive sentence imposed for the crimes of violence, even though the statute mandates that the sentences be consecutive. Because the statutory mandate strips the trial court of discretion in sentencing and removes the trial court's ability to assess the proportionality of the sentences imposed, the court of appeals must conduct a separate abbreviated proportionality review. *Close v. People*, 48 P.3d 528 (Colo. 2002).

Given the requirement that the court give great deference to legislatively mandated sentencing schemes and given the nature of the defendant's crimes and the sentences imposed, the court found no inference of gross disproportionality and upheld defendant's 60-year sentence for aggravated robbery and assault. The 10-year sentence imposed for each count of aggravated robbery did not give rise to an inference of gross disproportionality where aggravated robbery is a per se grave or serious offense. The court found that the crime of assault was grave or serious where the defendant, using a stick, caused bruises and lacerations requiring stitches. The legislatively mandated sentence of five years for each count of assault was also not grossly disproportional to the offense. *Close v. People*, 48 P.3d 528 (Colo. 2002).

No preliminary hearing is required for a charge under this section. *Brown v. District Court*, 194 Colo. 45, 569 P.2d 1390 (1977).

Mandatory sentences for violent crimes do not violate separation of powers doctrine; the judiciary is not granted the absolute right to determine punishment in every case. *People v. Childs*, 199 Colo. 436, 610 P.2d 101 (1980).

Nor equal protection clause. The statute providing mandatory sentences for violent crimes does not violate the equal protection clause by exempting attempted crimes from its enhanced penalties. The general assembly could rationally determine that since an attempt normally involves less severe consequences than are typical of a completed crime, attempts should not be included. *People v. Childs*, 199 Colo. 436, 610 P.2d 101 (1980).

A sentence imposed beyond the presumptive range for a defendant convicted of both first degree sexual assault with a deadly weapon and a crime of violence does not deny equal protection of law since it cannot be said that the sentencing statutes permit different degrees of punishment for persons in the defendant's situation. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

A rational distinction exists in the sentencing scheme for people convicted of first degree sexual assault with a deadly weapon in contrast to convictions of the same crime without a deadly weapon since the legislature could rationally perceive that use of a deadly weapon during the course of such an assault is more reprehensible and dangerous than commission of such a crime without a deadly weapon. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

Defendant's sentencing in the aggravated range for a crime of violence based on the use of a deadly weapon during the commission of first degree assault does not violate the guarantee of equal protection of the laws. *People v. Collins*, 730 P.2d 293 (Colo. 1986); *People v. Montoya*, 736 P.2d 1208 (Colo. 1987).

Mandating sentencing requirement for the crime of violence specified in this section does not deny the defendant his right to equal protection because the sentencing requirement does not permit different degrees of punishment for persons in defendant's situation. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Enhanced crime of violence sentence on conviction for pattern of sexual assault on a child does not violate defendant's due process and equal protection guarantees. Prosecution not required to charge and prove a separate crime of violence count pursuant to subsections (4) and (5) for per se crimes of violence even though the elements of the pattern sentence enhancer do not overlap with the elements of a crime of violence. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

When the crime of violence statute is superimposed on convictions for both aggravated robbery and simple robbery, there are real differences between the two forms of robbery. These differences provide substantial support for the disparate penalty applicable to a crime of violence finding which is superimposed on a conviction for aggravated robbery, and such

does not violate equal protection of the laws. *People v. Young*, 758 P.2d 667 (Colo. 1988).

Since the general assembly could have rationally decided that violent crimes committed as part of the same incident pose a greater threat to society than the same criminal conduct committed separately in different violent criminal episodes and since differing punishments have a reasonable relationship to the prevention of crime, the consecutive sentencing provision of subsection (1)(a) does not violate the constitutional requirements of equal protection of the law. *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

Convictions for violent crime and underlying offense not double jeopardy. Conviction for "crime of violence" for use of deadly weapon during commission of substantive offenses, in addition to conviction of substantive crimes, did not violate double jeopardy clause because legislature intended to authorize punishment for crime of violence cumulative to punishment for underlying substantive offense. *People v. Goodman*, 733 P.2d 1204 (Colo. 1987).

Defendant's aggravated sentence did not violate Apprendi principles. Although the sentencing range was beyond the maximum, the enhancement did not require any proof beyond the elements of the charged offenses which were necessarily proved beyond a reasonable doubt. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

Increase in penalty imposed pursuant to § 18-3-202 does not violate equal protection. Mandatory sentencing beyond the presumptive range in § 18-3-202, imposed pursuant to this section, does not violate equal protection even though one of the elements of first degree assault was use of deadly weapon. *People v. Montoya*, 736 P.2d 1208 (Colo. 1987).

The trial court appropriately increased the maximum presumptive penalty based on § 18-1-105 (9.7)(a) before applying the presumptive penalty provisions applicable to crimes of violence under this section. Thus, this section permits a doubling of the maximum penalty that is already increased under § 18-1-105 (9.7)(a) for certain extraordinary risk crimes. *People v. Greymountain*, 952 P.2d 829 (Colo. App. 1997).

The legislature's intent was to treat this section not as a sentence-enhancing statute but as a presumptive penalty statute. *People v. Terry*, 791 P.2d 374 (Colo. 1990).

Imposition of a 25-year sentence for second degree murder committed in the heat of passion was not abuse of discretion, because it is a per se crime of violence under subsection (1) and an extraordinary risk of harm crime pursuant to § 18-1-105 (9.7); thus, the presumptive sentencing range was 10 to 32 years and the trial court was required to sentence defendant to a term of incarceration of at least the midpoint in the presumptive range, but not more than twice

the maximum presumptive term for the offense. *People v. Martinez*, 32 P.3d 582 (Colo. App. 2001).

Court did not erroneously permit the jury to consider the crime of violence count after it found the defendant guilty of second degree murder committed in the heat of passion. Second degree murder is a per se crime of violence, even if committed in the heat of passion and defendant was properly sentenced according to this section. *People v. Roadcap*, 78 P.3d 1108 (Colo. App. 2003).

Stipulation by attorney that a guilty verdict to aggravated robbery also established that the defendant was guilty of a crime of violence did not violate the defendant's rights in that the jury returned a verdict form which showed it found the defendant placed another in fear by use of a deadly weapon and in that defendant failed to show how a special interrogatory could have produced a different result. *People v. McMullen*, 738 P.2d 23 (Colo. App. 1986).

Violent crime sentencing for patterned enhanced counts of sexual assault on a child by one in a position of trust only apply to offenses committed on or after July 1, 1998. *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Although a conviction for sexual assault on a child as part of a pattern of abuse requires violent crime sentencing, that fact does not make it a violent crime as defined in this section. *People ex rel. A.B.-B.*, 215 P.3d 1205 (Colo. App. 2009).

Where the defendant is not convicted of a crime of violence, the enhanced sentencing provisions of this section are not applicable. *People v. Van Patrick*, 789 P.2d 199 (Colo. App. 1989).

When the statute defining an offense does not prescribe crime of violence sentencing for the offense, the prosecution must meet the pleading and proof requirements specified in subsections (4) and (5) in order for the defendant to be sentenced for a crime of violence. If the statute defining the offense specifically requires crime of violence sentencing, the prosecution need not allege and prove the elements of a crime of violence, as described in this section. *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Where the defendant is sentenced for a crime of violence and the prosecution has not been required to comply with subsections (4) and (5) due to mandatory sentencing provisions in the statute describing the crime, the defendant is not subject to the extraordinary risk sentencing provisions of § 18-1-105 (9.7). Extraordinary risk sentencing applies only where the defendant is convicted of a crime of violence, as described in this section. This means that the prosecution must have followed the requirements of subsections (4) and (5). *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

When defendant is convicted of a crime of violence under this section for a crime that also constitutes an extraordinary risk crime, the presumptive range is first increased pursuant to § 18-1-105 (9.7)(a) before it is doubled pursuant to this section. *People v. Mata*, 56 P.3d 1169 (Colo. App. 2002).

Separate sentence improper. A separate sentence imposed for the crime of violence is improper and must be vacated. *People v. Espinoza*, 669 P.2d 142 (Colo. App. 1983), *aff'd*, 712 P.2d 476 (Colo. 1985).

This statute is not ambiguous. It clearly mandates that a defendant's sentences, whatever length they may be, must run consecutively to each other. *People v. Lanari*, 926 P.2d 116 (Colo. App. 1996).

Sentencing is discretionary act that is not subject to scientific precision. *People v. Warren*, 200 Colo. 110, 612 P.2d 1124 (1980).

Public interest in safety and deterrence is proper focal point of sentencing decision in crimes of grave personal violence or abuse, particularly when committed by a repeat-offender. *People v. Warren*, 200 Colo. 110, 612 P.2d 1124 (1980).

Extended sentence must be clearly justified. When a sentence of an extended duration is imposed, the record must establish a clear justification in fact for the trial judge's action. *People v. Warren*, 200 Colo. 110, 612 P.2d 1124 (1980).

Robbery as used in violent offender statute includes both simple robbery (§ 18-4-301) and aggravated robbery (§ 18-4-302). *People v. Eggers*, 196 Colo. 349, 585 P.2d 284 (1978).

Second degree murder is a per se crime of violence, even if committed in the heat of passion. *People v. Darbe*, 62 P.3d 1006 (Colo. App. 2002).

Criminally negligent homicide is not a per se crime of violence and merely alleging use of a deadly weapon as part of the factual basis does not satisfy the requirement of the crime of violence statute. *People v. Vickers*, 168 P.3d 9 (Colo. App. 2007).

Discretionary sentencing of juveniles not affected. The general assembly did not automatically intend to repeal the special provision for discretionary sentencing of juveniles, § 19-1-104, by the enactment of this section. *People v. District Court*, 196 Colo. 249, 585 P.2d 913 (1978).

Accessory may be punished as principal. An accessory to a crime of violence as defined by subsection (2) may be charged, tried and punished as a principal. *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

Requirement of specific findings by jury. An instruction by the trial court regarding the elements of a crime of violence, combined with a general verdict form does not meet the requirement of this section. Where the statute requires

the jury to make specific findings, the court must submit special interrogatories, which elicit the required findings. *People v. Grable*, 43 Colo. App. 518, 611 P.2d 588 (1979).

The special finding serves as the basis for the mandatory sentence which must be imposed on the defendant's conviction for the separately charged offense, and does not constitute a separate felony conviction. *People v. Russo*, 713 P.2d 356 (Colo. 1986).

Focus of subsection (5) is on whether the instructions and verdict forms adequately inform the jury that it must find beyond a reasonable doubt that the defendant committed the underlying substantive offense and used, or possessed and threatened to use, a deadly weapon during the commission or attempted commission of the offense. *People v. Griffin*, 867 P.2d 27 (Colo. App. 1993).

Requirement of specific findings not applied retroactively. Where defense counsel did not object to the verdict forms and there is no showing of harm from the form of the verdict, the requirement that the court submit special interrogatories to the jury will not be applied retroactively. *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

The holding of *People v. Swanson* that the special interrogatory requirement would not be applied retroactively is extended to the area of postconviction relief. *Stroup v. People*, 656 P.2d 680 (Colo. 1982).

Unusual and extenuating circumstances warranting sentence reduction found where record showed evidence of defendant's abusive family situation and mental problems, and where defendant had no previous convictions, had been a model prisoner, and with regular medical drug treatment, could lead a normal life. *People v. Byrum*, 784 P.2d 817 (Colo. App. 1989).

Court not required to hold hearing to modify a sentence. This section does not mandate a specific review procedure. *People v. Olivas*, 911 P.2d 675 (Colo. App. 1995).

It was not improper for trial court to consider during sentencing that violent crimes have a greater public impact in small rural communities than in larger urban ones since a sentencing court should always consider the interests of the public involved and this factor was not decisive of the court's decision. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

There are no conditions sufficient for a finding of aggravating circumstances in a criminal sentencing where evidence only shows each element of the crime charged. *People v. Janke*, 720 P.2d 613 (Colo. App. 1986).

When enhancement of sentence is plain error. Where a defendant is convicted of first-degree murder, and the mittimus reads that he was found to have committed a "crime of violence", but the jury was not instructed on the

elements of crime of violence nor given a separate verdict form or interrogatory as required, enhancement of sentence for having committed a crime of violence would be plain error. The cause must be remanded for correction of the mittimus to show conviction of first-degree murder only, and for imposition of sentence on that crime only. *People v. Thrower*, 670 P.2d 1251 (Colo. App. 1983).

When the trial court properly instructs the jury regarding the required, specific finding of fact under the crime-of-violence statute, but the verdict form fails to contain the mandatory language, the jury's resulting finding is inconclusive and inconsistent, and this incongruity constitutes trial error. Because the verdict form misstated an element of the crime-of-violence offense and there was contested evidence at trial, there is a reasonable possibility that the error in the verdict form contributed to the defendant's sentence. *Lehnert v. People*, 244 P.3d 1180 (Colo. 2010).

Penalty for first degree assault committed in "heat of passion". Where a defendant charged with first degree assault can establish that he acted in the "heat of passion", he cannot constitutionally receive a greater penalty than he would have received had he been convicted of manslaughter. *People v. Grable*, 43 Colo. App. 518, 611 P.2d 588 (1979); *People v. Harris*, 797 P.2d 816 (Colo. App. 1990).

Defendant waived notice pursuant to subsection (4) when defendant tendered an instruction for a lesser included offense which was a crime of violence. *People v. Williams*, 23 P.3d 1229 (Colo. App. 2000).

Verdict of not guilty of "crime of violence" not inconsistent with guilty verdicts on other charges. Guilty verdicts on the charges of first-degree sexual assault, sexual assault on a child and aggravated incest are not inconsistent as a matter of law with a jury finding of not guilty on a charge of "crime of violence". *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

Burden of proof. Like charges under the habitual criminal statute, the people bear the burden of proving the material elements of violent crime beyond a reasonable doubt and a jury should be so instructed. *People v. Russo*, 677 P.2d 386 (Colo. App. 1983), *rev'd* on other grounds, 713 P.2d 356 (Colo. 1986).

Mere threatened use of deadly weapon is not sufficient evidence for successful prosecution for violent crime. *People v. Janke*, 720 P.2d 613 (Colo. App. 1986).

The term "participant", for purposes of subsection (2)(a)(I), refers to a person who culpably engages in the offensive conduct and not to the victim of the criminal act. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Crime of violence may be committed by use of a deadly weapon during the commission of a second-degree assault, and by causing serious

bodily injury to another other than the defendant or another participant during the commission or attempted commission of second-degree assault or during the immediate flight therefrom. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Sufficient finding by jury regarding use of deadly weapon to support conviction under violent crime statute. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Conviction for conspiracy to commit aggravated robbery, as defined in § 18-4-302 (1)(b), necessarily requires crime of violence sentencing. *People v. Terry*, 961 P.2d 500 (Colo. App. 1997), *aff'd*, 977 P.2d 145 (Colo. 1999).

Fifteen- to 20-year sentence was not excessive for aggravated robbery and a crime of violence. *People v. Colasanti*, 626 P.2d 1136 (Colo. 1981).

Under § 18-2-201 (4.5), conspiracy to commit a per se crime of violence is itself a crime of violence to which the sentence enhancing provisions of this section apply. *Terry v. People*, 977 P.2d 145 (Colo. 1999).

Defendant convicted of conspiracy cannot be sentenced pursuant to this section because conspiracy is not specifically included among offenses statutorily defined as crimes of violence. *People v. Flores*, 757 P.2d 159 (Colo. App. 1988) (decided prior to the enactment of subsection (4.5)).

Attempted first degree murder is not a statutory crime of violence, therefore, without either a guilty verdict on a separate crime of violence pursuant to this section or a finding of statutory aggravating factors pursuant to §§ 18-1-105 (6), 18-1-105 (7), and 18-1-105 (9), the imposition of an aggravated range sentence for the class 2 felony of attempted first degree murder was error. *People v. Webster*, 987 P.2d 836 (Colo. App. 1998).

Using section as a basis for sentencing a defendant convicted of a crime not enumerated in section is error. *People v. Hare*, 782 P.2d 831 (Colo. App. 1989), *aff'd* on other grounds, 800 P.2d 1317 (Colo. 1990).

Where both the violent crimes statute and the habitual criminal statute apply, the sentencing provisions of both statutes apply and a judge must impose the defendant's sentences to run consecutively. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

If different evidence is required to establish guilt of each of the multiple offenses, they are "separate" crimes for purposes of this statute. *People v. Wilson*, 841 P.2d 337 (Colo. App. 1992).

Where information charged only one crime of violence and did not include a separate crime of violence count for each of the three victims but did inform the defendant that enhanced sentencing was sought and alleged sufficient facts for defendant to prepare an adequate defense, the information was sufficient to support the

imposition of three consecutive life sentences. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

Where defendant did not challenge the sufficiency of the information, jury completed only one verdict form finding that defendant did use or possess and threaten the use of a deadly weapon during the commission of the crime of criminal attempt first degree murder or criminal attempt second degree murder, and only one crime of violence count was plead and proven but defendant was convicted of two counts of criminal attempt to commit first degree extreme indifference murder, defendant waived right to challenge the sufficiency of the language in the information and was not entitled to resentencing. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

The term "incident" in subsection (1) means an occurrence taking place as part of a larger continuum or happening or related group of happenings subordinate to a main plot, including a series of acts committed in close proximity or a chain of events forming a part of a schematic whole. *People v. Beyer*, 768 P.2d 746 (Colo. App. 1988); *People v. Trujillo*, 860 P.2d 542 (Colo. App. 1992).

Remand for resentencing was required where the trial court, which imposed 20-year consecutive sentences for each robbery, failed to determine whether two aggravated robberies were separate incidents. *People v. Trujillo*, 860 P.2d 542 (Colo. App. 1992).

Phrase "at least" in § 16-11-309 (1) does not require the court to set the minimum length of the indeterminate sentence at the midpoint of the presumptive range. The court may impose a minimum length to the indeterminate sentence that is greater than the midpoint of the presumptive range. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

Sections 16-11-309 (1)(c) and 18-1-105 (9)(e.5) conflict irreconcilably with § 16-13-804 (1)(b). The phrase "up to the defendant's natural life" in §§ 16-11-309 (1)(c) and 18-1-105 (9)(e.5) conflicts with the phrase "a maximum of the sex offender's natural life" in § 16-13-804 (1)(b). Statutory construction calls for § 16-13-804 (1)(b) to prevail, requiring the court to set the maximum length of the indeterminate sentence at the defendant's natural life. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

Whether inmate is convicted of any crime enumerated in subsection (2) of this section is determinative as to how inmate is classified for eligibility for referral to community corrections pursuant to § 17-27-106 (4). *McKinney v. Kautzky*, 801 P.2d 508 (Colo. 1990).

Jury finding that burglary and sexual assault were crimes of violence made this section applicable and court imposition of mandatory sentence correct. *People v. Fishback*, 829 P.2d

489 (Colo. App. 1991), *aff'd*, 851 P.2d 884 (Colo. 1993).

Definition of "crime of violence" in § 16-11-309 applies in determining when a convicted person is eligible for parole under § 17-22.5-303.3 (1). *Busch v. Gunter*, 870 P.2d 586 (Colo. App. 1993).

Crimes of violence include attempts of the crimes listed in subsection (2)(a)(II). *People v. Laurson*, 70 P.3d 564 (Colo. App. 2002).

Even though defendant was not charged with a crime of violence under this section, the trial court found sufficient aggravating factors to support an enhanced, 48-year sentence for second degree kidnapping. *People v. Smith*, 881 P.2d 385 (Colo. App. 1994).

In bringing a motion for reduction of sentence under this section, defendant is subject to the procedures and time frames set forth in rule 35 of the criminal rules of procedure. This section alone merely authorizes a court to reduce a mandatory sentence imposed for a crime of violence, but a motion for reduction of sentence is not separately authorized in statute and is therefore subject to the provisions of rule 35. *People v. Williams*, 908 P.2d 1157 (Colo. App. 1995).

Applied in *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979); *People in Interest of R.R.*, 43 Colo. App. 208, 607 P.2d 1013 (1979); *People v. Martinez*, 43 Colo. App. 419, 608 P.2d 359 (1979); *Watson v. District Court*, 199 Colo. 76, 604 P.2d 1165 (1980); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291 (1980); *People v. Cabral*, 629 P.2d 575 (Colo. 1981); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Flowers*, 644 P.2d 916 (Colo. 1982); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. Constant*, 645 P.2d 843 (Colo. 1982); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *People v. Bookman*, 646 P.2d 924 (Colo. 1982); *People v. Bueno*, 646 P.2d 931 (Colo. 1982); *People v. Hogan*, 649 P.2d 326 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Dillion*, 655 P.2d 841 (Colo. 1982); *People v. Cooper*, 662 P.2d 478 (Colo. 1983); *People v. District Court*, 663 P.2d 616 (Colo. 1983); *People v. Smith*, 709 P.2d 4 (Colo. App. 1985); *Rocha v. People*, 713 P.2d 350 (Colo. 1986); *People v. Sanders*, 717 P.2d 948 (Colo. 1986); *People v. Wiegard*, 743 P.2d 977 (Colo. App. 1987); *People v. Zapata*, 759 P.2d 754 (Colo. App. 1988), *aff'd* on other grounds, 779 P.2d

1307 (Colo. 1989); People v. Guevara, 775 P.2d 74 (Colo. App. 1989), cert. denied, 786 P.2d 411 (Colo. 1989); People v. O'Shaughnessy, ___ P.3d

___ (Colo. App. 2010), aff'd, 2012 CO 9, 269 P.3d 1233.

18-1.3-407. Sentences - youthful offenders - legislative declaration - powers and duties of district court - authorization for youthful offender system - powers and duties of department of corrections - definitions. (1) (a) It is the intent of the general assembly that the youthful offender system established pursuant to this section shall benefit the state by providing as a sentencing option for certain youthful offenders a controlled and regimented environment that affirms dignity of self and others, promotes the value of work and self-discipline, and develops useful skills and abilities through enriched programming.

(b) It is the further intent of the general assembly in enacting this section that female and male offenders who are eligible for sentencing to the youthful offender system pursuant to section 18-1.3-407.5 or section 19-2-517 (6) or 19-2-518 (1) (d) (II), C.R.S., receive equitable treatment in sentencing, particularly in regard to the option of being sentenced to the youthful offender system. Accordingly, it is the general assembly's intent that necessary measures be taken by the department of corrections to establish separate housing for female and male offenders who are sentenced to the youthful offender system without compromising the equitable treatment of either.

(c) It is the intent of the general assembly that offenders sentenced to the youthful offender system be housed and serve their sentences in a facility specifically designed and programmed for the youthful offender system and that offenders so sentenced be housed separate from and not brought into daily physical contact with inmates sentenced to the department of corrections who have not been sentenced to the youthful offender system, except as specifically provided under subsection (5) of this section. The facility that houses offenders sentenced to the youthful offender system shall be limited to two hundred fifty-six beds.

(d) It is the intent of the general assembly that offenders sentenced to the youthful offender system be sentenced as adults and be subject to all laws and department of corrections rules, regulations, and standards pertaining to adult inmates, except as otherwise provided in this section.

(2) (a) (I) A juvenile may be sentenced to the youthful offender system created pursuant to this section under the circumstances set forth in section 19-2-517 (6) (a) (II) or 19-2-518 (1) (d) (II), C.R.S. A young adult offender may be sentenced to the youthful offender system created pursuant to this section under the circumstances set forth in section 18-1.3-407.5. In order to sentence a juvenile or young adult offender to the youthful offender system, the court shall first impose upon such person a sentence to the department of corrections in accordance with section 18-1.3-401. The court shall thereafter suspend such sentence conditioned on completion of a sentence to the youthful offender system, including a period of community supervision. The court shall impose any such sentence to the youthful offender system for a determinate period of not fewer than two years nor more than six years; except that a juvenile or young adult offender convicted of a class 2 felony may be sentenced for a determinate period of up to seven years. In imposing such sentence, the court shall grant authority to the department of corrections to place the offender under a period of community supervision for a period of not fewer than six months and up to twelve months any time after the date on which the offender has twelve months remaining to complete the determinate sentence. The court may award an offender sentenced to the youthful offender system credit for presentence confinement; except that such credit shall not reduce the offender's actual time served in the youthful offender system to fewer than two years. The court shall have a presentence investigation conducted before sentencing a juvenile or young adult offender pursuant to this section. Upon the request of either the prosecution or the defense, the presentence report shall include a determination by the warden of the youthful offender system whether the offender is acceptable for sentencing to the youthful offender system. When making a determination, the warden shall consider the nature and circumstances of the crime; the age, circumstances, and criminal history of the offender; the available bed space in the youthful offender system; and any other appropriate considerations.

(II) Upon the successful completion of the determinate sentence to the youthful offender system, including the mandatory period of community supervision, the suspended sentence pursuant to section 18-1.3-401 shall have been completed. Whenever an offender is returned to the district court for revocation pursuant to subsection (5) of this section, the court shall impose the original sentence following the revocation of the sentence to the youthful offender system, except as otherwise provided in paragraph (b) of subsection (5) of this section.

(III) For the purposes of this section, unless the context otherwise requires:

(A) "Juvenile" means a person who is under eighteen years of age when the crime is committed and under twenty-one years of age at the time of sentencing pursuant to this section.

(B) "Young adult offender" means a person who is at least eighteen years of age but under twenty years of age when the crime is committed and under twenty-one years of age at the time of sentencing pursuant to this section.

(C) "Youthful offender" or "offender" means a juvenile or a young adult offender who has been sentenced to the youthful offender system or who is eligible for sentencing to the youthful offender system.

(IV) As used in this section, "community supervision" shall not be construed to mean a community corrections program, as defined in section 17-27-102, C.R.S.

(a.5) During any period of incarceration under the youthful offender system, privileges including, but not limited to, televisions, radios, and entertainment systems, shall not be available for an offender unless such privileges have been earned under a merit system.

(b) Article 22.5 of title 17, C.R.S., concerning time credits, shall not apply to any person sentenced to the youthful offender system; except that an offender whose sentence to the youthful offender system is revoked pursuant to subsection (5) of this section may receive one day of credit against the suspended sentence imposed by the court following revocation of the sentence to the youthful offender system for each day the offender served in the youthful offender system, excluding any period of time during which the offender was under community supervision.

(2.1) (a) As originally enacted, this section applied only to offenses committed by juveniles on or after September 13, 1993. For purposes of extending the availability of sentencing options, a juvenile who meets the criteria set forth in section 19-2-517 (6) (a) (II), C.R.S., may be sentenced to the youthful offender system pursuant to this section, under the following circumstances:

(I) The juvenile is sentenced on or after June 3, 1994, for an offense committed prior to, on, or after September 13, 1993;

(II) The juvenile committed an offense prior to September 13, 1993, and was sentenced for the offense on or after September 13, 1993, but prior to June 3, 1994. Such a juvenile may only be resentenced to the youthful offender system if a court, in its discretion, so orders in response to a motion filed in accordance with rule 35 of the Colorado rules of criminal procedure.

(b) A juvenile who committed an offense prior to September 13, 1993, and who was sentenced prior to September 13, 1993, shall not be eligible to be sentenced to the youthful offender system.

(c) A juvenile described in paragraph (a) of this subsection (2.1) may be sentenced pursuant to this section only if the juvenile meets the age requirement set forth in subparagraph (III) of paragraph (a) of subsection (2) of this section.

(3) The department of corrections shall develop and implement a youthful offender system for offenders sentenced in accordance with subsection (2) of this section. The youthful offender system shall be under the direction and control of the executive director of the department of corrections. The youthful offender system shall be based on the following principles:

(a) The system should provide for teaching offenders self-discipline by providing clear consequences for inappropriate behavior;

(b) The system should include a daily regimen that involves offenders in physical training, self-discipline exercises, educational and work programs, and meaningful inter-

action, with a component for a tiered system for swift and strict discipline for noncompliance;

(c) The system should use staff models and mentors to promote within an offender the development of socially accepted attitudes and behaviors;

(d) The system should provide offenders with instruction on problem-solving skills and should incorporate methods to reinforce the use of cognitive behavior strategies that change offenders' orientation toward criminal thinking and behavior;

(e) The system should promote among offenders the creation and development of new group cultures which result in a transition to prosocial behavior; and

(f) The system should provide offenders the opportunity to gradually reenter the community while demonstrating the capacity for self-discipline and the attainment of respect for the community.

(3.3) The youthful offender system consists of the following components, and the department of corrections has the authority described in paragraphs (a) to (d) of this subsection (3.3) in connection with the administration of the components:

(a) An intake, diagnostic, and orientation phase;

(b) Phase I, during which time a range of core programs, supplementary activities, and educational and prevocational programs and services are provided to offenders;

(c) (I) Phase II, which may be administered during the last three months of the period of institutional confinement and during which time the department of corrections is authorized to transfer an offender to a twenty-four-hour custody residential program that serves youthful offenders.

(II) In connection with the component described in subparagraph (I) of this paragraph (c), the department of corrections is authorized to operate or to contract with a prerelease residential program for those sentenced as youthful offenders. The department of corrections or the contract provider shall provide for twenty-four-hour custody of offenders in phase II.

(d) (I) Phase III, which is to be administered for the period of community supervision that remains after the completion of phase II and during which the offender is monitored during reintegration into society.

(II) After the department determines appropriate phase III placement, the department shall notify, no later than thirty days prior to placement, the local law enforcement agency for the jurisdiction in which the offender shall be placed for phase III. The notice shall include the offender's name, the crime committed by the offender, the disposition of the offender's case, and the basis for the placement. The local law enforcement agency may appeal the placement, if the placement is in a jurisdiction other than the jurisdiction where the offender was convicted, it may appeal to the executive director of the department at least fifteen days prior to the placement. Except that the local law enforcement agency may not appeal if the placement is in the jurisdiction where the offender was residing at the time the offense was committed. If there is an appeal, after considering the department's basis for placement and the local law enforcement's basis for appeal, the executive director shall make the final determination of the placement.

(3.4) In addition to the powers granted to the department of corrections in subsection (3.3) of this section, the department of corrections may:

(a) Transfer a youthful offender to an appropriate facility for the purpose of accomplishing the offender's redirection goals, as long as the transfer does not jeopardize the safety and welfare of the offender;

(b) Operate an emancipation program and provide other support or monitoring services and residential placement for offenders participating in phase II and phase III under the youthful offender system for whom family reintegration poses difficulties. The department of corrections shall provide reintegration support services to an offender placed in an emancipation house.

(c) Contract with any public or private entity, including but not limited to a school district, for provision or certification of educational services. Offenders receiving educational services or diplomas from a school district under an agreement entered into pursuant to this paragraph (c) shall not be included in computing the school district's student performance on statewide assessments pursuant to section 22-7-409, C.R.S., or the school

district's levels of attainment of the performance indicators pursuant to article 11 of title 22, C.R.S.

(3.5) The executive director of the department of corrections shall have final approval on the hiring and transferring of staff for the youthful offender system. In staffing the youthful offender system, the executive director shall select persons who are trained in the treatment of youthful offenders or will be trained in the treatment of youthful offenders prior to working with such population, are trained to act as role models and mentors pursuant to paragraph (c) of subsection (3) of this section, and are best equipped to enable the youthful offender system to meet the principles specified in subsection (3) of this section. The executive director shall make a recommendation to the department of personnel regarding the classification of positions with the youthful offender system, taking into account the level of education and training required for such positions.

(4) The youthful offender system shall provide for community supervision which shall consist of highly structured surveillance and monitoring and educational and treatment programs. Community supervision shall be administered by the department of corrections, and revocation of the inmate's supervision status shall be subject to the provisions of subsections (2) and (5) of this section.

(4.3) The youthful offender system shall provide sex offender treatment services for an offender who is sentenced to the youthful offender system and who has a history of committing a sex offense as defined in section 16-11.7-102 (3), C.R.S., or who has a history of committing any other offense, the underlying factual basis of which includes a sex offense. Prior to July 1, 2002, the sex offender treatment services provided pursuant to this subsection (4.3) shall comply with any existing national standards for juvenile sex offender treatment. On and after July 1, 2002, the sex offender treatment services provided pursuant to this subsection (4.3) shall comply with the sex offender treatment standards adopted by the sex offender management board pursuant to section 16-11.7-103, C.R.S.

(4.5) The consent of the parent, parents, or legal guardian of an offender under the age of eighteen years who has been sentenced to the youthful offender system pursuant to this section shall not be necessary in order to authorize hospital, medical, mental health, dental, emergency health, or emergency surgical care. In addition, neither the department nor any hospital, physician, surgeon, mental health care provider, dentist, trained emergency health care provider, or agent or employee thereof who, in good faith, relies on such a minor offender's consent shall be liable for civil damages for failure to secure the consent of such an offender's parent, parents, or legal guardian prior to rendering such care. However, the parent, parents, or legal guardian of a minor offender described in this subsection (4.5) may be liable, as provided by law, to pay the charges for the care provided the minor on said minor's consent.

(5) (a) Except as otherwise provided by paragraph (b) of this subsection (5), the department of corrections shall implement a procedure for the transfer of an offender to another facility when an offender in the system poses a danger to himself or herself or others. The executive director of the department of corrections shall review any transfer determination by the department prior to the actual transfer of an inmate, including a transfer back to the district court for revocation of the sentence to the youthful offender system. A transfer pursuant to this paragraph (a) shall be limited to a period not to exceed sixty days, at which time the offender shall be returned to the youthful offender facility to complete his or her sentence or returned to the district court for revocation of the sentence to the youthful offender system. In no case shall an offender initially sentenced to the youthful offender system be held in isolation or segregation or in an adult facility for longer than sixty consecutive days without action by the sentencing court.

(b) (1) An offender who is thought to have a mental illness or developmental disability by a mental health clinician, as defined by regulation of the department of corrections, may be transferred to another facility for a period not to exceed sixty days for diagnostic validation of said illness or disability. At the conclusion of the sixty-day period, the psychiatrists or other appropriate professionals conducting the diagnosis shall forward to the executive director of the department of corrections their findings, which at a minimum shall include a statement of whether the offender has the ability to withstand the rigors of the youthful offender system. If the diagnosis determines that the offender is incapable of

completing his or her sentence to the youthful offender system due to a mental illness or developmental disability, the executive director shall forward such determination to the sentencing court. Based on the determination, the sentencing court shall review the offender's sentence to the youthful offender system and may:

(A) Impose the offender's original sentence to the department of corrections; or

(B) Reconsider and reduce the offender's sentence to the department of corrections in consideration of the offender's mental illness or developmental disability.

(II) Any offender who is resentenced pursuant to this paragraph (b) shall continue to be treated as an adult for purposes of sentencing and shall not be sentenced pursuant to article 2 of title 19, C.R.S.

(III) In no event shall the sentencing court, after reviewing the offender's sentence to the youthful offender system pursuant to this paragraph (b), increase the offender's sentence to the department of corrections due to the offender's diagnosis of mental illness or determination of developmental disability.

(IV) Any offender who is diagnosed as having mental illness or determined to have a developmental disability and is therefore incapable of completing his or her sentence to the youthful offender system may be housed in any department of corrections facility deemed appropriate by the executive director or transferred in accordance with procedures set forth in section 17-23-101, C.R.S., pending action by the sentencing court with regard to the offender's sentence.

(c) The department of corrections shall implement a procedure for returning offenders who cannot successfully complete the sentence to the youthful offender system, or who fail to comply with the terms or conditions of the youthful offender system, to the district court. An offender returned to the district court pursuant to paragraph (a) of this subsection (5) or because he or she cannot successfully complete the sentence to the youthful offender system for reasons other than mental illness or a developmental disability, or because he or she fails to comply with the terms or conditions of the youthful offender system, shall receive imposition of the original sentence to the department of corrections. After the executive director of the department upholds the department's decision, the offender may be held in any correctional facility deemed appropriate by the executive director; except that an offender who cannot successfully complete the sentence to the youthful offender system for reasons other than mental illness or a developmental disability, or because he or she fails to comply with the terms or conditions of the youthful offender system, shall be transferred, within thirty-five days after the executive director upholds the department's decision, to a county jail for holding prior to resentencing. The department shall notify the district attorney of record, and the district attorney of record shall be responsible for seeking the revocation or review of the offender's sentence and the imposition of the original sentence or modification of the original sentence pursuant to sub-subparagraph (B) of subparagraph (I) of paragraph (b) of this subsection (5). The district court shall review the offender's sentence within one hundred twenty-six days after notification to the district attorney of record by the department of corrections that the offender is not able to complete the sentence to the youthful offender system or fails to comply with the terms or conditions of the youthful offender system.

(6) The department of corrections shall establish and enforce standards for the youthful offender system. Offenders in the youthful offender system, including those under community supervision, shall be considered inmates for the purposes of section 17-1-111, C.R.S.

(7) The number of offenders in any program element under the youthful offender system shall be determined by the department within available appropriations.

(8) The department of corrections may and is encouraged to contract with any private or public entity for the provision of services and facilities under the youthful offender system.

(9) On or before November 1, 1993, the department, in conjunction with the division of criminal justice, shall develop and the department shall implement a process for monitoring and evaluating the youthful offender system. In implementing such system, the department may contract with a private agency for assistance.

(10) (a) (Deleted by amendment, L. 2002, p. 881, § 19, effective August 7, 2002.)

(b) The division of criminal justice shall independently monitor and evaluate, or contract with a public or private entity to independently monitor and evaluate, the youthful offender system. On or before November 1, 2002, and on or before November 1 every two years thereafter, the division of criminal justice shall report its findings, or the findings of the contract entity, to the judiciary committees of the senate and the house of representatives. The department of corrections shall cooperate in providing the necessary data to the division of criminal justice or an entity designated by the division of criminal justice to complete the evaluation required in this section.

(11) Any district attorney in the state shall maintain records regarding juveniles who are sentenced to the youthful offender system and such records shall indicate which juveniles have been filed on as adults or are sentenced to the system and the offenses committed by such juveniles.

(11.5) (a) (I) An offender who is sentenced to the youthful offender system shall submit to and pay for collection and a chemical testing of a biological substance sample from the offender to determine the genetic markers thereof.

(II) Collection of the biological substance sample shall occur as soon as possible after being sentenced to the youthful offender system, and the results thereof shall be filed with and maintained by the Colorado bureau of investigation. The results of such tests shall be furnished to any law enforcement agency upon request.

(b) The department of corrections or its designee or contractor may use reasonable force to obtain biological substance samples in accordance with paragraph (a) of this subsection (11.5).

(c) Any moneys received from offenders pursuant to paragraph (a) of this subsection (11.5) shall be deposited in the offender identification fund created in section 24-33.5-415.6, C.R.S.

(d) The Colorado bureau of investigation is directed to conduct the chemical testing of the biological substance samples obtained pursuant to this subsection (11.5).

(12) The general assembly recognizes that the increased number of violent crimes committed by juveniles and young adults is a problem faced by all the states of this nation. By creating the youthful offender system, Colorado stands at the forefront of the states in creating a new approach to addressing this problem. The general assembly also declares that the cost of implementing and operating the youthful offender system will create a burden on the state's limited resources. Accordingly, the general assembly directs the department of corrections to seek out and accept available federal, state, and local public funds, including project demonstration funds, and private moneys and private systems for the purpose of conducting the youthful offender system.

(13) Repealed.

Source: **L. 2002:** Entire article added with relocations, p. 1406, § 2, effective October 1. **L. 2003:** (5)(c) amended, p. 983, § 19, effective April 17. **L. 2004:** (1)(c) amended and (13) repealed, pp. 243, 244, §§ 2, 3, effective April 5; (3.4)(c) amended, p. 1662, § 14, effective June 3. **L. 2006:** IP(5)(b)(I) amended, p. 1399, § 49, effective August 7; (11.5)(a)(I) amended, p. 1690, § 10, effective July 1, 2007. **L. 2008:** (4.3) and (4.5) amended, p. 39, § 1, effective March 13; (1)(b) and (2)(a)(I) amended, p. 1507, § 3, effective May 28. **L. 2009:** (3.4)(c) amended, (SB 09-163), ch. 293, p. 1546, § 55, effective May 21; (1)(b), (1)(c), (1)(d), (2)(a)(I), (2)(a)(II), (2)(a)(III), (2)(a.5), (2)(b), (3.3), (3.4)(a), (3.4)(b), (3.5), IP (5)(b)(I), (5)(c), (11.5)(a)(I), (11.5)(c), and (12) amended, (HB 09-1122), ch. 77, p. 280, § 5, effective October 1. **L. 2010:** (1)(b), (2)(a)(I), and IP(2.1)(a) amended, (HB 10-1413), ch. 264, p. 1205, § 5, effective August 11. **L. 2012:** (5)(c) amended, (SB 12-175), ch. 208, p. 866, § 111, effective July 1.

Editor's note: (1) This section is similar to former § 16-11-311 as it existed prior to 2002.

(2) This section was amended in 2002 prior to its relocation on October 1, 2002. For that history, see the source note to § 16-11-311.

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the amending subsection (5)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-1.3-407 is similar to § 16-11-311 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Although this section no longer specifies the procedural framework governing revocation of a youth offender sentence, minimum due process protections are still required. Due process requires only: (1) Written notice of the claimed violations; (2) disclosure to defendant of the evidence against him or her; (3) a fair opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adversarial witnesses, unless there is good cause to deny such a right; (5) a neutral and detached hearing officer or judge; and (6) a written statement by the fact finder as to the evidence relied on and reasons for the revocation. *People v. McCoy*, 939 P.2d 537 (Colo. App. 1997).

Due process not denied because the grounds for revocation were established by hearsay evidence. *People v. McCoy*, 939 P.2d 537 (Colo. App. 1997); *People v. Bostelman*, 141 P.3d 891 (Colo. App. 2005), rev'd on other grounds, 162 P.3d 686 (Colo. 2007).

Plain language of section simply makes clear that youthful offender system facilities are to be available for youthful offenders of both genders, and toward that end, it mandates separate housing for male and female offenders, but it does not create an enforceable due process right to have the trial court consider youthful offender system sentencing. *People v. Espinoza*, 990 P.2d 1117 (Colo. App. 1999).

Trial courts are vested with the discretion to identify the youthful offenders who should

be sentenced to the youthful offender system, and a trial court sentencing a juvenile on a direct-filed charge of a violent crime also retains discretion to impose a sentence to the department of corrections. *People v. Espinoza*, 990 P.2d 1117 (Colo. App. 1999).

Court's comment to defendant at sentencing did not constitute a blanket policy or an abuse of discretion but was an explanation of the conclusion that despite defendant's young age, in light of the viciousness of his crimes, he was not an appropriate candidate for the youthful offender system. *People v. Espinoza*, 990 P.2d 1117 (Colo. App. 1999).

Revocation of a youth offender sentence requires the imposition of the original sentence, and a trial court is without authority to modify the original sentence. *People v. McCoy*, 939 P.2d 537 (Colo. App. 1997).

The filing of a complaint or other written motion is not the sole procedure for initiating revocation of a youth offender sentence. Although defendant's administrative hearing was not held and the motion to revoke was not filed until after the expected completion date of the youth offender sentence, defendant's arrest and custodial status tolled the completion date pending resolution of the pending charges. As a result, the trial court retained jurisdiction. *People v. Efferson*, 122 P.3d 1038 (Colo. App. 2005).

The trial court erred in determining that it lacked jurisdiction to revoke defendant's youthful offender system sentence when defendant did not successfully complete such sentence but the department of corrections mistakenly issued an unconditional discharge of defendant. *People v. Miller*, 25 P.3d 1230 (Colo. 2000); *People v. Valdez*, 68 P.3d 484 (Colo. App. 2002).

18-1.3-407.5. Sentences - young adult offenders - youthful offender system - repeal. (Repealed)

Source: L. 2009: Entire section added, (HB 09-1122), ch. 77, p. 278, § 1, effective October 1.

Editor's note: Subsection (4) provided for the repeal of this section, effective October 1, 2012. (See L. 2009, p. 278.)

18-1.3-408. Determinate sentence of imprisonment imposed by court. When a person has been convicted of a felony and a sentence of imprisonment imposed, the court imposing the sentence shall fix a definite term of imprisonment, which shall be not longer than the terms authorized in section 18-1.3-401; except that, for persons convicted on or after November 1, 1998, of a sex offense, as defined in section 18-1.3-1003 (5), the court shall impose an indeterminate sentence as provided in part 10 of this article.

Source: L. 2002: Entire article added with relocations, p. 1413, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-304 as it existed prior to 2002.

ANNOTATION

Law reviews. For note, “Correcting an Erroneous Judgment in a Criminal Case”, see 19 Rocky Mt. L. Rev. 295 (1947). For article, “Criminal Prosecutions under the Colorado Securities Act”, see 47 U. Colo. L. Rev. 233 (1976).

Annotator’s note. Since § 18-1.3-408 is similar to § 16-11-304 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-12-1, C.R.S. 1963, § 39-12-1, CRS 53, CSA, C. 48, § 545, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Only the general assembly may define crimes and prescribe punishments. People v. Hinchman, 196 Colo. 526, 589 P.2d 917 (1978), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed.2d 311 (1979).

The sentence is a matter solely within the discretion of the trial judge. Armbeck v. People, 135 Colo. 568, 313 P.2d 715 (1957).

A trial judge has the authority and the power to impose any sentence that falls within the statutory limitations that have been created by the general assembly as punishment for the particular crime in issue. People v. Jones, 176 Colo. 61, 489 P.2d 596 (1971).

An erroneous judgment is one rendered contrary to law. People ex rel. Best v. District Court, 115 Colo. 240, 171 P.2d 774 (1946).

When a district court has jurisdiction of the person and the subject matter — and that jurisdiction is not challenged — its judgment is not void; it is at most erroneous. Stilley v. Tinsley, 153 Colo. 66, 385 P.2d 677 (1963).

Excessive sentence invalid only as to excess. Where a judgment is merely excessive, and the court which pronounces it is one of general jurisdiction, it is not void ab initio because of the excess, but is good so far as the power of the court extends, and is invalid only as to the excess. Martin v. District Court, 37 Colo. 110,

86 P. 82, 119 Am. St. R. 262 (1906); Stilley v. Tinsley, 153 Colo. 66, 385 P.2d 677 (1963).

And court retains jurisdiction to correct erroneous judgment. Where a court has jurisdiction of the person and subject matter and has entered an erroneous judgment, it retains jurisdiction to correct, modify, and alter it in accordance with the statute involved, notwithstanding the expiration of the term at which the judgment was pronounced. People ex rel. Best v. District Court, 115 Colo. 240, 171 P.2d 774 (1946).

If an illegal sentence has been pronounced, the court has power to substitute a legal sentence, and this power is not impaired by the expiration of the term of court during which the judgment was pronounced. Stilley v. Tinsley, 153 Colo. 66, 385 P.2d 677 (1963).

Judgment may be corrected by appeal. An excessive sentence is at most voidable, and may be corrected on appeal. Martin v. District Court, 37 Colo. 110, 86 P. 82, 119 Am. St. R. 262 (1906).

An erroneous judgment may be corrected by appeal or other like proceeding in an appellate court. People ex rel. Best v. District Court, 115 Colo. 240, 171 P.2d 774 (1946).

Habeas corpus does not lie to obtain release from an erroneous sentence, but does lie to afford relief from a void sentence. Stilley v. Tinsley, 153 Colo. 66, 385 P.2d 677 (1963).

Petition for habeas corpus treated as one for entry of proper sentence. A defendant seeking habeas corpus without success could, if defendant so elected, have his petition for habeas corpus treated as a petition for entry of a proper sentence. Stilley v. Tinsley, 153 Colo. 66, 385 P.2d 677 (1963).

No violation of equal protection or double jeopardy where sentence within statutory limits. People v. Mieyr, 176 Colo. 90, 489 P.2d 327 (1971).

Applied in People v. Flowers, 644 P.2d 916 (Colo. App. 1982); People v. Chambers, 749 P.2d 984 (Colo. App. 1987).

PART 5

MISDEMEANOR AND PETTY
OFFENSE SENTENCING

18-1.3-501. Misdemeanors classified - penalties. (1) (a) Misdemeanors are divided into three classes which are distinguished from one another by the following penalties which are authorized upon conviction except as provided in subsection (1.5) of this section:

Class	Minimum Sentence	Maximum Sentence
1	Six months imprisonment, or five hundred dollars fine, or both	Eighteen months imprisonment, or five thousand dollars fine, or both

- | | |
|--|--|
| 2 Three months imprisonment, or two
hundred fifty dollars fine, or both | Twelve months imprisonment,
or one thousand dollars fine, or both |
| 3 Fifty dollars fine | Six months imprisonment, or seven
hundred fifty dollars fine, or both |

(b) A term of imprisonment for conviction of a misdemeanor shall not be served in a state correctional facility unless served concurrently with a term for conviction of a felony.

(c) A term of imprisonment in a county jail for a conviction of a misdemeanor, petty, or traffic misdemeanor offense shall not be ordered to be served consecutively to a sentence to be served in a state correctional facility; except that if, at the time of sentencing, the court determines, after consideration of all the relevant facts and circumstances, that a concurrent sentence is not warranted, the court may order that the misdemeanor sentence be served prior to the sentence to be served in the state correctional facility and prior to the time the defendant is transported to the state correctional facility to serve all or the remainder of the defendant's state correctional facility sentence.

(1.5) (a) If a defendant is convicted of assault in the third degree under section 18-3-204 and the victim is a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his or her duties, notwithstanding subsection (1) of this section, the court shall sentence the defendant to a term of imprisonment greater than the maximum sentence but no more than twice the maximum sentence authorized for the same crime when the victim is not a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his or her duties. In addition to the term of imprisonment, the court may impose a fine on the defendant under subsection (1) of this section. At any time after sentencing and before the discharge of the defendant's sentence, the victim may request that the defendant participate in restorative justice practices with the victim. If the defendant accepts responsibility for and expresses remorse for his or her actions and is willing to repair the harm caused by his or her actions, an individual responsible for the defendant's supervision shall make the necessary arrangements for the restorative justice practices requested by the victim.

(b) As used in this section, "peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his or her duties" means a peace officer as described in section 16-2.5-101, C.R.S., emergency medical service provider as defined in part 1 of article 3.5 of title 25, C.R.S., emergency medical care provider as defined by section 18-3-204 (4), or a firefighter as defined in section 18-3-201 (1), who is engaged or acting in or who is present to engage or act in the performance of a duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer, emergency medical service provider, emergency medical care provider, or firefighter, whether or not the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is within the territorial limits of his or her jurisdiction, if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is in uniform or the person committing an assault upon or offense against or otherwise acting toward the peace officer, emergency medical service provider, emergency medical care provider, or firefighter knows or reasonably should know that the victim is a peace officer, emergency medical service provider, emergency medical care provider, or firefighter or if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is intentionally assaulted in retaliation for the performance of his or her official duties.

(1.7) (a) If a defendant is convicted of assault in the third degree pursuant to section 18-3-204 or reckless endangerment pursuant to section 18-3-208 and the victim is a mental health professional employed by or under contract with the department of human services engaged in the performance of his or her duties, notwithstanding the provisions of subsection (1) of this section, the court may sentence the defendant to a term of imprisonment greater than the maximum sentence but not more than twice the maximum sentence authorized for the crime when the victim is not a mental health professional employed by or under contract with the department of human services engaged in the performance of his

or her duties. In addition to a term of imprisonment, the court may impose a fine on the defendant pursuant to subsection (1) of this section.

(b) “Mental health professional” means a mental health professional licensed to practice medicine pursuant to part 1 of article 36 of title 12, C.R.S., or a person licensed as a mental health professional pursuant to article 43 of title 12, C.R.S., a person licensed as a nurse pursuant to part 1 of article 38 of title 12, C.R.S., a nurse aide certified pursuant to part 1 of article 38.1 of title 12, C.R.S., and a psychiatric technician licensed pursuant to part 1 of article 42 of title 12, C.R.S.

(2) The defendant may be sentenced to perform a certain number of hours of community or useful public service in addition to any other sentence provided by subsection (1) of this section, subject to the conditions and restrictions of section 18-1.3-507. An inmate in county jail acting as a trustee shall not be given concurrent credit for community or useful public service when such service is performed in his or her capacity as trustee. For the purposes of this subsection (2), “community or useful public service” means any work which is beneficial to the public, any public entity, or any bona fide nonprofit private or public organization, which work involves a minimum of direct supervision or other public cost and which work would not, with the exercise of reasonable care, endanger the health or safety of the person required to work.

(3) (a) The general assembly hereby finds that certain misdemeanors which are listed in paragraph (b) of this subsection (3) present an extraordinary risk of harm to society and therefore, in the interest of public safety, the maximum sentence for such misdemeanors shall be increased by six months.

(b) Misdemeanors that present an extraordinary risk of harm to society shall include the following:

(I) Assault in the third degree, as defined in section 18-3-204;

(I.5) (A) Sexual assault, as defined in section 18-3-402; or

(B) Sexual assault in the second degree, as defined in section 18-3-403, as it existed prior to July 1, 2000;

(II) (A) Unlawful sexual contact, as defined in section 18-3-404; or

(B) Sexual assault in the third degree, as defined in section 18-3-404, as it existed prior to July 1, 2000;

(III) Child abuse, as defined in section 18-6-401 (7) (a) (V);

(IV) Second and all subsequent violations of a protection order as defined in section 18-6-803.5 (1.5) (a.5);

(V) Misdemeanor failure to register as a sex offender, as described in section 18-3-412.5; and

(VI) Misdemeanor invasion of privacy for sexual gratification, as described in section 18-3-405.6.

(4) Notwithstanding any provision of law to the contrary, any person who attempts to commit, conspires to commit, or commits against an elderly person any misdemeanor set forth in part 4 of article 4 of this title, part 1, 2, 3, or 5 of article 5 of this title, or article 5.5 of this title shall be required to pay a mandatory and substantial fine within the limits permitted by law. However, all moneys collected from the offender shall be applied in the following order: Costs for crime victim compensation fund pursuant to section 24-4.1-119, C.R.S.; surcharges for victims and witnesses assistance and law enforcement fund pursuant to section 24-4.2-104, C.R.S.; restitution; time payment fee; late fees; and any other fines, fees, or surcharges. For purposes of this subsection (4), an “elderly person” or “elderly victim” means a person sixty years of age or older.

(5) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

(6) For a defendant who is convicted of assault in the third degree, as described in section 18-3-204, the court, in addition to any fine the court may impose, shall sentence the defendant to a term of imprisonment of at least six months, but not longer than the maximum sentence authorized for the offense, as specified in this section, which sentence shall not be suspended in whole or in part, if the court makes the following findings on the record:

(a) The victim of the offense was pregnant at the time of commission of the offense; and

(b) The defendant knew or should have known that the victim of the offense was pregnant.

(c) (Deleted by amendment, L. 2003, p. 2163, § 4, effective July 1, 2003.)

Source: **L. 2002:** Entire article added with relocations, p. 1413, § 2, effective October 1. **L. 2003:** (3)(b)(IV) amended, p. 1014, § 22, effective July 1; (6)(b) and (6)(c) amended, p. 2163, § 4, effective July 1; (1.5)(b) amended, p. 1624, § 44, effective August 6. **L. 2004:** (3)(a) amended, p. 634, § 3, effective August 4. **L. 2005:** (1.7) added, p. 1009, § 1, effective July 1. **L. 2007:** (1) amended, p. 557, § 4, effective April 16. **L. 2008:** (1.7)(b) and (4) amended, p. 1890, § 55, effective August 5. **L. 2009:** (1.5) amended, (HB 09-1120), ch. 305, p. 1650, § 2, effective July 1. **L. 2010:** (1.5)(b) amended, (HB 10-1422), ch. 419, p. 2073, § 32, effective August 11; (3)(b)(IV) and (3)(b)(V) amended and (3)(b)(VI) added, (SB 10-128), ch. 415, p. 2046, § 6, effective July 1, 2012. **L. 2011:** (1.5) amended, (HB 11-1105), ch. 250, p. 1087, § 1, effective August 10. **L. 2012:** (1.5) amended, (HB 12-1059), ch. 271, p. 1434, § 11, effective July 1.

Editor's note: (1) This section is similar to former § 18-1-106 as it existed prior to 2002.

(2) Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (1.5) applies to acts committed on or after July 1, 2012.

Cross references: For the legislative declaration contained in the 2003 act amending subsections (6)(b) and (6)(c), see section 1 of chapter 340, Session Laws of Colorado 2003.

ANNOTATION

Law reviews. For note, "Comment: Constitutional Law — Symbolic Speech — Colorado Flag Desecration Statute", see 48 Den. L. J. 451 (1971). For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Annotator's note. Since § 18-1.3-501 is similar to § 18-1-106 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

Misdemeanor defined. Since felonies are defined in the constitution to be offenses punishable by death or imprisonment in the penitentiary, it follows that misdemeanors are violations of the public laws not thus punishable. *City of Greeley v. Hamman*, 12 Colo. 94, 20 P. 1 (1888) (decided under G.S. § 689).

A crime carrying a possible penitentiary sentence is a felony while a crime punishable by fine or imprisonment in county jail is a misdemeanor. *People v. Green*, 734 P.2d 616 (Colo. 1987).

Misdemeanor sentence in conjunction with felony sentence. A court may not sentence an adult offender 21 years of age or older to the department of corrections for a misdemeanor conviction unless such defendant has already been sentenced to the department for a felony and the misdemeanor sentence is made expressly concurrent with the felony sentence. *People v. Green*, 734 P.2d 616 (Colo. 1987).

Any consecutive sentence imposed on such offender for a misdemeanor conviction must be served in the county jail. *People v. Green*, 734

P.2d 616 (Colo. 1987); *People v. Battle*, 742 P.2d 952 (Colo. App. 1987).

Because defendant's misdemeanor sentence expired while he was being held by the corrections department on felony conviction, trial court improperly altered judgment and mittimus to require defendant to serve his misdemeanor time consecutively with his felony term. *People v. Battle*, 742 P.2d 952 (Colo. App. 1987).

Absent some fault on defendant's part, defendant was entitled to serve his misdemeanor sentence in uninterrupted manner, and mistaken transfer of defendant, by sheriff, to corrections department on subsequently imposed sentence for felony conviction should not have suspended running of defendant's misdemeanor sentence. *People v. Battle*, 742 P.2d 952 (Colo. App. 1987).

Credit required for presentence confinement. A sentencing judge is constitutionally required to give an indigent defendant credit for time served in presentence confinement, even where the total of the presentence confinement and the sentence imposed after trial is less than the maximum sentence allowed for the offense. *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981).

No equal protection violation inherent in mandatory sentencing provision as applicable to a conviction for misdemeanor offense of third degree assault on an on-duty peace officer. Sentence not more severe than that for the felony offense of second degree assault, and four-year sentence to department of corrections with possibility of probation after four months was determined to be more harsh than a sen-

tence of two years and one day in a county jail with possibility of home detention. *People v. Thompson*, 942 P.2d 1242 (Colo. App. 1996).

Establishment of more severe penalty for third degree assault of an on-duty peace officer than for conviction of reckless manslaughter or vehicular assault on a victim who is not a peace officer does not constitute violation of equal protection clause. The former punishes an act that has a greater social impact, which is reasonably related to the sentence. *People v. Thompson*, 942 P.2d 1242 (Colo. App. 1996).

Applied in *United States v. Dunn*, 545 F.2d 1281 (10th Cir. 1976); *People v. Storey*, 191

Colo. 546, 554 P.2d 694 (1976); *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983); *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983); *People v. Giles*, 662 P.2d 1073 (Colo. 1983); *People v. Clary*, 950 P.2d 654 (Colo. App. 1997).

18-1.3-502. Duration of sentences for misdemeanors. Courts sentencing any person for the commission of a misdemeanor to the custody of the executive director of the department of corrections shall not fix a minimum term but may fix a maximum term less than the maximum provided by law for the offense. The persons so sentenced shall be imprisoned, released under parole, and discharged as provided by other applicable statutes. No person sentenced to a correctional facility for the commission of a misdemeanor shall be subjected to imprisonment for a term exceeding the maximum term provided by the statute fixing the maximum length of the sentence for the crime of which he or she was convicted and for which he or she was sentenced. A person sentenced to a term of imprisonment for the commission of a misdemeanor shall be entitled to the same time credits as if he or she were sentenced to a term of imprisonment for the commission of a felony. No person committed as a juvenile delinquent shall be imprisoned for a term exceeding two years, except as otherwise provided for aggravated juvenile offenders in section 19-2-601, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-302.5 as it existed prior to 2002.

ANNOTATION

Applied in *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982) (decided prior to 2002 relocation of § 16-11-302.5).

18-1.3-503. Petty offenses classified - penalties. (1) A violation of a statute of this state is a "petty offense" if specifically classified as a class 1 or class 2 petty offense. The penalty for commission of a class 1 petty offense, upon conviction, is a fine of not more than five hundred dollars, or imprisonment for not more than six months other than in state correctional facilities, or both. The penalty for commission of a class 2 petty offense is a fine specified in the section defining the offense. The penalty assessment procedure of section 16-2-201, C.R.S., is available for the payment of fines in class 2 petty offense cases.

(2) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-107 as it existed prior to 2002.

ANNOTATION

Applied in *People v. Knaub*, 624 P.2d 922 (Colo. App. 1980) (decided prior to 2002 relocation of § 18-1-107).

18-1.3-504. Misdemeanors and petty offenses not classified. (1) Any misdemeanor or petty offense defined by state statute without specification of its class shall be punishable as provided in the statute defining it.

(2) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-108 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Applied in *People v. Spann*, 37 Colo. App. 152, 549 P.2d 427 (1975), rev'd on other

grounds, 193 Colo. 53, 561 P.2d 1268 (1977) (decided prior to 2002 relocation of § 18-1-108).

18-1.3-505. Penalty for misdemeanor not fixed by statute - punishment. (1) In all cases where an offense is denominated a misdemeanor and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than one year in the county jail, or a fine of not more than one thousand dollars, or both such imprisonment and fine.

(2) Every sentence entered under this section shall include consideration of restitution as required by part 6 of this article and by article 18.5 of title 16, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1416, § 2, effective October 1.

Editor's note: This section is similar to former § 18-1-109 as it existed prior to 2002.

18-1.3-506. Payment and collection of fines for class 1, 2, or 3 misdemeanors and class 1 or 2 petty offenses - release from incarceration. (1) Whenever the court imposes a fine for a nonviolent class 1, 2, or 3 misdemeanor or for a class 1 or 2 petty offense, if the person who committed the offense is unable to pay the fine at the time of the court hearing or if he or she fails to pay any fine imposed for the commission of such offense, in order to guarantee the payment of such fine, the court may:

(a) Require the person to post sufficient bond or collateral; or

(b) Enter a judgment in favor of the state or political subdivision to whom the fine is owed and enter an order based on such judgment for the garnishment of the person's earnings in accordance with the provisions of either article 54 or 54.5 of title 13, C.R.S., for the purpose of collecting said fine and the costs incurred in collecting said fine; or

(c) Enter a judgment in favor of the state or political subdivision to whom the fine is owed and execute a lien based on such judgment on any chattels, lands, tenements, moneys, and real estate of the person in accordance with article 52 of title 13, C.R.S., for the purpose of collecting said fine and the costs incurred in collecting said fine.

(2) The state or a political subdivision may appear before a court of record in this state and request that the court order the release from a county jail or a correctional facility of a person who has been incarcerated as a result of the failure to pay a fine or the failure to appear in court in connection with the commission of a nonviolent class 1, 2, or 3

misdemeanor or a class 1 or 2 petty offense upon the condition that the fine and any costs of collection are collected from the person incarcerated by the use of one of the methods set forth in subsection (1) of this section.

(3) For the purposes of this section, “nonviolent class 1, 2, or 3 misdemeanor” means a class 1, 2, or 3 misdemeanor that does not involve cruelty to an animal, as described in section 18-9-202 (1) (a), or the use or threat of physical force on or to a person in the commission of the misdemeanor.

Source: L. 2002: Entire article added with relocations, p. 1417, § 2, effective October 1.

Editor’s note: This section is similar to former § 18-1-110 as it existed prior to 2002.

18-1.3-507. Community or useful public service - misdemeanors. (1) Any sentence imposed pursuant to section 18-1.3-501 (2) shall be subject to the conditions and restrictions of this section.

(2) (a) A probation department, sentencing court, county sheriff, board of county commissioners, or any other governmental entity, or a private nonprofit or for-profit entity that has a contract with a governmental entity, may establish a community or useful public service program. It is the purpose of the community or useful public service program: To identify and seek the cooperation of governmental entities and political subdivisions thereof, as well as corporations, associations, or charitable trusts, for the purpose of providing community or useful public service jobs; to interview persons who have been ordered by the court to perform community or useful public service and to assign such persons to suitable community or useful public service jobs; and to monitor compliance or noncompliance of such persons in performing community or useful public service assignments within the time established by the court.

(b) Nothing in this subsection (2) shall limit the authority of an entity which is the recipient of community or useful public service to accept or reject such service, in its sole discretion.

(2.5) A charitable trust that is exempt from taxation under section 501 (c) (3) of the federal “Internal Revenue Code of 1986”, as amended, shall be eligible to provide community or useful public service jobs established under this article or any other provision of law, so long as the charitable trust meets any other requirement related to the provision of such jobs.

(3) Any general public liability insurance policy obtained pursuant to this section shall provide coverage for injuries caused by a person performing services under this section and shall be in a sum of not less than the current limit on government liability under the “Colorado Governmental Immunity Act”, article 10 of title 24, C.R.S.

(4) For the purposes of the “Colorado Governmental Immunity Act”, article 10 of title 24, C.R.S., public employee, as defined in section 24-10-103, C.R.S., does not include any person who is sentenced to participate in any type of community or useful public service.

(5) No governmental entity or private nonprofit or for-profit entity which has a contract with a governmental entity shall be liable under the “Workers’ Compensation Act of Colorado”, articles 40 to 47 of title 8, C.R.S., or under the “Colorado Employment Security Act”, articles 70 to 82 of title 8, C.R.S., for any benefits on account of any person who is sentenced to participate in any type of community or useful public service, but nothing in this subsection (5) shall prohibit a governmental entity or private nonprofit or for-profit entity from electing to accept the provisions of the “Workers’ Compensation Act of Colorado” by purchasing and keeping in force a policy of workers’ compensation insurance covering such person.

(6) The court shall assess an amount, not to exceed one hundred twenty dollars, upon every person required to perform community or useful public service pursuant to section 18-1.3-501 (2). The court may waive this fee if the court determines the defendant to be indigent. Such amount shall be used by the operating agency responsible for overseeing such person’s community or useful public service program to pay the cost of administration of the program and the cost of personal services. Such amount is to be commensurate with

program costs in providing services and shall be adjusted from time to time by the general assembly to insure that the operating agencies shall be financially self-supporting. The proceeds from such amounts shall be used by the operating agency only for defraying the cost of personal services and other operating expenses related to the administration of the program, a general liability policy covering such person, and, if such person will be covered by workers' compensation insurance pursuant to subsection (5) of this section or an insurance policy providing such or similar coverage, the cost of purchasing and keeping in force such insurance coverage and shall not be used by the operating agency for any other purpose.

Source: L. 2002: Entire article added with relocations, p. 1417, § 2, effective October 1. **L. 2004:** (2)(a) amended and (2.5) added, p. 505, § 1, effective August 4.

Editor's note: This section is similar to former § 16-11-701 as it existed prior to 2002.

Cross references: For community service for juvenile offenders, see § 19-2-308; for useful public service for alcohol- or drug-related traffic offenses, see § 42-4-1301; for community or useful public service for class 1 and class 2 misdemeanor traffic offenders, see § 42-4-1701.

18-1.3-508. Definite sentence not void. If, through oversight or otherwise, any person is sentenced or committed to the custody of the executive director of the department of corrections for the commission of a misdemeanor for a definite period of time, the sentence or commitment shall not for that reason be void, but the person so sentenced or committed shall be subject to the liabilities and entitled to the benefits which are applicable to those persons who are properly sentenced.

Source: L. 2002: Entire article added with relocations, p. 1419, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-303 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952).

Annotator's note. Since § 18-1.3-508 is similar to § 16-11-303 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

There is no irreconcilable inconsistency between this section and Crim. P. 35(a). This section corrects a specific error committed in sentencing. It changes the erroneous sentence automatically, with the same effect as if the

judge had sentenced correctly. *Smith v. Johns*, 187 Colo. 388, 532 P.2d 49 (1975).

Remand for resentencing. Sentence imposed by trial court which fixed a minimum term, contrary to the requirements of § 16-11-304, was erroneous, but since there is no statute which automatically corrects erroneous sentences of the trial court, the case is remanded to the trial court with directions to vacate that sentence and to resentence the defendant in accordance with law. *People v. Sandoval*, 36 Colo. App. 403, 541 P.2d 105 (1975).

Applied in *People v. Nix*, 44 Colo. App. 195, 610 P.2d 1088 (1980).

18-1.3-509. Credit for time served on misdemeanor sentences. A person who is confined for a misdemeanor offense prior to the imposition of a sentence for the misdemeanor offense shall be entitled to credit against the term of his or her sentence for the entire period of the confinement. At the time of sentencing, the court shall make a finding of the amount of presentence confinement to which the offender is entitled and shall include the finding in the mittimus. The period of confinement shall be deducted from the offender's sentence by the county jail.

Source: L. 2007: Entire section added, p. 558, § 5, effective April 16.

PART 6

RESTITUTION

Law reviews: For article, “Restitution in Criminal Cases”, see 30 Colo. Law. 125 (October 2001).

18-1.3-601. Legislative declaration. (1) The general assembly finds and declares that:

(a) Crime victims endure undue suffering and hardship resulting from physical injury, emotional and psychological injury, or loss of property;

(b) Persons found guilty of causing such suffering and hardship should be under a moral and legal obligation to make full restitution to those harmed by their misconduct;

(c) The payment of restitution by criminal offenders to their victims is a mechanism for the rehabilitation of offenders;

(d) Restitution is recognized as a deterrent to future criminality;

(e) An effective criminal justice system requires timely restitution to victims of crime and to members of the immediate families of such victims in order to lessen the financial burdens inflicted upon them, to compensate them for their suffering and hardship, and to preserve the individual dignity of victims;

(f) Former procedures for restitution assessment, collection, and distribution have proven to be inadequate and inconsistent from case to case;

(g) The purposes of this part 6 are to facilitate:

(I) The establishment of programs and procedures to provide for and collect full restitution for victims of crime in the most expeditious manner; and

(II) The effective and timely assessment, collection, and distribution of restitution requires the cooperation and collaboration of all criminal justice agencies and departments.

(2) It is the intent of the general assembly that restitution be ordered, collected, and disbursed to the victims of crime and their immediate families. Such restitution will aid the offender in reintegration as a productive member of society. This part 6 shall be liberally construed to accomplish all such purposes.

Source: L. 2002: Entire article added with relocations, p. 1419, § 2, effective October 1.

Editor’s note: This section is similar to former § 16-18.5-101 as it existed prior to 2002.

ANNOTATION

Because of the importance of requiring defendants to pay victims restitution, as expressed in this section, the doctrine of abatement ab initio does not apply to civil judgments created by restitution orders.

When defendant died after conviction and entry of the order of restitution, but before determination of the direct appeal, the common law doc-

trine of abatement ab initio applied to defendant’s conviction. Because of the importance of protecting the rights of victims, however, the restitution order, which created a civil judgment under § 18-1.3-603 (4)(a), was not subject to abatement but could be appealed by defendant’s estate. *People v. Daly*, __ P.3d __ (Colo. App. 2011).

18-1.3-602. Definitions. As used in this part 6, unless the context otherwise requires:

(1) “Collections investigator” means a person employed by the judicial department whose primary responsibility is to administer, enforce, and collect on court orders or judgments entered with respect to fines, fees, restitution, or any other accounts receivable of the court, judicial district, or judicial department.

(2) “Conviction” means a verdict of guilty by a judge or jury or a plea of guilty or nolo contendere that is accepted by the court for a felony, misdemeanor, petty offense, or traffic misdemeanor offense, or adjudication for an offense that would constitute a criminal offense if committed by an adult. “Conviction” also includes having received a deferred judgment and sentence or deferred adjudication; except that a person shall not be deemed to have been

convicted if the person has successfully completed a deferred sentence or deferred adjudication.

(2.3) “Money advanced by a governmental agency for a service animal” means costs incurred by a peace officer, law enforcement agency, fire department, fire protection district, or governmental search and rescue agency for the veterinary treatment and disposal of a service animal that was harmed while aiding in official duties and for the training of an animal to become a service animal to replace a service animal that was harmed while aiding in official duties, as applicable.

(2.5) Repealed.

(3) (a) “Restitution” means any pecuniary loss suffered by a victim and includes but is not limited to all out-of-pocket expenses, interest, loss of use of money, anticipated future expenses, rewards paid by victims, money advanced by law enforcement agencies, money advanced by a governmental agency for a service animal, adjustment expenses, and other losses or injuries proximately caused by an offender’s conduct and that can be reasonably calculated and recompensed in money. “Restitution” does not include damages for physical or mental pain and suffering, loss of consortium, loss of enjoyment of life, loss of future earnings, or punitive damages.

(b) “Restitution” may also include extraordinary direct public and all private investigative costs.

(c) (I) “Restitution” shall also include all costs incurred by a government agency or private entity to:

(A) Remove, clean up, or remediate a place used to manufacture or attempt to manufacture a controlled substance or which contains a controlled substance or which contains chemicals, supplies, or equipment used or intended to be used in the manufacturing of a controlled substance;

(B) Store, preserve, or test evidence of a controlled substance violation; or

(C) Sell and provide for the care of and provision for an animal disposed of under the animal cruelty laws in accordance with part 2 of article 9 of this title or article 42 of title 35, C.R.S.

(II) Costs under this paragraph (c) shall include, but are not limited to, overtime wages for peace officers or other government employees, the operating expenses for any equipment utilized, and the costs of any property designed for one-time use, such as protective clothing.

(3.5) “Service animal” means any animal, the services of which are used to aid the performance of official duties by a peace officer, law enforcement agency, fire department, fire protection district, or governmental search and rescue agency.

(4) (a) “Victim” means any person aggrieved by the conduct of an offender and includes but is not limited to the following:

(I) Any person against whom any felony, misdemeanor, petty, or traffic misdemeanor offense has been perpetrated or attempted;

(II) Any person harmed by an offender’s criminal conduct in the course of a scheme, conspiracy, or pattern of criminal activity;

(III) Any person who has suffered losses because of a contractual relationship with, including but not limited to an insurer, or because of liability under section 14-6-110, C.R.S., for a person described in subparagraph (I) or (II) of this paragraph (a);

(IV) Any victim compensation board that has paid a victim compensation claim;

(V) If any person described in subparagraph (I) or (II) of this paragraph (a) is deceased or incapacitated, the person’s spouse, parent, legal guardian, natural or adopted child, child living with the victim, sibling, grandparent, significant other, as defined in section 24-4.1-302 (4), C.R.S., or other lawful representative;

(VI) Any person who had to expend resources for the purposes described in subparagraph (I) of paragraph (c) of subsection (3) of this section.

(b) “Victim” shall not include a person who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan as defined under the law of this state or of the United States.

(c) Any “victim” under the age of eighteen is considered incapacitated, unless that person is legally emancipated or the court orders otherwise.

(d) It is the intent of the general assembly that this definition of the term “victim” shall apply to this part 6 and shall not be applied to any other provision of the laws of the state of Colorado that refers to the term “victim”.

(e) Notwithstanding any other provision of this section, “victim” includes a person less than eighteen years of age who has been trafficked by an offender, as described in section 18-3-502, or coerced into involuntary servitude, as described in section 18-3-503.

Source: L. 2002: Entire article added with relocations, p. 1420, § 2, effective October 1. **L. 2003:** (2) and (3)(a) amended and (2.5) added, p. 1049, § 2, effective September 1. **L. 2004:** (2.5) repealed, p. 904, § 27, effective May 21. **L. 2005:** (2.3) and (3.5) added and (3)(a) amended, p. 192, § 1, effective July 1; (3)(c) and (4)(a)(VI) added, p. 1498, §§ 1, 2, effective July 1. **L. 2006:** (3)(c)(I) amended, p. 895, § 4, effective August 7. **L. 2012:** (4)(e) added, (HB 12-1151), ch. 174, p. 626, § 8, effective August 8.

Editor’s note: This section is similar to former § 16-18.5-102 as it existed prior to 2002.

ANNOTATION

Attorney general not a “collections investigator”. The attorney general is not part of the judicial department. *People v. Robb*, 215 P.3d 1253 (Colo. App. 2009).

Because the definition of “restitution” includes “any pecuniary loss suffered by a victim”, including “loss of use of money”, trial courts are required to include pre-judgment interest in probationary restitution orders. The term “loss of use of money” means not only the amount of money stolen but also the value of the use of the money stolen from the victim from the date the money was stolen to the date of the restitution award. *Roberts v. People*, 130 P.3d 1005 (Colo. 2006).

Because the definition of restitution includes “any pecuniary loss suffered by a victim” including “other losses or injuries proximately caused by an offender’s conduct and that can be reasonably calculated and recompensed in money”, the victim was entitled to the fair rental value of stolen equipment even if the victim did not rent replacement equipment. *People v. Suttmiller*, 240 P.3d 504 (Colo. App. 2010).

Proximate cause for purposes of restitution has been defined as a cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003); *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005); *People v. Steinbeck*, 186 P.3d 54 (Colo. App. 2007).

Restitution statute only requires that the conduct underlying the basis of defendant’s criminal conviction proximately caused the victim’s losses. It does not require that a defendant be charged with a specific act to be ordered to pay restitution. *People v. Steinbeck*, 186 P.3d 54 (Colo. App. 2007).

Restitution is not limited to the value of the damaged item. It may include repair costs, even if those costs exceed the damage object’s value.

People v. Smith, 181 P.3d 324 (Colo. App. 2007).

Counseling and mental health costs are considered medical expenses, provided proximate cause is shown. *People v. Rivera*, 250 P.3d 1272 (Colo. App. 2010).

Cost of burglar alarm system for victim not within definition of “restitution”. The trial court’s findings do not support any loss by the victim other than a generalized feeling of insecurity. Crime victim’s feeling of insecurity could have multiple causes and the solutions they select are subjective and potentially numerous and varied. *People v. Trujillo*, 75 P.3d 1133 (Colo. App. 2003).

Court erred by ordering defendant to pay for expenses related to home sale because prosecution did not prove that the expenditures were proximately caused by the juvenile offender’s unlawful conduct. If a victim incurs expenses to avoid or mitigate the consequences of a specific and ongoing threat related to the offender’s unlawful conduct, such expenditures qualify as compensable restitution under subsection (3)(a); however, expenditures resulting from a generalized feeling of insecurity are too attenuated from the offender’s conduct, and thus do not qualify. *People ex rel. D.W.*, 232 P.3d 182 (Colo. App. 2009).

Towing company is a “victim” for purposes of restitution because it sustained a pecuniary loss as a result of defendant’s criminal conduct and is therefore a person aggrieved by the offender’s conduct. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003).

It is not necessary for the “victim” to be specifically named as a party in a criminal indictment or information. A defendant is responsible for restitution if there is sufficient evidence in the record to determine that an individual is directly and immediately aggrieved by the defendant’s conduct. *People v. Jones*, 701 P.2d 868 (Colo. App. 1984); *People v. Dubois*,

216 P.3d 27 (Colo. App. 2007); aff'd on other grounds, 211 P.3d 41 (Colo. 2009).

Peace officer and law enforcement agency who were indirectly aggrieved by defendant's conduct fall within the meaning of "victim". The restitution statute no longer limits restitution only to persons injured by the conduct alleged as the basis for the defendant's conviction. *Dubois v. People*, 211 P.3d 41 (Colo. 2009).

Peace officers are generally entitled to restitution only when the underlying crime defines a peace officer as the victim or when a peace officer has been specifically included by the legislature. *Dubois v. People*, 211 P.3d 41 (Colo. 2009).

Restitution is warranted where a peace officer is involved in an accident while responding to a crime in which another peace officer is statutorily defined as the victim. *Dubois v. People*, 211 P.3d 41 (Colo. 2009).

Defendant's act of stealing the vehicle was the proximate cause of the towing company's losses because, without it, such losses would not have been sustained. While the police department's failure to impound the vehicle on its own lot and the vehicle owner's failure to retrieve the vehicle earlier may have contributed to the towing company's losses, there is no evidence that these events were not reasonably foreseeable. *People v. Clay*, 74 P.3d 473 (Colo. App. 2003).

Order of restitution for travel expenses of victim's parents to attend memorial service for victim was not an abuse of trial court's discretion. Parents' attendance at a memorial service was a natural and probable consequence that would not have occurred without defendant's actions, and therefore, defendant's conduct was a proximate cause of their attendance. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005).

A specific threat that is still outstanding against the victim is sufficient to be considered the "proximate cause" of the victim's monetary loss, and, thus, defendant can be ordered to pay restitution for those losses. *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005).

Company employing defendant was a "victim" for purposes of restitution because it sustained a pecuniary loss as a result of defendant's conduct, and, while "victim" is defined as a "person" in this section, "person" as defined for the Colorado revised statutes in § 2-4-401 does include corporations and other legal entities, and such a reading fits within the context of "victim" in subsection (4) of this section. *People v. Webb-Johnson*, 113 P.3d 1253 (Colo. App. 2005).

Company's claimed medical expenses properly included in the restitution order as anticipated future expenses. *People v. Webb-Johnson*, 113 P.3d 1253 (Colo. App. 2005).

"Lost wages", for purposes of criminal restitution, are wages not received by the victim from the date the crime was committed to the date restitution is imposed or sooner if the victim is comparably employed prior to that date. "Loss of future earnings" are earnings not expected to be received by the victim after restitution is imposed. *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005).

Juvenile court lacked authority to transfer defendant's restitution obligation from an unrelated juvenile case to defendant's adult case, and district court had no authority to include the juvenile court's restitution order in its community corrections or department of corrections sentence in an unrelated case. *People v. Brooks*, 250 P.3d 771 (Colo. App. 2010).

Applied in *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002) (decided under former § 16-18.5-102).

18-1.3-603. Assessment of restitution - corrective orders. (1) Every order of conviction of a felony, misdemeanor, petty, or traffic misdemeanor offense, except any order of conviction for a state traffic misdemeanor offense issued by a municipal or county court in which the prosecuting attorney is acting as a special deputy district attorney pursuant to an agreement with the district attorney's office, shall include consideration of restitution. Each such order shall include one or more of the following:

- (a) An order of a specific amount of restitution be paid by the defendant;
 - (b) An order that the defendant is obligated to pay restitution, but that the specific amount of restitution shall be determined within the ninety-one days immediately following the order of conviction, unless good cause is shown for extending the time period by which the restitution amount shall be determined;
 - (c) An order, in addition to or in place of a specific amount of restitution, that the defendant pay restitution covering the actual costs of specific future treatment of any victim of the crime; or
 - (d) Contain a specific finding that no victim of the crime suffered a pecuniary loss and therefore no order for the payment of restitution is being entered.
- (2) The court shall base its order for restitution upon information presented to the court by the prosecuting attorney, who shall compile such information through victim impact statements or other means to determine the amount of restitution and the identities of the

victims. Further, the prosecuting attorney shall present this information to the court prior to the order of conviction or within ninety-one days, if it is not available prior to the order of conviction. The court may extend this date if it finds that there are extenuating circumstances affecting the prosecuting attorney's ability to determine restitution.

(3) Any order for restitution may be:

(a) Increased if additional victims or additional losses not known to the judge or the prosecutor at the time the order of restitution was entered are later discovered and the final amount of restitution due has not been set by the court; or

(b) Decreased:

(I) With the consent of the prosecuting attorney and the victim or victims to whom the restitution is owed; or

(II) If the defendant has otherwise compensated the victim or victims for the pecuniary losses suffered.

(4) (a) Any order for restitution entered pursuant to this section shall be a final civil judgment in favor of the state and any victim. Notwithstanding any other civil or criminal statute or rule, any such judgment shall remain in force until the restitution is paid in full.

(b) Any order for restitution made pursuant to this section shall also be deemed to order that:

(I) The defendant owes interest from the date of the entry of the order at the rate of twelve percent per annum; and

(II) The defendant owes all reasonable and necessary attorney fees and costs incurred in collecting such order due to the defendant's nonpayment.

(c) The entry of an order for restitution under this section creates a lien by operation of law against the defendant's personal property and any interest that the defendant may have in any personal property.

(d) Any order of restitution imposed shall be considered a debt for "willful and malicious" injury for purposes of exceptions to discharge in bankruptcy as provided in 11 U.S.C. sec. 523.

(5) If more than one defendant owes restitution to the same victim for the same pecuniary loss, the orders for restitution shall be joint and several obligations of the defendants.

(6) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in any federal or state civil proceeding.

(7) When a person's means of identification or financial information was used without that person's authorization in connection with a conviction for any crime in violation of part 2, 3, or 4 of article 4, part 1, 2, 3, or 7 of article 5, or article 5.5 of this title, the sentencing court may issue such orders as are necessary to correct a public record that contains false information resulting from any violation of such laws.

(8) (a) Notwithstanding the provisions of subsection (1) of this section, for a non-felony conviction under title 42, C.R.S., the court shall order restitution concerning only the portion of the victim's pecuniary loss for which the victim cannot be compensated under a policy of insurance, self-insurance, an indemnity agreement, or a risk management fund.

(b) The court, in determining the restitution amount, shall consider whether the defendant or the vehicle driven by the defendant at the time of the offense was covered by:

(I) A complying policy of insurance or certificate of self-insurance as required by the laws of this state;

(II) Self-insurance including but not limited to insurance coverage pursuant to the provisions of part 15 of article 30 of title 24, C.R.S.; or

(III) Any other insurance or indemnity agreement that would indemnify the defendant for any damages sustained by the victim.

(c) (I) Except as otherwise provided in this paragraph (c), a court may not award restitution to a victim concerning a pecuniary loss for which the victim has received or is entitled to receive benefits or reimbursement under a policy of insurance or other indemnity agreement.

(II) (A) A court may award a victim restitution for a deductible amount under his or her policy of insurance.

(B) (Deleted by amendment, L. 2004, p. 904, § 28, effective May 21, 2004.)

(d) (I) (Deleted by amendment, L. 2004, p. 904, § 28, effective May 21, 2004.)

(II) Nothing in this paragraph (d) shall prohibit a nonowner driver or passenger in the vehicle from being awarded restitution if the driver or passenger was not covered by his or her own medical payments coverage policy.

(e) (I) Notwithstanding any provision of law to the contrary, an insurance company, risk management fund, or public entity shall not be obligated to defend a defendant in a hearing concerning restitution. No court shall interpret an indemnity or insurance contract so as to obligate an insurance company, risk management fund, or public entity to defend a defendant at a restitution hearing absent a specific agreement.

(II) Notwithstanding any provision of law, indemnity contract, or insurance contract to the contrary, an insurance company, risk management fund, or public entity shall not be obligated to pay or otherwise satisfy a civil judgment entered pursuant to this part 6, or to indemnify a defendant for an amount awarded in a restitution order.

(f) Nothing in this article shall be construed to limit or abrogate the rights and immunities set forth in the “Colorado Governmental Immunity Act”, article 10 of title 24, C.R.S.

(g) The provisions of this subsection (8) shall not preclude the court, pursuant to article 4.1 of title 24, C.R.S., from ordering restitution to reimburse an expenditure made by a victim compensation fund.

Source: L. 2002: Entire article added with relocations, p. 1421, § 2, effective October 1. **L. 2003:** (8) added, p. 1048, § 1, effective September 1. **L. 2004:** (8)(c)(I), (8)(c)(II)(B), and (8)(d) amended, p. 904, § 28, effective May 21. **L. 2012:** (1)(b) and (2) amended, (SB 12-175), ch. 208, p. 866, § 112, effective July 1.

Editor’s note: (1) This section is similar to former § 16-18.5-103 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(b) and (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Defendant’s right against double jeopardy is not violated when, having deferred determination of the amount of restitution as permitted under subsection (1), the court ordered restitution after the defendant began to serve his or her sentence. *People v. Rosales*, 134 P.3d 429 (Colo. App. 2005).

The 90-day deadline in subsection (2) is not a jurisdictional limit that would prevent the court from reconsidering a motion for restitution. *People v. Harman*, 97 P.3d 290 (Colo. App. 2004).

A court-ordered deadline for determination of restitution, short of the statutory 90-day period, is not a jurisdictional limit. *People v. McCann*, 122 P.3d 1085 (Colo. App. 2005).

Extenuating circumstances affecting the prosecutor’s ability to calculate the amount of restitution may be a factor in finding good cause for the late determination pursuant to subsection (1)(b). *People v. Harman*, 97 P.3d 290 (Colo. App. 2004).

Under the plain language of subsection (1), restitution may be denied only after a finding that the victim has not suffered a pecuniary loss. *People v. Stovall*, 75 P.3d 1165 (Colo. App. 2003).

Absent such a finding, sentencing is not final until restitution is ordered. *People v. Rosales*, 134 P.3d 429 (Colo. App. 2005).

Court rejected defendant’s contention that “punitive” provisions of interest and attorney fees in subsection (4) constitute an ex post facto law. The restitution act simply facilitates collection from defendant of the sums he was ordered to pay at the time of his sentencing. *People v. Lowe*, 60 P.3d 753 (Colo. App. 2002) (decided under former § 16-18.5-103).

Court could liberally construe statute to authorize interest from the date of the offense instead of limiting the calculation of interest from the date of the entry of the order, since statute merely provides a certain, definite postjudgment interest rate but does not mandate that only postjudgment interest may be imposed. *People v. Roberts*, 114 P.3d 75 (Colo. App. 2005), *aff’d* on other grounds, 130 P.3d 1005 (Colo. 2006).

Because post-judgment interest on the restitution amount awarded has the statutory purpose to encourage speedy payment of the restitution order, which is different from the purpose of pre-judgment interest, a trial court must impose both pre-judgment interest and

post-judgment interest in probationary restitution orders. *Roberts v. People*, 130 P.3d 1005 (Colo. 2006); *People v. Cardenas*, 262 P.3d 913 (Colo. App. 2011).

A sentence that does not include restitution is illegal, because the consideration of restitution is mandatory. The court was required to correct the mittimus to reflect restitution. *People v. Smith*, 121 P.3d 243 (Colo. App. 2005).

Restitution component satisfied once ordered, even though specific amount not set until two years after sentence imposed. Once restitution ordered, although not set, judgment of conviction became final and appealable, even though district court retained jurisdiction to determine restitution amount. *Sanoff v. People*, 187 P.3d 576 (Colo. 2008).

An order setting the amount of restitution is itself an appealable order and is subject to time limits for filing an appeal. *People v. Hill*, ___ P.3d ___ (Colo. App. 2011).

Interest rate on orders for restitution entered on and after September 1, 2000, is 12%, even though offense was committed prior to the effective date of the section. Section merely codified a discretionary power and sets a uniform interest rate. *People v. Garcia*, 55 P.3d 243 (Colo. App. 2002).

The Colorado legislature cannot preempt federal bankruptcy law and declare certain debts to be nondischargeable. Subsection (4)(d) cannot preempt federal law. In re *McNabb*, 287 B.R. 820 (Bankr. D. Colo. 2003).

Trial court has broad discretion in determining the terms and conditions of a restitution order, and the court's ruling will not be disturbed unless it abuses its discretion when it misconstrues or misapplies the law. The court misapplied the law in ordering restitution for the cost of installing locks on all interior doors of office that was burglarized. *People v. Reyes*, 166 P.3d 301 (Colo. App. 2007).

In order to receive restitution, the loss must be pecuniary and may be specifically mentioned in statute or the loss or injury must be proximately caused by the offender's conduct that can be reasonably calculated and recompensed in money. Awarding restitution for installing locks on victim's interior doors would put the victim in a better financial position than victim had been in had defendant's conduct not occurred; therefore, installing the locks was not a loss proximately caused by defendant's conduct and did not qualify for a restitution award. *People v. Reyes*, 166 P.3d 301 (Colo. App. 2007).

A specific threat that is still outstanding against the victim is sufficient to be considered the "proximate cause" of the victim's monetary loss, and, thus, defendant can be ordered to pay restitution for those losses. *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005).

"Lost wages", for purposes of criminal restitution, are wages not received by the victim from the date the crime was committed to the date restitution is imposed or sooner if the victim is comparably employed prior to that date. "Loss of future earnings" are earnings not expected to be received by the victim after restitution is imposed. *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005); *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

Although a court may order restitution for lost wages, it may not order restitution for loss of future earnings. *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

While defendant is entitled to a setoff against a restitution order to the extent of any money actually paid to a victim for the same damages covered by the order, defendant bears the burden of proof in apportioning the damages. Where victim's parents received an unapportioned settlement from defendant's automobile insurer, defendant bears burden of presenting evidence as basis for allocating the unapportioned settlement to pecuniary losses covered by the restitution order. *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005).

Sentencing court not barred by collateral estoppel and double jeopardy principles from considering acquitted conduct in determining an award of restitution. *People v. Pagan*, 165 P.3d 724 (Colo. App. 2006).

Section does not prescribe a maximum restitution amount. Therefore, the rule set forth in *Apprendi* and *Blakely* concerning prescribed statutory maximum sentences does not apply to restitution orders in Colorado. Restitution is not limited by the jury's findings, but rather includes any pecuniary losses suffered by the victim as a proximate cause of the offender's conduct. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Burden of proof for establishing the amount of restitution owed is a preponderance of the evidence. *People v. Smith*, 181 P.3d 324 (Colo. App. 2007).

Court may not order restitution without a hearing when prosecution must prove the amount of victim's loss and its causal link to defendant, and when defense counsel is present and prepared to contest those matters. Defendant need not be present for the hearing, but his or her counsel must be given the opportunity to contest the amount of restitution ordered. *People v. Martinez*, 166 P.3d 223 (Colo. App. 2007).

Defendant's challenge to the amount of restitution that she should be obligated to pay constitutes a claim that her sentence was imposed in an illegal manner. Because her claim was not brought within 120 days of her conviction, the claim was time barred. *People v. Bowerman*, 258 P.3d 314 (Colo. App. 2010).

Under § 16-5-401, a plea of guilty to facilitate the disposition of a case constitutes a

waiver of the statute of limitations. Defendant waived her right to raise the statute of limitations as a defense to the amount of restitution ordered. *People v. Wilson*, 251 P.3d 507 (Colo. App. 2010).

In declaring an order for restitution to be a final civil judgment in favor of the state and any victim, the general assembly intended that the order of restitution would survive defendant's death just as a civil judgment survives the death of a judgment debtor pursuant to § 13-58-101. *People v. Daly*, __ P.3d __ (Colo. App. 2011).

Thus, the doctrine of abatement ab initio does not apply to civil judgments created by restitution orders. When defendant died after conviction and entry of the order of restitution, but before determination of the direct appeal, the common law doctrine of abatement ab initio applied to defendant's conviction. Because of the importance of protecting the rights of victims, however, the restitution order, which created a civil judgment under subsection (4), was not subject to abatement but could be appealed by defendant's estate. *People v. Daly*, __ P.3d __ (Colo. App. 2011).

PART 7

FINES AND COSTS

18-1.3-701. Judgment for costs and fines. (1) (a) Where any person, association, or corporation is convicted of an offense, or any juvenile is adjudicated a juvenile delinquent for the commission of an act that would have been a criminal offense if committed by an adult, the court shall give judgment in favor of the state of Colorado, the appropriate prosecuting attorney, or the appropriate law enforcement agency and against the offender or juvenile for the amount of the costs of prosecution, the amount of the cost of care, and any fine imposed. No fine shall be imposed for conviction of a felony except as provided in section 18-1.3-401 or 18-7-203 (2) (a). Such judgments shall be enforceable in the same manner as are civil judgments, and, in addition, the provisions of section 16-11-101.6, C.R.S., and section 18-1.3-702 apply. A county clerk and recorder may not charge a fee for the recording of a transcript or satisfaction of a judgment entered pursuant to this section.

(b) Except as otherwise provided in paragraph (c) of this subsection (1), on and after July 1, 2010, all judgments collected pursuant to this section for fees and court costs shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(c) Judgments collected pursuant to this section for fees for interpreters or auxiliary services provided pursuant to section 13-90-204, C.R.S., and reimbursed pursuant to section 13-90-210, C.R.S., shall be remitted to the Colorado commission for the deaf and hard of hearing in the department of human services created in section 26-21-104, C.R.S.

(2) The costs assessed pursuant to subsection (1) of this section or section 16-18-101, C.R.S., may include:

(a) Any docket fee required by article 32 of title 13, C.R.S., or any other fee or tax required by statute to be paid to the clerk of the court;

(b) The jury fee required by section 13-71-144, C.R.S.;

(c) Any fees required to be paid to sheriffs pursuant to section 30-1-104, C.R.S.;

(d) Any fees of the court reporter for all or any part of a transcript necessarily obtained for use in the case, including the fees provided for in section 16-18-101 (2), C.R.S., and including the fees for a transcript of any preliminary hearing;

(d.5) The actual costs paid to any expert witness;

(e) (I) The witness fees and mileage paid pursuant to article 33 of title 13, C.R.S., and section 16-9-203, C.R.S.;

(II) For any person required to travel more than fifty miles from the person's place of residence to the place where specified in the subpoena, in addition to the witness fee and mileage specified in subparagraph (I) of this paragraph (e):

(A) Actual lodging expenses incurred; and

(B) Actual rental car, taxi, or other transportation costs incurred;

(e.5) If a person under eighteen years of age is required to appear, the amount that a parent or guardian of the person was paid for transportation and lodging expenses incurred while accompanying the person;

(f) Any fees for exemplification and copies of papers necessarily obtained for use in the case;

(g) Any costs of taking depositions for the perpetuation of testimony, including reporter's fees, witness fees, expert witness fees, mileage for witnesses, and sheriff fees for service of subpoenas;

(h) Any statutory fees for service of process or statutory fees for any required publications;

(h.5) Any fees for interpreters required during depositions or during trials;

(i) Any item specifically authorized by statute to be included as part of the costs;

(j) On proper motion of the prosecuting attorney and at the discretion of the court, any other reasonable and necessary costs incurred by the prosecuting attorney or law enforcement agency that are directly the result of the prosecution of the defendant, including the costs resulting from the collection and analysis of any chemical test upon the defendant pursuant to section 42-4-1301.1, C.R.S., which costs shall be reimbursed by the defendant directly to the law enforcement agency that performed such chemical tests;

(k) Any costs incurred in obtaining a governor's warrant pursuant to section 16-19-108, C.R.S.;

(l) Any costs incurred by the law enforcement agency in photocopying reports, developing film, and purchasing videotape as necessary for use in the case;

(m) Any costs of participation in a diversion program if the offender or juvenile unsuccessfully participated in a diversion program prior to the conviction or adjudication.

(3) Where any person, association, or corporation is granted probation, the court shall order the offender to make such payments toward the cost of care as are appropriate under the circumstances. In setting the amount of such payments, the court shall take into consideration and make allowances for any restitution ordered to the victim or victims of a crime, which shall take priority over any payments ordered pursuant to this article, and for the maintenance and support of the offender's spouse, dependent children, or other persons having a legal right to support and maintenance from the estate of the offender. If the court determines that the offender has a sufficient estate to pay all or part of the cost of care, the court shall determine the amount which shall be paid by the offender for the cost of care, which amount shall in no event be in excess of the per capita cost of supervising an offender on probation.

(4) Where any person is sentenced to a term of imprisonment, whether to a county jail or the department of corrections, the court shall order such person to make such payments toward the cost of care as are appropriate under the circumstances. In setting the amount of such payments, the court shall take into consideration and make allowances for any restitution ordered to the victim or victims of a crime, which shall take priority over any payments ordered pursuant to this article, and for the maintenance and support of the inmate's spouse, dependent children, or any other persons having a legal right to support and maintenance out of the offender's estate. The court shall also consider the financial needs of the offender for the six-month period immediately following the offender's release, for the purpose of allowing said offender to seek employment. If the court determines that the person has a sufficient estate to pay all or part of the cost of care, the court shall determine the amount which shall be paid by the offender, which amount in no event shall be in excess of the per capita cost of maintaining prisoners in the institution or facility in which the offender has been residing prior to sentencing for the purpose of reimbursing the appropriate law enforcement agency and the per capita cost of maintaining prisoners in the department of corrections for the purpose of paying the cost of care after sentencing.

(5) As used in this section, unless the context otherwise requires:

(a) "Cost of care" means the cost to the department or the local government charged with the custody of an offender for providing room, board, clothing, medical care, and other normal living expenses for an offender confined to a jail or correctional facility, or any costs associated with maintaining an offender in a home detention program contracted for by the department of public safety, as determined by the executive director of the department of corrections or the executive director of the department of public safety, whichever is appropriate, or the cost of supervision of probation when the offender is granted probation,

or the cost of supervision of parole when the offender is placed on parole by the state board of parole, as determined by the court.

(b) “Estate” means any tangible or intangible properties, real or personal, belonging to or due to an offender, including income or payments to such person received or earned prior to or during incarceration from salary or wages, bonuses, annuities, pensions, or retirement benefits, or any source whatsoever except federal benefits of any kind. Real property that is held in joint ownership or ownership in common with an offender’s spouse, while being used and occupied by the spouse as a place of residence, shall not be considered a part of the estate of the offender for the purposes of this section.

(6) After the set-offs for restitution and for maintenance and support as provided in subsection (4) of this section, any amounts recovered pursuant to this section that are available to reimburse the costs of providing medical care shall be used to reimburse the state for the state’s financial participation for medical assistance if medical care is provided for the inmate or an infant of a female inmate under the “Colorado Medical Assistance Act”, articles 4, 5, and 6 of title 25.5, C.R.S.

Source: **L. 2002:** Entire article added with relocations, p. 1422, § 2, effective October 1. **L. 2003:** (1) amended, p. 1693, § 1, effective August 6. **L. 2006:** (1) amended, p. 1091, § 11, effective May 25; (6) amended, p. 2005, § 61, effective July 1. **L. 2007:** (1) amended, p. 1538, § 29, effective May 31. **L. 2008:** (1)(b) amended, p. 2146, § 21, effective June 4. **L. 2011:** (1)(a) amended, (SB 11-085), ch. 257, p. 1129, § 6, effective August 10.

Editor’s note: This section is similar to former § 16-11-501 as it existed prior to 2002.

Cross references: (1) For items includable as costs in civil actions, see § 13-16-122.

(2) For the legislative declaration in the 2008 act amending subsection (1)(b), see section 1 of chapter 417, Session Laws of Colorado 2008. For the legislative declaration in the 2011 act amending subsection (1)(a), see section 1 of chapter 257, Session Laws of Colorado 2011.

ANNOTATION

Annotator’s note. Since § 18-1.3-701 is similar to § 16-11-501 as it existed prior to the 2002 relocation of certain criminal sentencing provisions and repealed laws antecedent to CSA, C. 48, 516, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionality. Statutes imposing liability for costs on a convicted defendant have been uniformly held to be constitutional. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

No double jeopardy violation where the imposition of costs is primarily remedial rather than punitive. The reviewing court first considers if the legislature intended a criminal or civil sanction, then determines if the statutory scheme is primarily punitive. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Costs are imposed to reimburse the state for the actual expenses incurred in prosecuting a defendant; costs are not traditionally considered to be punishment; the imposition of costs does not serve the goals of retribution and deterrence. *People v. Howell*, 64 P.3d 894 (Colo. App. 2002).

Sixth amendment inapplicable. The sixth amendment of the constitution compels appointing counsel for indigent defendants but does not

speak to whether convicted defendants of limited resources may be charged with the costs of their trial. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Declaration of indigency differs. Whether a presumably innocent defendant is declared indigent for the purposes of appointing counsel before he is brought to trial involves different considerations than the question of whether a convicted defendant may be charged with the costs expended by the state to secure his conviction. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Judgment for costs must be rendered against defendant upon conviction. *Bransom v. Bd. of Comm’rs*, 5 Colo. App. 231, 37 P. 957 (1894).

This changes the doctrine of the common law. In authorizing a recovery by the people against a convicted defendant of the costs incurred to secure his conviction, it was a departure from the doctrine of the common law. *Bd. of Comm’rs v. Wilson*, 3 Colo. App. 492, 34 P. 265 (1893).

Costs are a matter of statute under this section. *Glavino v. People*, 75 Colo. 94, 224 P. 225 (1924).

And are not to be taxed according to plea agreement. The costs in a criminal case must be

taxed according to statutes and not according to any plea agreement. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

There is no restriction or limit to the amount of costs of prosecution, only that the items of cost must necessarily conform to the fee bill, and that the charge for each service shall not exceed the amount allowed. The whole matter has been left to the discretion of the prosecutor and the court. *Parker v. People*, 7 Colo. App. 56, 42 P. 172 (1895).

A defendant convicted of fewer than all of the counts in a multi-count indictment or criminal information, or in consolidated cases, can be assessed only those costs of prosecution attributable to the counts for which the defendant is actually convicted, if an allocation is practicable. *People v. Palomo*, __ P.3d __ (Colo. App. 2011).

Extradition expenses fall within subsection (2)(j). *People v. Fogarty*, 126 P.3d 238 (Colo. App. 2005).

And are not subject to a time limitation. The phrase "[w]here any person...is convicted" means nothing more than "under conditions or in circumstances in which a person is convicted of an offense". The prosecution does not have an unlimited time, however, to seek expenses for extradition costs. *People v. Scoggins*, 240 P.3d 331 (Colo. App. 2009), *aff'd* by operation of law, 2012 CO 16, __ P.3d __.

Judicial discretion. The general rule as to payment of costs may be avoided if the trial

judge, in his discretion, determines that the defendant is unable to pay the costs. *People v. Fisher*, 189 Colo. 297, 539 P.2d 1258 (1975).

Joint defendants are severally liable for costs. Inasmuch as the costs are merely incident to the judgment, joint defendants are severally liable for the costs incurred in procuring their respective convictions, not for the costs of each other, nor for costs made by the people against them respectively. *Murphy v. People*, 3 Colo. 147 (1876).

Judgment rendered against person convicted is a lien on his property. In case of a conviction in a criminal proceeding judgment must be rendered against the defendant for the costs of the prosecution, and when rendered, is a lien upon his property, if he has any, and is collected by execution. *Bransom v. Bd. of Comm'rs*, 5 Colo. App. 231, 37 P. 957 (1894).

Although it becomes the duty of parole board to provide, as a condition of parole, that offender make restitution to the victim or victim's immediate family, it is error for court to require that defendant pay restitution to the police of cost of extradition. The proper way to effectuate this result is for court to enter judgment in favor of state of Colorado for amount of costs of prosecution under § 16-1-501. *People v. Lemons*, 824 P.2d 56 (Colo. App. 1991).

This section is not applicable to a juvenile who is adjudicated delinquent. *People v. T.R.*, 860 P.2d 559 (Colo. App. 1993).

18-1.3-702. Fines - methods of payment. (1) When the court imposes a fine upon an individual, the court may direct as follows:

(a) That the defendant pay the entire amount of the fine at the time sentence is pronounced;

(b) That the defendant pay the entire amount of the fine at some later date;

(c) That the defendant pay a specified portion of the fine at designated periodic intervals, and in such case the court may also direct that the fine be remitted to a designated official who shall report to the court on any failure to comply with the order;

(d) Where the defendant is sentenced to a period of probation as well as a fine, that payment of the fine be a condition of probation.

(2) Where the court imposes a fine, the sentence shall provide that, except in the case of a corporation, if the defendant fails to pay the fine in accordance with the direction of the court, the defendant shall be imprisoned until the fine is satisfied or the defendant is released as provided in subsections (3) and (6) of this section. This provision shall be added at the time sentence is pronounced. If the defendant fails to pay a fine as directed, the court may issue a warrant for his or her arrest.

(3) When the court directs that the defendant be imprisoned until the fine is satisfied, the court shall specify a maximum period of imprisonment subject to the following limits:

(a) Where the fine was imposed for a felony, the period shall not exceed one year;

(b) Where the fine was imposed for a misdemeanor, the period shall not exceed one-third of the maximum term of imprisonment authorized for the misdemeanor;

(c) Where the fine was imposed for a petty offense, a traffic violation, or a violation of a municipal ordinance, any of which is punishable by a possible jail sentence, the period shall not exceed fifteen days;

(c.5) There shall be no imprisonment in those cases where no imprisonment is provided for in the possible sentence; and

(d) Where a sentence of imprisonment as well as a fine was imposed, the aggregate of the period and the term of the sentence shall not exceed the maximum term of imprisonment authorized for the offense.

(4) Where the defendant is unable to pay a fine imposed by the court, the defendant may at any time apply to the court for resentence. If the court is satisfied that the defendant is unable to pay the fine, the court shall:

(a) Adjust the terms of payment; or

(b) Lower the amount of the fine; or

(c) Where the sentence consists of probation or imprisonment and a fine, revoke the portion of the sentence imposing the fine; or

(d) Revoke the entire sentence imposed and resentence the defendant. Upon a resentence, the court may impose any sentence it originally could have imposed; except that the amount of any fine imposed shall not be in excess of the amount the defendant is able to pay.

(5) Notwithstanding that the defendant was imprisoned for failure to pay a fine or that he or she has served the period of imprisonment imposed, a fine may be collected in the same manner as a judgment in a civil action. The district attorney may, in his or her discretion, and shall, upon order of the court, institute proceedings to collect such fine.

(6) If it satisfactorily appears to the district court of the judicial district in which a person is confined that such person is confined in jail or in a correctional facility or other place of confinement, for any fine or costs of prosecution for any criminal offense, including any violation of a municipal ordinance, and has no estate whatever with which to pay such fine and costs, or costs only, it is the duty of the court to discharge such person from further imprisonment for the fine and costs. Nothing in this subsection (6) shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned as part of his or her punishment. The court shall hear without delay any application made under this subsection (6).

Source: L. 2002: Entire article added with relocations, p. 1425, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-502 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-702 is similar to § 16-11-502 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, a relevant case construing that provision has been included in the annotations to this section.

It is the purpose of subsection (2) to provide a method of compelling one to pay fine and costs adjudged against him in a criminal case,

irrespective of any exemptions. *Enderman v. Alexander*, 68 Colo. 110, 187 P. 729 (1920) (decided under repealed laws antecedent to CSA, C. 48, § 526).

“Any criminal offense”, in subsection (6), does not include violations of municipal ordinances. *People v. District Court*, 198 Colo. 284, 599 P.2d 260 (1979).

PART 8

SPECIAL PROCEEDINGS - SENTENCING OF HABITUAL CRIMINALS

18-1.3-801. Punishment for habitual criminals. (1) (a) A person shall be adjudged an habitual criminal and shall be punished by a term in the department of corrections of life imprisonment if the person:

(I) Is convicted of:

(A) Any class 1 or 2 felony; or

(B) Any class 3 felony that is a crime of violence, as defined in section 18-1.3-406 (2);
and

(II) Has been twice convicted previously for any of the offenses described in subparagraph (I) of this paragraph (a).

(b) A felony described in subparagraph (I) of paragraph (a) of this subsection (1) is:

(I) One based upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, in this or any other state; or

(II) A crime under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, which, if committed within this state, would be such a felony described in paragraph (a) of this subsection (1).

(c) No person sentenced pursuant to this subsection (1) shall be eligible for parole until such person has served at least forty calendar years.

(d) Nothing in this subsection (1) prohibits the governor from issuing a pardon or a clemency order on a case-by-case basis; however, the governor shall submit a report to the general assembly on each such pardon or clemency order in accordance with section 7 of article IV of the state constitution.

(e) Nothing in this subsection (1) is to be construed to prohibit a person convicted of a class 1 felony from being sentenced pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102.

(f) This subsection (1) shall not apply to a person convicted of first or second degree burglary, which person shall be subject to subsections (1.5), (2), and (2.5) of this section and section 18-1.3-804.

(1.5) Except as otherwise provided in subsection (5) of this section, every person convicted in this state of any class 1, 2, 3, 4, or 5 felony who, within ten years of the date of the commission of the said offense, has been twice previously convicted upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony shall be adjudged an habitual criminal and shall be punished for the felony offense of which such person is convicted by imprisonment in the department of corrections for a term of three times the maximum of the presumptive range pursuant to section 18-1.3-401 for the class of felony of which such person is convicted.

(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2) and in subsection (5) of this section, every person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony, shall be adjudged an habitual criminal and shall be punished for the felony offense of which such person is convicted by imprisonment in the department of corrections for a term of four times the maximum of the presumptive range pursuant to section 18-1.3-401 for the class of felony of which such person is convicted. Such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment or information. Nothing in this part 8 shall abrogate or affect the punishment by death in any and all crimes punishable by death on or after July 1, 1972.

(b) The provisions of paragraph (a) of this subsection (2) shall not apply to a conviction for a class 6 felony pursuant to section 18-18-403.5 (2) (a) (I) or (2) (b) (I), or a conviction for a class 6 felony for attempt or conspiracy to commit unlawful possession of a controlled substance, as described in section 18-18-403.5 (2) (a) (I) or (2) (b) (I), even if the person has been previously convicted of three or more qualifying felony convictions.

(2.5) Any person who is convicted and sentenced pursuant to subsection (2) of this section, or section 16-13-101 (2), C.R.S., as it existed prior to October 1, 2002, who is thereafter convicted of a felony which is a crime of violence pursuant to section 18-1.3-406, shall be adjudged an habitual criminal and shall be punished by a term in the department of corrections of life imprisonment. No person sentenced pursuant to this subsection (2.5) shall be eligible for parole until such person has served at least forty calendar years.

(3) No drug law conviction shall be counted as a prior felony conviction under this section unless such prior offense would be a felony if committed in this state at the time of the commission of the new offense.

(4) A person who meets the criteria set forth in subsection (1) of this section shall be adjudged an habitual criminal and sentenced only in accordance with that subsection and not pursuant to subsections (1.5), (2), and (2.5) of this section.

(5) A conviction for escape, as described in section 18-8-208 (1), (2), or (3), or attempt to escape, as described in section 18-8-208.1 (1), (1.5), or (2), shall not be used for the purpose of adjudicating a person an habitual criminal as described in subsection (1.5) or subsection (2) of this section unless the conviction is based on the offender's escape or attempt to escape from a correctional facility, as defined in section 17-1-102, C.R.S., or from physical custody within a county jail.

Source: **L. 2002:** Entire article added with relocations, p. 1426, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1)(e) amended, p. 33, § 28, effective October 1. **L. 2003:** (2.5) amended, p. 978, § 16, effective April 17; IP(1)(a), (1.5), (2), and (2.5) amended, p. 1426, § 5, effective April 29. **L. 2011:** (2) amended, (SB 11-096), ch. 57, p. 151, § 1, effective March 25. **L. 2012:** (1.5) and (2)(a) amended and (5) added, (HB 12-1213), ch. 183, p. 695, § 1, effective May 17.

Editor's note: (1) This section is similar to former § 16-13-101 as it existed prior to 2002.

(2) Amendments to subsection (2.5) by Senate Bill 03-147 and House Bill 03-1236 were harmonized.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1)(e), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Law reviews. For article, "Recent Judicial Modification of Habitual Criminal Act", see 23 Dicta 84 (1946). For article, "Prosecution of Habitual Criminals", see 27 Dicta 376 (1950). For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For comment on *Smalley v. People* (134 Colo. 360, 304 P.2d 902 (1956)), see 34 Dicta 126 (1957). For article, "Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike", see Colo. Law. 1225 (1982). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law. 215 (1983). For article, "Criminal Procedure", which discusses a Tenth Circuit decision dealing with double jeopardy and habitual criminal adjudications, see 61 Den. L.J. 299 (1984). For article, "Colorado Felony Sentencing — an Update", see 14 Colo. Law. 2163 (1985).

Annotator's note. Since § 18-1.3-702 is similar to § 16-11-502 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, a relevant case construing that provision has been included in the annotations to this section.

This section must be strictly construed. A law which establishes additional and drastic punishment, under a given state of facts, must be

strictly construed. *Smalley v. People*, 96 Colo. 361, 43 P.2d 385 (1935).

This section must be strictly construed, being in derogation of the common law. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947); *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

The habitual criminal statute shall be narrowly construed in favor of the accused. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

And doubtful construction resolved in defendant's favor. If there is any doubt about the constitutional meaning of the word "felony" in the habitual criminal act, the supreme court must, upon construction, give the construction that favors the liberty of the accused. *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956).

The habitual criminal act does not create a new crime. It merely provides that the court, in sentencing a defendant after conviction, must consider former convictions in imposing sentence. *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947); *Casias v. People*, 148 Colo. 544, 367 P.2d 327 (1961), cert. denied, 369 U.S. 862, 82 S. Ct. 952, 8 L. Ed.2d 20 (1962).

This section does not establish a substantive offense, but prescribes circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities. *Casias v. People*, 148 Colo. 544, 367 P.2d 327 (1961), cert. denied, 369 U.S. 862, 82 S. Ct. 952, 8 L. Ed.2d 20 (1962).

The habitual criminal statute does not define a substantive offense but relates to sentencing en-

hancement for the underlying felony. *People v. Montoya*, 640 P.2d 234 (Colo. App. 1981); *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

It does not violate the constitution. Section 16 of art. II, Colo. Const., providing that the accused shall be tried by an impartial jury of the county or district in which the offense is alleged to have been committed. *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947).

The habitual criminal act is not unconstitutional since it is not a special law affecting unequally those similarly situated; it does not place a defendant in double jeopardy and it does not require a defendant to be a witness against himself. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

This section is not invalid as against the objection that it inflicts a double punishment for the same offense, that it inflicts cruel or unusual punishment, or unreasonable punishment, that it denies an accused a fair and impartial trial, or that it imposes a penalty on crimes committed outside a jurisdiction. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

The habitual criminal provisions do not violate due process as inflicting cruel or unusual punishment. *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960), cert. denied, 365 U.S. 830, 81 S. Ct. 718, 5 L. Ed.2d 708 (1961).

Both the United States supreme court and the Colorado supreme court have ruled unequivocally that habitual criminal statutes are constitutional despite contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishments, due process, equal protection, and privileges and immunities. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The equal protection, due process, and cruel, and unusual punishment provisions of the United States constitution are not breached by this section. *People v. Larson*, 194 Colo. 338, 572 P.2d 815 (1977).

Even though a person sentenced to life in prison may be eligible for parole before a person sentenced for a term of not less than 25 years and not more than 50 years under this statute, it does not violate the equal protection clause because the statutory scheme gives the parole board discretionary power to grant parole on the basis of factors other than the length of a prisoner's sentence and this is reasonably related to a legitimate government interest. *People v. Alexander*, 797 P.2d 1250 (Colo. 1990).

The fact that a judge, and not a jury, finds facts that increase a defendant's sentence beyond that authorized by the jury's verdict does not make the habitual criminal act unconstitutional. *People v. Carrasco*, 85 P.3d 580 (Colo. App. 2003); *People v. Benzor*, 100 P.3d 542 (Colo. App. 2004).

The constitutionality of this section is well settled in this state. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Since the habitual criminal act only applies after a defendant is convicted following a criminal trial or plea of guilty, the act is not a bill of attainder. *Garcia v. Zavaras*, 960 P.2d 1191 (Colo. 1998).

Nor does this section constitute cruel and unusual punishment within the meaning of the eighth amendment. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977); *People v. Martinez*, 689 P.2d 653 (Colo. App. 1984); *People v. Wandel*, 713 P.2d 398 (Colo. App. 1985); *People v. Herrera*, 728 P.2d 366 (Colo. App. 1986).

The absence of sentencing discretion, even when coupled with a prescribed life sentence, does not render subsection (2) of this section facially invalid as violative of the prohibition of cruel and unusual punishment in § 20 of art. II, Colo. Const. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

The uniquely grave nature of the death penalty is the wellspring from which flows the constitutional requirement that mitigating factors be considered in sentencing notwithstanding the number or seriousness of a defendant's prior offenses. No such requirement is included within the Colorado Constitution's prohibition of cruel and unusual punishments as applied to the sentencing of habitual criminals. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

Considering the number and severity of offenses, the court of appeals did not err in concluding that petitioner's sentence to life imprisonment with no possibility of parole for 40 years was not cruel and unusual punishment under the eighth amendment. At time of sentencing the petitioner was 48 years old. *Juarez v. People of the State of Colorado*, 855 P.2d 818 (Colo. 1993).

Constitutional protection against double jeopardy applies to defendant prosecuted as habitual criminal. *People v. Quintana*, 634 P.2d 413 (Colo. 1981); *People v. Mason*, 643 P.2d 745 (Colo. 1982).

Use of prior conviction does not constitute double jeopardy. Because the habitual criminal statute does not create new or separate offenses, but rather defines statutes which mandate enhanced or different punishment, the use of a prior conviction as a determinant of status does not constitute double jeopardy. *People v. Anderson*, 43 Colo. App. 178, 605 P.2d 60 (1979).

Neither does prior adjudication as habitual criminal. A second habitual criminal adjudication which resulted in the imposition of a second life sentence before the first such habitual criminal sentence is satisfied does not constitute double jeopardy. *People v. Anderson*, 43 Colo. App. 178, 605 P.2d 60 (1979).

No denial of equal protection in selective use. Absent a showing of discrimination based on race or other arbitrary criteria, the selective use of the habitual criminal act does not deny any defendant equal protection of the laws. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *People v. Renfrow*, 193 Colo. 131, 564 P.2d 411 (1977).

Where statistical data does not substantiate completely arbitrary or discriminatory enforcement of this statute based on invidious classifications, defendant's constitutional challenge to the recidivist charge on grounds of equal protection cannot be upheld. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

In prescribing a specific inflexible sentence to life imprisonment for persons found to be habitual criminals on the basis of three prior felony convictions, while allowing various degrees of flexibility in sentencing other offenders, the legislature has not denied such habitual criminals the equal protection of the laws. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

Nor does this section violate the constitutional prohibition on bills of attainder. *Velarde v. Zavaras*, 960 P.2d 1162 (Colo. 1998).

No sentence is per se constitutional, and habitual criminal statute does not necessarily incorporate proportionality considerations, thus, defendant may have a right to proportionality review in such a case. *People v. Deroulet*, 22 P.3d 939 (Colo. App. 2000), *aff'd*, 48 P.3d 520 (Colo. 2002).

Defendant is entitled to a proportionality review of his sentence imposed under this section, even though the 1993 amendments to this section result in sentences that are arguably more proportional. Any increase in proportionality resulting from the amendments is only with regard to the triggering offense. The underlying offenses are not considered by the statute for proportionality purposes. The court recognized, however, that in almost every case, the abbreviated proportionality review will result in a finding that the sentence is constitutionally proportional, thereby preserving the primacy of the general assembly in crafting sentencing schemes. *People v. Deroulet*, 48 P.3d 520 (Colo. 2002); *People v. Allen*, 111 P.3d 518 (Colo. App. 2004).

An abbreviated proportionality review consists of a comparison of two subparts, the gravity of the offense and the harshness of the penalty, to discern if an inference of disproportionality is raised. *People v. Allen*, 111 P.3d 518 (Colo. App. 2004).

Filing habitual criminal charges improper after defendant prevails in a Crim. P. 35 motion. Where habitual criminal charges were never brought against defendant, notwithstanding the fact that such charges could have been filed under the original information, the filing of

such charges in the event defendant prevailed in his Crim. P. 35 motion would not be the reinstatement of previously dismissed charges, but rather would be the improper filing of new and additional charges in retaliation for defendant's exercise of his right to seek postconviction review. *People v. Ivery*, 44 Colo. App. 511, 615 P.2d 80 (1980).

Filing habitual criminal charges after defendant's successful appeal of conviction was improper where the factual basis for the charges was known to the prosecution from the outset. If the filing were permitted, a defendant's right to be free from apprehension of retaliation by virtue of his having exercised his constitutional right to appeal would be illusory. *People v. Walters*, 802 P.2d 1155 (Colo. App. 1990).

Section does not violate separation of powers. This section does not delegate to prosecutors the power to define criminal conduct, and thus does not run afoul of the constitutional limitations on separation of powers. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

U.S. supreme court decision in *Solem v. Helm* (463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed.2d 637 (1983)), requires consideration of whether the lack of violence in convictions supporting a finding of habitual criminality is proportional to the life sentence imposed. *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984); *Alvarez v. People*, 797 P.2d 37 (Colo. 1990).

Proportionality review under *Solem v. Helm* is not required where a defendant is sentenced to multiple, consecutive terms for multiple offenses and the total exceeds the defendant's anticipated life span. *People v. Bolton*, 859 P.2d 311 (Colo. App. 1993), *overruled in* *Close v. People*, 48 P.3d 528 (Colo. 2002).

Extended proportionality review not required simply because of the imposition of consecutive sentences. When imposing consecutive sentences the court already exercised its discretion, therefore it may be presumed that such court engaged in a consideration of the nature of the offenses similar to that required by an abbreviated proportionality review. *People v. Cabral*, 878 P.2d 1 (Colo. App. 1993).

Abbreviated proportionality review is required when life sentence is imposed under habitual criminal statute. *Alvarez v. People*, 797 P.2d 37 (Colo. 1990); *People v. Cisneros*, 824 P.2d 16 (Colo. App. 1991).

During sentencing, upon request, a defendant is also entitled to an abbreviated proportionality review of the sentence under this section even if the sentence under review is less than a life term. *People v. McNeely*, 68 P.3d 540 (Colo. App. 2002).

Proportionality review is required when a life sentence is imposed under this section even though parole is allowed. *People v. Austin*, 799 P.2d 408 (Colo. App. 1990) (disagreeing with *People v. Herrera* annotated above).

If defendant faced with life sentence without possibility of parole, a more extensive review is required rather than a limited proportionality review to protect the defendant against cruel and unusual punishment. Under such extended proportionality review, the court should be guided by objective criteria including: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *People v. Cisneros*, 824 P.2d 16 (Colo. App. 1991).

Court applied the following *Solem v. Helm* three-prong analysis used to guide courts in proportionality reviews of life sentences under the eighth amendment: (1) The gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *People v. Gaskins*, 923 P.2d 292 (Colo. App. 1996).

Extensive review pursuant to *People v. Cisneros* not required because: (1) Defendant is 48 and although he would be in prison for a minimum of 40 years under this section, there is still a possibility of parole based on mortality tables set out in § 13-25-103, and (2) defendant's criminal record consists of crimes more violent and grave than those in *Cisneros*. *People v. Shackelford*, 851 P.2d 218 (Colo. App. 1992).

When the sentence mandated by the habitual offender statute gives rise to an inference of gross disproportionality, when compared to the predicate offense and prior convictions, an extended review of the sentence is necessary. Two driving offenses do not amount to grave and serious crimes raising a question of disproportionality. *People v. Patnode*, 126 P.3d 249 (Colo. App. 2005).

An abbreviated proportionality review is sufficient when the crimes supporting a habitual criminal sentence include grave or serious offenses and when the defendant will become eligible for parole. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992), cert. denied, 505 U.S. 1213, 112 S. Ct. 3015, 120 L.Ed.2d 888 (1994); *People v. Shackelford*, 851 P.2d 218 (Colo. App. 1992).

In determining whether the crimes involved in a habitual criminal conviction are grave or serious the offenses are to be reviewed in light of the harm caused or threatened to the victim or society, and the culpability of the offender. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992), cert. denied, 505 U.S. 1213, 112 S. Ct. 3015, 120 L.Ed.2d 888 (1994); *Juarez v. People*, 855 P.2d 818 (Colo. 1993).

Violence is a relevant consideration but not the sole criterion by which to evaluate whether defendant's crimes, when examined in combination, are lacking in gravity or se-

riousness. Conviction for crimes involving sale and distribution of heroin and other drugs along with prior convictions for felonies of robbery, theft, and attempted criminal mischief justifies imposition of life sentence under this act and does not violate § 20 of article II of the Colorado Constitution or the eighth amendment to the U.S. Constitution. *People v. Mershon*, 874 P.2d 1025 (Colo. 1994).

Sentence was not disproportionate where one prior felony conviction was for violation of bail bond conditions but the other prior convictions were for serious offenses. *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

There is no inference of gross disproportionality when weighing the predicate convictions of attempted aggravated robbery and second degree burglary against the sentence of 48 years. *People v. Reese*, 155 P.3d 477 (Colo. App. 2006).

Attempted aggravated robbery is a grave or serious offense for purposes of proportionality review. *People v. Reese*, 155 P.3d 477 (Colo. App. 2006).

A court may consider whether a substantial legislative change in penalties during the pendency of the case should be considered in conjunction with a proportionality review. *People v. Penrod*, 892 P.2d 383 (Colo. App. 1994).

A court may consider events that have occurred after defendant committed the offense at issue that may justify a more severe sentence. *People v. Penrod*, 892 P.2d 383 (Colo. App. 1994).

In deciding whether to remand a case to the trial court for an abbreviated proportionality review an appellate court is given wide discretion. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992), cert. denied, 505 U.S. 1213, 112 S. Ct. 3015, 120 L.Ed.2d 888 (1994).

Proportionality review ordinarily should be conducted by trial court in first instance, subject to appellate review. *People v. Austin*, 799 P.2d 408 (Colo. App. 1990).

But neither this section governing sentencing of habitual criminals, nor former § 18-1-105 (now § 18-1.3-401) governing felony sentencing in general, specifically addresses the issue of what sentence may be imposed after a finding by the trial court that the habitual criminal sentence, big or little, would be disproportionate. Therefore, once a finding of disproportionality has been made, a trial court in resentencing should consider all sentencing options otherwise authorized by statute. *People v. Valdez*, 56 P.3d 1148 (Colo. App. 2002) (decided under former law).

In absence of a need for a refined analysis inquiring into the details of the specific offenses or a detailed comparison of sentences imposed, an appellate court is as well positioned as a trial court to conduct a proportionality review, and there is no justification for remand to the trial

court. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992), cert. denied, 505 U.S. 1213, 112 S. Ct. 3015, 120 L.Ed.2d 888 (1994).

Court of appeals was as well positioned as trial court to conduct proportionality review. *Juarez v. People*, 855 P.2d 818 (Colo. 1993).

If the appellate court determines that additional evidence is necessary or desirable, the court should remand for an initial proportionality review by the trial court. *People v. Gaskins*, 825 P.2d 30 (Colo. 1992), cert. denied, 505 U.S. 1213, 112 S. Ct. 3015, 120 L.Ed.2d 888 (1994).

However, proportionality review is not required where sentence was an enhanced term of years and not a life sentence with no possibility of parole. *People v. Herrera*, 728 P.2d 366 (Colo. App. 1986), overruled in *Close v. People*, 48 P.3d 528 (Colo. 2002).

Trial court erred in substituting a 22-year sentence for the 36-year sentence mandated under this section based on an abbreviated proportionality review. Legislatively mandated sentencing schemes are to be given great deference by court engaging in proportionality review. Adjusting a sentence by a small number of years in either direction goes beyond a determination of disproportionality and improperly interferes with the general assembly's role of determining sentencing schemes. *People v. Deroulet*, 48 P.3d 520 (Colo. 2002).

Consecutive life sentences not unconstitutional. The exercise of the trial court's discretion that the defendant should serve several of his life sentences consecutively is not an unconstitutional interference with the duties of the parole board. *People v. Montgomery*, 669 P.2d 1387 (Colo. 1983).

Purpose of this section is to punish more severely those who show a propensity toward repeated criminal conduct. *People v. Jimmy*, 44 Colo. App. 352, 620 P.2d 42 (1980), aff'd, 645 P.2d 262 (Colo. 1982); *People v. District Court*, 711 P.2d 666 (Colo. 1985).

The policy of the habitual criminal statute is to punish repeat offenders. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

The legislative purpose of this section is to punish more severely those who show a propensity toward repeated criminal conduct without regard to an opportunity between convictions for the defendant to reform. *Jimmy v. People*, 645 P.2d 262 (Colo. 1982).

An important rationale for the habitual criminal statute is that enhanced punishment is appropriate when an individual has shown a propensity toward repeated criminal acts. *Jimmy v. People*, 645 P.2d 262 (Colo. 1982).

The deterrent purpose of this section is to put the defendant on notice that future conduct of the same kind will result in more severe penalties. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

Judgment is necessary predicate for sentence enhancement. A plea of guilty may not be used to enhance punishment, for the reason that the conviction process is incomplete. A judgment is a necessary predicate before a conviction may be used for sentence enhancement purposes. *Hafelfinger v. District Court*, 674 P.2d 375 (Colo. 1984).

Enhanced penalty should not be imposed until offender has opportunity to reform because of the salutary discipline from the punishment for the first conviction. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

There is no requirement of a series of warnings and opportunities to reform. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

Ten-year limitation applies to previous convictions. The 10-year limitation of this section applies only to convictions previous to the commission of the offense subject to the habitual criminal penalty enhancement. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

Sentencing is matter reserved for trial judge. The jury's function under this section is to determine how many, if any, prior felony convictions have been suffered by the defendant. Once this determination is made the act of sentencing is a matter reserved for the trial judge acting under applicable statute. *Swift v. People*, 171 Colo. 178, 465 P.2d 391 (1970).

But this section makes mandatory the imposition of a life sentence upon a person who has been convicted for the fourth time of having committed a felony. *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951); *Farrell v. District Court*, 135 Colo. 329, 311 P.2d 410 (1957); *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960), cert. denied, 365 U.S. 830, 81 S. Ct. 718, 5 L. Ed.2d 708 (1961).

Once a defendant is adjudged an habitual criminal, the court is required to impose a life sentence. *People v. Montoya*, 640 P.2d 234 (Colo. App. 1981); *People v. Reyes*, 728 P.2d 349 (Colo. App. 1986).

Sentencing court has no authority to ignore the penalty provisions of this section and to impose sentences below the statutory minimums set by said section. *People v. Montgomery*, 737 P.2d 413 (Colo. 1987).

If a defendant is advised that evidence of prior convictions introduced in the substantive trial can be used only for credibility proposes, no additional advice is needed that such evidence cannot be used as evidence to prove the habitual offender charges. *People v. Windsor*, 876 P.2d 55 (Colo. App. 1993).

The legislature's adoption of procedural safeguards under the Habitual Criminal Act was not intended to modify in any manner the provision of the act which requires imposition of a life sentence where an accused has been found guilty of a felony and the jury also finds that he has been three times previously convicted of

other felonies alleged against him in the indictment or information. *People v. District Court*, 711 P.2d 666 (Colo. 1985).

And a defendant who requested an instruction on a lesser felony offense not included in the offense charged in the information placed himself in the same position as if that offense had originally been included in the charging document, for purposes of sentencing under the Habitual Criminal Act. *People v. District Court*, 711 P.2d 666 (Colo. 1985).

The legislature did not intend to change the effective date of the 1993 amendment to this section in its 1994 amendment, renumbering subsection (1) as subsection (1.5), and intended to maintain the original July 1, 1993, effective date of the renumbered subsection. *People v. Pichon*, 929 P.2d 3 (Colo. App. 1996).

Inasmuch as habitual criminal counts do not constitute "offenses", probable cause need not be established in the preliminary hearing to bind these charges over to the district court. *Maestas v. District Court*, 189 Colo. 443, 541 P.2d 889 (1975).

The required former convictions must be felonies under this section. *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956).

"Felony" defined. The supreme court has expressly recognized § 4 of art. XVIII, Colo. Const., as a definition of the term felony, and that the test by which to determine whether an offense is a felony is by the place of confinement for the prescribed punishment. *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956).

Class 4 felony qualifies under subsection (1). A class 4 felony may be punished by a sentence of eight years, and, as such, qualifies under § 16-13-101 (1) as a felony for which the maximum penalty prescribed by law exceeds five years. *People v. Quintana*, 634 P.2d 413 (Colo. 1981).

Class 6 felony is specifically not included in subsection (1.5) and therefore does not fall within the purview of this section. *People v. Cooper*, 205 P.3d 475 (Colo. App. 2008).

"Convicted" means verdict or plea of guilty. Since the definition of "judgment of conviction" in Crim. P. 32(c) was not in existence at the time the general assembly adopted the habitual criminal act, the general assembly, in employing the words "conviction" and "convicted" in the act, intended to use them in their popular sense, i.e., a verdict of guilty or a plea of guilty. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971); *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

Conviction based upon a plea of nolo contendere is a "conviction" for purposes of enhancing punishment pursuant to this section. *People v. Goodwin*, 197 Colo. 47, 593 P.2d 326 (1979); *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

"Conviction" as used in the habitual offender statute, includes a judgment of conviction entered upon a plea of nolo contendere. *People v. Windsor*, 876 P.2d 55 (Colo. App. 1993).

"Driving under the influence-bodily injury" conviction under California law is not a "drug law conviction" under this section. *Wilczynski v. People*, 891 P.2d 998 (Colo. 1995).

"Driving under the influence-bodily injury" conviction under California law does constitute prior felony conviction under this section. *Wilczynski v. People*, 891 P.2d 998 (Colo. 1995).

Conviction of lesser nonincluded felony. When a guilty verdict to a lesser nonincluded felony is followed by a verdict finding that the defendant has previously been convicted of three prior felonies which were charged against him in separate counts of the information, subsection (2) mandates the imposition of a sentence to life imprisonment. *People v. District Court*, 711 P.2d 666 (Colo. 1985).

The term "first conviction", as used in this section, means punishment for a first conviction under a felony for which defendant is currently charged and convicted. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

Whether conviction results from jury determination of guilt or from a guilty plea is immaterial. *People v. Gimmy*, 44 Colo. App. 352, 620 P.2d 42 (1980), aff'd, 645 P.2d 262 (Colo. 1982).

A predicate conviction under this section may result either from a conviction following trial, or upon entry of a guilty plea. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

Jury verdicts regarding defendant's status as an habitual offender were not unreliable because jury forms failed to require that the jury make findings on all elements of defendant's habitual criminal status for sentencing where defendant did not assert that the jury instructions were incomplete or inaccurate with respect to each of the elements required to be established by this section. *People v. Windsor*, 876 P.2d 55 (Colo. App. 1993).

Even though the jury had not made appropriate findings on defendant's status under the "little" habitual statute, the trial court erred in not considering the range of sentences for habitual offenders under subsection (1). Jurors are not required to make any special findings with respect to each element specified in this section. *People v. Gaskins*, 923 P.2d 292 (Colo. App. 1996).

The wording of the information properly put defendant on notice of the essential elements for habitual criminal sentencing so that defendant could adequately defend himself although the words "conviction" and "judgment" do not appear in the information.

The information itemized defendant's four prior felonies and recited that the defendant had pled guilty or nolo contendere to and been sentenced for each. *People v. Ortega*, 899 P.2d 236 (Colo. App. 1994).

Jury instructions were not defective because jury was not instructed to determine whether previous convictions had occurred within ten years of the commission of the current offense or whether the convictions were for felonies. The dates of the previous offenses were specified in the charges, and the classification of the previous offenses as felonies is a question of law, and not of fact. *People v. Chambers*, 900 P.2d 1249 (Colo. App. 1994).

Prior convictions are considered as aggravating factors for increased punishment. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

What "prior conviction" includes. The general assembly intended the term "prior conviction" to include those judgments of conviction that are on appeal. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

If prior convictions on appeal were not included, many recent felony convictions might be effectively exempted from the operation of this section. This would be clearly inconsistent with the obvious purpose of the statute, which is to punish repeat offenders. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

"Previously convicted" means that the convictions upon which the habitual criminal counts are based must be "previous" to the commission of the present offense. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

Phrase "twice previously convicted" as used in this section refers back to "commission of the said offense". *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

Prior convictions need not be committed sequentially. There is no requirement that each of the crimes on which the habitual criminal charges are based be committed sequentially; in other words, that the second of the predicate crimes be committed after commission and conviction of the first crime, the third be committed after commission and conviction of the second, and so on. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

The habitual criminal statute requires that neither the prior felonies nor the resulting judgments of conviction occur in any particular sequence in relation to each other. *People ex rel. VanMeveren v. District Court*, 643 P.2d 37 (Colo. 1982).

It is the commission of the act which gives rise to the conviction, and not the time when conviction occurs, which controls. *People v. Ramirez*, 652 P.2d 1077 (Colo. App. 1982).

So long as convictions entered prior to commission of pending offense. The determinative consideration is whether judgments of

conviction on the prior felonies had been entered prior to the commission of the substantive offense charged in the pending case. *People ex rel. VanMeveren v. District Court*, 643 P.2d 37 (Colo. 1982).

The court may use two felony convictions that were later reclassified by the legislature after defendant's convictions as misdemeanors for a habitual offender charge. *People v. Patnode*, 126 P.3d 249 (Colo. App. 2005).

Effective date of prior conviction is not the time that a plea of guilty is entered by a defendant, nor when a jury's verdict of guilt is received by the court, nor is it the time a finding of guilt is made by the trial judge in a trial to the court, but rather the time of a prior conviction for the purposes of this section is the date the judgment of conviction is entered in the trial court. *People v. Jacquez*, 196 Colo. 569, 588 P.2d 871 (1979); *People v. Skufca*, 141 P.3d 876 (Colo. App. 2005), rev'd on other grounds, 176 P.3d 83 (Colo. 2008).

Where prior conviction cannot be used for enhancement. Where defendant never admitted his conviction of an earlier offense, and the issue was not submitted to the jury which convicted him of the present substantive offense, that earlier conviction could not be considered by the trial court for purposes of enhancement of sentence under the habitual criminal statute. *Vigil v. People*, 196 Colo. 522, 587 P.2d 1196 (1978).

Where defendant who was subject to sentencing act in an earlier conviction was not properly advised of the penalties under such sentencing act prior to pleading guilty, plea could not be basis for enhancement under habitual criminal statute. *People v. Sutka*, 713 P.2d 1326 (Colo. App. 1985).

Defendant's previous convictions cannot be used for enhancement where the record does not establish that defendant understood the true nature of the charges to which he pled guilty. *Lacy v. People*, 775 P.2d 1 (Colo. 1989).

Prior conviction for felonies in another state held to be invalid for enhancing defendant's sentence under habitual offender statute where there was a history of earlier findings of not guilty by reason of insanity and no subsequent formal finding of sanity. *People v. Blehm*, 791 P.2d 1177 (Colo. App. 1989), aff'd in part and rev'd in part, 817 P.2d 988 (Colo. 1991).

Prior conviction in Colorado by one previously adjudged insane may be valid notwithstanding that he has not been judicially declared to have been restored to sanity. *People v. Blehm*, 791 P.2d 1177 (Colo. App. 1989), aff'd in part and rev'd in part, 817 P.2d 988 (Colo. 1991).

Prior conviction for causing bodily injury while driving under the influence under California statute was not "drug law conviction" under subsection (3) and was counted as prior felony conviction for sentencing pur-

poses under this section. Categorization of driving under the influence as offense in the vehicle code as opposed to offense relating to controlled substances precludes a determination that general assembly intended to consider it a drug law offense. *People v. Wilczynski*, 873 P.2d 10 (Colo. App. 1993).

Prior charges which do not result in convictions are irrelevant, and therefore, should not be admitted in a habitual criminal hearing. *People v. Reed*, 42 Colo. App. 275, 598 P.2d 148 (1979); *People v. Nieto*, 715 P.2d 1262 (Colo. App. 1985).

Admission to documents in a habitual criminal hearing showing prior crimes charged but which did not result in convictions is not reversible error unless prejudice is shown. *People v. Reed*, 42 Colo. App. 275, 598 P.2d 148 (1979); *People v. Nieto*, 715 P.2d 1262 (Colo. App. 1985).

Convictions sustained after subject crime not basis for enhanced penalty. It is improper for the trial court to allow convictions which were sustained after the commission of the subject crime to be the basis for habitual criminal counts. *People v. Nees*, 200 Colo. 392, 615 P.2d 690 (1980).

Convictions on separate charges obtained on the same day. The fact that convictions result from charges separately brought and tried and obtained pursuant to guilty pleas on the same day does not reduce them to one conviction for purposes of this section. *People v. Gimmy*, 44 Colo. App. 352, 620 P.2d 42 (1980), *aff'd*, 645 P.2d 262 (Colo. 1982); *People v. Germany*, 643 P.2d 776 (Colo. App. 1980); *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980); *People v. Hodge*, 644 P.2d 38 (Colo. App. 1981).

Where the charges against the defendants were separately brought and would have been tried separately but for the defendant's decisions to enter guilty pleas, the convictions thereby obtained satisfy the definition of predicate felonies in the habitual criminal statute. *Gimmy v. People*, 645 P.2d 262 (Colo. 1982).

To determine whether two convictions entered on the same date as part of a single plea agreement arose "out of separate and distinct criminal episodes", it is necessary to determine whether the convictions arose from a series of acts arising from the same criminal episode, such as physical acts that are committed simultaneously or in close sequence, that occur in the same place or closely related places, and that form part of a schematic whole. *People v. Jones*, 967 P.2d 166 (Colo. App. 1997).

Convictions may be separate even though sentences concurrent. Separate judgments of convictions may result from the separate charges in question, even though the sentences are made concurrent. *People v. Ybarra*, 652 P.2d 182 (Colo. App. 1982).

A guilty verdict that has withstood a motion for new trial and for which a defendant has been sentenced can be used as a prior conviction for purposes of bringing an habitual criminal charge against a defendant in conjunction with a later felony charge. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

The error, if any, in admitting a questionable federal conviction was harmless because four other previous felonies were proved. *People v. Boehmer*, 872 P.2d 1320 (Colo. App. 1993).

This section embraces every felony committed by a defendant here or in a foreign state, and if a felony in the foreign state, it satisfies the statute. The language of this section refutes the contention that all crimes, wherever committed, and regardless of their grade at the situs of the crime must be proven to be felonies if committed within this state. *Hahn v. People*, 126 Colo. 451, 251 P.2d 316 (1952).

Conviction of a felony in a sister state, even though crime charged is not a felony in Colorado, is sufficient to authorize sentence under this section. A reading of this section admits of no other interpretation. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979).

It makes no difference for the purposes of enhanced punishment under this section that a previously committed crime is not a felony in Colorado if it is a felony where the conviction was had. *People v. Renfrow*, 199 Colo. 101, 605 P.2d 915 (1980).

The time as well as the place of commission of a crime should determine its status as a felony under this section. *People v. Renfrow*, 199 Colo. 101, 605 P.2d 915 (1980).

Focus of this section is on "crime", not conduct, occurring in foreign state. Therefore, the inquiry as to whether a foreign predicate misdemeanor conviction would have been a felony in Colorado is limited to a comparison of the statutes, or, where required, to the operative and material allegations of the charging document. Otherwise the defendant could be subjected to a trial of the foreign matter in the habitual criminal phase at a time and place far removed from the site of the crime. *People v. Nguyen*, 899 P.2d 352 (Colo. App. 1995) (decided under statute as it existed prior to 1994 amendment to subsection (1)).

Allegation and proof necessary to sustain imposition of enhanced penalty under this section focus upon the entry of judgment against a defendant, not on the defendant's plea or a verdict of guilt. Where the prosecutor charged and proved the entry of judgment for three prior convictions, the trial court erred in ruling that the enhanced penalty could not be imposed. *People v. Chavez*, 198 Colo. 309, 599 P.2d 261 (1979).

An authenticated copy of the record of former convictions and judgments is prima facie evidence of the convictions and may be used as evidence in a habitual criminal conviction proceeding. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Discretionary reformatory sentence was conviction of a felony. Conviction of the crime of robbery resulting in a sentence to the reformatory rather than to the penitentiary is nevertheless conviction of a felony within the meaning of this section since sentence could have been to the penitentiary notwithstanding the fact that defendant was under the age of 21 years. *Martinez v. Tinsley*, 142 Colo. 495, 351 P.2d 879 (1960). But see *Smalley v. People*, 134 Colo. 360, 304 P.2d 902 (1956); *Villalon v. People*, 145 Colo. 327, 358 P.2d 1018 (1961) (decided under former statute imposing reformatory sentence as a matter of right).

The trial court's ruling that defendant being under 21 years, convicted of a robbery, and subject to sentence to either the reformatory or the penitentiary was guilty of a felony, was correct and within the purview of this section; it does not offend the provisions of § 4 of art. XVIII, Colo. Const. *Sandoval v. People*, 162 Colo. 416, 426 P.2d 968 (1967).

Conviction in county court not felony. Before a defendant can be adjudged an habitual criminal, he must have had two prior convictions of felony, and a conviction of grand larceny in the county court is not conviction of a felony. *Latham v. People*, 136 Colo. 252, 317 P.2d 894 (1957).

The increased punishment under this statute is not arbitrary because it can only be imposed after the proof of the additional facts of prior convictions. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The recidivist statute does not attempt to resentence a defendant for a prior felony. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

Sentences imposed under habitual criminal statute supersede those statutorily mandated for specific crimes. *People v. Anderson*, 43 Colo. App. 178, 605 P.2d 60 (1979).

Rather than imposing a separate sentence for defendant's status, habitual criminal statutes merely substitute a different and more severe sentencing range than the penalty provided for in the criminal statute or statutes which were violated by defendant and which constitute the underlying offense or offenses. The recidivist statute is aimed at habitual criminals and the punishment is for the new crime only, but is heavier if he is an habitual criminal. *People v. Early*, 692 P.2d 1116 (Colo. App. 1984).

No separate sentence is to be imposed for the habitual criminal adjudication. *People v. Reyes*, 728 P.2d 349 (Colo. App. 1986).

The sentence to be imposed under this section relates only to the enhancement of punishment of the felony for which defendant is currently charged and convicted. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

A convicted defendant is not foreclosed from later challenging the enhanced sentence resulting from the habitual criminal charge if, in fact, a prior conviction is reversed. *People v. District Court*, 192 Colo. 351, 559 P.2d 235 (1977).

In an enhanced sentencing proceeding, the defendant may collaterally attack the constitutional validity of the underlying convictions, but defendant must make a prima facie showing that a prior conviction is invalid in order to challenge the use of that conviction in a later proceeding. *People v. Montoya*, 640 P.2d 234 (Colo. App. 1981); *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

Collateral attacks pursuant to Crim. P. 35(c) on infirmities related to adjudication of habitual criminality under this section should be considered under § 16-5-402 (1), limiting the time within which such attacks must be made. *People v. Hampton*, 876 P.2d 1236 (Colo. 1994).

Whether the previous convictions were constitutionally procured is an issue which may properly be raised in an habitual offender proceeding. *People v. Gonzales*, 38 Colo. App. 522, 565 P.2d 945 (1977).

Prior unconstitutional conviction may not be used. A prior conviction obtained in violation of a constitutional right of the accused cannot be used in a subsequent criminal proceeding to support guilt or to enhance punishment. *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Cisneros*, 665 P.2d 145 (Colo. App. 1983); *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984).

Procedure where prior conviction alleged to have been unconstitutionally obtained. In attacking the constitutional validity of a prior conviction in habitual criminal proceedings, the defendant must make a prima facie showing that the challenged conviction was unconstitutionally obtained. Once a prima facie showing is made, the conviction is not admissible unless the prosecution establishes by a preponderance of the evidence that the conviction was obtained in accordance with the defendant's constitutional rights. *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984); *People v. Wade*, 708 P.2d 1366 (Colo. 1985); *Lacy v. People*, 775 P.2d 1 (Colo. 1989); *People v. Mogul*, 812 P.2d 705 (Colo. App. 1991).

Procedure applied in *People v. Reyes*, 728 P.2d 349 (Colo. App. 1986).

A mere showing of uncertainty about whether the defendant's constitutional rights were fully protected is not sufficient to support vacating an enhanced penalty which was based on a claim that a guilty plea was uncon-

stitutionally obtained. *People v. Ball*, 813 P.2d 759 (Colo. App. 1990).

Collateral estoppel not applicable in context of an habitual criminal proceeding to a trial court ruling which merely excludes evidence concerning defendant's status as an habitual criminal and, thus, district court was not barred from considering validity of a plea advisement that was previously found to be invalid for purpose of sentence enhancement in an habitual criminal proceeding. *Wright v. People*, 690 P.2d 1257 (Colo. 1984).

Prior conviction decreed nullity cannot be reaffirmed by defendant. The defendant cannot "reaffirm" the validity of a prior conviction at an habitual offender hearing when the court of appeals has decreed by final judgment that the prior conviction is a nullity. *People v. Dugger*, 673 P.2d 351 (Colo. 1983).

Proof of habitual criminality through testimonial admissions unconstitutional. Use of defendant's testimonial admissions to prior felony convictions as substantive evidence of his habitual criminality violates due process of law, by unduly burdening defendant's constitutional right to testify in his own defense. *People v. Chavez*, 632 P.2d 574 (Colo. 1981); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984).

The decision in *People v. Chavez*, is to be given retroactive application. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982).

If a defendant's guilty plea in a previous conviction was not voluntary and knowing, it was obtained in violation of due process, and a conviction based thereon cannot be used for the purpose of enhancing the punishment for another offense. *People v. Gonzales*, 38 Colo. App. 522, 565 P.2d 945 (1977).

The admissibility of prior guilty pleas in a habitual criminal hearing turns on whether they meet the constitutional requirements for voluntariness, not whether they satisfy the particular standards of a state's substantive law. *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

Prior convictions held to have been obtained constitutionally. *People v. Chavez*, 650 P.2d 1310 (Colo. App. 1982).

Guilty pleas or pleas of *nolo contendere* which meet the constitutional requirements for voluntariness will be admissible in habitual criminal proceedings even if they do not satisfy more stringent admissibility requirements under another state's substantive law. *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

If evidence is insufficient to prove that two of defendant's three convictions were separate and distinct, defendant may be resentenced under subsection (1.5). *People v. Jones*, 967 P.2d 166 (Colo. App. 1997).

When indigent entitled to transcript of prior proceedings. Although an indigent defendant is entitled to a free transcript of prior proceedings when it is necessary for an effective

defense in an enhanced sentencing proceeding, the defendant must make a showing that the furnishing of the transcripts would not be just a vain and useless gesture. *People v. Montoya*, 640 P.2d 234 (Colo. App. 1981).

Plea of guilty under less severe provisions of section proper. Where a plea of guilty to the substantive charge was made by the defendant with the understanding that the less severe provisions of the habitual criminal act only would be invoked against him, and the trial court approved of such disposition of the case and eliminated from consideration one of the counts of the information, and imposed sentence accordingly, the sentence was valid and a writ of habeas corpus was properly denied. *Martinez v. Tinsley*, 142 Colo. 495, 351 P.2d 879 (1960).

Indeterminate commitment under the sex offenders act was in lieu of prisoner's sentence under the habitual criminal act, and, therefore, the trial court erred in sentencing him to concurrent terms under the respective statutes. *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

Sentence imposed under this section was valid. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958); *Hackett v. Tinsley*, 143 Colo. 203, 352 P.2d 799, cert. denied, 364 U.S. 874, 81 S. Ct. 118, 5 L. Ed. 96 (1960).

Where petitioner's sentence under this section cannot be said to be void, he did not seek modification thereof, and there was no showing that he is presently being illegally incarcerated, a petition for a writ of habeas corpus was properly denied. *Wright v. Tinsley*, 148 Colo. 258, 365 P.2d 691 (1961).

Defendant's sentence under habitual criminal statute to a term of 40 to 50 years was not disproportionate to his conduct or grossly excessive where he had been convicted of burglary and aggravated robbery before his present conviction for first-degree burglary. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

Sentence of 25 years and 4 months is neither cruel or unusual, nor is it disproportionate where defendant was convicted of 3 theft-related felony offenses in 10 years. *People v. Nieto*, 715 P.2d 1262 (Colo. App. 1985).

The requirement in § 16-11-304 for a definite sentence is also a requirement for any increased sentence imposed under § 16-13-101. Thus, it was proper for a trial court to impose a definite sentence. *People v. Chambers*, 749 P.2d 984 (Colo. App. 1987).

Reinstatement of prior felony conviction. Where a prior felony conviction has been dismissed from consideration in habitual criminal proceedings and, without consideration of that conviction, the defendant could not be adjudged an habitual criminal, then it is appropriate that the people be entitled to reinstate that conviction subject to proof of authenticity. *People v. Vigil*, 39 Colo. App. 462, 570 P.2d 13 (1977).

Reinstatement of all charges where defendant was allowed to plead guilty to the wrong habitual criminal charges. Vacating guilty pleas and reinstating all charges, including habitual criminal charges, is appropriate remedy where, as part of a plea agreement to avoid "big" habitual criminal charges, defendant pled guilty to robbery, violent crime, and to two "little" habitual criminal charges. *People v. Martinez*, 751 P.2d 660 (Colo. App. 1987).

Where defendant was convicted of aggravated robbery and was adjudicated a habitual criminal, a subsequent reversal of the adjudication of habitual criminality negated its sentence enhancing effect and required resentencing for the underlying charge since it was not clear from the record that the robbery sentence was imposed independently from the habitual criminal adjudication. When resentencing the trial court could consider all relevant and material factors, including new evidence incorporated in a supplemental presentence report. *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

Mittimus listing "habitual criminal" as crime may be corrected. Where the mittimus erroneously states "habitual criminal" as the crime for which sentence was imposed the only relief to which petitioner is entitled is a correction of the mittimus to conform to the judgment finding him guilty of aggravated robbery, not to a writ of habeas corpus. *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960), cert. denied, 365 U.S. 830, 81 S. Ct. 718, 5 L. Ed.2d 708 (1961).

Habitual criminal act was validly adopted. *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir.), appeal dismissed and cert. denied, 375 U.S. 17, 84 S. Ct. 139, 11 L. Ed.2d 46 (1963).

Out-of-state felonies may be the basis for a habitual criminal count and the people need not allege or prove that the crimes the defendant committed would have been felonies if they had been committed in this state. *People v. Drake*, 785 P.2d 1257 (Colo. 1990); *People v. Wilczynski*, 873 P.2d 10 (Colo. App. 1993); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

Where both the violent crimes statute and the habitual criminal statute apply, the sentencing provisions of both statutes apply and a judge must impose the defendant's sentences to run consecutively. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

The sentencing provisions of this section do not preempt other statutory enhancement provisions. *People v. Perry*, 981 P.2d 667 (Colo. App. 1999).

The provisions of § 18-1-105 (9.7)(a) and (9.7)(b)(XI) which provide that the maximum presumptive range for a class 4 felony shall be increased by two years are not preempted by this section. *People v. Perry*, 981 P.2d 667 (Colo. App. 1999).

Nothing in this section expressly authorizes trial courts, upon a finding of unusual and extenuating circumstances, to modify crime of violence sentences imposed pursuant to § 18-1-105 (9). *People v. Perry*, 981 P.2d 667 (Colo. App. 1999).

If a convicted sex offender is subject to both subsection (1.5) and the provisions of the Colorado Sex Offender Lifetime Supervision Act of 1998, both statutes must be reconciled. In such case, the trial court must impose a prison sentence for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life. *People v. Apodaca*, 58 P.3d 1126 (Colo. App. 2002).

Where the defendant was convicted of "extraordinary risk of harm" crime and adjudicated as a habitual criminal, trial court properly calculated defendant's sentence by increasing the maximum presumptive range sentence pursuant to § 18-1-105 (9.7) and then multiplying it by three pursuant to subsection (1.5). *People v. Hoefer*, 961 P.2d 563 (Colo. App. 1998).

The preemptive scope of the habitual criminal statute does not extend so far as to preclude the mandatory consecutive sentencing requirement for multiple crimes of violence arising out of the same incident. *People v. Pena*, 794 P.2d 1070 (Colo. App. 1990).

The language "three times the maximum of the presumptive range" as used in subsection (1.5) refers only to sentences of less than life imprisonment and thus trial court erred in imposing three terms of life imprisonment without parole for a defendant charged with one count of first degree murder for the killing of a single victim. *People v. Holloway*, 973 P.2d 721 (Colo. App. 1998).

Defendant's drug conviction, as both an habitual criminal under this section and as a special drug offender under a prior version of § 18-18-407, should have resulted in a prison sentence determined by the additional aggravating circumstances of the special drug offender section. By using a formula in the special drug offender section that increases the sentence length without reclassifying the offense for which it is imposed, the legislature requires the application of two different sentence enhancing provisions when the special offender is also an habitual criminal, independently mandating sentence enhancement for different aggravating circumstances. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

Neither this section nor § 18-18-407 purports to limit the effect of additional aggravation or to place an upper limit on the ultimate sentence for a defendant to whom its provisions apply. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

Statute as basis for jurisdiction. See *Munsell v. People*, 122 Colo. 402, 222 P.2d 615 (1950); *Hackett v. People*, 158 Colo. 304, 406 P.2d 331 (1965); *Silva v. People*, 170 Colo. 152, 459 P.2d 285 (1969); *Mingo v. People*, 171 Colo. 474, 468 P.2d 849 (1970); *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973).

The presumptive range for a class 6 felony could not be doubled and then the sentence quadrupled because the defendant was also considered an habitual offender. The defendant was convicted of stalking while the defendant was on parole from prison. The stalking offense qualified the defendant as an habitual offender. Stalking is a class 6 felony. Section 18-1-105 requires the doubling of the presumptive range of the conviction for offenses that occur while on parole. Subsection (2) requires the quadrupling of offenses committed by habitual offenders. Subsection (2), however, does not authorize the quadrupling of a sentence that is already increased. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

Court required to apply both § 18-18-405 and this section. A second violation of § 18-18-405 for unlawful distribution and sale of a schedule II controlled substance increases the offense to a class 2 felony. If defendant has been convicted of three previous felonies, subsection (2) requires court to sentence defendant to four times the maximum of the presumptive range for a class 2 felony. *People v. Cordova*, 199 P.3d 1 (Colo. App. 2007).

18-1.3-802. Evidence of former convictions - identity. On any trial under the provisions of this section and sections 18-1.3-801 and 18-1.3-803, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the party indicted or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. Identification photographs and fingerprints that are part of the record of such former convictions and judgments, or are part of the records kept at the place of such party's incarceration or by any custodian authorized by the executive director of the department of corrections after sentencing for any of such former convictions and judgments, shall be prima facie evidence of the identity of such party and may be used in evidence against him or her.

Source: L. 2002: Entire article added with relocations, p. 1428, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-102 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law 215 (1983).

Annotator's note. Since § 18-1.3-802 is similar to § 16-13-102 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-13-2, C.R.S. 1963, § 39-13-2, CRS 53, and CSA, C. 48, § 555(2),

Applied in *People v. Enlow*, 135 Colo. 249, 310 P.2d 539 (1957); *Hatch v. Tinsley*, 143 Colo. 170, 352 P.2d 670 (1960); *Jaramillo v. District Court*, 173 Colo. 459, 480 P.2d 841 (1971); *People v. Marquez*, 190 Colo. 255, 546 P.2d 482 (1976); *People v. Keelin*, 39 Colo. App. 124, 565 P.2d 957 (1977); *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978); *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978); *Hampton v. District Court*, 199 Colo. 104, 605 P.2d 54 (1980); *People v. Watkins*, 200 Colo. 163, 613 P.2d 633 (1980); *People v. Self*, 200 Colo. 406, 615 P.2d 693 (1980); *People v. McKnight*, 200 Colo. 486, 617 P.2d 1178 (1980); *People v. Cabral*, 629 P.2d 575 (Colo. 1981); *People v. Shaver*, 630 P.2d 600 (Colo. 1981); *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Hotopp*, 632 P.2d 600 (Colo. 1981); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Wiedemer*, 641 P.2d 289 (Colo. App. 1981); *Massey v. People*, 649 P.2d 1070 (Colo. 1982); *People v. Hale*, 654 P.2d 849 (Colo. 1982); *People v. Leonard*, 673 P.2d 37 (Colo. 1983); *People ex rel. Faulk v. District Court ex rel. County of Fremont*, 673 P.2d 998 (Colo. 1983); *People v. Akers*, 746 P.2d 1381 (Colo. App. 1987); *People v. Daniels*, 973 P.2d 641 (Colo. App. 1998); *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd on other grounds*, 2 P.3d 1283 (Colo. 2000).

relevant cases construing those provisions have been included in the annotations to this section.

An authenticated copy of the record of conviction in a court of record is required under this section to constitute prima facie evidence of a former conviction. Certified copies of the record of former convictions are not sufficient. *Coppinger v. People*, 152 Colo. 9, 380

P.2d 19, cert. denied, 375 U.S. 923, 84 S. Ct. 270, 11 L. Ed.2d 167 (1963).

Certified copies of public records provide proper authentication of former convictions and judgments for purposes of this section. *People v. Frost*, 5 P.3d 317 (Colo. App. 1999).

Authentication requirement satisfied.

There is no definition as to what is intended by the term "duly authenticated". However, certified copies of final judgments entered in three separate proceedings in each of which the defendant was convicted and sentenced to the penitentiary of a sister state, each being certified as a full, true, and complete copy of the judgment and sentence of the court and authenticated by the clerk of that court under his signature and the seal thereof, accompanied by the certificate of the judge of the court to the effect that the individual who signed as clerk is the clerk of the court; that he is the custodian of the records and papers thereof; that the said attestation is in due form and according to law; and then the further certificate by the clerk that the judge who so certified is a duly elected, commissioned, and qualified judge of said circuit court, all of said certifications being impressed with the seal of the court, are amply and properly certified public records and come within all definitions of due authentication. *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

In addition to certified copies of the record of former convictions and judgments of a court of record, certificates of authenticity by the judge of the court that the clerk who certified the records is in fact the clerk of the court and is the custodian of the records and papers thereof, and that his attestation is in due form and according to law, and the additional certificate by the clerk that the judge who so certified is the duly elected, commissioned and qualified judge of said court are essential before the documents may be received under the statute. *Coppinger v. People*, 152 Colo. 9, 380 P.2d 19, cert. denied, 375 U.S. 923, 84 S. Ct. 270, 11 L. Ed.2d 167 (1963).

Sufficiency of documents relating to conviction. The habitual criminal statute requires "a duly authenticated copy of the record of former convictions and judgments". Thus, certified copies of public records provide proper authentication under this section. *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984); *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998); *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001).

Contrary to defendant's contentions, there is no requirement of a reciprocal attestation of the judge and the clerk on the documents. *People v. Johnson*, 699 P.2d 5 (Colo. App. 1984); *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998).

Additionally, documents that are admissible under certain rules of evidence, for example, C.R.E. 901 (b)(7), which governs public re-

ords, and C.R.E. 902 (1) and (4), which covers self-authenticating documents, may also be used to support a habitual criminal conviction under this section. *People v. Bielecki*, 964 P.2d 598 (Colo. App. 1998); *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003); *People v. Gregg*, __ P.3d __ (Colo. App. 2011).

Nothing in the statute requires that the copies to be introduced come directly and exclusively from the particular courts of record; hence, department of corrections' records of prior convictions, certified by the records' custodian, were properly admitted. *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), aff'd on other grounds, 2 P.3d 1283 (Colo. 2000); *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001); *People v. Martinez*, 51 P.3d 1029 (Colo. App. 2001), aff'd in part and rev'd in part on other grounds, 69 P.3d 1029 (Colo. 2003).

Nor is there a requirement that each and every signature contained with an otherwise properly authenticated set of public documents be certified or embossed with a seal. *People v. Shepherd*, 43 P.3d 693 (Colo. App. 2001).

Certified court records of convictions, certified department of corrections records, testimony from prosecutor's investigator and detention facility employee, detention facility records, and testimony from fingerprint expert constituted sufficient evidence to establish a chain of identity proving beyond a reasonable doubt that defendant was the person convicted in the prior cases on which the habitual criminal counts were based. *People v. Martinez*, 83 P.3d 1174 (Colo. App. 2003).

Evidence in a packet pertaining to one conviction admitted under this section that also is evidence of another separate and distinct conviction is admissible to prove the other separate and distinct conviction for habitual offender purposes. *People v. Tafoya*, 985 P.2d 26 (Colo. App. 1999).

Affirmative waiver of right to counsel in record of prior conviction. Although waiver of the right to counsel may not be presumed from a silent record, when the record of a prior conviction affirmatively reflects such waiver, the defendant must make a prima facie showing that the waiver was ineffective before the prosecution must introduce additional evidence to prove the validity of the waiver. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981).

When facing an habitual offender charge, a defendant is entitled to advance notice that admissions of prior felonies may not be used in the habitual offender phase of the trial as substantive evidence. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982); *People v. Turley*, 870 P.2d 503 (Colo. App. 1993).

When an habitual offender count is charged, an advisement is sufficient if it informs the defendant that admissions concerning prior convictions may be considered on the issue

of credibility and for no other reason. *People v. Clouse*, 859 P.2d 228 (Colo. App. 1992); *People v. Turley*, 870 P.2d 498 (Colo. App. 1993).

Record of defendant's conviction of forgery maintained by the Kansas bureau of investigation was sufficient evidence under this section as to a forgery count where the record contained defendant's name, physical descrip-

tion, and federal bureau of investigation number. *People v. Deskins*, 904 P.2d 1358 (Colo. App. 1995), *aff'd in part and rev'd in part* on other grounds, 927 P.2d 368 (Colo. 1996).

Applied in *Silva v. People*, 170 Colo. 152, 459 P.2d 285 (1969); *People v. Weber*, 199 Colo. 25, 604 P.2d 30 (1979); *Ramirez v. People*, 682 P.2d 1181 (Colo. 1984).

18-1.3-803. Verdict of jury. (1) If the allegation of previous convictions of other felony offenses is included in an indictment or information and if a verdict of guilty of the substantive offense with which the defendant is charged is returned, the court shall conduct a separate sentencing hearing to determine whether or not the defendant has suffered such previous felony convictions. As soon as practicable, the hearing shall be conducted by the judge who presided at trial or before whom the guilty plea was entered or a replacement for said judge in the event he or she dies, resigns, is incapacitated, or is otherwise disqualified as provided in section 16-6-201, C.R.S.

(2) An information or indictment seeking the increased penalties authorized by section 18-1.3-801 shall identify by separate counts each alleged former conviction and shall allege that the defendant on a date and at a place specified was convicted of a specific felony. If any such conviction was had outside this state, the information or indictment shall allege that the offense, if committed in this state, would be a felony.

(3) Upon arraignment of the defendant, such defendant shall be required to admit or deny that such defendant has been previously convicted of the crimes identified in the information or indictment. If the defendant refuses to admit or deny the previous convictions, such refusal shall be treated as a denial by such defendant that the defendant has been convicted as alleged. If the defendant admits to having been convicted as alleged in any count charging a previous conviction, no proof of such previous conviction is required. Such admission shall constitute conclusive proof in determining whether the defendant has been previously convicted of an alleged felony and the court shall sentence the defendant in accordance with section 18-1.3-801.

(4) If the defendant denies that he or she has been previously convicted as alleged in any count of an information or indictment, the trial judge, or a replacement judge as provided in subsection (1) of this section, shall determine by separate hearing and verdict whether the defendant has been convicted as alleged. The procedure in any case in which the defendant does not become a witness in his or her own behalf upon the trial of the substantive offense shall be as follows:

(a) The jury shall render a verdict upon the issue of the defendant's guilt or innocence of the substantive offense charged;

(b) If the verdict is that the defendant is guilty of the substantive offense charged, the trial judge, or a replacement judge as provided in subsection (1) of this section, shall proceed to try the issues of whether the defendant has been previously convicted as alleged. The prosecuting attorney has the burden of proving beyond a reasonable doubt that the defendant has been previously convicted as alleged.

(5) (a) If, upon the trial of the issues upon the substantive offense charged, the defendant testifies in his or her own defense and denies that he or she has been previously convicted as alleged, the prosecuting attorney on rebuttal, may present all evidence relevant to the issues of previous convictions for the sole purpose of impeachment of the defendant's credibility, subject to the rules governing admission of evidence at criminal trials.

(b) If, upon the trial of the issues upon the substantive offense charged, the defendant testifies in his or her own defense and, after having denied the previous conviction under subsection (3) of this section, admits that he or she has been previously convicted as alleged, the trial judge, or a replacement judge as provided in subsection (1) of this section, shall, in any sentencing hearing, consider any admissions of prior convictions elicited from the defendant in connection with his or her testimony on the substantive offense only as they affect the defendant's credibility. In any sentencing hearing, the prosecution shall be required to meet its burden of proving beyond a reasonable doubt the defendant's prior convictions by evidence independent of the defendant's testimony.

(6) If the prosecuting attorney does not have any information indicating that the defendant has been previously convicted of a felony prior to the time a verdict of guilty is rendered on a felony charge and if thereafter the prosecuting attorney learns of the felony conviction prior to the time that sentence is pronounced by the court, he or she may file a new information in which it shall be alleged in separate counts that the defendant has been convicted of the particular offense upon which judgment has not been entered and that prior thereto at a specified date and place the defendant has been convicted of a felony warranting application of increased penalties authorized in this section and sections 18-1.3-801 and 18-1.3-802. The defendant shall be arraigned upon the new information, and, if the defendant denies the previous conviction, the trial judge, or a replacement judge as provided in subsection (1) of this section, shall try the issue prior to imposition of sentence.

Source: L. 2002: Entire article added with relocations, p. 1428, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-103 as it existed prior to 2002.

ANNOTATION

- I. General Consideration.
- II. Procedure and Evidence.
- III. Verdict of Jury.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Recent Judicial Modification of Habitual Criminal Act", see 23 Dicta 84 (1946). For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For article, "Prosecution of Habitual Criminals", see 27 Dicta 376 (1950). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953). For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law. 215 (1983).

Annotator's note. Since § 18-1.3-803 is similar to § 16-13-103 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-13-3, C.R.S. 1963, § 39-13-3, CRS 53, CSA, C. 48, § 555(3), and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section does not restrict § 16-11-101. Section 16-11-101 contains no directive requiring that procedures similar to those of this section be followed. The general assembly's decision to enact § 16-11-101 without procedures similar to this section indicates its intent not to conform § 16-11-101 to the requirements of this section even though it had the right to do so. *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978).

Conviction based upon plea of nolo contendere is "conviction" for purposes of enhancing punishment pursuant to this section. *People v. Goodwin*, 197 Colo. 47, 593 P.2d 326 (1979).

Both statutory and decisional law served to nullify the effect of the court of appeals' re-

versal of the trial court's dismissal of the habitual criminal charge against defendant and remand to retry defendant as a habitual criminal, inasmuch as settled law prohibits a retrial on that charge. *Smith v. People*, 872 P.2d 685 (Colo. 1994).

The three findings for habitual criminal sentencing are not in addition to the "fact" of the prior convictions. Therefore, the court may find that the prior crimes were separately brought and tried, that they arose out of separate and distinct criminal episodes, and that the accused was the person named in each prior conviction without violating the principle in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Nunn*, 148 P.3d 222 (Colo. App. 2006).

Applied in *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

II. PROCEDURE AND EVIDENCE.

Court permission to file an information under the habitual criminal act is not required. *People v. District Court*, 93 Colo. 314, 25 P.2d 738 (1933).

Purpose of bifurcated trial and separate verdict provisions. The bifurcated trial and separate verdict provisions are manifestations of legislative intent to require that an adjudication of habitual criminality be made only in accordance with the same procedural and constitutional safeguards traditionally associated with a trial on guilt or innocence. *People v. Quintana*, 634 P.2d 413 (Colo. 1981).

Because of the special nature of the habitual criminal adjudication process, any waiver of the jury trial guaranteed in habitual criminal adjudications must be governed by the same constitutional principles associated with a waiver of

the right to a jury trial on felony criminal charges. *Moore v. People*, 707 P.2d 990 (Colo. 1985).

And purpose of requiring proof of prior conviction beyond reasonable doubt. The statutory requirement of proof beyond a reasonable doubt manifests a deliberate legislative decision to impose on the state, rather than the defendant, the risk of an erroneous decision as to the prior conviction counts. *People v. Quintana*, 634 P.2d 413 (Colo. 1981).

Statutory procedures mandate bifurcated trial to obviate prejudicial effect of prior convictions on the trial of the substantive offense. *People v. Lucero*, 200 Colo. 335, 615 P.2d 660 (1980).

Burden of proof as to constitutionality of prior conviction. Upon challenging the validity of the prior conviction, the defendant's burden is to make a prima facie showing that the challenged conviction was unconstitutionally obtained; when such showing is made, the conviction is not admissible unless the prosecution establishes, by a preponderance of evidence, that the conviction was obtained in accordance with the defendant's constitutional rights. *People v. Quintana*, 634 P.2d 413 (Colo. 1981).

Because there is no longer a statutory right to a jury determination of habitual criminal status, and because defendant's admissions to prior felony convictions act as conclusive proof of the prior counts, any error by the trial court in failing to obtain from defendant an explicit personal waiver of rights was harmless beyond a reasonable doubt. *People v. Deroulet*, 22 P.3d 939 (Colo. App. 2000), rev'd on other grounds, 48 P.3d 520 (Colo. 2002).

Information alleging previous convictions in foreign state held sufficient. *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947); *People v. Swain*, 43 Colo. App. 343, 607 P.2d 396 (1979).

Where information fails to allege that out-of-state convictions would be felonies if committed in Colorado, such failure does not warrant reversal where it causes no prejudice to defendant. *People v. Weighard*, 709 P.2d 81 (Colo. App. 1985); *People v. Drake*, 785 P.2d 1257 (Colo. 1990).

When a defendant is arraigned, he can admit a previous conviction or deny his identity. *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948).

Where defendant enters guilty plea, proof of prior convictions is not required. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

Where it was held that the plea of defendant to the habitual criminal counts of an information was in effect a plea of guilty, it followed that defendant pleaded guilty to every fact averred in the counts, and there was nothing requiring proof of the things admitted by such plea. *Hahn v. People*, 126 Colo. 451, 251 P.2d 316 (1952).

What would or would not constitute competent evidence to establish prima facie proof of former felony convictions under this section is not material where a defendant enters pleas of guilty to charges of such former convictions. *Vigil v. People*, 137 Colo. 161, 322 P.2d 320 (1958).

Likewise, admissions of defendant dispense with need for other proof. In a prosecution under this section prior convictions of felonies, established by the admissions of the accused on the witness stand, relieve the prosecution of the necessity of other proof thereof. *Hackett v. Tinsley*, 143 Colo. 203, 352 P.2d 799, cert. denied, 364 U.S. 874, 81 S. Ct. 118, 5 L.Ed.2d 96 (1960), overruled, *People v. Chavez*, 621 P.2d 1362 (Colo.), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L.Ed.2d 398 (1981).

Use of defendant's admission of prior convictions. The impeachment use of an admission of prior convictions elicited from a defendant who chooses to testify is permissible in the trial of the substantive offense underlying a habitual criminal charge; however, the substantive use of that same evidence to relieve the prosecution of its statutory and constitutional burden of proving the elements of a separate status, habitual criminality, by introducing evidence independent of the defendant's testimony such as duly authenticated records of a defendant's prior convictions, impermissibly burdens the exercise of a defendant's right to testify in his own behalf. *People v. Chavez*, 621 P.2d 1362 (Colo.), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L.Ed.2d 398 (1981).

Trial court's ruling that evidence of the defendant's prior convictions elicited during his trial on the substantive charges, would be admissible for substantive purposes in the habitual criminal proceeding was an error which its "bifurcation" of the jury's deliberations failed to remedy. *People v. Chavez*, 621 P.2d 1362 (Colo.), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L.Ed.2d 398 (1981).

Retroactive application. The decision in *People v. Chavez* is to be given retroactive application. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982).

This section addresses the defendant's testimony at the trial phase and the permissible use thereof by acknowledging that, should the defendant choose to testify during trial, the prosecution may confront the defendant for the sole purpose of impeachment of the defendant's credibility, but by also making clear that a defendant's admissions during the trial phase are not conclusive proof of the existence of prior convictions. *People v. Ziglar*, 45 P.3d 1266 (Colo. 2002).

Because prior felony evidence is relevant to habitual criminal proceedings, when a defendant testifies during the sentencing phase, the judge may consider admissions elicited at that

time as substantive evidence; while such admissions are not "conclusive proof", they are some evidence that those felonies exist. *People v. Ziglar*, 45 P.3d 1266 (Colo. 2002).

Admission of identity as to some previous convictions is not general plea of guilty to all. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947).

Effect on right to testify. The right of a defendant charged with habitual offender counts to testify is impermissibly burdened by the threat of impeachment by means of prior conviction without procedural protections requiring independent proof of the habitual offender allegations. The defendant is constitutionally entitled to advance notice that the jury would be specifically instructed to consider evidence of his prior convictions only on the issue of his credibility, and that the prosecution would still have the burden of proving his prior convictions by independent evidence at the habitual offender stage of the trial. *People v. Tafoya*, 654 P.2d 1342 (Colo. App. 1982).

Statute does not explicitly delineate procedures where defendant admits convictions. The habitual criminal statute does not explicitly delineate the procedures to be followed at trial if the defendant takes the witness stand and admits that he has been convicted previously as alleged. *People v. Chavez*, 621 P.2d 1362 (Colo.), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L.Ed.2d 398 (1981).

Duty of state to prove disputed identity. Where defendant denied his identity at arraignment under this section, it was incumbent upon the people to prove his identity and the previous convictions, and it became the statutory duty of the jury to find whether or not he has suffered such previous convictions. *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948).

The state has the burden of proving the prior conviction of accused and establishing his identity as the person previously convicted. *People v. Wolff*, 111 Colo. 46, 137 P.2d 693 (1943); *O'Day v. People*, 114 Colo. 373, 166 P.2d 789 (1946).

And identity must be proved with particularity. This section requires that where the defendant denies his identity as the person previously convicted, such fact is to be proved with particularity. The cases have consistently required strict proof. *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

Evidence inadequate to establish identity. *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

Trial court may not preempt defendant's right to jury trial. The trial court is without authority to preempt a defendant's right to a jury trial on the habitual criminal counts solely on the basis of the defendant's testimony given in defense of the substantive charge. *People v. Mason*, 643 P.2d 745 (Colo. 1982).

Retroactive application of the rule requiring a jury determination of habitual criminal charges was denied because of the adverse impact such application would have on the administration of justice, and because the reliability of the inquiry into the truth of the defendant's convictions would not have been significantly enhanced by submission of the issue to the jury. *People v. Moore*, 707 P.2d 990 (Colo. 1985).

The language contained in paragraph (b) of subsection (5) referencing testimony relates entirely to the defendant's testimony elicited during the trial phase. *People v. Ziglar*, 45 P.3d 1266 (Colo. 2002).

Accused's testimony on own behalf merges trial of crime and former convictions. Where a defendant testifies in his own behalf, or where evidence of former convictions is introduced in impeachment, the question of former convictions is thus opened for consideration and resolution, all the facts concerning prior convictions become admissible, and the main charge may then be submitted and disposed of without separation. *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958); *People v. Trujillo*, 40 Colo. App. 220, 577 P.2d 297 (1977).

When a defendant, having denied at arraignment the alleged prior convictions supporting an habitual criminal determination, elects to testify at trial and admits the charged convictions, the habitual criminal allegations may be submitted to the jury along with charges of the substantive offense. *People v. Trujillo*, 40 Colo. App. 220, 577 P.2d 297 (1977).

And permits cross-examination of accused on counts of prior convictions. In a criminal prosecution where an information contains counts under the habitual criminal act denied by defendant, and the prosecution offers evidence of the substantive offense only, if then the defendant voluntarily takes the witness stand to testify in his own behalf it is not error to require him upon cross-examination to testify to facts pertinent to the charge of previous felony convictions. *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958).

But refusal to take stand bars such proof at trial of crime. Under provisions of the witness statute, it is defendant's right and privilege to refuse to take the witness stand, and in that event a district attorney cannot offer evidence on the issue of previous convictions until the jury has determined the question of his guilt upon the main or substantive offense. *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958).

Right of defendant to be advised of consequences of guilty plea sufficiently protected. *Glass v. People*, 127 Colo. 210, 255 P.2d 738 (1953).

Admission of exhibits as evidence of prior conviction held not prejudicial. Where three separate previous felony convictions of the defendant were clearly established by competent

evidence and separate verdicts to that effect were returned by the jury, and these verdicts were in addition to one finding that the defendant had been convicted of a felony in Missouri, sentence of life imprisonment would be mandatory under the three verdicts supported by competent evidence, and defendant was not prejudiced by admitting certain exhibits as evidence of the alleged Missouri conviction. *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951).

Admission into evidence of offenses not alleged as basis of habitual criminality during the second phase of a bifurcated trial constituted reversible error. *People v. Lucero*, 200 Colo. 335, 615 P.2d 660 (1980).

Where defendant withdrew pretrial motion for continuance to preserve his speedy trial rights, court did not abuse its discretion in denying post-trial motion for continuance in order to hold a habitual criminal hearing as soon as practicable under subsection (1) even though defense counsel consequently had insufficient time to investigate the validity of the defendant's prior convictions. *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd* on other grounds, 2 P.3d 1283 (Colo. 2000).

Subsection (1) clearly and unambiguously states that the habitual criminal hearing shall be conducted by the judge who presided at the trial, subject to four stated exceptions. Thus, it was reversible error for another judge to handle the habitual criminal hearing when the court merely found that the trial judge was unavailable. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

This section does not allow a prosecutor, for good cause or otherwise, to add known habitual criminal counts after a guilty plea has been accepted. *People v. Rieger*, 128 P.3d 295 (Colo. App. 2005).

Trial court misinterpreted plain language of subsection (6) when it allowed prosecutor to file two habitual criminal counts against defendant after defendant had pled guilty, despite prosecutor's prior knowledge of the convictions. *People v. Rieger*, 128 P.3d 295 (Colo. App. 2005).

III. VERDICT OF JURY.

Jury determines identity on counts of former convictions, not guilt. Proceedings before the jury on the habitual criminal counts are not in determination of whether defendant is or is not guilty of the crime, but go only to issues pertaining to identity of the defendant as being the individual named in such count as the one who was previously convicted of a felony. *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

Under the habitual criminal act, it is the jury's function to determine whether the defendant has been previously convicted. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

Defendant has a limited right to a jury trial to determine identity; all other questions relating to the habitual criminal statute are matters of law for the court. Once the jury found beyond a reasonable doubt that defendant was the person convicted of three prior felonies, the defendant was not entitled to have any other issues determined by the court. *People v. Jones*, 967 P.2d 166 (Colo. App. 1997) (decided under law in effect prior to 1995 amendments).

A defendant does not have the right to a jury determination of habitual criminality under the Colorado Constitution or the sixth amendment, therefore the court's determination of whether the defendant has suffered previous felony convictions is not a violation of a defendant's constitutional rights. *People v. Edwards*, 971 P.2d 1080 (Colo. App. 1998); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

The determination of habitual criminality is covered under the prior conviction exception and is exempt from the constitutional jury requirement. *People v. Felder*, 129 P.3d 1072 (Colo. App. 2005).

The issues in the habitual criminal counts are tried by the same jury immediately following the determination of the substantive charge, and they shall forthwith proceed to try those issues without being resworn. This definitely precludes any change in the personnel of the jury. *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951); *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951); *Smith v. People*, 872 P.2d 685 (Colo. 1994).

No error is committed by a trial court in denying peremptory challenges to jurors made by defendant's counsel after the receipt of verdicts determining the guilt of defendant upon the substantive offenses charged against him and before the presentation of evidence on the habitual criminal counts in the information. *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951); *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

The habitual criminal act indicates clearly that the same jury must be utilized for both segments of the prosecution. *Quintana v. People*, 169 Colo. 295, 455 P.2d 210 (1969).

Same jury must determine guilt on both substantive and prior offenses. Except when the defendant admits his previous conviction of a crime alleged in the habitual criminal count, the jury which determines his guilt on the substantive offense must forthwith determine that he was the person convicted of the alleged prior crime. *Vigil v. People*, 196 Colo. 522, 587 P.2d 1196 (1978); *Smith v. People*, 872 P.2d 685 (Colo. 1994).

Under plain language of § 16-13-103 (4)(a) and (4)(b), a defendant may not try to court issue of habitual criminal status once jury has convicted defendant of underlying offense. Absent showing of due process violation, jury must

decide habitual criminal status. If defendant waives right to jury trial of underlying offense, court determines habitual criminal status of defendant. *People v. Clouse*, 859 P.2d 228 (Colo. App. 1992).

Subsections (1) and (3), by their terms, plainly establish that the jury empaneled to try the substantive offense charged shall decide whether a defendant is adjudicated a habitual criminal, and the same jury which determines a defendant's guilt on the pending substantive offense must also resolve the validity of the habitual criminal charge. *Smith v. People*, 872 P.2d 685 (Colo. 1994).

Same-jury requirement is constitutional. Under the habitual criminal statute, the same jury which returns a guilty verdict on the underlying offense must then decide whether the defendant committed the necessary prior crimes to be adjudged an habitual criminal. Despite this "same-jury" requirement in this section, the defendant can have an impartial jury during the habitual criminal sentencing hearing, as guaranteed by §§ 16 and 25 of art. II, Colo. Const. *People ex rel. Fault v. District Court ex rel. County of Fremont*, 673 P.2d 998 (Colo. 1983).

Prior convictions must be submitted to the jury separately and separate verdicts must be returned by the jury as to each prior conviction. *Coppinger v. People*, 152 Colo. 9, 380 P.2d 19, cert. denied, 375 U.S. 923, 84 S. Ct. 270, 11 L.Ed.2d 167 (1963).

The jury should not be required to find in one form of verdict that the accused was the same person named in both alleged previous convictions; they should have been required to make a determination separately as to each of the two former convictions, because a negative finding as to one count would have rendered the determination a nullity. *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961).

Whether previous convictions were constitutionally procured involves a question of law for the court. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

Prior conviction valid despite invalid sentence. Where one of the previous convictions upon which an habitual criminal conviction was predicated had taken place in New Mexico and it appeared that the defendant was represented by counsel at all stages except sentencing in that proceeding, it may be that his constitutional rights were violated by reason of the absence of counsel at sentencing, but any violation would relate only to that sentence, and his remedy would therefore lie in New Mexico. The punishment as an habitual criminal is based upon prior convictions, and the amount or validity of sentence under a valid conviction is immaterial. *Swift v. People*, 174 Colo. 259, 488 P.2d 80 (1971).

Informing jury that penalty is automatically life imprisonment. Where defendant is an habitual criminal and the habitual criminal act is invoked by the people, the court has discretion to refuse the defendant's attorney permission to inform the jury on voir dire that penalty, if defendant is convicted, is automatically life imprisonment. *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948).

It was not reversible error for same jury to determine identity of all defendants on habitual criminal counts, notwithstanding separation on these issues. *Brown v. People*, 124 Colo. 412, 238 P.2d 847 (1951).

Verdict forms were adequate to demonstrate that the jury unanimously agreed that defendant was the same person identified in prosecution documents as having been convicted previously of several felonies. *People v. Romero*, 767 P.2d 782 (Colo. App. 1988).

Even where the defense counsel does not object to the court's finding that the defendant was an habitual criminal without a separate sentencing hearing, such a finding is reversed because the waiver of such an additional hearing must be personally made by the defendant and not his attorney. *People v. Killpack*, 793 P.2d 642 (Colo. App. 1990).

Defects in the information and the verdict form concerning the correct file number for the previous conviction were defects of form rather than substance. Such defects do not require reversal where the defendant was not prejudiced by the discrepancy in file numbers. The court found sufficient evidence was presented whereby the jury could find beyond a reasonable doubt that the defendant was previously convicted of felony theft. *People v. Young*, 923 P.2d 145 (Colo. App. 1995).

Also, an inaccuracy or discrepancy in the date of the prior conviction does not mandate dismissal if the defendant was not prejudiced thereby. Because both the incorrect and the correct dates were within ten years prior to commission of the substantive offense and a reasonable jury could find that defendant's identity was established beyond a reasonable doubt as to the prior convictions, the mistake did not affect defendant's substantive rights. *People v. Young*, 923 P.2d 145 (Colo. App. 1995).

For purposes of this section, two prior convictions will only be considered as one conviction if they arose from the same criminal episode. Even though two prior convictions were entered on the same day, they do not count as one conviction because they were the result of separate and distinct criminal episodes. *People v. Young*, 923 P.2d 145 (Colo. App. 1995).

Section 18-3-412 specifically incorporates the procedures of this section. *People v. Harper*, 796 P.2d 4 (Colo. App. 1990).

Convictions must be set forth specifically in the complaint or information, and, if the de-

fendant pleads not guilty to these counts, the validity of the previous convictions must be proven beyond a reasonable doubt. People v. Harper, 796 P.2d 4 (Colo. App. 1990).

18-1.3-804. Habitual burglary offenders - punishment - legislative declaration.

(1) Every person convicted in this state of first degree burglary, first degree burglary of controlled substances, or second degree burglary of a dwelling who, within ten years of the date of the commission of the said offense, has been previously convicted upon charges separately brought and tried, either in this state or elsewhere, of first degree burglary, first degree burglary of drugs or first degree burglary of controlled substances, or second degree burglary of a dwelling or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a felony which, if committed within this state, would be first degree burglary, first degree burglary of drugs or first degree burglary of controlled substances, or second degree burglary of a dwelling shall be adjudged a habitual burglary offender and shall be sentenced to the department of corrections for a term of incarceration greater than the maximum in the presumptive range, but not more than twice the maximum term, provided for such offense in section 18-1.3-401 (1) (a).

(2) Every person convicted in this state of first degree burglary, first degree burglary of controlled substances, or second degree burglary of a dwelling who has been previously convicted of two or more felonies shall be subject to the applicable provisions of section 18-1.3-801.

(3) Such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment or information.

(4) In no case shall any person who is subject to the provisions of this section be eligible for suspension of sentence or probation.

(5) Insofar as they may be applicable, sections 18-1.3-802 and 18-1.3-803 shall govern trials which are held as a result of the provisions of this section.

(6) The general assembly hereby finds and declares that the frequency of incidence of the crime of burglary, together with particularly high rates of recidivism among burglary offenders and the extensive economic impact which results from the crime of burglary, requires the special classification and punishment of habitual burglary offenders as provided in this section.

Source: L. 2002: Entire article added with relocations, p. 1430, § 2, effective October 1. **L. 2003:** (1) amended, p. 1427, § 6, effective April 29.

Editor's note: This section is similar to former § 18-4-202.1 as it existed prior to 2002.

Cross references: For limitations on collateral attacks of prior convictions, see § 16-5-402.

PART 9

SENTENCING OF SEX OFFENDERS

18-1.3-901. Short title. This part 9 shall be known and may be cited as the "Colorado Sex Offenders Act of 1968".

Source: L. 2002: Entire article added with relocations, p. 1430, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-201 as it existed prior to 2002.

18-1.3-902. Applicability of part. The provisions of this part 9 shall apply to persons sentenced for offenses committed prior to November 1, 1998.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-201.5 as it existed prior to 2002.

18-1.3-903. Definitions. As used in this part 9, unless the context otherwise requires:

- (1) "Board" means the state board of parole.
- (2) "Conviction" means conviction after trial by court or jury or acceptance of a plea of guilty.
- (3) "Department" means the department of corrections.
- (4) "Sex offender" means a person convicted of a sex offense.
- (5) "Sex offense" means sexual assault, except misdemeanor sexual assault in the third degree, as set forth in section 18-3-404 (2), as it existed prior to July 1, 2000; sexual assault on a child, as defined in section 18-3-405; aggravated incest, as defined in section 18-6-302; and an attempt to commit any of the offenses mentioned in this subsection (5).

Source: **L. 2002:** Entire article added with relocations, p. 1431, § 2, effective October 1. **L. 2008:** (5) amended, p. 1890, § 56, effective August 5.

Editor's note: This section is similar to former § 16-13-202 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Annotator's note. Since § 18-1.3-903 is similar to § 16-13-202 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing that provision have been included in the annotations to this section.

When indeterminate commitment authorized in lieu of imprisonment. When the req-

uisite proscribed intent accompanying an unauthorized intrusion is that of seeking to accomplish one of the sex offenses enumerated in subsection (5), a district court may order an indeterminate commitment under § 16-13-203, in lieu of imprisonment. *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

Applied in *People v. White*, 656 P.2d 690 (Colo. 1983).

18-1.3-904. Indeterminate commitment. The district court having jurisdiction may, subject to the requirements of this part 9, in lieu of the sentence otherwise provided by law, commit a sex offender to the custody of the department for an indeterminate term having a minimum of one day and a maximum of his or her natural life.

Source: **L. 2002:** Entire article added with relocations, p. 1431, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-203 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment, "A Constitutional Challenge to the Release Procedures of the Colorado Sex Offenders Act: Is It Just a Matter of Time?", see 58 U. Colo. L. Rev. 313 (1987).

Annotator's note. Since § 18-1.3-904 is similar to § 16-13-203 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-19-1, C.R.S. 1963, and § 39-19-1, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of act is to protect public. The primary purpose of the Colorado sex offenders

act is the protection of members of the public from proven dangerous sex offenders. *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995); *People v. Wortham*, 928 P.2d 771 (Colo. App. 1996).

Sex offenders subject to indeterminate term. Sex offenders within the meaning of this part 2 may be committed to a state institution for an indeterminate term having a minimum of one day and a maximum of his natural life. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

Upon notice and hearing. A defendant who has been convicted of a sexual offense which carries a maximum sentence of 10 years but not sentenced under such provision, may not be

sentenced under the sex offenders act for an indeterminate term of from one day to life. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L.Ed.2d 326 (1967).

Constitutionality. Statutes similar to the sex offenders act have been held not repugnant to the equal protection provision, since it is recognized that the state has the right through its general assembly to classify persons based upon reasonable and natural distinctions, to accomplish the legitimate purposes of its police power in fixing the differing penalties. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

Where classification of sex offenders under this section is based upon reasonable and natural distinctions to accomplish a legitimate purpose under the police power, and the trial court makes a finding of fact to determine whether a defendant comes with the classification, such findings and classification do not offend against equal protection principles of the constitution. *Vanderhoof v. People*, 152 Colo. 147, 380 P.2d 903 (1963).

This section providing for commitment of one day to life for certain sex offenses is not unconstitutional as imposing cruel and unusual punishment upon one charged and sentenced thereunder. *Specht v. Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963); *Raullerson v. People*, 157 Colo. 462, 404 P.2d 149 (1965).

The Colorado sex offenders act is not unconstitutional as being void for vagueness or violative of due process or equal protection, or as constituting cruel and unusual punishment. *People v. White*, 656 P.2d 690 (Colo. 1983).

Release procedures of the Colorado sex offenders act are not unconstitutional as being violative of due process or equal protection. *People v. Kibel*, 701 P.2d 37 (Colo. 1985); *People v. Adrian*, 701 P.2d 45 (Colo. 1985).

Convicted sex offenders who were paroled prior to the expiration of the maximum sentences for the underlying offenses had no standing to challenge whether the lack of periodic judicial review under the act could be justified, under equal protection, after the expiration of a period of confinement equal to the maximum sentence for the underlying crimes. *People v. Kibel*, 701 P.2d 37 (Colo. 1985).

Sentencing alternative does not involve constitutional right. From the wording of the sex offenders act, it appears that a defendant may require the commencement of a hearing. However, the matter of whether there should be sentencing under the act is an alternative which may be granted or denied by the court, once the psychiatrist and probation officer's reports have been filed and reviewed. This being a sentencing alternative, a constitutional right is not attained. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970

(1975); *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Former provisions of sex offenders act held unconstitutional on due process grounds for lack of procedural safeguards. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L.Ed.2d 326 (1967).

Sentencing under the Sex Offenders Act is an alternative which may be granted or denied by the trial court in its discretion; however, there is no constitutional or statutory right to be sentenced under the Act. *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995).

Commitment proceedings, whether denominated civil or criminal, are subject to the equal protection clause of the fourteenth amendment and to the due process clause. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L.Ed.2d 326 (1967).

The punishment under this section is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L.Ed.2d 326 (1967).

Trial court's failure to advise defendant of the possibility of being sentenced pursuant to the Sex Offenders Act, § 16-13-201 et seq., was not grounds to set aside defendant's guilty plea entered a decade earlier; the failure to so advise was harmless since the defendant was not originally sentenced under the Act. *People v. Lustgarden*, 914 P.2d 488 (Colo. App. 1995).

This section and § 18-3-408 relating to sexual assault on a child are in pari material and must be interpreted together. *Sutton v. People*, 156 Colo. 201, 397 P.2d 746 (1964).

Section does not confer sentencing power on parole board. This section providing for commitment of not less than one day nor more than life, and § 16-13-216 (2) authorizing the parole board to transfer such persons after commitment to other institutions to effectuate purposes of act, do not confer judicial powers on the parole board or involve the sentencing authority of the court. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

The provisions of this act vest the trial court with discretion to commit a defendant under an alternate sentence. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975); *People v. Wortham*, 928 P.2d 771 (Colo. App. 1996); *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

The decision to sentence pursuant to this part is strictly discretionary with the trial court. *People v. Sharpless*, 635 P.2d 896 (Colo. App. 1981).

When indeterminate commitment authorized in lieu of imprisonment. When the requisite proscribed intent accompanying an unauthorized intrusion is that of seeking to

accomplish one of the sex offenses enumerated in § 16-13-202 (5), a district court may order an indeterminate commitment under this section in lieu of imprisonment. *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

Defendant cannot be given sentence of commitment and sentence of imprisonment. This section, read together with § 16-13-211 (2), established that the district courts could not give a defendant, who was found to constitute a threat of bodily harm to the public, a sentence of commitment and a sentence of imprisonment but have the option to either sentence to imprisonment or sentence to commitment. *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974); *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

Only if the court finds that the defendant is a threat to the public has the court the power to commit the defendant for an indeterminate term. *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974); *People v. Ingram*, 40 Colo. App. 518, 582 P.2d 689 (1978).

If it elects to exercise this option, it must do so "in lieu of the sentence otherwise provided by law". *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

Thus, indeterminate commitment under the sex offenders act was in lieu of prisoner's sentence under the habitual criminal act, and, therefore, the trial court erred in sentencing him to concurrent terms under the respective statutes. *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

Second court found defendant not threat to public contrary to first court's determination. Even though a district court, in prosecution under § 18-3-408, determined that the defendant constituted "a threat of bodily harm to members of the public" under § 16-13-211 (2) and ordered him committed pursuant to this section, a different district court, in a subsequent prosecution of defendant under § 18-3-401, arising out of different acts by the defendant, was not required under the doctrine of collateral estoppel to accept the first court's determination but could find that defendant was not a threat to

the public and could sentence him to imprisonment. *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974).

Statutory limits of sentence proper question on habeas corpus. A person convicted of crime can resort to habeas corpus as a remedy if there is a question of the court's jurisdiction of the person, or its jurisdiction of the accusation made against the defendant, or where the question arises as to whether the judgment and sentence were within the prescribed statutory limits. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

Remedy for one sentenced under void statute. Since the time when defendant was sentenced under former provisions of the sex offenders act, the United States supreme court has declared the former provisions to be unconstitutional, and a motion under Crim. P. 35(b) to vacate the sentence and impose a proper one may be in order. *Nowels v. People*, 166 Colo. 140, 442 P.2d 410 (1968).

The court did not abuse its discretion when it did not impose indeterminate sentencing. The court reviewed the psychiatric reports and probation report and based on those reports determined the defendant was a significant threat to society and indeterminate sentencing was inappropriate. *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Form of commitment valid. A commitment "for a period not exceeding life and not less than one day" was within the limitations of this section providing for commitment of a minimum of one day and a maximum of natural life. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L.Ed.2d 507 (1962).

Person convicted of a sex offense is not entitled to mandatory parole; therefore, the accumulation of good time and earned time credits do not make person eligible for immediate release. *Rather v. Suthers*, 973 P.2d 1264 (Colo. 1999).

Applied in *Carter v. People*, 161 Colo. 10, 419 P.2d 654 (1966); *People v. District Court*, 196 Colo. 249, 585 P.2d 913 (1978).

18-1.3-905. Requirements before acceptance of a plea of guilty. Before the district court may accept a plea of guilty from any person charged with a sex offense, the court shall, in addition to any other requirement of law, advise the defendant that he or she may be committed to the custody of the department, including any penal institution under the jurisdiction of the department, as provided in section 18-1.3-904.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-204 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-905 is similar to § 16-13-204 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing those provisions have been included in the annotations to this section.

Duty where defendant represented by counsel. The trial court only has a duty to advise those who plead guilty to a sex offense of the possibility of sentencing under the act and has no such duty where the defendant pleads guilty

and is represented by counsel. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Failure to expressly advise defendant of possibility of sentence of imprisonment under this section does not invalidate guilty plea. *Wilson v. People*, 708 P.2d 792 (Colo. 1985).

Advisement substantially complied with the requirement of this section. *People v. Adrian*, 701 P.2d 45 (Colo. 1985).

Applied in *People v. Wilkerson*, 192 Colo. 386, 559 P.2d 1107 (1977).

18-1.3-906. Commencement of proceedings. Within twenty-one days after the conviction of a sex offense, upon the motion of the district attorney, the defendant, or the court, the court shall commence proceedings under this part 9 by ordering the district attorney to prepare a notice of the commencement of proceedings and to serve that notice upon the defendant personally.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 867, § 113, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-205 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-1.3-906 is similar to § 16-13-205 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing those provisions have been included in the annotations to this section.

Conviction as basis for commencing action. This section does not make the commission of a specified crime the basis for sentencing; rather it makes one conviction the basis for commencing another proceeding under the sex offenders act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18

L.Ed.2d 326 (1967) (decided under repealed § 39-19-1, C.R.S. 1963).

Any defendant convicted either by plea or trial by court or jury may request commencement of proceedings under the act within 20 days following the conviction. *People v. Medina*, 193 Colo. 190, 564 P.2d 119 (1977).

Where trial court failed to meet certain deadlines contained in the statutes, the trial court could not, on its own motion, sentence the defendant under the Sex Offender's Act of 1968. *People v. Wortham*, 928 P.2d 771 (Colo. App. 1996).

Applied in *People v. Lyons*, 196 Colo. 384, 585 P.2d 916 (1978).

18-1.3-907. Defendant to be advised of rights. (1) Upon the commencement of proceedings, the court shall advise the defendant, orally and in writing, that:

(a) The defendant is to be examined in accordance with the provisions of section 18-1.3-908;

(b) The defendant has a right to counsel, and, if the defendant is indigent, counsel will be appointed to represent him or her;

(c) The defendant has a right to remain silent;

(d) An evidentiary hearing will be held pursuant to section 18-1.3-911 and the defendant and his or her counsel will be furnished with copies of all reports prepared for the court pursuant to sections 18-1.3-908 and 18-1.3-909 at least fourteen days prior to the evidentiary hearing.

(2) The written advisement of rights may be incorporated into the notice of commencement of proceedings.

Source: L. 2002: Entire article added with relocations, p. 1431, § 2, effective October 1. **L. 2012:** (1)(d) amended, (SB 12-175), ch. 208, p. 867, § 114, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-206 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (1)(d) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Rights of defendant under due process. Under Colorado's criminal procedure the invocation of the sex offenders act means the making of a new charge leading to criminal punishment. Due process requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the

right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed.2d 326 (1967) (decided under repealed § 39-19-1, C.R.S. 1963).

18-1.3-908. Psychiatric examination and report. (1) (a) After advising the defendant of his or her rights, the court shall forthwith commit the defendant to the Colorado mental health institute at Pueblo, the university of Colorado psychiatric hospital, or the county jail.

(b) If committed to the Colorado mental health institute at Pueblo or the university of Colorado psychiatric hospital, the defendant shall be examined by two psychiatrists of the receiving institution.

(c) If committed to the county jail, the defendant shall be examined by two psychiatrists appointed by the court.

(2) (a) The examining psychiatrists shall make independent written reports to the court which shall contain the opinion of the psychiatrist as to whether the defendant, if at large, constitutes a threat of bodily harm to members of the public.

(b) The written reports shall also contain opinions concerning:

(I) Whether the defendant is mentally deficient;

(II) Whether the defendant could benefit from psychiatric treatment; and

(III) Whether the defendant could be adequately supervised on probation.

(3) The examinations shall be made and the reports filed with the court and the probation department within sixty-three days after the commencement of proceedings, and this time may not be enlarged by the court.

Source: L. 2002: Entire article added with relocations, p. 1432, § 2, effective October 1. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 867, § 115, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-207 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-1.3-908 is similar to § 16-13-207 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing those provisions have been included in the annotations to this section.

The requirements of this section are: (1) That there should be a complete psychiatric examination; (2) that there should be a complete written report containing all facts and findings, together with recommendations as to whether

the person was treatable under the provisions of the article; (3) and that the report contain a psychiatrist's opinion as to whether the person could be adequately supervised on probation. *Ray v. People*, 160 Colo. 173, 415 P.2d 328 (1966) (decided under repealed § 39-19-2, C.R.S. 1963).

Order for removal of a defendant to another state for psychiatric examination in connection with proceedings held solely in Colorado issued without statutory authority.

People v. District Court, 195 Colo. 14, 575 P.2d 7 (1978).

Where trial court failed to meet certain deadlines contained in the statutes, the trial court could not, on its own motion, sentence the

defendant under the Sex Offender's Act of 1968. People v. Wortham, 928 P.2d 771 (Colo. App. 1996).

Applied in People v. White, 656 P.2d 690 (Colo. 1983).

18-1.3-909. Report of probation department. (1) Upon the commencement of proceedings under this part 9, the court shall order an investigation and report to be made by the probation officer similar to the presentence report provided for in section 16-11-102, C.R.S.

(2) The report shall be filed with the court within seventy-seven days after the commencement of proceedings, and this time may not be enlarged by the court.

Source: L. 2002: Entire article added with relocations, p. 1432, § 2, effective October 1. **L. 2012:** (2) amended, SB 12-175), ch. 208, p. 867, § 116, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-208 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Applied in People v. White, 656 P.2d 690 (Colo. 1983) (decided prior to 2002 relocation of § 16-13-208).

18-1.3-910. Termination of proceedings. After reviewing the reports of the psychiatrists and the probation officer, the court may terminate proceedings under this part 9 and proceed with sentencing as otherwise provided by law.

Source: L. 2002: Entire article added with relocations, p. 1432, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-209 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-910 is similar to § 16-13-209 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing those provisions have been included in the annotations to this section.

Sentencing alternative does not involve a constitutional right. From the wording of the sex offenders act, it appears that a defendant may require the commencement of a hearing. However, the matter of whether there should be sentencing under the act is an alternative which may be granted or denied by the court, once the psychiatrist's and probation officer's reports have been filed and reviewed. This being a sentencing alternative, a constitutional right is not attained. People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975).

There is no constitutional or statutory right to be sentenced under the sex offenders act. People v. Medina, 193 Colo. 190, 564 P.2d 119 (1977).

Termination of proceedings did not violate legislative intent. Where the court did not continue with proceedings under the sex offenders act, including the holding of a hearing, legislative intent was not violated. People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975).

The provisions of this act vest the trial court with discretion to commit a defendant under an alternate sentence. People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975).

Imposition of an indeterminate sentence under the act is totally within the discretion of the trial court. People v. Medina, 193 Colo. 190, 564 P.2d 119 (1977).

Finding not requiring sentencing under act. A finding by the court "that the defendant, if at large, constitutes a threat of bodily harm to members of the public" does not require a person to be sentenced under the act if the court makes such a finding. People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975).

18-1.3-911. Evidentiary hearing. (1) (a) The court shall set a hearing date at least fourteen days and no more than twenty-eight days after service upon the defendant and his or her counsel of the reports required by sections 18-1.3-908 and 18-1.3-909.

(b) The court may, in its discretion, upon the motion of the defendant, continue the hearing an additional twenty-one days.

(2) (a) The court shall, upon motion of the district attorney or the defendant, subpoena all witnesses required by the moving party in accordance with the Colorado rules of criminal procedure.

(b) The district attorney shall serve upon the defendant and his or her counsel a list of all witnesses to be called by the district attorney at least fourteen days before the evidentiary hearing.

(3) In the evidentiary hearing, the court shall receive evidence bearing on the issue of whether the defendant, if at large, constitutes a threat of bodily harm to members of the public.

(4) In the evidentiary hearing, the following procedure shall govern:

(a) The district attorney may call and examine witnesses, and the defendant shall be allowed to cross-examine those witnesses.

(b) The defendant may call and examine witnesses, and the district attorney shall be allowed to cross-examine those witnesses.

(c) The defendant may call and cross-examine as adverse witnesses the psychiatrists and probation officers who have filed reports pursuant to sections 18-1.3-908 and 18-1.3-909.

(5) The reports of the psychiatrists and probation officers filed with the court pursuant to sections 18-1.3-908 and 18-1.3-909 may be received into evidence.

(6) Except as otherwise provided in this section, the laws of this state concerning evidence in criminal trials shall govern in the evidentiary hearing.

Source: L. 2002: Entire article added with relocations, p. 1433, § 2, effective October 1. L. 2012: (1) and (2)(b) amended, (SB 12-175), ch. 208, p. 867, § 117, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-210 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (2)(b) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For subpoenas to compel attendance of witnesses, see Crim. P. 17.

ANNOTATION

Annotator's note. Since § 18-1.3-911 is similar to § 16-13-210 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-19-10, C.R.S. 1963 (1969 Supp.), and §§ 39-19-1 to 39-19-10, C.R.S. 1963, and to §§ 39-19-1 to 39-19-10, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Commitment proceedings, whether denominated civil or criminal, are subject to the equal protection clause of the fourteenth amendment and to the due process clause. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed.2d 326 (1967).

Defendant entitled to all safeguards of fair trial. A proceeding under the sex offenders act is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. A defendant is entitled to a full judicial hearing before the magnified sentence is im-

posed and to the full panoply of relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including notice, that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed.2d 326 (1967); *People v. Harper*, 796 P.2d 4 (Colo. App. 1989).

A psychiatric report is not binding on the trial court, and was not intended to limit or restrict the trial court in the exercise of its judgment relating to sentencing of sex offenders. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L. Ed.2d 507 (1962).

The trial court should consider all material matter before it from probation reports and other sources which will aid in the formation of a proper opinion. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929 82 S. Ct. 1570, 8 L. Ed.2d 507 (1962); *Ray v. People*, 160 Colo. 173, 415 P.2d 328 (1966).

This act does not purport to make the findings or opinion of the psychiatrist binding or controlling on the court. It is merely an aid to the court. *Trueblood v. Tinsley*, 316 F.2d 783 (10th Cir. 1963).

Applied in *People v. White*, 656 P.2d 690 (Colo. 1983).

18-1.3-912. Findings of fact and conclusions of law. (1) After the evidentiary hearing, the court shall, within seven days, make oral or written findings of fact and conclusions of law.

(2) If the court finds beyond a reasonable doubt that the defendant, if at large, constitutes a threat of bodily harm to members of the public, the court shall commit the defendant pursuant to section 18-1.3-904.

(3) If the court does not find as provided in subsection (2) of this section, it shall terminate proceedings under this part 9 and proceed with sentencing as otherwise provided by law.

(4) If the findings and conclusions are oral, they shall be reduced to writing and filed within fourteen days, and the defendant shall not be committed to the custody of the department pursuant to section 18-1.3-904 until the findings and conclusions are filed.

Source: L. 2002: Entire article added with relocations, p. 1433, § 2, effective October 1. **L. 2012:** (1) and (4) amended, (SB 12-175), ch. 208, p. 868, § 118, effective July 1.

Editor's note: (1) This section is similar to former § 16-13-211 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1) and (4) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-1.3-912 is similar to § 16-13-211 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-19-1, C.R.S. 1963, and § 39-19-1, CRS 53, relevant cases construing those provisions have been included in the annotations to this section.

Constitutionality of classification and findings. Where classification of sex offenders under § 16-13-203 is based upon reasonable and natural distinctions to accomplish a legitimate purpose under the police power, and where the trial court makes a finding of fact to determine whether a defendant comes within the classification, such findings and classification do not offend against equal protection principles of the constitution. *Vanderhoof v. People*, 152 Colo. 147, 380 P.2d 903 (1963).

Power to sentence vested in court. The court is vested with power, after the psychiatric examination has been made and the report thereof filed, to determine whether sentence should be imposed under this part 2. *Trueblood v. Tinsley*, 316 F.2d 783 (10th Cir. 1963).

The trial court is the one imposing sentence and not the psychiatrist. After being apprised of the information it is the trial court which finally makes the determination whether a person, if at

large, would constitute a threat of bodily harm to a member of the public. *Ray v. People*, 160 Colo. 173, 415 P.2d 328 (1966).

Section limits discretion of court. The trial court is empowered only to impose sentence under and in accord with the statute. In so doing the court performs a ministerial function with discretion confined to the limits permitted by this section. *Trueblood v. Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929, 82 S. Ct. 1570, 8 L. Ed.2d 507 (1962).

Proceeding requires new finding of fact. This section does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under this act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact that was not an ingredient of the offense charged. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed.2d 326 (1967).

And due process requires that there be findings adequate to make meaningful any appeal that is allowed. *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed.2d 326 (1967).

Procedure did not abuse trial court's discretion. *Jordan v. People*, 161 Colo. 54, 419

P.2d 656 (1966), cert. denied, 386 U.S. 992, 87 S. Ct. 1308, 18 L.Ed.2d 338 (1967).

Finding of threat to public not automatic right to commitment. The effect the general assembly has given to a finding of a threat to the public under subsection (2) is not an automatic right to commitment. *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974).

A finding by the court "that the defendant, if at large, constitutes a threat of bodily harm to members of the public" does not require a person to be sentenced under the act if the court makes such a finding. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975).

The general assembly permits the court to terminate proceedings, irrespective of this finding. *People v. Breazeale*, 190 Colo. 17, 544 P.2d 970 (1975).

Defendant cannot be given sentence of commitment and sentence of imprisonment. Section 16-13-203, read together with subsection (2), established that the district courts could not give a defendant, who was found to constitute a threat of bodily harm to the public, a sentence of commitment and a sentence of imprisonment but have the option to either sentence to imprisonment or sentence to commitment. *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974).

18-1.3-913. Appeal. The defendant may appeal an adverse finding made pursuant to section 18-1.3-912 in the same manner as is provided by law for other criminal appeals.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-212 as it existed prior to 2002.

18-1.3-914. Time allowed on sentence. If the proceedings under this part 9 are terminated by the court, as provided in section 18-1.3-910 or 18-1.3-912 (3), the court shall deduct the time from the commencement of proceedings to the termination of proceedings from the minimum sentence of the defendant.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-213 as it existed prior to 2002.

18-1.3-915. Costs. The costs of the maintenance of the prisoner during the pendency of proceedings under this part 9 and the costs of the psychiatric examinations and reports shall be paid by the state of Colorado.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-214 as it existed prior to 2002.

18-1.3-916. Diagnostic center as receiving center. The diagnostic center, as defined in section 17-40-101 (1.5), C.R.S., shall be the receiving center for all persons committed pursuant to section 18-1.3-904.

Only if the court finds that the defendant is a threat to the public has the court the power to commit the defendant for an indeterminate term. *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

If it elects to exercise this option, it must do so "in lieu of the sentence otherwise provided by law". *People v. Sanchez*, 184 Colo. 379, 520 P.2d 751 (1974).

Second court found defendant not threat to public contrary to first court's determination. Even though a district court, in prosecution under § 18-3-408, determined that the defendant constituted "a threat of bodily harm to members of the public" under subsection (2) and ordered him committed pursuant to § 16-13-203, a different district court, in a subsequent prosecution of defendant under § 18-3-401, arising out of different acts by the defendant, was not required under the doctrine of collateral estoppel to accept the first court's determination but could find that defendant was not a threat to the public and could sentence him to imprisonment. *People v. Lyons*, 185 Colo. 112, 521 P.2d 1265 (1974).

Applied in *People v. White*, 656 P.2d 690 (Colo. 1983).

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-215 as it existed prior to 2002.

PART 10

LIFETIME SUPERVISION OF SEX OFFENDERS

Law reviews: For article, "Felony Sex Offender Sentencing", see 33 Colo. Law. 11 (December 2004).

18-1.3-1001. Legislative declaration. The general assembly hereby finds that the majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision. The general assembly also finds that keeping all sex offenders in lifetime incarceration imposes an unacceptably high cost in both state dollars and loss of human potential. The general assembly further finds that some sex offenders respond well to treatment and can function as safe, responsible, and contributing members of society, so long as they receive treatment and supervision. The general assembly therefore declares that a program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for the safety, health, and welfare of the state.

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-801 as it existed prior to 2002.

18-1.3-1002. Short title. This part 10 shall be known and may be cited as the "Colorado Sex Offender Lifetime Supervision Act of 1998".

Source: L. 2002: Entire article added with relocations, p. 1434, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-802 as it existed prior to 2002.

18-1.3-1003. Definitions. As used in this part 10, unless the context otherwise requires:

- (1) "Department" means the department of corrections.
- (2) "Management board" means the sex offender management board created in section 16-11.7-103, C.R.S.
- (3) "Parole board" means the state board of parole created in section 17-2-201, C.R.S.
- (4) "Sex offender" means a person who is convicted of or pleads guilty or nolo contendere to a sex offense.
- (5) (a) "Sex offense" means any of the following offenses:
 - (I) (A) Sexual assault, as described in section 18-3-402; or
 - (B) Sexual assault in the first degree, as described in section 18-3-402 as it existed prior to July 1, 2000;
 - (II) Sexual assault in the second degree, as described in section 18-3-403 as it existed prior to July 1, 2000;
 - (III) (A) Felony unlawful sexual contact, as described in section 18-3-404 (2); or
 - (B) Felony sexual assault in the third degree, as described in section 18-3-404 (2) as it existed prior to July 1, 2000;
 - (IV) Sexual assault on a child, as described in section 18-3-405;
 - (V) Sexual assault on a child by one in a position of trust, as described in section 18-3-405.3;

(VI) Aggravated sexual assault on a client by a psychotherapist, as described in section 18-3-405.5 (1);

(VII) Enticement of a child, as described in section 18-3-305;

(VIII) Incest, as described in section 18-6-301;

(IX) Aggravated incest, as described in section 18-6-302;

(X) Patronizing a prostituted child, as described in section 18-7-406;

(XI) Class 4 felony internet luring of a child, in violation of section 18-3-306 (3); or

(XII) Internet sexual exploitation of a child, in violation of section 18-3-405.4.

(b) "Sex offense" also includes criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in paragraph (a) of this subsection (5) if such criminal attempt, conspiracy, or solicitation would constitute a class 2, 3, or 4 felony.

Source: **L. 2002:** Entire article added with relocations, p. 1434, § 2, effective October 1. **L. 2005:** (5)(b) amended, p. 765, § 26, effective June 1. **L. 2006:** (5)(a)(XI) and (5)(a)(XII) added, p. 2055, § 3, effective July 1. **L. 2012:** (4) amended, (HB 12-1310), ch. 268, p. 1402, § 23, effective June 7.

Editor's note: This section is similar to former § 16-13-803 as it existed prior to 2002.

ANNOTATION

Conviction of any offense listed in subsection (5) must result in a mandatory indeterminate sentence under § 18-1.3-1004. People v. Harrison, 165 P.3d 859 (Colo. App. 2007).

Criminal attempt to commit a sexual assault is considered a sex offense if the attempt constitutes a class 2, 3, or 4 felony. People v. King, 151 P.3d 594 (Colo. App. 2006).

18-1.3-1004. Indeterminate sentence. (1) (a) Except as otherwise provided in this subsection (1) and in subsection (2) of this section, the district court having jurisdiction shall sentence a sex offender to the custody of the department for an indeterminate term of at least the minimum of the presumptive range specified in section 18-1.3-401 for the level of offense committed and a maximum of the sex offender's natural life.

(b) If the sex offender committed a sex offense that constitutes a crime of violence, as defined in section 18-1.3-406, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least the midpoint in the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(c) If the sex offender committed a sex offense that makes him or her eligible for sentencing as an habitual sex offender against children pursuant to section 18-3-412, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(d) If the sex offender committed a sex offense that constitutes a sexual offense, as defined in section 18-3-415.5, and the sex offender, prior to committing the offense, had notice that he or she had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(2) (a) The district court having jurisdiction, based on consideration of the evaluation conducted pursuant to section 16-11.7-104, C.R.S., and the factors specified in section 18-1.3-203, may sentence a sex offender to probation for an indeterminate period of at least ten years for a class 4 felony or twenty years for a class 2 or 3 felony and a maximum of the sex offender's natural life; except that, if the sex offender committed a sex offense that constitutes a crime of violence, as defined in section 18-1.3-406, or committed a sex offense that makes him or her eligible for sentencing as a habitual sex offender against children pursuant to section 18-3-412, the court shall sentence the sex offender to the department of corrections as provided in subsection (1) of this section. For any sex offender sentenced to

probation pursuant to this subsection (2), the court shall order that the sex offender, as a condition of probation, participate in an intensive supervision probation program established pursuant to section 18-1.3-1007, until further order of the court.

(b) The court, as a condition of probation, may sentence a sex offender to a residential community corrections program pursuant to section 18-1.3-301 for a minimum period specified by the court. Following completion of the minimum period, the sex offender may be released to intensive supervision probation as provided in section 18-1.3-1008 (1.5).

(3) Each sex offender sentenced pursuant to this section shall be required as a part of the sentence to undergo treatment to the extent appropriate pursuant to section 16-11.7-105, C.R.S.

(4) Repealed.

(5) (a) Any sex offender sentenced pursuant to subsection (1) of this section and convicted of one or more additional crimes arising out of the same incident as the sex offense shall be sentenced for the sex offense and such other crimes so that the sentences are served consecutively rather than concurrently.

(b) (I) Except as otherwise provided in subparagraph (II) of this paragraph (b), if a sex offender sentenced pursuant to this part 10 is convicted of a subsequent crime prior to being discharged from parole pursuant to section 18-1.3-1006 or discharged from probation pursuant to section 18-1.3-1008, any sentence imposed for the second crime shall not supersede the sex offender's sentence pursuant to the provisions of this part 10. If the sex offender commits the subsequent crime while he or she is on parole or probation and the sex offender receives a sentence to the department of corrections for the subsequent crime, the sex offender's parole or probation shall be deemed revoked pursuant to section 18-1.3-1010, and the sex offender shall continue to be subject to the provisions of this part 10.

(II) The provisions of subparagraph (I) of this paragraph (b) shall not apply if the sex offender commits a subsequent crime that is a class 1 felony.

Source: **L. 2002:** Entire article added with relocations, p. 1435, § 2, effective October 1. **L. 2006:** (4)(b)(II) amended, p. 2044, § 3, effective July 1. **L. 2010:** (4)(b)(I) amended, (SB 10-140), ch. 156, p. 538, § 8, effective April 21. **L. 2012:** (4) repealed and (5)(a) amended, (HB 12-1310), ch. 268, pp. 1397, 1402, § § 14, 24, effective June 7.

Editor's note: This section is similar to former § 16-13-804 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-1004 is similar to § 16-13-804 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing those provisions have been included in the annotations to this section.

Indeterminate sentencing portion of the lifetime supervision of sex offenders act is constitutional. Indeterminate sentencing does not violate procedural due process. A defendant is given an opportunity to be heard at sentencing, and, since the statute does not require any further findings by a court to impose indeterminate sentencing, the defendant is not entitled to any further opportunity to be heard. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Indeterminate sentencing for sex offenders does not violate procedural due process. The opportunities in § 18-1.3-1006 (1) satisfy continuing due process requirements by providing an adequate continuing opportunity to be heard

on the issue of release after a sentence has been imposed. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Substantive due process is not infringed by indeterminate sentencing. Indeterminate sentencing does implicate a fundamental right; therefore, it is subject to the rational basis test. The sentencing scheme is rationally related to the government's legitimate interest in shielding the public from untreated sex offenders and rehabilitating and treating those offenders. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Indeterminate sentencing does not violate equal protection. The threshold question in any equal protection challenge is whether the person allegedly subject to the disparate treatment is in fact similarly situated. In this case, the defendant is similarly situated with other offenders

convicted of the same or similar crimes and subject to the same law, so there is no disparate treatment. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Indeterminate sentencing does not violate separation of powers. In this sentencing scheme, each branch carries out a different function, the legislative branch determined the particular punishment, the judicial branch imposed the particular sentence, and the executive branch carried out the sentence. Vesting the parole board with the decision to grant parole or release does not violate separation of powers. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004); *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Trial court properly reviewed constitutionality of this section under the rational basis test. An adult offender has no fundamental liberty interest in freedom from incarceration. Because no fundamental right is implicated, the section is evaluated under the rational basis test. *People v. Streat*, 74 P.3d 387 (Colo. App. 2002); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004).

This section bears a reasonable relationship to the legitimate state interests of safety, flexibility in rehabilitation and treatment, and minimizing unacceptably high costs of lifetime incarceration. *People v. Streat*, 74 P.3d 387 (Colo. App. 2002); *People v. Dash*, 104 P.3d 286 (Colo. App. 2004).

Indeterminate sentencing for sex offenders does not constitute cruel and unusual punishment. Sex offenses are considered particularly heinous crimes. *People v. Dash*, 104 P.3d 286 (Colo. App. 2004).

Prisoner has a liberty interest in participation in a statutorily mandated sex offender treatment program. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

In evaluating prisoner's substantive due process claim, the court must consider whether prison officials were deliberately indifferent to a liberty interest and deprived prisoner of that interest in such a way that the behavior of the governmental officers was so egregious, so outrageous that it may fairly be said to shock the contemporary conscience. The deliberate indifference standard is sensibly employed when actual deliberation is practical. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

Due process must be provided to a convicted sex offender before he can be excluded from such a program. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

The court must consider first, whether prisoner's exclusion from the treatment program itself constitutes an atypical and significant hardship and, second, whether the failure of the prison officials to provide prisoner with due process

before terminating him from sex offender treatment constitutes an atypical and significant hardship. To evaluate whether a prisoner's freedom has been restrained in a manner that imposes atypical and significant hardship, the court must carefully examine the conditions of the prisoner's confinement, including the duration and degree of prisoner's restrictions as compared with other inmates. *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

This part 10 grants the court discretion to impose an indeterminate sentence with a minimum term that exceeds the maximum of the presumptive range set forth in § 18-1.3-401. This part 10 creates specific sentencing provisions for a specific type of felony, whereas the general sentencing provisions in § 18-1.3-401 create presumptive ranges that apply to general classes of felonies. These sentencing provisions, therefore, supplant the presumptive ranges in § 18-1.3-401. *People v. Larson*, 97 P.3d 246 (Colo. App. 2004).

If a convicted sex offender is subject to both subsection (1)(a) and the provisions of the habitual criminal statute, both statutes must be reconciled. In such case, the trial court must impose a prison sentence for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life. *People v. Apodaca*, 58 P.3d 1126 (Colo. App. 2002).

This section requires the court to give the offender an indeterminate sentence. The phrase "at least" in paragraph (a) of subsection (1) by its plain meaning provides the court with the options to impose either the minimum of the presumptive range or an increased minimum sentence as the minimum period of the indeterminate sentence. *People v. Smith*, 29 P.3d 347 (Colo. App. 2001); *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

Indeterminate sentencing is mandatory for the types of inchoate or completed offenses enumerated in § 18-1.3-1003 (5). *People v. Harrison*, 165 P.3d 859 (Colo. App. 2007).

Discretionary indeterminate sentencing permits the court to sentence an offender to indeterminate term only if: (1) He or she is convicted of an economic sex crime and (2) an assessment of that offender determines that he or she is likely to commit a sexually violent predator (SVP) offense against a stranger or a groomed victim. *People v. Walker*, __ P.3d __ (Colo. App. 2011).

A mental health sex offender specific evaluation satisfies the assessment prong. The assessment was sufficient to determine defendant was likely to commit an SVP offense in the future against a groomed victim. The assessment's use of the term "significant risk to commit" was the same as "likely to commit". *People v. Walker*, __ P.3d __ (Colo. App. 2011).

Indeterminate sentencing is discretionary and appropriate but only under certain circumstances, including the need for an SVP assessment, for the offenses specified in subsection (4). *People v. Harrison*, 165 P.3d 859 (Colo. App. 2007).

This section gives notice of the possible sentencing range and allows the court to exercise its discretion in considering rehabilitative potential. *People v. Smith*, 29 P.3d 347 (Colo. App. 2001).

Phrase “at least” in § 16-13-804 (1) does not require the court to set the minimum length of the indeterminate sentence at the midpoint of the presumptive range. The court may impose a minimum length to the indeterminate sentence that is greater than the midpoint of the presumptive range. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

When the court sentenced the defendant to consecutive sentences after finding that the two counts arose out of the same incident, the sentencing did not violate Apprendi principles. In this case, the court’s fact finding did not increase the defendant’s sentence beyond the maximum allowed by statute. *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Sections 16-11-309 (1)(c) and 18-1-105 (9)(e.5) conflict irreconcilably with § 16-13-804 (1)(b). The phrase “up to the defendant’s natural life” in §§ 16-11-309 (1)(c) and 18-1-105 (9)(e.5) conflicts with the phrase “a maximum of the sex offender’s natural life” in § 16-13-804 (1)(b). Statutory construction calls for § 16-13-804 (1)(b) to prevail, requiring the court to set the maximum length of the indeterminate sentence at the defendant’s natural life. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002).

The court has discretion to designate a minimum term that is greater than the maximum presumptive penalty. To conclude otherwise would be to read a provision into the act that does not exist. *People v. Larson*, 97 P.3d 246 (Colo. App. 2004).

The Colorado Sex Offender Lifetime Supervision Act requires an indeterminate sentence for the class 2, 3, and 4 felony sex offenses to which it applies, consisting of an upper term of the sex offender’s natural life and a lower term of a definite number of years, not less than the minimum nor more than twice the maximum of the presumptive range authorized for the class of felony of which the defendant stands con-

victed. *Vensor v. People*, 151 P.3d 1274 (Colo. 2007).

Although the Colorado Sex Offender Lifetime Supervision Act expressly forbids a sentence with a lower term that is less than the minimum of the presumptive range, it does not preclude the lower term of the defendant’s indeterminate sentence from exceeding the presumptive range as the result of extraordinary aggravating circumstances. Subject to the express prohibition of subsection (1)(a) against a sentencing below the presumptive range, the lower term of a sex offender’s indeterminate sentence must be fixed according to the provisions of the determinate sentencing scheme of § 18-1.3-401. *Vensor v. People*, 151 P.3d 1274 (Colo. 2007).

This section applies to first degree sexual assault on an at-risk adult. *People v. Klausner*, 74 P.3d 421 (Colo. App. 2003).

This section applies to an attempt to commit a sex offense if the attempt constitutes a class 2, 3, or 4 felony. *People v. King*, 151 P.3d 594 (Colo. App. 2006).

Before a defendant convicted of soliciting for child prostitution can be sentenced to an indeterminate sentence, an assessment must be made that it is likely that the defendant will commit an enumerated SVP crime under certain specific circumstances. *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

When the sentence imposed by the court is supported by the record there is no abuse of discretion. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003).

Where defendant was sentenced under subsection (1)(a) of this section and not § 18-1.3-401 (7), the court was not required to make specific findings to identify extraordinary circumstances and reasons for varying from the presumptive sentencing range. *People v. Vensor*, 116 P.3d 1240 (Colo. App. 2005), rev’d on other grounds, 151 P.3d 1274 (Colo. 2007).

Collateral attack on district court’s jurisdiction to order a deferred judgment and sentence barred under statute of limitations set forth in § 16-5-402. The statutory language expressly limits the court’s jurisdiction only in those cases where it actually enters a sentence, and a deferred judgment is technically not a sentence but rather a continuance with probation-like supervision conditions. *People v. Loveall*, 231 P.3d 408 (Colo. 2010).

Applied in *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004).

18-1.3-1005. Parole - intensive supervision program. (1) The department shall establish an intensive supervision parole program for sex offenders sentenced to incarceration and subsequently released on parole pursuant to this part 10. In addition, the parole board may require a person, as a condition of parole, to participate in the intensive supervision parole program established pursuant to this section if the person is convicted of:

- (a) Indecent exposure, as described in section 18-7-302;
- (b) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified

in section 18-1.3-1003 (5) (a), which attempt, conspiracy, or solicitation would constitute a class 5 felony; or

(c) Any of the offenses specified in section 16-22-102 (9) (j), (9) (k), (9) (l), (9) (n), (9) (o), (9) (p), (9) (q), (9) (r), or (9) (s), C.R.S.

(1.5) In addition to the persons specified in subsection (1) of this section, the parole board shall require, as a condition of parole, any person convicted of felony failure to register as a sex offender, as described in section 18-3-412.5, who is sentenced to incarceration and subsequently released on parole, to participate in the intensive supervision parole program established pursuant to this section.

(2) The department shall require that sex offenders and any other persons in the intensive supervision parole program established pursuant to this section receive the highest level of supervision that is provided to parolees. The intensive supervision parole program may include, but is not limited to, severely restricted activities, daily contact between the sex offender or other person and the community parole officer, monitored curfew, home visitation, employment visitation and monitoring, drug and alcohol screening, treatment referrals and monitoring, including physiological monitoring, and payment of restitution. In addition, the intensive supervision parole program shall be designed to minimize the risk to the public to the greatest extent possible.

(3) The executive director of the department shall establish and enforce standards and criteria for administration of the intensive supervision parole program created pursuant to this section.

Source: L. 2002: Entire article added with relocations, p. 1438, § 2, effective October 1. L. 2008: (2) amended, p. 659, § 13, effective April 25. L. 2012: (1)(c) amended, (HB 12-1310), ch. 268, p. 1402, § 25, effective June 7.

Editor's note: This section is similar to former § 16-13-805 as it existed prior to 2002.

18-1.3-1006. Release from incarceration - parole - conditions. (1) (a) On completion of the minimum period of incarceration specified in a sex offender's indeterminate sentence, less any earned time credited to the sex offender pursuant to section 17-22.5-405, C.R.S., the parole board shall schedule a hearing to determine whether the sex offender may be released on parole. In determining whether to release the sex offender on parole, the parole board shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if released under appropriate treatment and monitoring requirements and whether there is a strong and reasonable probability that the person will not thereafter violate the law. The department shall make recommendations to the parole board concerning whether the sex offender should be released on parole and the level of treatment and monitoring that should be imposed as a condition of parole. The recommendation shall be based on the criteria established by the management board pursuant to section 18-1.3-1009.

(b) If a sex offender is released on parole pursuant to this section, the sex offender's sentence to incarceration shall continue and shall not be deemed discharged until such time as the parole board may discharge the sex offender from parole pursuant to subsection (3) of this section. The period of parole for any sex offender convicted of a class 4 felony shall be an indeterminate term of at least ten years and a maximum of the remainder of the sex offender's natural life. The period of parole for any sex offender convicted of a class 2 or 3 felony shall be an indeterminate term of at least twenty years and a maximum of the remainder of the sex offender's natural life.

(c) If the parole board does not release the sex offender on parole pursuant to paragraph (a) of this subsection (1), the parole board shall review such denial at least once every three years until it determines that the sex offender meets the criteria for release on parole specified in paragraph (a) of this subsection (1). At each review, the department shall make recommendations, based on the criteria established by the management board pursuant to section 18-1.3-1009, concerning whether the sex offender should be released on parole.

(2) (a) As a condition of release on parole pursuant to this section, a sex offender shall participate in the intensive supervision parole program created by the department pursuant

to section 18-1.3-1005. Participation in the intensive supervision parole program shall continue until the sex offender can demonstrate that he or she has successfully progressed in treatment and would not pose an undue threat to the community if paroled to a lower level of supervision, at which time the sex offender's community parole officer may petition the parole board for a reduction in the sex offender's level of supervision. The sex offender's community parole officer and treatment provider shall make recommendations to the parole board concerning whether the sex offender has met the requirements specified in this subsection (2) such that the level of parole supervision should be reduced. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009.

(b) Following reduction in a sex offender's level of parole supervision pursuant to paragraph (a) of this subsection (2), the sex offender's community parole officer may return the sex offender to the intensive supervision parole program if the community parole officer determines that an increased level of supervision is necessary to protect the public safety. The community parole officer shall notify the parole board as soon as possible after returning the sex offender to the intensive supervision parole program. To subsequently reduce the sex offender's level of supervision, the community parole officer may petition the parole board as provided in paragraph (a) of this subsection (2).

(3) (a) On completion of twenty years on parole for any sex offender convicted of a class 2 or 3 felony or on completion of ten years of parole for any sex offender convicted of a class 4 felony, the parole board shall schedule a hearing to determine whether the sex offender may be discharged from parole. In determining whether to discharge the sex offender from parole, the parole board shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if allowed to live in the community without treatment or supervision. The sex offender's community parole officer and treatment provider shall make recommendations to the parole board concerning whether the sex offender has met the requirements specified in this subsection (3) such that the sex offender should be discharged from parole. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009.

(b) If the parole board does not discharge the sex offender from parole pursuant to paragraph (a) of this subsection (3), the parole board shall review such denial at least once every three years until it determines that the sex offender meets the criteria for discharge specified in paragraph (a) of this subsection (3). At each review, the sex offender's community parole officer and treatment provider shall make recommendations, based on the criteria established by the management board pursuant to section 18-1.3-1009, concerning whether the sex offender should be discharged.

(4) In determining whether to release a sex offender on parole, reduce the level of supervision, or discharge a sex offender from parole pursuant to this section, the parole board shall consider the recommendations of the department and the sex offender's community parole officer and treatment provider. If the parole board chooses not to follow the recommendations made, it shall make findings on the record in support of its decision.

Source: L. 2002: Entire article added with relocations, p. 1438, § 2, effective October 1. **L. 2003:** (1)(a) amended, p. 975, § 11, effective April 17. **L. 2008:** (2), (3), and (4) amended, p. 660, §14, effective April 25.

Editor's note: This section is similar to former § 16-13-806 as it existed prior to 2002.

ANNOTATION

Indeterminate sentencing for sex offenders does not violate procedural due process. The opportunities in § 18-1.3-1006 (1) satisfy continuing due process requirements by providing

an adequate continuing opportunity to be heard on the issue of release after a sentence has been imposed. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003).

18-1.3-1007. Probation - intensive supervision program. (1) (a) The judicial department shall establish an intensive supervision probation program for sex offenders sentenced to probation pursuant to this part 10. In addition, the court shall require a person, as a condition of probation, to participate in the intensive supervision probation program established pursuant to this section if the person is convicted of one of the following offenses and sentenced to probation:

(I) Indecent exposure, as described in section 18-7-302 (4);

(II) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in section 18-1.3-1003 (5) (a), which attempt, conspiracy, or solicitation would constitute a class 5 felony;

(III) Any of the offenses specified in section 16-22-102 (9) (j), (9) (k), (9) (l), (9) (n), (9) (o), (9) (p), (9) (q), (9) (r), or (9) (s), C.R.S.;

(IV) Any felony offense that involves unlawful sexual behavior or any felony offense with an underlying factual basis, as determined by the court, resulting in a conviction or plea of guilty or nolo contendere on or after July 1, 2001;

(V) Sexual assault in the third degree, in violation of section 18-3-404 (2), as it existed prior to July 1, 2000.

(b) The judicial department may establish the intensive supervision probation program in any judicial district or combination of judicial districts.

(1.5) In addition to the persons specified in subsection (1) of this section, the court may require any person convicted of felony failure to register as a sex offender, as described in section 18-3-412.5, and sentenced to probation to participate, as a condition of probation and until further order of the court, in the intensive supervision probation program established pursuant to this section.

(2) The judicial department shall require that sex offenders and any other persons participating in the intensive supervision probation program created pursuant to this section receive the highest level of supervision that is provided to probationers. The intensive supervision probation program may include but not be limited to severely restricted activities, daily contact between the sex offender or other person and the probation officer, monitored curfew, home visitation, employment visitation and monitoring, drug and alcohol screening, treatment referrals and monitoring, including physiological monitoring, and payment of restitution. In addition, the intensive supervision probation program shall be designed to minimize the risk to the public to the greatest extent possible.

(3) The judicial department shall establish and enforce standards and criteria for administration of the intensive supervision probation program created pursuant to this section.

(4) For the purposes of this section, “convicted” means having entered a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, or a plea of no contest, accepted by the court, or having received a verdict of guilty by a judge or jury.

Source: L. 2002: Entire article added with relocations, p. 1440, § 2, effective October 1. **L. 2011:** (1.5) amended, (HB 11-1278), ch. 224, p. 965, § 9, effective May 27. **L. 2012:** (1)(a)(III) amended, (HB 12-1310), ch. 268, p. 1402, § 26, effective June 7.

Editor’s note: This section is similar to former § 16-13-807 as it existed prior to 2002.

ANNOTATION

This section and § 18-1.3-1008 allow the court to exercise its discretion in determining whether and on what conditions a sex offender may be released from sex offender intensified supervision probation, so long as it takes steps to minimize risk to the public. *People v. Valenzuela*, 98 P.3d 951 (Colo. App. 2004).

Trial court had authority to direct that defendant’s sex offender intensive supervision program would commence consecutively at the end of his incarceration on another conviction. *People v. Trujillo*, 261 P.3d 485 (Colo. App. 2010).

18-1.3-1008. Probation - conditions - release. (1) If the court sentences a sex offender to probation, in addition to any conditions imposed pursuant to section 18-1.3-204, the court shall require as a condition of probation that the sex offender participate until further order of the court in the intensive supervision probation program created pursuant to section 18-1.3-1007.

(1.5) If the court as a condition of probation sentences a sex offender to a residential community corrections program, following completion of the minimum period of sentence specified by the court, the community corrections program shall notify the judicial department when it determines that the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if allowed to live in the community while continuing on intensive supervision probation. The community corrections program shall base its determination on the criteria established by the management board pursuant to section 18-1.3-1009. The judicial department shall file the recommendations of the community corrections program with the court. Upon order of the court, the sex offender shall be released from the community corrections program, and the court shall order the sex offender, as a condition of probation, to participate in the intensive supervision program created in section 18-1.3-1007. The sex offender shall participate in such program until further order of the court.

(2) On completion of twenty years of probation for any sex offender convicted of a class 2 or 3 felony or on completion of ten years of probation for any sex offender convicted of a class 4 felony, the court shall schedule a review hearing to determine whether the sex offender should be discharged from probation. In making its determination, the court shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community if allowed to live in the community without treatment or supervision. The sex offender's probation officer and treatment provider shall make recommendations to the court concerning whether the sex offender has met the requirements of this section such that he or she should be discharged from probation.

(3) (a) In determining whether to discharge a sex offender from probation pursuant to this section, the court shall consider the recommendations of the sex offender's probation officer and treatment provider. The recommendations of the probation officer and the treatment provider shall be based on the criteria established by the management board pursuant to section 18-1.3-1009. If the court chooses not to follow the recommendations made, the court shall make findings on the record in support of its decision.

(b) If the court does not discharge the sex offender from probation pursuant to paragraph (a) of this subsection (3), the court shall review such denial at least once every three years until it determines that the sex offender meets the criteria for discharge as specified in paragraph (a) of this subsection (3). At each review, the sex offender's probation officer and treatment provider shall make recommendations, based on the criteria established by the management board pursuant to section 18-1.3-1009, concerning whether the sex offender should be discharged.

Source: L. 2002: Entire article added with relocations, p. 1441, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-808 as it existed prior to 2002.

ANNOTATION

A defendant's removal from sex offender intensified supervision probation is not dependent upon completion of a treatment pro-

gram. *People v. Valenzuela*, 98 P.3d 951 (Colo. App. 2004).

18-1.3-1009. Criteria for release from incarceration, reduction in supervision, and discharge. (1) On or before July 1, 1999, the management board, in collaboration with the department of corrections, the judicial department, and the parole board, shall establish:

(a) The criteria by and the manner in which a sex offender may demonstrate that he or she would not pose an undue threat to the community if released on parole or to a lower

level of supervision while on parole or probation or if discharged from parole or probation. The court and the parole board may use the criteria to assist in making decisions concerning release of a sex offender, reduction of the level of supervision for a sex offender, and discharge of a sex offender.

(b) The methods of determining whether a sex offender has successfully progressed in treatment; and

(c) Standards for community entities that provide supervision and treatment specifically designed for sex offenders who have developmental disabilities. At a minimum, the standards shall determine whether an entity would provide adequate support and supervision to minimize any threat that the sex offender may pose to the community.

Source: L. 2002: Entire article added with relocations, p. 1442, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-809 as it existed prior to 2002.

18-1.3-1010. Arrest of parolee or probationer - revocation. (1) (a) A sex offender paroled pursuant to section 18-1.3-1006 is subject to arrest and revocation of parole as provided in sections 17-2-103 and 17-2-103.5, C.R.S. At any revocation proceeding, the sex offender's community parole officer and the treatment provider shall submit written recommendations concerning the level of treatment and monitoring that should be imposed as a condition of parole if parole is not revoked or whether the sex offender poses a sufficient threat to the community that parole should be revoked. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009. If the parole board revokes the sex offender's parole, the sex offender shall continue to be subject to the provisions of this part 10.

(b) At a revocation hearing held pursuant to this subsection (1), the parole board shall consider the recommendations of the community parole officer and the treatment provider, in addition to evidence concerning any of the grounds for revocation of parole specified in sections 17-2-103 and 17-2-103.5, C.R.S. If the parole board chooses not to follow the recommendations made, it shall make findings on the record in support of its decision.

(2) (a) A sex offender sentenced to probation pursuant to section 18-1.3-1004 (2) is subject to arrest and revocation of probation as provided in sections 16-11-205 and 16-11-206, C.R.S. At any revocation proceeding, the sex offender's probation officer and the sex offender's treatment provider shall submit recommendations concerning the level of treatment and monitoring that should be imposed as a condition of probation if probation is not revoked or whether the sex offender poses a sufficient threat to the community that probation should be revoked. The recommendations shall be based on the criteria established by the management board pursuant to section 18-1.3-1009. If the court revokes the sex offender's probation, the court shall sentence the sex offender as provided in section 18-1.3-1004, and the sex offender shall be subject to the provisions of this part 10.

(b) At a revocation hearing held pursuant to this subsection (2), the court shall consider the recommendations of the probation officer and the treatment provider, in addition to evidence concerning any of the grounds for revocation of probation specified in sections 16-11-205 and 16-11-206, C.R.S. If the court chooses not to follow the recommendations made, it shall make findings on the record in support of its decision.

Source: L. 2002: Entire article added with relocations, p. 1442, § 2, effective October 1. **L. 2008:** (1) amended, p. 661, § 15, effective April 25.

Editor's note: This section is similar to former § 16-13-810 as it existed prior to 2002.

18-1.3-1011. Annual report. (1) On or before November 1, 2000, and on or before each November 1 thereafter, the department of corrections, the department of public safety, and the judicial department shall submit a report to the judiciary committees of the house

of representatives and the senate, or any successor committees, and to the joint budget committee of the general assembly specifying, at a minimum:

(a) The impact on the prison population, the parole population, and the probation population in the state due to the extended length of incarceration and supervision provided for in sections 18-1.3-1004, 18-1.3-1006, and 18-1.3-1008;

(b) The number of offenders placed in the intensive supervision parole program and the intensive supervision probation program and the length of supervision of offenders in said programs;

(c) The number of sex offenders sentenced pursuant to this part 10 who received parole release hearings and the number released on parole during the preceding twelve months, if any;

(d) The number of sex offenders sentenced pursuant to this part 10 who received parole or probation discharge hearings and the number discharged from parole or probation during the preceding twelve months, if any;

(e) The number of sex offenders sentenced pursuant to this part 10 who received parole or probation revocation hearings and the number whose parole or probation was revoked during the preceding twelve months, if any;

(f) A summary of the evaluation instruments developed by the management board and use of the evaluation instruments in evaluating sex offenders pursuant to this part 10;

(g) The availability of sex offender treatment providers throughout the state, including location of the treatment providers, the services provided, and the amount paid by offenders and by the state for the services provided, and the manner of regulation and review of the services provided by sex offender treatment providers;

(h) The average number of sex offenders sentenced pursuant to this part 10 that participated in phase I and phase II of the department's sex offender treatment and monitoring program during each month of the preceding twelve months;

(i) The number of sex offenders sentenced pursuant to this part 10 who were denied admission to treatment in phase I and phase II of the department's sex offender treatment and monitoring program for reasons other than length of remaining sentence during each month of the preceding twelve months;

(j) The number of sex offenders sentenced pursuant to this part 10 who were terminated from phase I and phase II of the department's sex offender treatment and monitoring program during the preceding twelve months and the reason for termination in each case;

(k) The average length of participation by sex offenders sentenced pursuant to this part 10 in phase I and phase II of the department's sex offender treatment and monitoring program during the preceding twelve months;

(l) The number of sex offenders sentenced pursuant to this part 10 who were denied readmission to phase I and phase II of the department's sex offender treatment and monitoring program after having previously been terminated from the program during the preceding twelve months;

(m) The number of sex offenders sentenced pursuant to this part 10 who were recommended by the department's sex offender treatment and monitoring program to the parole board for release on parole during the preceding twelve months and whether the recommendation was followed in each case; and

(n) The number of sex offenders sentenced pursuant to this part 10 who were recommended by the department's sex offender treatment and monitoring program for placement in community corrections during the preceding twelve months and whether the recommendation was followed in each case.

Source: L. 2002: Entire article added with relocations, p. 1443, § 2, effective October 1. L. 2007: IP(1) and (1)(f) amended and (1)(h) to (1)(n) added, p. 1543, § 1, effective May 31.

Editor's note: This section is similar to former § 16-13-811 as it existed prior to 2002.

18-1.3-1012. Applicability of part. The provisions of this part 10 shall apply to any person who commits a sex offense on or after November 1, 1998.

Source: L. 2002: Entire article added with relocations, p. 1444, § 2, effective October 1.

Editor's note: This section is similar to former § 16-13-812 as it existed prior to 2002.

PART 11

SPECIAL PROCEEDINGS - PRETRIAL MOTIONS IN CLASS 1 FELONY CASES ALLEGING THAT A DEFENDANT IS A MENTALLY RETARDED DEFENDANT

18-1.3-1101. Definitions. As used in this part 11:

(1) "Defendant" means any person charged with a class 1 felony.

(2) "Mentally retarded defendant" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist.

Source: L. 2002: Entire article added with relocations, p. 1444, § 2, effective October 1.

Editor's note: This section is similar to former § 16-9-401 as it existed prior to 2002.

18-1.3-1102. Pretrial motion by defendant in class 1 felony case - determination whether defendant is mentally retarded - procedure. (1) Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant. Such motion shall be filed at least ninety-one days prior to trial.

(2) The court shall hold a hearing upon any motion filed pursuant to subsection (1) of this section and shall make a determination regarding such motion no later than fourteen days prior to trial. At such hearing, the defendant shall be permitted to present evidence with regard to such motion and the prosecution shall be permitted to offer evidence in rebuttal. The defendant shall have the burden of proof to show by clear and convincing evidence that such defendant is mentally retarded.

(3) The court shall enter specific findings of fact and conclusions of law regarding whether or not the defendant is a mentally retarded defendant as defined in section 18-1.3-1101.

Source: L. 2002: Entire article added with relocations, p. 1444, § 2, effective October 1. **L. 2012:** (1) and (2) amended, (SB 12-175), ch. 208, p. 868, § 119, effective July 1.

Editor's note: (1) This section is similar to former § 16-9-402 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the amending subsections (1) and (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

The allocation by this section of the burden of proof to the defendant is constitutionally permissible. *People v. Vasquez*, 84 P.3d 1019 (Colo. 2004).

The clear and convincing standard of proof placed upon the defendant by this section is constitutionally adequate. *People v. Vasquez*, 84 P.3d 1019 (Colo. 2004).

18-1.3-1103. Mentally retarded defendant - death penalty not imposed thereon. A sentence of death shall not be imposed upon any defendant who is determined to be a

mentally retarded defendant pursuant to section 18-1.3-1102. If any person who is determined to be a mentally retarded defendant is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment.

Source: L. 2002: Entire article added with relocations, p. 1444, § 2, effective October 1.

Editor's note: This section is similar to former § 16-9-403 as it existed prior to 2002.

18-1.3-1104. Evaluation and report. (1) When the defendant files a motion alleging that the defendant is a mentally retarded defendant, the court shall order one or more evaluations of the defendant with regard to such motion.

(2) In ordering an evaluation of the defendant pursuant to subsection (1) of this section, the court shall specify the place where the evaluation is to be conducted and the period of time allocated for the evaluation. In determining the place where the evaluation is to be conducted, the court shall give priority to the place where the defendant is in custody, unless the nature and circumstances of the evaluation requires designation of a different location. The court shall direct one or more psychologists who are recommended by the executive director of the department of human services pursuant to section 27-10.5-139, C.R.S., or his or her designee, to evaluate the defendant. For good cause shown, upon motion of the prosecution or the defendant or upon the court's own motion, the court may order such further or other evaluation as it deems necessary. Nothing in this section shall abridge the right of the defendant to procure an evaluation as provided in section 18-1.3-1105.

(3) The defendant shall have a privilege against self-incrimination that may be invoked prior to or during the course of an evaluation under this section. A defendant's failure to cooperate with the evaluators or other personnel conducting the evaluation may be admissible in the defendant's mental retardation hearing.

(4) To aid in the formation of an opinion as to mental retardation, it is permissible in the course of an evaluation under this section to use statements of the defendant and any other evidence, including but not limited to the circumstances surrounding the commission of the offense as well as the medical and social history of the defendant, in evaluating the defendant.

(5) A written report of the evaluation shall be prepared in triplicate and delivered to the appropriate clerk of the court. The clerk shall furnish a copy of the report to both the prosecuting attorney and the counsel for the defendant.

(6) The report of evaluation shall include, but is not limited to:

(a) The name of each expert who evaluated the defendant;

(b) A description of the nature, content, extent, and results of the evaluation and any tests conducted; and

(c) Diagnosis and an opinion as to whether the defendant is mentally retarded.

(7) Nothing in this section shall be construed to preclude the application of section 16-8-109, C.R.S.

Source: L. 2002: Entire article added with relocations, p. 1445, § 2, effective October 1.

Editor's note: This section is similar to former § 16-9-404 as it existed prior to 2002.

18-1.3-1105. Evaluation at insistence of defendant. (1) If the defendant wishes to be evaluated by an expert in mental retardation of the defendant's choice in connection with the mental retardation hearing under this part 11, the court, upon timely motion, shall order that the evaluator chosen by the defendant be given reasonable opportunity to conduct the evaluation.

(2) Whenever an expert is endorsed as a witness by the defendant, a copy of any report of an evaluation of the defendant shall be furnished to the prosecution within a reasonable time but not less than thirty-five days prior to the mental retardation hearing.

Source: L. 2002: Entire article added with relocations, p. 1445, § 2, effective October 1. L. 2012: (2) amended, (SB 12-175), ch. 208, p. 868, § 120, effective July 1.

Editor's note: (1) This section is similar to former § 16-9-405 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

PART 12

SPECIAL PROCEEDINGS - SENTENCING IN CLASS 1 FELONIES

18-1.3-1201. Imposition of sentence in class 1 felonies - appellate review.

(1) (a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense or unless the defendant has been determined to be a mentally retarded defendant pursuant to part 11 of this article, in either of which cases, the defendant shall be sentenced to life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict is entered by the trial jury. If the verdict of the trial jury is that the defendant is guilty of a class 1 felony, the alternate jurors shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the court, any member or members of the trial jury are excused from participation in the sentencing hearing, the trial judge shall replace each juror or jurors with an alternate juror or jurors. If a trial jury was waived or if the defendant pled guilty, the hearing shall be conducted before the trial judge. The court shall instruct the defendant when waiving his or her right to a jury trial or when pleading guilty, that he or she is also waiving his or her right to a jury determination of the sentence at the sentencing hearing.

(a.5) and (a.7) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(b) All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented. Any such evidence, including but not limited to the testimony of members of the victim's immediate family, as defined in section 24-4.1-302 (6), C.R.S., which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. The prosecuting attorney and the defendant or the defendant's counsel shall be permitted to present arguments for or against a sentence of death. The jury shall be instructed that life imprisonment means imprisonment for life without the possibility of parole.

(c) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(d) The burden of proof as to the aggravating factors enumerated in subsection (5) of this section shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.

(2) (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

(I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;

(II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and

(III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

(b) (I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it unanimously finds and specifies in writing that:

(A) At least one aggravating factor has been proved; and

(B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

(c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(2.5) In all cases where the sentencing hearing is held before the court alone, the court shall determine whether the defendant should be sentenced to death or life imprisonment in the same manner in which a jury determines its verdict under paragraphs (a) and (b) of subsection (2) of this section. The sentence of the court shall be supported by specific written findings of fact based upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and sentencing hearing.

(3) (a) The provisions of this subsection (3) shall apply only in a class 1 felony case in which the prosecuting attorney has filed a statement of intent to seek the death penalty pursuant to rule 32.1 (b) of the Colorado rules of criminal procedure.

(b) The prosecuting attorney shall provide the defendant with the following information and materials not later than twenty-one days after the prosecution files its written intention to seek the death penalty or within such other time frame as the supreme court may establish by rule; except that any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the prosecuting attorney intends to call as a witness at the sentencing hearing shall be provided to the defense as soon as practicable but not later than sixty-three days before trial:

(I) A list of all aggravating factors that are known to the prosecuting attorney at that time and that the prosecuting attorney intends to prove at the sentencing hearing;

(II) A list of all witnesses whom the prosecuting attorney may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(III) The written and recorded statements, including any notes of those statements, for each witness whom the prosecuting attorney may call at the sentencing hearing;

(IV) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(V) A list of books, papers, documents, photographs, or tangible objects that the prosecuting attorney may introduce at the sentencing hearing; and

(VI) All material or information that tends to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing.

(b.5) Upon receipt of the information required to be disclosed by the defendant pursuant to paragraph (c) of this subsection (3), the prosecuting attorney shall notify the defendant as soon as practicable of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

(c) The defendant shall provide the prosecuting attorney with the following information and materials no later than thirty-five days before the first trial date set for the beginning of the defendant's trial or within such other time frame as the supreme court may establish by rule; however, any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the defense intends to call as a witness at the sentencing hearing shall be provided to the prosecuting attorney as soon as practicable but not later than thirty-five days before trial:

(I) A list of all witnesses whom the defendant may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(II) The written and recorded statements, including any notes of those statements, of each witness whom the defendant may call at the sentencing hearing; and

(III) *(Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(IV) A list of books, papers, documents, photographs, or tangible objects that the defendant may introduce at the sentencing hearing.

(c.5) (I) Any material subject to this subsection (3) that the defendant believes contains information that is privileged to the extent that the prosecution cannot be aware of it in connection with its preparation for, or conduct of, the trial to determine guilt on the substantive charges against the defendant shall be submitted by the defendant to the trial judge under seal no later than forty-nine days before trial.

(II) The trial judge shall review any such material submitted under seal pursuant to subparagraph (I) of this paragraph (c.5) to determine whether it is in fact privileged. Any material the trial judge finds not to be privileged shall be provided forthwith to the prosecuting attorney. Any material submitted under seal that the trial judge finds to be privileged shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

(d) (I) Except as otherwise provided in subparagraph (II) of this paragraph (d), if the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing conducted pursuant to this section, the trial court, at the request of the prosecuting attorney, shall order that the defendant be examined and a report of said examination be prepared pursuant to section 16-8-106, C.R.S.

(II) The court shall not order an examination pursuant to subparagraph (I) of this paragraph (d) if:

(A) Such an examination was previously performed and a report was prepared in the same case; and

(B) The report included an opinion concerning how any mental disease or defect of the defendant or condition of mind caused by mental disease or defect of the defendant affects the mitigating factors that the defendant may raise at the sentencing hearing held pursuant to this section.

(e) If the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include witnesses who may provide evidence concerning the defendant's mental condition at a sentencing hearing conducted pursuant to this section, the provisions of section 16-8-109, C.R.S., concerning testimony of lay witnesses shall apply to said sentencing hearing.

(f) There is a continuing duty on the part of the prosecuting attorney and the defendant to disclose the information and materials specified in this subsection (3). If, after complying with the duty to disclose the information and materials described in this subsection (3), either party discovers or obtains any additional information and materials that are subject to disclosure under this subsection (3), the party shall promptly notify the other party and provide the other party with complete access to the information and materials.

(g) The trial court, upon a showing of extraordinary circumstances that could not have been foreseen and prevented, may grant an extension of time to comply with the requirements of this subsection (3).

(h) If it is brought to the attention of the court that either the prosecuting attorney or the defendant has failed to comply with the provisions of this subsection (3) or with an order issued pursuant to this subsection (3), the court may enter any order against such party that the court deems just under the circumstances, including but not limited to an order to permit the discovery or inspection of information and materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing the information and materials not disclosed, or to impose sanctions against the offending party.

(4) For purposes of this section, mitigating factors shall be the following factors:

(a) The age of the defendant at the time of the crime; or

(b) The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person; or

(f) The emotional state of the defendant at the time the crime was committed; or

(g) The absence of any significant prior conviction; or

(h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or

(i) The influence of drugs or alcohol; or

(j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or

(k) The defendant is not a continuing threat to society; or

(l) Any other evidence which in the court's opinion bears on the question of mitigation.

(5) For purposes of this section, aggravating factors shall be the following factors:

(a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law; or

(b) The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 18-1.3-406, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law in section 18-1.3-406; or

(c) The defendant intentionally killed any of the following persons while such person was engaged in the course of the performance of such person's official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of such person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:

(I) A peace officer or former peace officer as described in section 16-2.5-101, C.R.S.; or

(II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or

(III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.

(IV) An elected state, county, or municipal official; or

(V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or

(d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or

(e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or

(f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon. As used in this paragraph (f), "explosive or incendiary device" means:

(I) Dynamite and all other forms of high explosives; or

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting

such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) The defendant committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants; or

(h) The class 1 felony was committed for pecuniary gain; or

(i) In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(j) The defendant committed the offense in an especially heinous, cruel, or depraved manner; or

(k) The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense.

(l) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode; or

(m) The defendant intentionally killed a child who has not yet attained twelve years of age; or

(n) The defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin; or

(o) The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States; or

(p) The defendant intentionally killed more than one person in more than one criminal episode; or

(q) The victim was a pregnant woman, and the defendant intentionally killed the victim, knowing she was pregnant.

(6) (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based. The procedures to be employed in the review shall be as provided by supreme court rule. The supreme court shall combine its review pursuant to this subsection (6) with consideration of any appeal that may be filed pursuant to part 2 of article 12 of title 16, C.R.S.

(b) A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances.

(7) (a) If any provisions of this section are determined by the United States supreme court or by the Colorado supreme court to render this section unconstitutional or invalid such that this section does not constitute a valid and operative death penalty statute for class 1 felonies, but severance of such provisions would, through operation of the remaining provisions of this section, maintain this section as a valid and operative death penalty statute for class 1 felonies, it is the intent of the general assembly that those remaining provisions are severable and are to have full force and effect.

(b) If any death sentence is imposed upon a defendant pursuant to the provisions of this section and, on appellate review including consideration pursuant to subsection (8) of this section, the imposition of such death sentence upon such defendant is held invalid for reasons other than unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, the case shall be remanded to the trial court to set a new sentencing hearing before a newly impaneled jury or, if the defendant pled guilty or waived the right to jury sentencing, before the trial judge; except that, if the prosecutor informs the trial court that, in the opinion of the prosecutor, capital punishment would no longer be in the interest of justice, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment. If a death sentence imposed pursuant to this section is held invalid based on unconstitutionality of the death penalty or insufficiency of the evidence to support the

sentence, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment.

(8) If, on appeal, the supreme court finds one or more of the aggravating factors that were found to support a sentence to death to be invalid for any reason, the supreme court may determine whether the sentence of death should be affirmed on appeal by:

(a) Reweighing the remaining aggravating factor or factors and all mitigating factors and then determining whether death is the appropriate punishment in the case; or

(b) Applying harmless error analysis by considering whether, if the sentencing body had not considered the invalid aggravating factor, it would have nonetheless sentenced the defendant to death; or

(c) If the supreme court finds the sentencing body's consideration of an aggravating factor was improper because the aggravating factor was not given a constitutionally narrow construction, determining whether, beyond a reasonable doubt, the sentencing body would have returned a verdict of death had the aggravating factor been properly narrowed; or

(d) Employing any other constitutionally permissible method of review.

Source: **L. 2002:** Entire article added with relocations, p. 1446, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1), (2), (3), and (7) amended and (2.5) and (8) added, p. 7, § 2, effective July 12. **L. 2003:** IP(5)(f) amended and (5)(p) added, p. 1443, § 1, effective April 29; (5)(q) added, p. 2163, § 5, effective July 1; (5)(c)(I) amended, p. 1614, § 10, effective August 6. **L. 2012:** IP(3)(b), IP(3)(c), and (3)(c.5)(I) amended, (SB 12-175), ch. 208, p. 868, § 121, effective July 1.

Editor's note: (1) This section is similar to former § 16-11-103 as it existed prior to 2002.

(2) Language of an Arizona statute requiring a judge instead of a jury to determine the presence or absence of certain enumerated circumstances for imposition of the death penalty, which was similar to the language found in subsection (2) as it existed prior to July 12, 2002, was held unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002).

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portions to subsections (3)(b) and (3)(c) and subsection (c.5)(I) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: (1) For provisions relating to the applicability of procedures in class 1 felony cases for crimes committed on or after July 1, 1988, and prior to September 20, 1991, see part 13 of article 1.3 of title 18.

(2) For the legislative declaration contained in the 2002 act amending subsections (1), (2), (3), and (7) and enacting subsections (2.5) and (8), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2003 act enacting subsection (5)(q), see section 1 of chapter 340, Session Laws of Colorado 2003.

ANNOTATION

- I. General Consideration.
- II. Evidence.
- III. Sentencing and Punishment.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979). For article, "The 'Biased but Unbiased Juror,' What Are the States' Legitimate Interests?", see 65 Den. U. L. Rev. 1 (1988). For comment, "The Process of Death: Reflections on Capital Punishment Issues in the Tenth Circuit Court of Appeals", see 66 Den. U. L. Rev. 563 (1989). For comment, "No More Tears: Anti-Sympathy Jury Instructions Attempt to

Disallow Impulsive Emotion", see 66 Den. U. L. Rev. 645 (1989). For comment, "And Then There Were Three: Colorado's New Death Penalty Sentencing Statute", see 68 U. Colo. L. Rev. 189 (1997). For comment, "Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing", see 73 U. Colo. L. Rev. 227 (2002). For article, "Race, Gender, Region and Death Sentencing in Colorado", see 77 U. Colo. L. Rev. 549 (2006).

Annotator's note. Since § 18-1.3-1201 is similar to § 16-11-103 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed §§ 39-7-8 and 40-2-3, C.R.S. 1963, CSA, C. 48, §§ 32 and 482, and laws antecedent thereto, relevant cases construe-

ing those provisions have been included in the annotations to this section.

Former provisions of this section unconstitutional. People v. District Court, 196 Colo. 401, 586 P.2d 31 (1978) (decided prior to 1979 amendment).

Three-judge panel for death penalty sentencing unconstitutional. A three-judge panel is required to engage in a three-step fact-finding process to determine if the defendant is eligible for the death penalty. The U.S. supreme court in Ring v. Arizona determined death penalty eligibility fact-finding belongs solely to the jury under the sixth amendment, thus Colorado's three-judge panel is unconstitutional. Woldt v. People, 64 P.3d 256 (Colo. 2003) (decided under law in effect prior to the 2002 amendment).

Section largely procedural. This section, allowing for a bifurcated trial when a first-degree murder verdict is returned, is, if not wholly procedural, largely so. People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975).

The people may not seek the death penalty under pre-1988 statute, it was not revived when the 1988 amendment was found unconstitutional. People v. Aguayo, 840 P.2d 336 (Colo. 1992).

Defendant's right to waive jury trial. Subsection (1)(a), which governs the imposition of sentence in class 1 felonies, implies that a trial by jury may be waived. People v. Cisneros, 720 P.2d 982 (Colo. App. 1986), cert. denied, 479 U.S. 887, 107 S. Ct. 282, 93 L. Ed. 2d 257 (1986).

A defendant has a common law right to waive a trial by jury, which right extends to first degree felonies. The exercise of such right is conditioned upon the consent of the prosecution. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

No statute requires the district attorney to give notice of intent to seek the death penalty but sufficient notice must be given to satisfy the requirements of due process. People v. District Court, 825 P.2d 1000 (Colo. 1992).

The purpose of the sentencing inquiry is to reveal aggravation or mitigation of the offense for the guidance of the court in the imposition of sentence. Champion v. People, 124 Colo. 253, 236 P.2d 127 (1951); Hawkins v. People, 131 Colo. 281, 281 P.2d 156 (1955).

The only necessity for the taking of evidence after a plea of guilty is to enable the court to determine whether aggravating or mitigating circumstances are present to guide a court in exercising discretion as to the minimum and maximum sentence to be imposed. Marler v. People, 139 Colo. 23, 336 P.2d 101 (1959).

The purpose of this section relating to the taking of testimony on a plea of guilty when the court has discretion as to the penalty is to show

aggravation or mitigation. Stilley v. People, 160 Colo. 329, 417 P.2d 494 (1966).

When court exercises its independent review of a death sentence under the public interest provision in subsection (6), it must determine whether the proceedings were fundamentally fair. People v. Montour, 157 P.3d 489 (Colo. 2007).

Fundamental fairness dictates that appropriate questions on voir dire be asked of the jury concerning capital punishment. People v. District Court, 190 Colo. 342, 546 P.2d 1268 (1976).

"Age" means age in years. "Age" as used in the provisions of this section means age in years and not mental age, and that no person shall suffer the death penalty who, at the time of conviction, was under the age of 18 years. Sullivan v. People, 111 Colo. 205, 139 P.2d 876 (1943).

The term "convicted" means convicted upon trial. People v. District Court, 191 Colo. 558, 554 P.2d 1105 (1976).

The term "convicted" as used in this section, defining aggravating circumstances, means a judgment of conviction in the trial court, not a final determination of conviction after appeal. People v. District Court, 191 Colo. 558, 554 P.2d 1105 (1976).

Defendant should have been granted bifurcated trial. Where the effective date of this section was prior to the date of trial, and the defendant requested a bifurcated trial and preserved that request and his objections to the denial of the request at every possible moment throughout the trial, the defendant should have been granted a bifurcated trial. People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975).

Applied in Goodwin v. District Court, 196 Colo. 246, 586 P.2d 2 (1978); People v. Botham, 629 P.2d 589 (Colo. 1981); People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983); People v. Harlan, 8 P.3d 448 (Colo. 2000).

II. EVIDENCE.

Any evidence relevant to punishment is admissible. Guilt and punishment are so definitely integrants of a verdict in a first degree murder case that courts should admit in evidence any material relevant to the question of punishment, i.e., matters in aggravation and mitigation, whether it applies to the issue of guilt or has relation only to the degree of culpability. Jones v. People, 155 Colo. 148, 393 P.2d 366 (1964).

Polygraph evidence is per se inadmissible in a criminal trial in Colorado. Thus, the defendant's right to present all relevant mitigating evidence does not include the right to present evidence concerning polygraph results. People v. Dunlap, 975 P.2d 723 (Colo. 1999), cert.

denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

However, the mere reference to such testing does not require a mistrial. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002); *People v. Kerber*, 64 P.3d 930 (Colo. App. 2002).

Admissibility before the court. Following the entry of a plea of guilty, the evidence proper for the consideration of the court is not limited to that which would be admissible upon a trial following a plea of not guilty. *Champion v. People*, 124 Colo. 253, 236 P.2d 127 (1951).

Before a jury. Any and all evidence relating to the series of events of which the act charged in the information is a part was proper for the consideration of the jury. Anything admissible in a trial in which the accused enters a plea of not guilty is proper for the consideration of the jury which is called upon to fix a penalty if the evidence bears upon circumstances showing aggravation or mitigation of the offense. *Monge v. People*, 158 Colo. 224, 406 P.2d 674 (1965).

Duty of jury to weigh all evidence in choosing mode of punishment. Where a homicide is committed in the perpetration of a robbery, proof of specific intent is not a prerequisite to a conviction of first degree murder, but in the exercise of its discretion in choosing between the two modes of punishment for that crime prescribed by this section, it is the duty of the jury to weigh and consider all the evidence in the case. *Leopold v. People*, 105 Colo. 147, 95 P.2d 811 (1939).

Subjects pertinent to aggravation or mitigation of offense. The character of the defendant, his habits, his social standing, his intelligence, and his motive for the commission of the offense are all subjects pertinent to the inquiry concerning aggravation or mitigation of the offense. *Smith v. People*, 32 Colo. 251, 75 P. 914 (1904).

Aggravation is defined to be any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself. *Smith v. People*, 32 Colo. 251, 75 P. 914 (1904).

Although subsection (6) provides that a previous felony conviction is an aggravating factor, there is no statutory provision expressly permitting the admission of underlying factual circumstances of prior felonies. *People v. Borrego*, 774 P.2d 854 (Colo. 1989).

Evidence concerning the impact of the defendant's prior crimes on the victims of those crimes is not admissible, because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced. The facts of the prior crimes, however, may be properly admitted. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied,

528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability. *Smith v. People*, 32 Colo. 251, 75 P. 914 (1904).

The trial court inappropriately allowed the jury to consider during steps one through three of the process evidence introduced by the prosecution for the purpose of rebutting mitigating factors that the defense had not raised. The error was harmless, however, due to the limiting instructions given the jury by the trial court. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

However, the jury may consider any aggravating evidence submitted by the prosecution, regardless of whether it is related to the rebuttal of mitigating factors, after the jury has found the defendant, under steps one through three, to be eligible for the death penalty. The admissibility of evidence rebutting mitigation at the point at which the jury determines whether to select the defendant to receive the death penalty is constrained only by the standard evidentiary principles concerning the relevance of the evidence and the potential for the evidence to inflame the passion or prejudice of the jury. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

The standard for determining the sufficiency of the evidence of death penalty aggravators is the same as that for determining the sufficiency of the evidence of guilt: Whether the relevant evidence, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable juror that the aggravating factor has been proven. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

The prosecution introduced sufficient evidence to convince the jury beyond a reasonable doubt that the defendant killed his victims to avoid arrest, including evidence that the defendant did not use a disguise in carrying out the robbery and murders and that the defendant had previously worked with the victims and therefore knew they could identify him. The fact that the defendant may have had additional motives for the murders does not prevent application of the "killing to avoid arrest" aggravator. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Former provisions of this section prohibited death penalty where conviction was

based entirely on circumstantial evidence. *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970).

It required direct evidence on any element of crime. This section as it read prior to the 1974 amendment could reasonably have been read to mean that any direct evidence on any element of the crime was sufficient to submit the question of life imprisonment or death to the jury. *Scheer v. Patterson*, 429 F.2d 907 (10th Cir. 1970), cert. denied, 400 U.S. 996, 91 S. Ct. 471, 27 L. Ed. 2d 445 (1971).

For cases discussing circumstantial evidence, see *Covington v. People*, 36 Colo. 183, 85 P. 832 (1906); *Ives v. People*, 86 Colo. 141, 278 P. 792 (1929); *Moya v. People*, 88 Colo. 139, 293 P. 335 (1930); *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950); *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961); *Mills v. People*, 146 Colo. 457, 362 P.2d 152 (1961), cert. denied, 369 U.S. 841, 82 S. Ct. 869, 7 L. Ed. 2d 846 (1962); *Mitchell v. People*, 173 Colo. 217, 476 P.2d 1000 (1970).

Introduction of confession was nonprejudicial. Under this section after a plea of guilty to murder, a hearing is held solely for the purpose of determining whether the accused is guilty of murder in the first or second degree. Petitioner was found guilty of murder in the second degree, despite the introduction of his confession. He thus received the most favorable possible verdict under the statute and the introduction of the confession into evidence was nonprejudicial. *Melton v. Patterson*, 313 F. Supp. 1287 (D. Colo. 1970), aff'd, 445 F.2d 410 (10th Cir. 1971).

III. SENTENCING AND PUNISHMENT.

Unconstitutionality. Imposition of death penalty when aggravating and mitigating factors weigh equally for defendants convicted of first degree murder violates fundamental requirements of certainty and reliability under the cruel and unusual punishment and due process clauses of the Colorado constitution. *People v. Young*, 814 P.2d 834 (Colo. 1991) (decided under law in effect prior to 1991 repeal and reenactment of this section).

This section establishes a four-step process in the sentencing procedure. The jury first determines if at least one statutory aggravating factor exists. If the jury unanimously finds the state has proven at least one aggravating factor beyond a reasonable doubt, it must next determine whether any mitigating factors exist. Third, the jury must determine whether "sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist." If the jury finds that mitigating factors do not outweigh any aggravating factors then it must go on to the fourth step. The fourth step requires the jury to decide "whether the defendant should be sentenced to death or life impris-

onment." *People v. O'Neill*, 803 P.2d 164 (Colo. 1990) (decided under law in effect prior to 1988 amendment); *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Jury sentencing is constitutional. For a state to permit a jury to fix the penalty in a first degree murder case, when in all other instances the penalty is imposed by a judge after presentencing hearings, is not an unreasonable or arbitrary classification. *People ex rel. McKevitt v. District Court*, 167 Colo. 221, 447 P.2d 205 (1968).

Colorado's system of jury sentencing is not a denial of equal protection of the laws because it is used only in capital cases. This legislative classification is neither arbitrary, unreasonable, nor discriminatory against capital offenders. Capital offenses are in a distinct class; thus, the limitation of jury sentencing in this manner and for this purpose is not discriminatory. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

Colorado's jury sentencing procedure does not deprive the petitioner of his right against self-incrimination. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

No constitutional infirmity in capital sentencing scheme. By requiring that the jury find both that a statutory aggravator has been proven beyond a reasonable doubt and that mitigation does not outweigh aggravation before a defendant is even eligible to receive the death penalty, Colorado's sentencing scheme is sufficiently reliable to pass constitutional muster. *People v. Dunlap*, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Requirement that defendant waive his or her sixth amendment right to a jury trial on all facts essential to a death penalty eligibility determination jointly with a guilty plea to the underlying capital crime violates the sixth amendment. The right to have a jury trial on sentencing facts is independent of the right to a jury trial on the underlying offense. By coupling the waiver of the jury hearing on a death sentence with the guilty plea to the underlying charge, there is no opportunity for an independent, knowing, voluntary, and intelligent waiver, rather the waiver is automatic. Without such a waiver, the provision is unconstitutional. *People v. Montour*, 157 P.3d 489 (Colo. 2007).

To cure the constitutional defect, the court excised the offending provision. After severing the language, the result is to remand the case back to the trial court for sentencing hearing with a jury unless the defendant waives the sentencing hearing with a jury. This remedy is consistent with the intent of the general assem-

bly to maintain a valid and operative death penalty. The other remedy, requiring a life sentence when pleading guilty to a capital crime, would subject a defendant to the death penalty only when he or she chooses a jury trial, such a result would create an unconstitutional burden on the defendant's sixth amendment right. *People v. Montour*, 157 P.3d 489 (Colo. 2007).

The existence of one Blakely-exempt fact does not alone make a defendant death penalty eligible. Defendant has the right to have the jury weigh all mitigating factors against aggravating factors. *People v. Montour*, 157 P.3d 489 (Colo. 2007).

As to discretion of jury prior to 1974 amendment to determine whether the penalty should be life imprisonment or death, see *Jones v. People*, 155 Colo. 148, 393 P.2d 366 (1964); *Monge v. People*, 158 Colo. 224, 406 P.2d 674 (1965); *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

For instructions trial court should give to the jury at the conclusion of evidentiary stage of capital sentencing hearing, see *People v. Durre*, 690 P.2d 165 (Colo. 1984).

Belief against capital punishment does not disqualify juror. Belief against capital punishment on the part of jurors who are vested with a dichotomy of functions—the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed—cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Jury must make separate determination that death is the appropriate penalty beyond a reasonable doubt when aggravating and mitigating factors are in equipoise. *People v. Young*, 814 P.2d 834 (Colo. 1991) (decided under law in effect prior to 1991 repeal and reenactment of this section).

Jury must be convinced beyond a reasonable doubt that mitigating factors do not outweigh proven statutory aggravating factors before sentencing defendant to death. *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

In order to ensure reliability in process, "beyond reasonable doubt" standard is properly applied to determination of relevant weight of aggravating and mitigating factors during penalty stage of death penalty trial. *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Trial court improperly instructed jury that, in order to impose a death penalty, they must be

convinced beyond a reasonable doubt that the proven statutory aggravating factors outweigh the mitigating factors as said instruction is contrary to subsection (2)(a)(II). *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Jury was properly instructed that, after weighing mitigating and aggravating factors, a death verdict could be returned only if the jurors unanimously agreed that death is the appropriate punishment beyond a reasonable doubt and the jury should be instructed that the outcome of such weighing process does not govern the final determination as to whether a death verdict is appropriate. *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Requirement that jury must be convinced beyond reasonable doubt that mitigating factors do not outweigh proven statutory aggravating factors creates to some extent a presumption that mitigating factors do outweigh aggravating factors and a presumption in favor of life imprisonment sentences; however, the use of the term "presumption of life imprisonment" in jury instructions should be discouraged. *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

"Beyond a reasonable doubt" language with respect to third and fourth steps of the sentencing process do not impose a burden of proof, such language is intended to impose a standard on juries as to the high degree of certainty which is required in order to ensure the reliability and certainty of their decisions. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Trial court erred by instructing jury that they must consider certain statements of purported fact to be mitigating factors as such instruction assumed facts not supported by the record. *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

"Proportionality" review not mandated by state constitution. That a reviewing court conduct an inquiry into whether the sentence in a particular case is proportional when compared with the sentences in all similar cases in Colorado is not required by either the due process or cruel and unusual punishment clauses of the state constitution. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

The defendant's age should not be considered in determining whether to conduct an abbreviated or an extended proportionality review. *Valenzuela v. People*, 856 P.2d 805 (Colo. 1993); *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Sentence of life imprisonment with no possibility of parole for 40 years for a juvenile offender under the automatic sentencing provi-

sions mandated by this section for first degree murder was not disproportionate in violation of the eighth amendment. *Valenzuela v. People*, 856 P.2d 805 (Colo. 1993).

Sentence of life imprisonment with no possibility of parole for a juvenile offender under the automatic sentencing provisions mandated by this section for first-degree murder was not disproportionate to offense. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Discretion afforded to the prosecutor, who determines against whom to seek a death sentence, to the jury, which determines who is to receive a sentence of death, and to the governor, who determines who shall be granted clemency, violates neither the constitutional guarantee of due process nor the constitutional prohibition against cruel and unusual punishment. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Mitigating factors not unconstitutionally vague. Mitigators established under subsection (5) meet the requirement of certainty and clarity required by due process clause and provide the jury with sufficiently precise guidelines to determine whether or not to impose the death penalty. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Two-prong test in determining constitutionality of death penalty aggravator: (1) Whether the aggravator establishes "rational criteria" for narrowing a jury's discretion in considering whether death is appropriate; and (2) whether the aggravator identifies special indicia of blameworthiness or dangerousness capable of objective determination. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

The purpose of a statutory aggravator generally is to provide a rational criteria in order to narrow the class of persons eligible for the death penalty. The United States supreme court has held that this is one of the requirements for a capital sentencing scheme to pass constitutional muster. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

"Grave risk of death" aggravator is not unconstitutionally vague. Alleging that a victim whom the defendant had attempted to kill was a victim "in addition to" the victims of the class 1 felonies committed by the defendant was proper under this aggravating factor. By shooting and wounding a person, the defendant created a grave risk of death to a person other than the victims of his class 1 felonies. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

"Lying in wait or from ambush" aggravator is not unconstitutionally vague. The terms "lying in wait" and "ambush" are terms that an average juror should be capable of understanding. Thus, the aggravator is not unconstitutionally vague. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

"Avoiding or preventing a lawful arrest or prosecution" aggravator is appropriate if the evidence indicates that a defendant has murdered the victim of a contemporaneously or recently perpetrated offense and the reason for the murder was to prevent the victim from becoming a witness. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); *Davis v. Executive Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

The statutory aggravator sufficiently narrows the class of defendants to whom it applies; therefore, it is constitutional. *Davis v. Executive Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

Aggravator established under subsection (6)(j) held unconstitutionally vague. The words "especially heinous, atrocious, or depraved" do not inherently restrain the arbitrary and capricious infliction of the death sentence. *People v. Davis*, 794 P.2d 159 (Colo. 1990) (decided prior to 1989 amendment defining the words heinous, atrocious, and depraved), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Submission of the unconstitutionally vague "heinousness" aggravator to the jury did not have a substantial and injurious effect or influence in determining the jury's verdict. *Davis v. Executive Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

Invalidation on appeal of an aggravator does not require automatic reversal of sentence. The invalidation of an aggravator considered by a jury in passing sentence does not demand reversal of such sentence if the reviewing court determines, beyond a reasonable doubt, that consideration by the jury of the aggravator was harmless error. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Construction given death penalty aggravators. "Under sentence of imprisonment" within context of aggravator established by subsection (6)(a) includes period of parole. *People v. Davis*, 794 P.2d 159 (Colo. 1990) (decided prior to 1988 amendment adding the phrase "including the period of parole or probation"), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

"Party to an agreement" within context of aggravator established under subsection (6)(e) does not refer exclusively to agreements involv-

ing contract murders or murders for pecuniary gain. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); *Davis v. Executive Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

“Kidnapped” within context of aggravator established under subsection (6)(d) is not restricted to a kidnap-for-ransom situation. Aggravator applies to both first and second-degree kidnapping. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

“Avoiding or preventing lawful arrest” within context of aggravator established under subsection (6)(k) is not limited to the following situations: (1) The murder of a witness in an attempt to thwart the investigation or prosecution of a previous separate offense; or (2) the murder of a law enforcement officer while attempting to effect an arrest. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Trial court did not err in excluding evidence addressing the issue of guilt or innocence at the sentencing phase. A trial court’s decision to exclude will not be reversed absent an abuse of discretion. No such abuse exists where the trial court accepted defendant’s guilty plea and heard extensive evidence concerning mistreatment of prisoners as defendant desired. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

“Doubling up” of aggravators permissible. The submission to the jury of both the “kidnapping” aggravator and the “felony-murder” aggravator under circumstances where kidnapping formed the basis for the “felony-murder” aggravator did not constitute plain error. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Since the jury instructions were sufficient to advise the jury that the weighing of mitigating and aggravating factors rests not on the number of each, but on a qualitative determination of whether the aggregate weight of any mitigating factors outweighs the aggregate weight of any aggravating factors, it was not error to allow the prosecution to submit to the jury multiple aggravating factors based on the same underlying factual circumstances. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Trial court did not sua sponte introduce aggravators not alleged by the prosecution. Although the prosecution listed the statutory aggravators of prior felony conviction and knowingly creating a grave risk of death to another only once as opposed to once for each of the murder victims, the disclosure was sufficient to put defendant on notice that the prosecution intended to allege and introduce evidence of the

two aggravators. *People v. Dunlap*, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Submission to the jury of both the felony murder and the kidnapping aggravators addressing the same basic conduct did not have a substantial and injurious effect or influence on the jury verdict. *Davis v. Executive Dir. of Dept. of Corr.*, 100 F.3d 750 (10th Cir. 1996).

Previous convictions incorporates convictions existing at the time the sentencing hearing is conducted pursuant to this section, regardless of the date on which the offense underlying the “previous conviction” occurred. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute); *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Consideration of defendant’s acts occurring a day after the acts that caused the death of another as contributory to a finding of the “especially heinous” aggravator improper and contrary to the statutory scheme. It was error for a court to consider under subsection (6)(j) the method in which a body was disposed as aggravating the defendant’s actions which resulted in the death of another person. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

For options available to a reviewing court where jury has improperly considered an aggravator in determining whether death is the appropriate sentence, see *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Application of “harmless error” analysis. *People v. White*, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

In the context of capital punishment, the state constitution does not provide broader protection than the federal constitution. *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

In the death penalty phase of the trial, it is proper for the jury to consider the circumstances of the offense itself. In order to do so, it is germane for the jury to make the assessment from the viewpoint of the victim. *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

Statements made by the prosecutor concerning the victim’s inability to celebrate another birthday or write letters were made in response to defense counsel’s arguments regarding the severity of life imprisonment, and compared the victim’s fate with that of the defendant and were

permissible comment for the sentence of death. *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

Statements made by the prosecutor concerning whether the defendant would pose a continuing threat to society and whether rehabilitation was likely were proper statements. *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

A statement by the prosecutor that the case before them was one of the worst he had ever seen was irrelevant and had the possibility of being unfairly prejudicial but by itself did not rise to the level of reversible error. *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

A statement by the prosecutor that it is cheaper to execute a defendant than to keep him in prison for the rest of his life had no support in the record and was not a legitimate factor for the jury to consider. *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

Unanimity is not required for the finding of mitigating factors. *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

But inability to impose death penalty in proper case is disqualifying. Disqualification of a juror for inability to join in a verdict imposing the death penalty in a proper case is not error where the jury has the duty to determine the defendant's guilt or innocence and his punishment if he is found guilty. Such a person is disqualified to act as a juror for the reason that his attitude on the subject of capital punishment would prevent him from performing his duty. He would not carry into effect the whole law, and therefore would not stand indifferent between the state and the accused. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Exclusion for cause of all prospective jurors who are unable to impose the death penalty is permissible. *People v. Drake*, 748 P.2d 1237 (Colo. 1988); *People v. Davis*, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Defendant has the right to allocution before sentence is imposed and denial of the right of

allocution requires resentencing. *People v. Borrego*, 774 P.2d 854 (Colo. 1989).

Since complicity is a theory that necessitates holding one person legally accountable for the behavior of another, a defendant's constitutional rights are violated if the jury in a capital offense sentencing hearing is given a complicity instruction. *People v. Borrego*, 774 P.2d 854 (Colo. 1989).

Inconsistent verdicts between the parts of a capital murder trial which determine guilt or innocence and which determine the penalty do not invalidate the guilty verdict. *People v. Rodriguez*, 786 P.2d 472 (Colo. App. 1989).

During sentencing phase of trial for a class 1 felony, trial court must allow prosecution to introduce evidence of defendant's prior felony convictions, whether or not any prior felonies constitute statutory aggravating factors, since the evidence is relevant to show lack of statutory mitigating circumstances. *People v. Saathoff*, 790 P.2d 804 (Colo. 1990).

Reciprocal discovery provisions of subsection (3.5) are constitutional. Requiring disclosure of identities of persons defense intends to call at the sentencing phase and witness statements for such persons does not violate the fifth, sixth, or fourteenth amendments, nor does it violate the work product privilege. *People v. Martinez*, 970 P.2d 469 (Colo. 1998).

Reciprocal discovery extends to persons the defense "intends" to call at the sentencing phase, not to all prospective witnesses. Such discovery extends only to statements that relate to the subject matter of the intended testimony and comprise only substantial recitation of witness statements, and not the mental impressions, conclusions, opinions, or legal theories of the defense. *People v. Martinez*, 970 P.2d 469 (Colo. 1998).

Subsection (2), as it existed in 1993, and Crim. P. 35(b) together direct that a trial court may only order post-conviction relief pursuant to the rule from a jury's death sentence if the circumstances delineated in subsection (2) are met. Thus, trial court's specific finding that the evidence supported the death sentence circumscribed the limits of the court's authority to overturn that sentence under subsection (2) or to reduce it under Crim. P. 35(b). *People v. Dunlap*, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).

18-1.3-1202. Death penalty inflicted by lethal injection. The manner of inflicting the punishment of death shall be by the administration of a lethal injection within the time prescribed in this part 12, unless for good cause the court or governor may prolong the time. For the purposes of this part 12, "lethal injection" means a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death. The manner of inflicting the punishment of death shall, in all circumstances, be by the administration of a lethal injection regardless of the date of the commission of the offense or offenses for which the death penalty is imposed.

Source: L. 2002: Entire article added with relocations, p. 1452, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-401 as it existed prior to 2002.

ANNOTATION

Law reviews. For article, "Criminal Procedure in Colorado — A Summary and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950). For comment, "And

Then There Were Three: Colorado's New Death Penalty Sentencing Statute", see 68 U. Colo. L. Rev. 189 (1997).

18-1.3-1203. Genetic testing prior to execution. Prior to the execution of the death penalty pursuant to this part 12, the judicial department shall obtain the chemical testing of a biological substance sample from the convicted offender to determine the genetic markers thereof.

Source: L. 2002: Entire article added with relocations, p. 1453, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-401.5 as it existed prior to 2002.

18-1.3-1204. Implements - sentence executed by executive director. The executive director of the department of corrections, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the correctional facilities at Canon City and therein at all times have in preparation all necessary implements requisite for carrying into execution the death penalty by means of the administration of a lethal injection. The execution shall be performed in the room or place by a person selected by the executive director and trained to administer intravenous injections. Death shall be pronounced by a licensed physician or a coroner according to accepted medical standards.

Source: L. 2002: Entire article added with relocations, p. 1453, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-402 as it existed prior to 2002.

18-1.3-1205. Week of execution - warrant. When a person is convicted of a class 1 felony, the punishment for which is death, and the convicted person is sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which the sentence must be executed; the end of such week so appointed shall be not fewer than ninety-one days nor more than one hundred twenty-six days from the day of passing the sentence. Said warrant shall be directed to the executive director of the department of corrections or the executive director's designee commanding said executive director or designee to execute the sentence imposed upon some day within the week of time designated in the warrant and shall be delivered to the sheriff of the county in which such conviction is had, who, within three days thereafter, shall proceed to the correctional facilities at Canon City and deliver the convicted person, together with the warrant, to said executive director or designee, who shall keep the convict in confinement until execution of the death penalty. Persons shall be permitted access to the inmate pursuant to prison rules. Such rules shall provide, at a minimum, for the inmate's attendants, counsel, and physician, a spiritual adviser selected by the inmate, and members of the inmate's family to have access to the inmate.

Source: L. 2002: Entire article added with relocations, p. 1453, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** Entire section amended, p. 14, § 4, effective October 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 869, § 122, effective July 1.

Editor's note: (1) This section is similar to former § 16-11-403 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2002 act amending this section, see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

Annotator's note. Since § 18-1.3-1205 is similar to § 16-11-403 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed § 39-11-3, C.R.S. 1963, CSA, C. 48, § 538, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Meaning of "week of time". The week of time which is required by this section to be appointed and designated in capital cases within which the sentence must be executed, is a period of time extending from 12 midnight Saturday until 12 midnight the following Saturday, but an error in the designation of the week is rendered immaterial when the execution is stayed by the supreme court pending review. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

Court fixes date of execution following stay. The court has authority to fix the date of execution in cases of affirmance, where the ex-

ecution has been stayed upon appeal or supersedeas. *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893).

But definite date set in order granting stay did not deny due process. The fact that the state supreme court set a definite execution date pending determination of post-conviction relief was not "suggestion of predetermination" in violation of due process and did not constitute an implied direction to deny petitioner relief. *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed.2d 865 (1971).

Procedure of delivery of prisoner by sheriff held not improper. *Agnes v. People*, 104 Colo. 527, 93 P.2d 891 (1939).

Applied in *Medley*, Petitioner, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 (1890).

18-1.3-1206. Execution - witnesses. The particular day and hour of the execution of said sentence within the week specified in said warrant shall be fixed by the executive director of the department of corrections or the executive director's designee, and the executive director shall be present thereat or shall appoint some other representative among the officials or officers of the correctional facilities at Canon City to be present in his or her place and stead. There shall also be present a physician and such guards, attendants, and other persons as the executive director or the executive director's designee in his or her discretion deems necessary to conduct the execution. In addition, there may be present such witnesses as the executive director or the executive director's designee in his or her discretion deems desirable, not to exceed eighteen persons. The executive director or the executive director's designee shall notify the governor of the day and hour for the execution as soon as it has been fixed.

Source: L. 2002: Entire article added with relocations, p. 1453, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-404 as it existed prior to 2002.

18-1.3-1207. Record and certificate of execution. The executive director of the department of corrections or his or her designee shall keep a book of record, to be known as record of executions, in which shall be entered the reports specified in this section. Immediately after the execution, a postmortem examination of the body of the convict shall be made by the attending physician, who shall enter in said book of record the nature and extent of the examination and sign and certify to the same. The executive director or his or her designee shall also immediately make and enter in said book a report, setting forth the time of such execution and that the convict (naming him or her) was then and there executed in conformity to the sentence specified in the warrant of the court (naming such court) to him or her directed and in accordance with the provisions of this part 12, and shall insert

in said report the names of all the persons who were present and witnessed the execution, and shall procure each of such persons to sign said report with his or her full name and place of residence before leaving the place of execution. The executive director or his or her designee shall thereupon attach his or her certificate to said report, certifying to the truth and correctness thereof, and shall immediately deliver a certified transcript of the record entry to the court which sentenced the convict.

Source: L. 2002: Entire article added with relocations, p. 1454, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-405 as it existed prior to 2002.

PART 13

SPECIAL PROCEEDINGS - APPLICABILITY OF PROCEDURE IN CLASS 1 FELONY CASES FOR CRIMES COMMITTED ON OR AFTER JULY 1, 1988, AND PRIOR TO SEPTEMBER 20, 1991

18-1.3-1301. Applicability of procedure for the imposition of sentences in class 1 felony cases. (1) It is the expressed intention of the general assembly that there be no hiatus in the imposition of the death penalty as a sentence for the commission of a class 1 felony in the state of Colorado as a result of the holding of the Colorado supreme court in *People v. Young*, 814 P.2d 834 (Colo. 1991). Toward that end, the provisions of former section 16-11-103, C.R.S., as it existed prior to the enactment of senate bill 78, enacted at the second regular session of the fifty-sixth general assembly, and as it currently exists as section 18-1.3-1201, to the extent such provisions were not automatically revitalized by the operation of law, are reenacted as section 18-1.3-1302 and are hereby made applicable to offenses committed on or after July 1, 1988, and prior to September 20, 1991.

(2) It is the intent of the general assembly that this part 13 is independent from former section 16-11-103, C.R.S., now section 18-1.3-1201, and that if any provision of this part 13 or the application thereof to any person or circumstance is held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the application of section 18-1.3-1201 to any offense committed on or after September 20, 1991.

Source: L. 2002: Entire article added with relocations, p. 1454, § 2, effective October 1.

Editor's note: This section is similar to former § 16-11-801 as it existed prior to 2002.

ANNOTATION

Applying §§ 16-11-801 and 16-11-802 retroactively violates proscription against ex post facto laws where, as a result of the decision in *People v. Young*, there was no valid death

penalty sentencing statute in effect at the time the offenses were committed. *People v. Aguayo*, 840 P.2d 336 (Colo. 1992) (decided prior to 2002 relocation of § 16-11-801).

18-1.3-1302. Imposition of sentences in class 1 felonies for crimes committed on or after July 1, 1988, and prior to September 20, 1991 - appellate review. (1) (a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense, in which case the defendant shall be sentenced to life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict is entered by the trial jury. If the verdict of the trial jury is that the defendant is guilty of a class 1 felony, the alternate jurors shall sit as alternate jurors on the issue of punishment. If, for

any reason satisfactory to the court, any member or members of the trial jury are excused from participation in the sentencing hearing, the trial judge shall replace such juror or jurors with an alternate juror or jurors. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(b) All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, and any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section may be presented. Any such evidence which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. The prosecuting attorney and the defendant or the defendant's counsel shall be permitted to present arguments for or against a sentence of death. For offenses committed before July 1, 1985, the jury shall be instructed that life imprisonment means life without the possibility of parole for twenty calendar years. For offenses committed on or after July 1, 1985, the jury shall be instructed that life imprisonment means life without the possibility of parole for forty calendar years.

(c) Both the prosecuting attorney and the defense shall notify each other of the names and addresses of any witnesses to be called in the sentencing hearing and the subject matter of such testimony. Such discovery shall be provided within a reasonable amount of time as determined by order of the court and shall be provided not less than twenty-four hours prior to the commencement of the sentencing hearing. Unless good cause is shown, noncompliance with this paragraph (c) shall result in the exclusion of such evidence without further sanction.

(d) The burden of proof as to the aggravating factors enumerated in subsection (5) of this section shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.

(2) (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

(I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;

(II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and

(III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

(b) (I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it finds and specifies in writing that:

(A) At least one aggravating factor has been proved; and

(B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

(c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(3) In all cases where the sentencing hearing is held before the court alone, the court shall determine whether the defendant should be sentenced to death or life imprisonment in the same manner in which a jury determines its verdict under paragraphs (a) and (b) of subsection (2) of this section. The sentence of the court shall be supported by specific written findings of fact based upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and the sentencing hearing.

(4) For purposes of this section, mitigating factors shall be the following factors:

- (a) The age of the defendant at the time of the crime; or
 - (b) The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
 - (c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
 - (d) The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution; or
 - (e) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person; or
 - (f) The emotional state of the defendant at the time the crime was committed; or
 - (g) The absence of any significant prior conviction; or
 - (h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or
 - (i) The influence of drugs or alcohol; or
 - (j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or
 - (k) The defendant is not a continuing threat to society; or
 - (l) Any other evidence which in the court's opinion bears on the question of mitigation.
- (5) For purposes of this section, aggravating factors shall be the following factors:
- (a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law; or
 - (b) The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 18-1.3-406, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law in section 18-1.3-406; or
 - (c) The defendant intentionally killed any of the following persons while such person was engaged in the course of the performance of such person's official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of such person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:
 - (I) A peace officer or former peace officer as described in section 16-2.5-101, C.R.S.; or
 - (II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or
 - (III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.
 - (IV) An elected state, county, or municipal official; or
 - (V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or
- (d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or
 - (e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or
 - (f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), "explosive or incendiary device" means:
 - (I) Dynamite and all other forms of high explosives; or
 - (II) Any explosive bomb, grenade, missile, or similar device; or
 - (III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or

compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) The defendant committed or attempted to commit a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants; or

(h) The class 1 felony was committed for pecuniary gain; or

(i) In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(j) The defendant committed the offense in an especially heinous, cruel, or depraved manner; or

(k) The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense.

(6) (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based. The procedures to be employed in the review shall be as provided by supreme court rule. The supreme court shall combine its review pursuant to this subsection (6) with consideration of any appeal that may be filed pursuant to part 2 of article 12 of title 16, C.R.S.

(b) A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances.

(7) (a) If any provision of this section or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this section, which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this section are declared to be severable.

(b) If any death sentence imposed upon a defendant pursuant to the provisions of this section and the imposition of such death sentence upon such defendant is held invalid or unconstitutional, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment.

Source: L. 2002: Entire article added with relocations, p. 1455, § 2, effective October 1. L. 2004: (5)(c)(I) amended, p. 1198, § 50, effective August 4.

Editor's note: This section is similar to former § 16-11-802 as it existed prior to 2002.

ANNOTATION

Annotator's note. Since § 18-1.3-1302 is similar to § 16-11-802 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, relevant cases construing those provisions have been included in the annotations to this section.

No statute requires the district attorney to give notice of intent to seek the death penalty but sufficient notice must be given to satisfy the requirements of due process. *People v. District Court*, 825 P.2d 1000 (Colo. 1992).

The fact that the legislature excluded the definitions in subsection (6.5) of § 16-11-103 does not mean that there has been a detrimental change that violates the ex post facto clause.

People v. District Court, 834 P.2d 181 (Colo. 1992).

The reinstatement in this section of the fourth step in the sentencing procedure that was formerly in § 16-11-103 does not violate the ex post facto clause because the defendant was subject to the death penalty provision in § 16-11-103 when he allegedly committed the acts. *People v. District Court*, 834 P.2d 181 (Colo. 1992).

A charge that counsel was overzealous in his or her defense was not sufficient to establish a charge by defendant that he had ineffective assistance of counsel. Defendant claimed that had his counsel not been so zealous he would

have been charged under statute (§ 16-11-103) that did not involve the death penalty. *People v. District Court*, 834 P.2d 181 (Colo. 1992).

Applying §§ 16-11-801 and 16-11-802 retroactively violates proscription against ex post facto laws where, as a result of the decision in *People v. Young*, there was no valid death penalty sentencing statute in effect at the time the offenses were committed. *People v. Aguayo*, 840 P.2d 336 (Colo. 1992).

Since § 16-11-802 (1)(b) (now § 18-1.3-1302 (1)(b)) has a later effective date, was later enacted, and operates in an ameliorative manner for criminal defendants, it controls and that portion of § 18-1-105(4) (now § 18-1.3-401 (4)) which provides for no possibility of

parole for persons sentenced to life imprisonment following conviction for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991, is abrogated by this later enactment. Thus, § 16-11-103 (1)(b) (now § 18-1.3-1201 (1)(b)), as amended by House Bill 91S-1001, controls parole eligibility for convictions and sentences to life imprisonment based on class 1 felony offenses occurring on or after September 20, 1991, and § 16-11-802 (1)(b) (now § 18-1.3-1302 (1)(b)) controls parole eligibility for class 1 felony offenses occurring during the period from July 1, 1990, until September 19, 1991. *People v. District Court*, 834 P.2d 236 (Colo. 1992).

PART 14

COMPETENCY OF PERSONS TO BE EXECUTED

18-1.3-1401. Definitions. As used in this part 14, unless the context otherwise requires: (1) "Colorado mental health institute" means the Colorado mental health institute at Pueblo.

(2) "Mentally incompetent to be executed" means that, due to a mental disease or defect, a person who has been sentenced to death is presently unaware that he or she is to be punished for the crime of murder or that the impending punishment for that crime is death.

Source: L. 2002: Entire article added with relocations, p. 1459, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-301 as it existed prior to 2002.

18-1.3-1402. Mental competency to be executed - presumptions. (1) A person who is sentenced to death shall not be executed so long as the person is mentally incompetent to be executed.

(2) Any convicted person who is sentenced to death is presumed mentally competent to be executed. A convicted person may be found mentally incompetent to be executed only on clear and convincing evidence of such condition. The party asserting that the convicted person is mentally incompetent to be executed bears the burden of proof regarding such condition and the burden of producing evidence of such condition.

Source: L. 2002: Entire article added with relocations, p. 1459, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-302 as it existed prior to 2002.

18-1.3-1403. Mental incompetency to be executed - filing of motion. (1) (a) If, after a sentence of death is imposed, the executive director of the department of corrections, the convicted person's attorney, or an attorney for the state has a good faith reason to believe that the convicted person may be mentally incompetent to be executed, the executive director, the convicted person's attorney, or the state attorney may file a motion raising the issue of whether the convicted person is mentally incompetent to be executed. The motion shall be filed in the district court in the judicial district in which the convicted person was sentenced and shall be directed to the judge who presided over the convicted person's sentencing hearing. If that judge is unavailable, the chief judge of the same judicial district shall decide the motion. The motion shall be filed in both the district court clerk's

office and the office of the judge who will hear the motion. On the same day the motion and accompanying materials are filed with the court, the motion and all accompanying materials shall be served upon the office of the prosecuting attorney who tried the case and the attorney general's office.

(b) If the judge who presided at the sentencing hearing has a good faith reason to believe that the convicted person may be mentally incompetent to be executed, the judge shall so advise the convicted person's attorney or shall appoint an attorney to investigate the issue and file any motions the attorney deems appropriate under this part 14.

(2) (a) A motion filed pursuant to subsection (1) of this section shall set forth the facts relating to the convicted person's conviction and sentence and the facts giving rise to the belief that the convicted person may be mentally incompetent to be executed and shall request the district court to order that the convicted person be examined for mental incompetency to be executed. The motion shall be accompanied by the names and addresses of any mental health experts who have examined the convicted person with respect to the issue of whether the convicted person is mentally incompetent to be executed and the results of those examinations, as well as any records of any other mental health examinations, treatment, or reports that are not privileged and are available to the moving party or in the moving party's possession. If the moving party has any question regarding whether any such report is privileged, the report shall be submitted to the court ex parte and the court shall make a determination as to release of the report. If the moving party is the convicted person's attorney, the convicted person shall be deemed to have waived any claim of confidentiality or privilege as to communications made by the convicted person to any physician, psychiatrist, or psychologist in the course of examination or treatment for any mental health condition for which the convicted person has received treatment, and the moving party shall include any records of any other mental health examinations, treatment, or reports.

(b) On receipt of a motion raising the issue of whether a convicted person is mentally incompetent to be executed, the clerk of the district court shall transmit copies of the motion to the supreme court. The clerk of the district court shall transmit copies of all subsequent filings to the supreme court as they are received.

Source: L. 2002: Entire article added with relocations, p. 1459, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-303 as it existed prior to 2002.

18-1.3-1404. Mental incompetency to be executed - examination. (1) (a) On receipt of a motion filed pursuant to section 18-1.3-1403, the district court shall determine whether the motion is timely, as prescribed by section 18-1.3-1405, and whether it presents reasonable grounds for ordering an examination. Prior to making any determinations, the district court shall ensure that the prosecution has an opportunity to respond to the motion and to submit any additional information for consideration. The district court shall also provide an opportunity for the executive director of the department of corrections, the convicted person's attorney, or an attorney for the state to respond to the motion and to submit additional information for consideration. All responses and additional submissions shall be filed with the court within three days following the filing of the motion. Within seven days following the filing of the motion, the district court shall determine whether there are reasonable grounds for ordering the examination, based on the motion and any supporting information, any information submitted by the prosecuting attorney or any other responding party, and the record in the case, including transcripts of previous hearings and orders.

(b) The district court shall issue a stay of execution upon a showing of reasonable grounds for granting the stay. A stay of execution may be requested only by the convicted person's attorney, the executive director of the department of corrections, or an attorney for the state.

(2) (a) If the court finds there are no reasonable grounds for the requested examination, the court shall dismiss the motion. If the court finds the motion is timely and there are

reasonable grounds for ordering an examination, the court may order the convicted person to submit to physical, neurological, psychiatric, psychological, or other examinations or evaluations that are reasonably necessary to adequately determine whether the convicted person is mentally incompetent to be executed.

(b) The Colorado mental health institute shall create and maintain a list of licensed, qualified psychiatrists and psychologists who shall be available to perform the examinations required pursuant to this part 14.

(c) If the court determines an examination is necessary, the court shall appoint one or more licensed psychiatrists to observe and examine the convicted person. In making such appointment, the court may select one or more licensed psychiatrists from the list prepared by the Colorado mental health institute pursuant to paragraph (b) of this subsection (2) or appoint another qualified, licensed psychiatrist. If requested in the motion for competency examination or by motion of the executive director of the department of corrections, the prosecution, or the attorney for the convicted person or by request of the appointed psychiatrist, and for good cause shown, the court may order further examinations, including the services of licensed psychologists, licensed physicians, or psychiatrists. All examinations shall be completed and reports filed with the court within thirty-five days following the court's initial appointment of experts.

(3) (a) Any examination ordered pursuant to this section shall be conducted at a department of corrections facility.

(b) At the time of appointment of experts, the parties shall disclose to the appointed experts and to each other the names and addresses of any other previously undisclosed mental health experts who have examined the convicted person and the results of the examinations, as well as any and all records of any other previously undisclosed mental health examinations, treatment, or reports that are not privileged. If the party has any question regarding whether any such records are privileged, the records shall be submitted to the court ex parte and the court shall make a determination as to release of the record. The appointed experts shall make copies of their reports available to all of the parties at the time of filing the reports with the court. The experts' reports shall indicate whether the convicted person has a mental disease or defect which renders the convicted person mentally incompetent to be executed.

(4) The convicted person shall submit to and cooperate in all examinations or evaluations ordered by the court, regardless of which party selects the examining mental health expert. The district court shall consider any relevant evidence concerning the issue of the convicted person's competency to be executed, including but not limited to the convicted person's refusal to be examined or evaluated.

(5) (a) After the examinations are completed and reports are filed, the court shall conduct a hearing within seven days following the court's receipt of all reports from appointed experts. The hearing shall be limited to the sole issue of whether the convicted person is mentally incompetent to be executed. At the hearing, all parties may present evidence, cross-examine witnesses, and present argument or, by stipulation, may submit the matter for the court's determination on the basis of the experts' reports or other evidence.

(b) The Colorado rules of evidence shall apply to each hearing held pursuant to this section. The transcript of the hearing shall be forwarded to the Colorado supreme court within three days following the conclusion of the hearing.

(6) (a) Within three days following the conclusion of the hearing held pursuant to subsection (5) of this section, the district court, either on the record or by written ruling, shall specifically state its findings on the motion raising the issue of whether the convicted person is mentally incompetent to be executed. If the ruling is in written form, it shall be transmitted by facsimile or electronic mail to all parties and the Colorado supreme court on the same day of its issuance.

(b) If the court finds the convicted person is not mentally incompetent to be executed, the court shall immediately remand the convicted person to the custody of the executive director of the department of corrections who shall execute the judgment as specified in the warrant issued pursuant to section 18-1.3-1205. If the week specified in the warrant has passed, the district court shall issue a new warrant designating a week of time within which the sentence shall be executed.

(c) If the court finds the convicted person is mentally incompetent to be executed, the court shall stay the execution and shall immediately transmit a copy of its order to the Colorado supreme court.

(7) The time frames specified in this section shall apply only if the motion filed pursuant to section 18-1.3-1403 is filed within one hundred nineteen days prior to the convicted person's execution date. In all other cases, the court shall establish time frames for filing of responses and additional submissions and for completion of the examinations and shall hear and rule on the motion as expeditiously as possible.

Source: L. 2002: Entire article added with relocations, p. 1460, § 2, effective October 1. L. 2012: (1)(a), (2)(c), (5)(a), and (7) amended, (SB 12-175), ch. 208, p. 869, § 123, effective July 1.

Editor's note: (1) This section is similar to former § 16-8-304 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1)(a), (2)(c), (5)(a), and (7) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

18-1.3-1405. Mentally incompetent to be executed - untimely or successive motions. (1) A motion raising the issue of whether a convicted person is mentally incompetent to be executed that is filed pursuant to section 18-1.3-1404 fewer than thirty-five days before the scheduled execution is untimely and shall not be considered by the court unless it is accompanied by both of the following:

(a) At least one affidavit from a licensed physician, licensed psychiatrist, or licensed psychologist who has examined the convicted person that states the physician's, psychiatrist's, or psychologist's opinion that the convicted person is mentally incompetent to be executed; and

(b) A statement that establishes good cause for the failure to file the motion in a timely manner.

(2) (a) Except as provided in paragraph (b) of this subsection (2), if the court has determined, pursuant to section 18-1.3-1404 or 18-1.3-1406 (3), that a convicted person is not mentally incompetent to be executed, no further consideration of the convicted person's mental incompetence to be executed may be granted by the court.

(b) A successive motion raising the issue of whether a convicted person is mentally incompetent to be executed may be filed only if the successive motion is accompanied by an affidavit from a licensed physician, licensed psychiatrist, or licensed psychologist who has examined the convicted person that shows a substantial change of circumstances since the previous motion was denied or the prior determination of restoration to competency to be executed was made and the showing is sufficient to raise a significant question regarding whether the convicted person is mentally incompetent to be executed.

Source: L. 2002: Entire article added with relocations, p. 1462, § 2, effective October 1. L. 2012: IP(1) amended, (SB 12-175), ch. 208, p. 870, § 124, effective July 1.

Editor's note: (1) This section is similar to former § 16-8-305 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portion of subsection (1) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

18-1.3-1406. Persons mentally incompetent to be executed - restoration to competency. (1) The court may order a restoration hearing at any time on its own motion, on motion of an attorney for the state, or on motion of the convicted person's attorney. The court shall order a hearing if the executive director of the department of corrections files a report that the convicted person is no longer mentally incompetent to be executed.

(2) At the hearing, if the question is contested, the burden of submitting evidence and the burden of proof by clear and convincing evidence shall be upon the party asserting that the convicted person is mentally competent to be executed.

(3) At the hearing, the court shall determine whether the convicted person is mentally competent to be executed and, if so, shall order that the execution be conducted according to the original warrant issued pursuant to section 18-1.3-1205, if unexpired, or shall issue a new warrant appointing a time for execution of the judgment.

Source: L. 2002: Entire article added with relocations, p. 1463, § 2, effective October 1.

Editor's note: This section is similar to former § 16-8-306 as it existed prior to 2002.

18-1.3-1407. Appeal of determination of mental incompetency to be executed.

(1) Within seven days after the district court rules on a motion raising the issue of whether a convicted person is mentally incompetent to be executed filed pursuant to this part 14, a party may file with the Colorado supreme court a petition to obtain a review of the district court's decision and requesting a stay of execution pending the review.

(2) The supreme court shall expedite its review of the district court's decision and, if the designated week of execution in an existing warrant of conviction has not passed, shall not take more than seven days to render its decision.

Source: L. 2002: Entire article added with relocations, p. 1463, § 2, effective October 1. **L. 2012:** Entire section amended, (SB 12-175), ch. 208, p. 871, § 125, effective July 1.

Editor's note: (1) This section is similar to former § 16-8-307 as it existed prior to 2002.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending this section applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ARTICLE 1.4

Class 1 Felonies Committed - July 1, 1995, through July 12, 2002

18-1.4-101.	Applicability of procedure for the imposition of sentences in class 1 felony cases.	18-1.4-102.	Imposition of sentence in class 1 felonies for crimes committed on or after July 1, 1995, and prior to July 12, 2002 - appellate review.
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18-1.4-101. Applicability of procedure for the imposition of sentences in class 1 felony cases. (1) It is the expressed intention of the general assembly that there be no hiatus in the imposition of the death penalty as a sentence for the commission of a class 1 felony in the state of Colorado as a result of the holding of the United States supreme court in *Ring v. Arizona*, 536 U.S. 584 (2002). Toward that end, the provisions of section 16-11-103, C.R.S., as it existed prior to the passage of Senate Bill 95-54, enacted at the first regular session of the sixtieth general assembly, are reenacted as section 18-1.4-102, and are hereby made applicable to offenses committed on or after July 1, 1995, and prior to July 12, 2002.

(2) It is the expressed intention of the general assembly that the adoption of section 18-1.4-102 shall not be construed by any court as a legislative statement that the provisions of Senate Bill 95-54, enacted at the first regular session of the sixtieth general assembly, are unconstitutional in any way or that any death sentence obtained pursuant to the provisions of Senate Bill 95-54, enacted at the first regular session of the sixtieth general assembly, is invalid in any way.

(3) It is the expressed intention of the general assembly that this article is independent from section 16-11-103, C.R.S., as it existed prior to October 1, 2002, and section 18-1.3-1201 and that, if any provision of this article or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality

shall not affect the application of section 16-11-103, C.R.S., as it existed prior to October 1, 2002, and section 18-1.3-1201 to any offense committed on or after the effective date of amendments to said sections enacted at the third extraordinary session of the sixty-third general assembly.

Source: **L. 2002, 3rd Ex. Sess.:** Entire article added, p. 16, § 12, effective July 12.
L. 2005: (1) amended, p. 766, § 27, effective June 1.

Cross references: For the legislative declaration contained in the 2002 act enacting this article, see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

18-1.4-102. Imposition of sentence in class 1 felonies for crimes committed on or after July 1, 1995, and prior to July 12, 2002 - appellate review. (1) (a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense, or unless the defendant has been determined to be a mentally retarded defendant pursuant to part 4 of article 9 of title 16, C.R.S., as it existed prior to October 1, 2002, in either of which cases, the defendant shall be sentenced to life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict is entered by the trial jury. If the verdict of the trial jury is that the defendant is guilty of a class 1 felony, the alternate jurors shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the court, any member or members of the trial jury are excused from participation in the sentencing hearing, the trial judge shall replace such juror or jurors with an alternate juror or jurors. If a trial jury was waived or if the defendant pled guilty, the hearing shall be conducted before the trial judge. The court shall instruct the defendant when waiving his or her right to a jury trial or when pleading guilty, that he or she is also waiving his or her right to a jury determination of the sentence at the sentencing hearing.

(b) All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented. Any such evidence, including but not limited to the testimony of members of the victim's immediate family, as defined in section 24-4.1-302 (6), C.R.S., which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. The prosecuting attorney and the defendant or the defendant's counsel shall be permitted to present arguments for or against a sentence of death. The jury shall be instructed that life imprisonment means imprisonment for life without the possibility of parole.

(c) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 24, § 14, effective July 12, 2002.)

(d) The burden of proof as to the aggravating factors enumerated in subsection (5) of this section shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.

(e) If, as of July 12, 2002, the prosecution has announced it will be seeking the death sentence as the punishment for a conviction of a class 1 felony and a defendant has been convicted at trial of a class 1 felony or has pled guilty to a class 1 felony, but a sentencing hearing to determine whether that defendant shall be sentenced to death or life imprisonment has not yet been held, a jury shall be impaneled to determine the sentence at the sentencing hearing pursuant to the procedures set forth in this section or, if the defendant pled guilty or waived the right to jury sentencing, the sentence shall be determined by the trial judge.

(2) (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

(I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;

(II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and

(III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

(b) (I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it finds and specifies in writing that:

(A) At least one aggravating factor has been proved; and

(B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

(c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(3) In all cases where the sentencing hearing is held before the court alone, the court shall determine whether the defendant should be sentenced to death or life imprisonment in the same manner in which a jury determines its verdict under paragraphs (a) and (b) of subsection (2) of this section. The sentence of the court shall be supported by specific written findings of fact based upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and the sentencing hearing.

(3.5) (a) The provisions of this subsection (3.5) shall apply only in a class 1 felony case in which the prosecuting attorney has filed a statement of intent to seek the death penalty pursuant to rule 32.1 (b) of the Colorado rules of criminal procedure.

(b) The prosecuting attorney shall provide the defendant with the following information and materials not later than twenty-one days after the prosecution files its written intention to seek the death penalty or within such other time frame as the supreme court may establish by rule; except that any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the prosecuting attorney intends to call as a witness at the sentencing hearing shall be provided to the defense as soon as practicable but not later than sixty-three days before trial:

(I) A list of all aggravating factors that are known to the prosecuting attorney at that time and that the prosecuting attorney intends to prove at the sentencing hearing;

(II) A list of all witnesses whom the prosecuting attorney may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(III) The written and recorded statements, including any notes of those statements, for each witness whom the prosecuting attorney may call at the sentencing hearing;

(IV) A list of books, papers, documents, photographs, or tangible objects that the prosecuting attorney may introduce at the sentencing hearing; and

(V) All material or information that tends to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing.

(c) Upon receipt of the information required to be disclosed by the defendant pursuant to paragraph (d) of this subsection (3.5), the prosecuting attorney shall notify the defendant as soon as practicable of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

(d) The defendant shall provide the prosecuting attorney with the following information and materials no later than thirty-five days before the first trial date set for the beginning of the defendant's trial or within such other time frame as the supreme court may establish by rule; however, any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the defense intends to call as a witness at the sentencing hearing shall be provided to the prosecuting attorney as soon as practicable but not later than thirty-five days before trial:

(I) A list of all witnesses whom the defendant may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(II) The written and recorded statements, including any notes of those statements, of each witness whom the defendant may call at the sentencing hearing; and

(III) A list of books, papers, documents, photographs, or tangible objects that the defendant may introduce at the sentencing hearing.

(e) (I) Any material subject to this subsection (3.5) that the defendant believes contains information that is privileged to the extent that the prosecution cannot be aware of it in connection with its preparation for, or conduct of, the trial to determine guilt on the substantive charges against the defendant shall be submitted by the defendant to the trial judge under seal no later than forty-nine days before trial.

(II) The trial judge shall review any such material submitted under seal pursuant to subparagraph (I) of this paragraph (e) to determine whether it is in fact privileged. Any material the trial judge finds not to be privileged shall be provided forthwith to the prosecuting attorney. Any material submitted under seal that the trial judge finds to be privileged shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

(f) (I) Except as otherwise provided in subparagraph (II) of this paragraph (f), if the witnesses disclosed by the defendant pursuant to paragraph (d) of this subsection (3.5) include witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing conducted pursuant to this section, the trial court, at the request of the prosecuting attorney, shall order that the defendant be examined and a report of said examination be prepared pursuant to section 16-8-106, C.R.S.

(II) The court shall not order an examination pursuant to subparagraph (I) of this paragraph (f) if:

(A) Such an examination was previously performed and a report was prepared in the same case; and

(B) The report included an opinion concerning how any mental disease or defect of the defendant or condition of mind caused by mental disease or defect of the defendant affects the mitigating factors that the defendant may raise at the sentencing hearing held pursuant to this section.

(g) If the witnesses disclosed by the defendant pursuant to paragraph (d) of this subsection (3.5) include witnesses who may provide evidence concerning the defendant's mental condition at a sentencing hearing conducted pursuant to this section, the provisions of section 16-8-109, C.R.S., concerning testimony of lay witnesses shall apply to said sentencing hearing.

(h) There is a continuing duty on the part of the prosecuting attorney and the defendant to disclose the information and materials specified in this subsection (3.5). If, after complying with the duty to disclose the information and materials described in this subsection (3.5), either party discovers or obtains any additional information and materials that are subject to disclosure under this subsection (3.5), the party shall promptly notify the other party and provide the other party with complete access to the information and materials.

(i) The trial court, upon a showing of extraordinary circumstances that could not have been foreseen and prevented, may grant an extension of time to comply with the requirements of this subsection (3.5).

(j) If it is brought to the attention of the court that either the prosecuting attorney or the defendant has failed to comply with the provisions of this subsection (3.5) or with an order issued pursuant to this subsection (3.5), the court may enter any order against such party

that the court deems just under the circumstances, including but not limited to an order to permit the discovery or inspection of information and materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing the information and materials not disclosed, or to impose sanctions against the offending party.

(4) For purposes of this section, mitigating factors shall be the following factors:

(a) The age of the defendant at the time of the crime; or

(b) The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person; or

(f) The emotional state of the defendant at the time the crime was committed; or

(g) The absence of any significant prior conviction; or

(h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or

(i) The influence of drugs or alcohol; or

(j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or

(k) The defendant is not a continuing threat to society; or

(l) Any other evidence which in the court's opinion bears on the question of mitigation.

(5) For purposes of this section, aggravating factors shall be the following factors:

(a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law; or

(b) The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 16-11-309, C.R.S., as it existed prior to October 1, 2002, or section 18-1.3-406, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law in section 16-11-309, C.R.S., as it existed prior to October 1, 2002, or section 18-1.3-406; or

(c) The defendant intentionally killed any of the following persons while such person was engaged in the course of the performance of such person's official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of such person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:

(I) A peace officer or former peace officer as described in section 16-2.5-101, C.R.S.; or

(II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or

(III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.

(IV) An elected state, county, or municipal official; or

(V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or

(d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or

(e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or

(f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), "explosive or incendiary device" means:

(I) Dynamite and all other forms of high explosives; or

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) The defendant committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants; or

(h) The class 1 felony was committed for pecuniary gain; or

(i) In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(j) The defendant committed the offense in an especially heinous, cruel, or depraved manner; or

(k) The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense.

(l) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode; or

(m) The defendant intentionally killed a child who has not yet attained twelve years of age; or

(n) (I) The defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin.

(II) The provisions of this paragraph (n) shall apply to offenses committed on or after July 1, 1998.

(o) (I) The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States.

(II) The provisions of this paragraph (o) shall apply to offenses committed on or after August 2, 2000.

(6) (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based. The procedures to be employed in the review shall be as provided by supreme court rule. The supreme court shall combine its review pursuant to this subsection (6) with consideration of any appeal that may be filed pursuant to part 2 of article 12 of title 16, C.R.S.

(b) A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances.

(7) (a) It is the expressed intent of the general assembly that there be in place a valid and operative procedure for the imposition of a sentence of death concerning class 1 felonies committed on or after July 1, 1995, and prior to July 12, 2002. Towards that end, if any provisions of this section are determined by the United States supreme court or by the Colorado supreme court to render this section unconstitutional or invalid such that this section does not constitute a valid and operative death penalty statute concerning such class 1 felonies, but severance of such provisions would, through operation of the remaining provisions of this section, maintain this section as a valid and operative death penalty statute concerning such class 1 felonies, it is the intent of the general assembly that those remaining provisions are severable and are to have full force and effect. If, instead, any provisions of this section are determined by the United States supreme court or by the Colorado supreme

court to render this section unconstitutional or invalid such that this section does not constitute a valid and operative death penalty statute concerning such class 1 felonies, and severance of such provisions would not, through operation of the remaining provisions of this section, render this section a valid and operative death penalty statute concerning such offenses, it is the intent of the general assembly that this entire article be void and inoperative.

(b) If any death sentence is imposed upon a defendant pursuant to the provisions of this section and, on appellate review including consideration pursuant to subsection (9) of this section, the imposition of such death sentence upon such defendant is held invalid for reasons other than unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, the case shall be remanded to the trial court to set a new sentencing hearing before a newly impaneled jury or, if the defendant pled guilty or waived the right to jury sentencing, before the trial judge; except that, if the prosecutor informs the trial court that, in the opinion of the prosecutor, capital punishment would no longer be in the interest of justice, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment. If a death sentence imposed pursuant to this section is held invalid based on unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment.

(8) When reviewing a sentence of death imposed by a three-judge panel, if the Colorado supreme court concludes that any one or more of the determinations made by the three-judge panel were constitutionally required to have been made by a jury, the supreme court may:

(a) Examine the record and the jury's verdicts or the defendant's guilty pleas at the guilt phase of the trial and determine whether any of the aggravating factors found to exist by the three-judge panel were also fairly determined to exist beyond a reasonable doubt by the jury's verdicts or the defendant's guilty pleas; and

(b) (I) If the supreme court determines that one or more aggravating factors were fairly determined to exist beyond a reasonable doubt by the jury's verdicts or the defendant's guilty pleas, the supreme court shall determine whether the sentence of death should be affirmed on appeal by proceeding in accordance with the provisions of paragraphs (a) to (d) of subsection (9) of this section; or

(II) If the supreme court determines there were no aggravating factors fairly determined to exist beyond a reasonable doubt by the jury's verdicts or the defendant's guilty pleas, the supreme court shall remand the case to the trial court for a sentencing hearing before a newly impaneled jury.

(9) If, on appeal, the supreme court finds one or more of the aggravating factors that were found to support a sentence to death to be invalid for any reason, the supreme court may determine whether the sentence of death should be affirmed on appeal by:

(a) Reweighing the remaining aggravating factor or factors and all mitigating factors and then determining whether death is the appropriate punishment in the case; or

(b) Applying harmless error analysis by considering whether, if the sentencing body had not considered the invalid aggravating factor, it would have nonetheless sentenced the defendant to death; or

(c) If the supreme court finds the sentencing body's consideration of an aggravating factor was improper because the aggravating factor was not given a constitutionally narrow construction, determining whether, beyond a reasonable doubt, the sentencing body would have returned a verdict of death had the aggravating factor been properly narrowed; or

(d) Employing any other constitutionally permissible method of review.

Source: L. 2002, 3rd Ex. Sess.: Entire article added and (1)(a), (1)(b), (1)(c), (5)(m), (6)(a), and (7) amended and (1)(e), (3.5), (5)(n), (5)(o), (8), and (9) added, pp. 16, 22, 24, 28, §§ 12, 13, 14, 15, effective July 12. **L. 2003:** (5)(c)(I) amended, p. 1615, § 11, effective August 6. **L. 2012:** IP(3.5)(b), IP(3.5)(d), and (3.5)(e)(I) amended, (SB 12-175), ch. 208, p. 871, § 126, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending the introductory portions to subsections (3.5)(b) and (3.5)(d) and subsection (3.5)(e)(I) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2002 act enacting this article and amending subsections (1)(a), (1)(b), (1)(c), (5)(m), (6)(a), and (7) and enacting subsections (1)(e), (3.5), (5)(n), (5)(o), (8), and (9), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

ANNOTATION

When a statute addresses an enumerated provision from the special legislation prohibition, a court must answer the threshold question of whether the classification adopted by the legislature is a real or potential class or logically and factually limited to a class of one and thus illusory. The provision in subsection (1)(e) comes within two of the enumerated provisions in the special legislation prohibition. *People v. Canister*, 110 P.3d 380 (Colo. 2005); *People v. Hagos*, 110 P. 3d 1290 (Colo. 2005).

The special legislation provision prohibits an illusory class. The general assembly creates an illusory class when it defines the class so that it will never have any other members other than those targeted by the legislation. The provision in subsection (1)(e) was "conceived, cut, and tailored" to apply to only two defendants, and the time limitation in the provision ensured it would only apply to two defendants. The legislation, therefore, is unconstitutional special legislation. *People v. Canister*, 110 P.3d 380 (Colo. 2005); *People v. Hagos*, 110 P. 3d 1290 (Colo. 2005).

Subsections (8) and (9) conflict with § 18-1.3-401 (5). Section 18-1.3-401 (5) requires the court to impose a life sentence on a defendant

sentenced to death under an unconstitutional death penalty scheme. In contrast, subsections (8) and (9) of this section allow the supreme court to review the death sentence or remand for a new sentencing hearing. Section 18-1.3-401 (5) is a mandatory provision and therefore it applies over the discretionary provision. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

Subsections (8) and (9) are unconstitutional. Allowing the supreme court to determine if the jury implicitly found one or more aggravating factors that the three-judge panel found in their written findings violates the U.S. supreme court's decision in *Ring v. Arizona*. The supreme court would engage in the type of fact-finding declared unconstitutional in *Ring*. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

Allowing the supreme court to remand the cases back for new penalty proceedings violates the ex post facto clause. Subjecting a defendant, sentenced under an unconstitutional death penalty statute, to a new penalty hearing in front of a jury is ex post facto because of the statutory dictate of a life sentence in § 18-1.3-401 (5) and because the defendants in these cases were identifiable targets of the legislation. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

ARTICLE 1.5

Criminal Justice Commission

18-1.5-101 to 18-1.5-105. (Repealed)

Editor's note: (1) This article was added in 1989. For amendments to this article prior to its repeal in 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 18-1.5-105 provided for the repeal of this article, effective March 15, 1994. (See L. 89, p. 833.)

ARTICLE 1.7

Treatment of Persons with Mental Illness Involved in the Criminal Justice System

18-1.7-101 to 18-1.7-106. (Repealed)

Editor's note: (1) This article was added in 2000 and was not amended prior to its repeal in 2003. For the text of this article prior to 2003, consult the 2002 Colorado Revised Statutes.

(2) Section 18-1.7-106 provided for the repeal of this article, effective July 1, 2003. (See L. 2000, p. 1567.)

ARTICLE 1.8

Interagency Task Force on
Trafficking in Persons

18-1.8-101. Interagency task force. (Repealed)

18-1.8-101. (Repealed)

Source: L. 2012: Entire article repealed, (HB 12-1151), ch. 174, p. 621, § 1, effective August 8.

Editor’s note: This article was added in 2005 and consisted of only § 18-1.8-101 and was not amended prior to its repeal in 2012. For the text of this article prior to 2012, consult the 2011 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

ARTICLE 1.9

Continuing Examination of the Treatment of Persons
with Mental Illness Who are Involved in the Justice System

18-1.9-101.	Legislative declaration.		
18-1.9-102.	Definitions.	18-1.9-104.	systems - creation - duties. Mentally ill offender task
18-1.9-103.	Legislative oversight committee for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice		force - creation - membership - duties.
		18-1.9-105.	Task force funding - staff support.
		18-1.9-106.	Cash fund.
		18-1.9-107.	Repeal of article.

- 18-1.9-101. Legislative declaration.** (1) The general assembly hereby finds that:
- (a) In November of 1998, the Colorado department of corrections reported that ten percent of its correctional population met the diagnostic criteria for serious mental illness, which number was double the number identified two years earlier, and five to six times the number documented in 1988, only ten years earlier;
- (b) The Colorado department of corrections estimates that in 2002, sixteen percent of its inmate population met the diagnostic criteria for major mental illness;
- (c) The Colorado division of youth corrections estimates that twenty-four percent of juveniles in the juvenile justice system are diagnosed with mental illness;
- (d) A study conducted in 1995 found that approximately six percent of the persons held in county jails and in community corrections throughout the state had been diagnosed as persons with serious mental illness;
- (e) It is estimated that nationally, nearly nine percent of all adults and juveniles on probation have been identified as having serious mental illness;
- (f) For the 1998-99 fiscal year, approximately forty-four percent of the inpatient population at the Colorado mental health institute at Pueblo had been committed following the return of a verdict of not guilty by reason of insanity or a determination by the court that the person was incompetent to stand trial due to mental illness;
- (g) Persons with mental illness, as a direct or indirect result of their condition, are in many instances more likely than persons who do not have mental illness to be involved in the criminal and juvenile justice systems;
- (h) The existing procedures and diagnostic tools used by persons working in the criminal and juvenile justice systems may not be sufficient to identify appropriately and

diagnose persons with mental illness who are involved in the criminal and juvenile justice systems;

(i) The criminal and juvenile justice systems may not be structured in such a manner as to provide the level of treatment and care for persons with mental illness that is necessary to ensure the safety of these persons, of other persons in the criminal and juvenile justice systems, and of the community at large;

(j) Studies show that, for offenders under community supervision, treatment of the mental illness of the offender decreases repeat arrests by forty-four percent; and

(k) The ongoing supervision, care, and monitoring, especially with regard to medication, of persons with mental illness who are released from incarceration are crucial to ensuring the safety of the community.

(2) The general assembly further finds that pursuant to the findings in a report requested by the joint budget committee in 1999 that recommended cross-system collaboration and communication as a method for reducing the number of persons with mental illness who are involved in the criminal and juvenile justice systems, the legislative oversight committee and advisory task force for the examination of the treatment of persons with mental illness who are involved in the criminal justice system were created in 1999 and extended for an additional three years in 2000. Over the course of four years, the legislative oversight committee and advisory task force began to address, but did not finish addressing, the issues specified in subsection (1) of this section, through both legislative and non-legislative solutions including, but not limited to:

(a) Community-based intensive treatment management programs for juveniles involved in the juvenile justice system;

(b) An expedited application process for aid to the needy disabled benefits for persons with mental illness upon release from incarceration;

(c) Standardized inter-agency screening to detect mental illness in adults who are involved in the criminal justice system and juveniles who are involved in the juvenile justice system;

(d) Training of law enforcement officers to recognize and safely deal with persons who have mental illness through the use of crisis intervention teams; and

(e) Creating local initiative committee pilot programs for the management of community-based programs for adults with mental illness who are involved in the criminal justice system.

(3) Experts involved in cross-system collaboration and communication to reduce the number of persons with mental illness who are involved in the criminal and juvenile justice systems recommend a five-year plan to continue the work of the task force and the legislative oversight committee in order to more fully effectuate solutions to these issues.

(4) Therefore, the general assembly declares that it is necessary to create a task force to continue to examine the identification, diagnosis, and treatment of persons with mental illness who are involved in the state criminal and juvenile justice systems and to make additional recommendations to a legislative oversight committee for the continuing development of legislative proposals related to this issue.

Source: L. 2004: Entire article added, p. 1866, § 1, effective June 4.

18-1.9-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Committee" means the legislative oversight committee established pursuant to section 18-1.9-103.

(1.5) "Co-occurring disorder" means a disorder that commonly coincides with mental illness and may include, but is not limited to, substance abuse, developmental disability, fetal alcohol syndrome, and traumatic brain injury.

(2) "Task force" means the task force for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems established pursuant to section 18-1.9-104.

Source: L. 2004: Entire article added, p. 1868, § 1, effective June 4. **L. 2009:** (1.5) added, (HB 09-1021), ch. 33, p. 139, § 1, effective August 5.

18-1.9-103. Legislative oversight committee for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems - creation - duties. (1) **Creation.** (a) There is hereby created a legislative oversight committee for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems.

(b) The committee shall consist of six members. The president of the senate, the minority leader of the senate, and the speaker of the house of representatives shall appoint the members of the committee, as follows:

(I) The president of the senate shall appoint two senators to serve on the committee, and the minority leader of the senate shall appoint one senator to serve on the committee;

(II) The speaker of the house of representatives shall appoint three representatives to serve on the committee, no more than two of whom shall be members of the same political party;

(III) The terms of the members appointed by the speaker of the house of representatives, the president of the senate, and the minority leader of the senate and who are serving on March 22, 2007, shall be extended to and expire on or shall terminate on the convening date of the first regular session of the sixty-seventh general assembly. As soon as practicable after such convening date, the speaker, the president, and the minority leader of the senate shall each appoint or reappoint members in the same manner as provided in subparagraphs (I) and (II) of this paragraph (b). Thereafter, the terms of members appointed or reappointed by the speaker, the president, and the minority leader of the senate shall expire on the convening date of the first regular session of each general assembly, and all subsequent appointments and reappointments by the speaker, the president, and the minority leader of the senate shall be made as soon as practicable after such convening date. The person making the original appointment or reappointment shall fill any vacancy by appointment for the remainder of an unexpired term. Members appointed or reappointed by the speaker, the president, and the minority leader of the senate shall serve at the pleasure of the appointing authority and shall continue in office until the member's successor is appointed.

(c) The president of the senate shall select the first chair of the committee, and the speaker of the house of representatives shall select the first vice-chair. The chair and vice-chair shall alternate annually thereafter between the two houses. The chair and vice-chair of the committee may establish such organizational and procedural rules as are necessary for the operation of the committee.

(d) (I) Notwithstanding the provisions of section 2-2-307, C.R.S., the committee may receive payment of per diem and reimbursement for actual and necessary expenses authorized pursuant to said section and any other direct or indirect costs associated with the duties of the committee set forth in this article only from moneys appropriated from the examination of the treatment of persons with mental illness in the criminal justice system cash fund created in section 18-1.9-106.

(II) The director of research of the legislative council and the director of the office of legislative legal services may supply staff assistance to the committee as they deem appropriate, within existing appropriations. If staff assistance is not available within existing appropriations, then the director of research of the legislative council and the director of the office of legislative legal services may supply staff assistance to the task force only if moneys are credited to the examination of the treatment of persons with mental illness in the criminal justice system cash fund created in section 18-1.9-106 in an amount sufficient to fund staff assistance.

(2) **Duties.** (a) The committee shall meet at least once on or before August 1, 2004. Beginning in 2005 and continuing each year thereafter through 2014, the committee shall meet at least three times each year and at such other times as it deems necessary; except that the committee shall not meet during the 2010 interim.

(b) (I) The committee shall be responsible for the oversight of the task force and shall submit annual reports to the general assembly regarding the findings and recommendations of the task force. In addition, the committee may recommend legislative changes that shall be treated as bills recommended by an interim legislative committee for purposes of any introduction deadlines or bill limitations imposed by the joint rules of the general assembly.

(II) The provisions of subparagraph (I) of this paragraph (b) shall not apply during the suspension of the committee during the 2010 interim.

(c) (I) The committee shall submit a report to the general assembly by January 15, 2005, by each January 15 thereafter through January 15, 2010, and by January 15, 2012, and by each January 15 thereafter through January 15, 2015. The annual reports shall summarize the issues addressing the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems that have been considered and any recommended legislative proposals.

(II) The general assembly reviewed the reporting requirements in subparagraph (I) of this paragraph (c) during the 2008 regular session and continued the requirements.

Source: L. 2004: Entire article added, p. 1868, § 1, effective June 4. **L. 2007:** (1)(b)(III) added, p. 178, § 8, effective March 22. **L. 2008:** (2)(c) amended, p. 1267, § 1, effective August 5. **L. 2009:** (2)(a) and (2)(c)(I) amended, (HB 09-1021), ch. 33, p. 139, § 2, effective August 5. **L. 2010:** (2)(a), (2)(b), and (2)(c)(I) amended, (SB 10-213), ch. 375, p. 1761, § 6, effective June 7.

18-1.9-104. Mentally ill offender task force - creation - membership - duties.

(1) **Creation.** (a) There is hereby created a task force for the continuing examination of the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems in Colorado. The task force shall consist of thirty members appointed as provided in paragraphs (b) and (c) of this subsection (1).

(b) The chief justice of the Colorado supreme court shall appoint four members who represent the judicial department, two of whom shall represent the division of probation within the department, one of whom shall have experience handling juvenile justice matters within the department, and one of whom shall have experience handling adult criminal justice matters within the department.

(c) The chair and vice-chair of the committee shall appoint twenty-six members as follows:

(I) One member who represents the division of criminal justice within the department of public safety;

(II) Two members who represent the department of corrections, one of whom represents the division of parole within the department;

(III) Two members who represent local law enforcement agencies, one of whom shall be in active service and the other one of whom shall have experience dealing with juveniles in the juvenile justice system;

(IV) Six members who represent the department of human services, as follows:

(A) One member who represents the unit within the department of human services that is responsible for mental health and drug and alcohol abuse services;

(B) One member who represents the division of youth corrections;

(C) One member who represents the unit within the department of human services that is responsible for child welfare services;

(D) (Deleted by amendment, L. 2009, p. 140, § 3, effective August 5, 2009.)

(E) One member who represents the Colorado mental health institute at Pueblo; and

(F) One member who represents the mental health planning and advisory committee within the department of human services;

(V) One member who represents the interests of county departments of social services;

(VI) One member who represents the department of education;

(VII) One member who represents the state attorney general's office;

(VIII) One member who represents the district attorneys within the state;

(IX) Two members who represent the criminal defense bar within the state, one of whom shall have experience representing juveniles in the juvenile justice system;

(X) Two members who are licensed mental health professionals practicing within the state, one of whom shall have experience treating juveniles;

(XI) One member who represents community mental health centers within the state;

(XII) One member who is a person with knowledge of public benefits and public housing within the state;

- (XIII) One member who is a practicing forensic professional within the state;
 - (XIV) Three members of the public as follows:
 - (A) One member who has mental illness and has been involved in the criminal justice system in this state;
 - (B) One member who has an adult family member who has mental illness and has been involved in the criminal justice system in this state; and
 - (C) One member who is the parent of a child who has mental illness and has been involved in the juvenile justice system in this state;
 - (XV) One member who represents the department of health care policy and financing; and
 - (XVI) One member who represents the department of labor and employment.
- (d) A vacancy occurring in a position filled by the chief justice of the Colorado supreme court pursuant to paragraph (b) of this subsection (1) shall be filled as soon as possible by the chief justice of the Colorado supreme court in accordance with the limitations specified in paragraph (b) of this subsection (1). In addition, the chief justice of the Colorado supreme court may remove and replace any appointment to the task force made pursuant to paragraph (b) of this subsection (1).
- (e) A vacancy occurring in a position filled by the chair and vice-chair of the committee pursuant to paragraph (c) of this subsection (1) shall be filled as soon as possible by the chair and vice-chair of the committee in accordance with the limitations specified in paragraph (c) of this subsection (1). In addition, the chair and vice-chair of the committee may remove and replace any appointment to the task force made pursuant to paragraph (c) of this subsection (1).
- (f) In making appointments to the task force, the appointing authorities shall ensure that the membership of the task force reflects the ethnic, cultural, and gender diversity of the state and includes representation of all areas of the state.
- (2) **Issues for study.** The task force shall examine the identification, diagnosis, and treatment of persons with mental illness who are involved in the state criminal and juvenile justice systems, including an examination of liability, safety, and cost as they relate to these issues. The task force shall specifically consider, but need not be limited to, the following issues:
- (a) On or before July 1, 2005, the following issues:
 - (I) The diagnosis, treatment, and housing of juveniles with mental illness who are involved in the criminal justice system or the juvenile justice system; and
 - (II) The adoption of a common framework for effectively addressing the mental health issues, including competency and co-occurring disorders, of juveniles who are involved in the criminal justice system or the juvenile justice system;
 - (b) On or before July 1, 2006, the following issues:
 - (I) The prosecution of and sentencing alternatives for persons with mental illness that may involve treatment and ongoing supervision;
 - (II) The civil commitment of persons with mental illness who have been criminally convicted, found not guilty by reason of insanity, or found to be incompetent to stand trial; and
 - (III) The development of a plan to most effectively and collaboratively serve the population of juveniles involved in the criminal justice system or the juvenile justice system;
- (b.5) Repealed.
- (c) On or before July 1, 2007, the following issues:
 - (I) The diagnosis, treatment, and housing of adults with mental illness who are involved in the criminal justice system;
 - (II) The ongoing treatment, housing, and supervision, especially with regard to medication, of adults and juveniles who are involved in the criminal and juvenile justice systems and who are incarcerated or housed within the community and the availability of public benefits for such persons;
 - (III) The ongoing assistance and supervision, especially with regard to medication, of persons with mental illness after discharge from sentence; and

(IV) The identification of alternative entities to exercise jurisdiction regarding release for persons found not guilty by reason of insanity, such as the development and use of a psychiatric security review board, including recommendations related to the indeterminate nature of the commitment imposed;

(d) On or before July 1, 2008, the identification, diagnosis, and treatment of minority persons with mental illness, women with mental illness, and persons with co-occurring disorders, in the criminal and juvenile justice systems;

(e) On or before July 1, 2009, the following issues:

(I) The early identification, diagnosis, and treatment of adults and juveniles with mental illness who are involved in the criminal and juvenile justice systems;

(II) The modification of the criminal and juvenile justice systems to most effectively serve adults and juveniles with mental illness who are involved in these systems;

(III) The implementation of appropriate diagnostic tools to identify persons in the criminal and juvenile justice systems with mental illness; and

(IV) Any other issues concerning persons with mental illness who are involved in the state criminal and juvenile justice systems that arise during the course of the task force study.

(f) Beginning July 1, 2011, through July 1, 2014, the following issues:

(I) The diagnosis, treatment, and housing of persons with mental illness or co-occurring disorders who are convicted of crimes, or incarcerated or who plead guilty, nolo contendere, or not guilty by reason of insanity or who are found to be incompetent to stand trial;

(II) The diagnosis, treatment, and housing of juveniles with mental illness or co-occurring disorders who are adjudicated, detained, or committed for offenses that would constitute crimes if committed by adults or who plead guilty, nolo contendere, or not guilty by reason of insanity or who are found to be incompetent to stand trial;

(III) The ongoing treatment, housing, and supervision, especially with regard to medication, of adults and juveniles who are involved in the criminal and juvenile justice systems and who are incarcerated or housed within the community and the availability of public benefits for these persons; and

(IV) The safety of the staff who treat or supervise persons with mental illness and the use of force against persons with mental illness.

(3) **Additional duties of the task force.** The task force shall provide guidance and make findings and recommendations to the committee for its development of reports and legislative recommendations for modification of the criminal and juvenile justice systems, with respect to persons with mental illness who are involved in these systems. In addition, the task force shall:

(a) On or before August 1, 2004, and by each August 1 thereafter through August 1, 2013, except during the suspension of the committee during the 2010 interim, select a chair and a vice-chair from among its members;

(b) Meet at least six times each year from the date of the first meeting until January 1, 2015, or more often as directed by the chair of the committee; except that the committee shall not meet during the 2010 interim;

(c) Communicate with and obtain input from groups throughout the state affected by the issues identified in subsection (2) of this section;

(d) Create subcommittees as needed to carry out the duties of the task force. The subcommittees may consist, in part, of persons who are not members of the task force. Such persons may vote on issues before the subcommittee but shall not be entitled to a vote at meetings of the task force.

(e) Submit a report to the committee by October 1, 2004, and by each October 1 thereafter through October 1, 2009, and by October 1, 2011, and by each October 1 thereafter through October 1, 2014, at a minimum specifying the following:

(I) Issues to be studied in upcoming task force meetings and a prioritization of those issues;

(II) Findings and recommendations regarding issues of prior consideration by the task force;

(III) Legislative proposals of the task force that identify the policy issues involved, the agencies responsible for the implementation of the changes, and the funding sources required for such implementation.

(4) **Flexibility.** No requirement set forth in subsection (2) of this section shall prohibit the task force from studying, presenting findings and recommendations on, or requesting permission to draft legislative proposals concerning any issue described in subsection (2) of this section at any time during the existence of the task force.

(5) **Compensation.** Members of the task force shall serve without compensation.

(6) **Coordination.** The task force may work with other task forces, committees, or organizations that are pursuing policy initiatives similar to those addressed in subsection (2) of this section. The task force shall consider developing relationships with other task forces, committees, and organizations to leverage efficient policy-making opportunities through collaborative efforts.

Source: L. 2004: Entire article added, p. 1870, § 1, effective June 4. L. 2006: (2)(b.5) added, p. 528, § 1, effective April 18. L. 2008: (1)(a) and IP(1)(c) amended and (1)(c)(XV) added, p. 105, § 1, effective March 19. L. 2009: (1)(c)(IV)(A), (1)(c)(IV)(D), (1)(c)(XV), (3), and (4) amended and (1)(c)(XVI), (2)(f), and (6) added, (HB 09-1021), ch. 33, pp. 140, 141, §§ 3, 4, 5, effective August 5. L. 2010: IP(2)(f), (3)(a), (3)(b), and IP(3)(e) amended, (SB 10-213), ch. 375, p. 1762, § 7, effective June 7.

Editor's note: Subsection (2)(b.5)(IV) provided for the repeal of subsection (2)(b.5), effective December 30, 2006. (See L. 2006, p. 528.)

18-1.9-105. Task force funding - staff support. (1) The division of criminal justice of the department of public safety, on behalf of the task force, is authorized to receive and expend contributions, grants, services, and in-kind donations from any public or private entity for any direct or indirect costs associated with the duties of the task force set forth in this article.

(2) The director of research of the legislative council, the director of the office of legislative legal services, the director of the division of criminal justice within the department of public safety, and the executive directors of the departments represented on the task force may supply staff assistance to the task force as they deem appropriate within existing appropriations. If staff assistance is not available from a governmental agency within existing appropriations, then the executive directors of the departments represented on the task force, the director of research of the legislative council, and the director of the office of legislative legal services may supply staff assistance to the task force only if moneys are credited to the examination of the treatment of persons with mental illness in the criminal justice system cash fund created in section 18-1.9-106 in an amount sufficient to fund staff assistance. The task force may also accept staff support from the private sector.

Source: L. 2004: Entire article added, p. 1874, § 1, effective June 4.

18-1.9-106. Cash fund. (1) All private and public funds received through grants, contributions, and donations pursuant to this article shall be transmitted to the state treasurer, who shall credit the same to the examination of the treatment of persons with mental illness in the criminal justice system cash fund, which fund is hereby created and referred to in this section as the "fund". The moneys in the fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs associated with the implementation of this article. All moneys in the fund not expended for the purpose of this article may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund. All unexpended and unencumbered moneys remaining in the fund as of July 1, 2015, shall be transferred to the general fund.

(2) Compensation as provided in sections 18-1.9-103 (1) (d) and 18-1.9-105 (2) for members of the general assembly and for staff assistance to the committee and task force provided by the director of research of the legislative council and the director of the office of legislative legal services shall be approved by the chair of the legislative council and paid by vouchers and warrants drawn as provided by law from moneys appropriated for such purpose and allocated to the legislative council from the fund.

Source: **L. 2004:** Entire article added, p. 1875, § 1, effective June 4. **L. 2009:** (1) amended, (HB 09-1021), ch. 33, p. 142, § 6, effective August 5.

18-1.9-107. Repeal of article. This article is repealed, effective July 1, 2015.

Source: **L. 2004:** Entire article added, p. 1875, § 1, effective June 4. **L. 2009:** Entire section amended, (HB 09-1021), ch. 33, p. 142, § 7, effective August 5.

ARTICLE 2

Inchoate Offenses

Editor’s note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor’s note following the title heading.

	PART 1	18-2-205.	Incapacity, irresponsibility, or immunity of party to conspiracy.
	ATTEMPTS	18-2-206.	Penalties for criminal conspiracy - when convictions barred.
18-2-101.	Criminal attempt.		
	PART 2		PART 3
	CRIMINAL CONSPIRACY		CRIMINAL SOLICITATION
18-2-201.	Conspiracy.	18-2-301.	Criminal solicitation.
18-2-202.	Joinder and venue in conspiracy prosecutions.		PART 4
18-2-203.	Renunciation of criminal purpose.		RENUNCIATION AND ABANDONMENT
18-2-204.	Duration of conspiracy.	18-2-401.	Nonavailability of defenses.

PART 1

ATTEMPTS

18-2-101. Criminal attempt. (1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused.

(2) A person who engages in conduct intending to aid another to commit an offense commits criminal attempt if the conduct would establish his complicity under section 18-1-603 were the offense committed by the other person, even if the other is not guilty of committing or attempting the offense.

(3) It is an affirmative defense to a charge under this section that the defendant abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the complete and voluntary renunciation of his criminal intent.

(3.5) Criminal attempt to commit any crime for which a court is required to sentence a defendant for a crime of violence in accordance with section 18-1.3-406 is itself a crime of violence for the purposes of that section.

(4) Criminal attempt to commit a class 1 felony is a class 2 felony; criminal attempt to commit a class 2 felony is a class 3 felony; criminal attempt to commit a class 3 felony is a class 4 felony; criminal attempt to commit a class 4 felony is a class 5 felony; criminal attempt to commit a class 5 or 6 felony is a class 6 felony.

(5) Criminal attempt to commit a felony which is defined by any statute other than one contained in this title and for which no penalty is specifically provided is a class 6 felony.

(6) Criminal attempt to commit a class 1 misdemeanor is a class 2 misdemeanor.

(7) Criminal attempt to commit a misdemeanor other than a class 1 misdemeanor is a class 3 misdemeanor.

(8) Criminal attempt to commit a petty offense is a crime of the same class as the offense itself.

(9) The provisions of subsections (4) to (8) of this section shall not apply to a person who commits criminal attempt to escape. A person who commits criminal attempt to escape shall be punished as provided in section 18-8-208.1.

Source: L. 71: R&RE, p. 414, § 1. C.R.S. 1963: § 40-2-101. L. 75: (4) to (7) amended and (8) added, p. 617, § 3, effective July 21. L. 76, Ex. Sess.: (9) added, p. 10, § 2, effective September 18. L. 77: (1) amended, p. 960, § 4, effective July 1. L. 89, 1st Ex. Sess.: (4) and (5) amended, p. 21, § 11, effective July 1. L. 95: (3.5) added, p. 1250, § 4, effective July 1. L. 2002: (3.5) amended, p. 1511, § 182, effective October 1.

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

(2) For the legislative declaration contained in the 2002 act amending subsection (3.5), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Attempt, Reckless Homicide, and the Design of Criminal Law", see 78 U. Colo. L. Rev. 879 (2007).

Annotator's note. Since § 18-2-101 is similar to former § 40-25-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The attempt provision was drawn from proposed federal criminal code. People v. Darr, 37 Colo. App. 143, 551 P.2d 735 (1975), aff'd, 193 Colo. 445, 568 P.2d 32 (1977); People v. Frysig, 628 P.2d 1004 (Colo. 1981).

"Criminal attempt" construed. Criminal attempt is a crime in which the defendant's purpose is to effect a criminal result. People v. Derrera, 667 P.2d 1363 (Colo. 1983).

Criminal attempt is not readily understandable to a person of ordinary intelligence in a guilty plea hearing without some further explanation by the court. People v. Leonard, 673 P.2d 37 (Colo. 1983).

"Purpose" equivalent of "intent". The word "purpose", as used in this section, is the

equivalent of the common meaning of the word "intent". People v. Frysig, 628 P.2d 1004 (Colo. 1981).

An attempt merely requires some overt act beyond mere preparation. Johnson v. People, 174 Colo. 413, 484 P.2d 110 (1971).

An attempt means an effort to commit a crime, and a direct, ineffectual act done towards its commission. Lewis v. People, 124 Colo. 62, 235 P.2d 348 (1951); Martin v. People, 179 Colo. 237, 499 P.2d 606 (1972).

This section provides that criminal attempt requires that the defendant has the intent to perform any act, and to obtain any result which, if accomplished, would constitute such crime, plus some step toward the commission of the crime which would result in its commission, except for the extraneous intervention of another person or factor. Sandoval v. People, 176 Colo. 414, 490 P.2d 1298 (1971).

Such overt act need not be the last proximate act necessary. People v. Goff, 187 Colo. 57, 530 P.2d 512 (1974).

A transaction, if complete, must constitute offense. Where a transaction, had it proceeded to its contemplated conclusion, would not have been a completed crime, the incompleted transaction does not rise to the dignity of an attempt

to commit such offense. *Martin v. People*, 179 Colo. 237, 499 P.2d 606 (1972).

Culpability and conduct required for criminal attempt. In order to be guilty of criminal attempt, an actor must act with the kind of culpability otherwise required for commission of the underlying offense and must engage in conduct which constitutes a substantial step, with the further intent to perform acts which, if completed, would constitute the underlying offense. *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Because the jury instructions taken as a whole failed to instruct the jury that the defendant must intend to complete the crime intended, the judgment of conviction of attempted theft is reversed. *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Commission of a criminal attempt requires the intent to commit a specific crime. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Specific criminal attempt provision prevails over the general criminal attempt statute. There was no violation of equal protection in defendant's conviction under a specific attempt provision of the second degree assault statute, despite defendant's contention that this section proscribes the same conduct. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

First degree murder statutes contain rationally different elements than first degree assault statute, § 18-3-202, and thus a defendant sentenced under the former and not the latter was not denied equal protection of law. *People v. Brewer*, 720 P.2d 596 (Colo. App. 1985).

Attempt to commit aggravated robbery requires same culpability, plus substantial step. Criminal attempt to commit aggravated robbery requires that the offender act with the kind of culpability otherwise required for aggravated robbery and engage in a substantial step toward the commission of aggravated robbery. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Conviction of attempted aggravated robbery does not require a showing of specific intent to commit the underlying crime. *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

Information reciting elements of attempt, and referring to provision defining ulterior crime, adequate. Where the information recited the elements of the inchoate crime of attempt in the language of this section and included a reference to the section defining the burglary allegedly attempted, and where the defendant claimed no surprise or prejudice resulting from the absence of an allegation specifying the ulterior crime to be relied upon by the prosecution in its proof of the elements of burglary, the information adequately described the offense of attempt. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

This section and § 18-1-504 may be harmonized and do not conflict. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Subsection (1) and § 18-3-203 (1)(b) do not proscribe the same conduct, and disparity in applicable punishment does not violate equal protection guarantees. *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

Legislative intent in amending subsection (5). It is immaterial that the offense of attempted possession of a narcotic drug is not proscribed by part 3 of article 22 of title 12; the general assembly's manifest intent was to broaden the crime of criminal attempt to include felonies other than those defined in the criminal code when it amended subsection (5) of this section. *People v. Maciel*, 39 Colo. App. 149, 568 P.2d 68 (1977).

No defense of impossibility available in attempt prosecution. The general assembly intended that the defense of factual or legal impossibility not be available in an attempt prosecution. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

A person who only thinks he is violating law may not be prosecuted. Exclusion of the defense of impossibility is not intended to permit prosecuting the person who thinks he is violating a law when in fact no such law exists. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Attempted criminally negligent homicide logical and legal impossibility. Where the trial court joined criminally negligent homicide and attempt and charged the jury on attempted criminally negligent homicide, the charge was a logical and legal impossibility. *People v. Hernandez*, 44 Colo. App. 161, 614 P.2d 900 (1980).

Defendant may raise defense of general mistake of fact. A defendant may not rely on the defense of legal impossibility in a prosecution for attempted theft, but may raise the defense of general mistake of fact by alleging that he never believed the goods were stolen. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

The fact that the items were not in fact stolen does not provide a defense to attempted theft where the defendant believed they were stolen. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Intoxication not defense in criminal attempt action. The legislative intent in amending this section in 1977 was to preclude a defendant from utilizing intoxication as a defense to his ability to form the intent required for criminal attempt. *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).

Proper instructions on affirmative defense must be given. Where an issue of renunciation and abandonment is before a jury, proper instructions on this affirmative defense must be given. *People v. Traubert*, 625 P.2d 991 (Colo. 1981).

Effect of voluntary renunciation of criminal intent. Even though the crime of attempt is complete once the actor intentionally takes a substantial step towards the commission of the crime, the affirmative defense of abandonment is present if he thereafter voluntarily renounces his criminal intent. *People v. Johnson*, 41 Colo. App. 220, 585 P.2d 306 (1978).

Defense of abandonment may apply at various stages, early and late, in the commission of attempted crimes; however, the abandonment defense does not provide immunity where the actor has put in motion forces that the actor is powerless to stop, because the attempt is deemed to have been completed and cannot be abandoned. *People v. Gandiaga*, 70 P.3d 523 (Colo. App. 2002).

Defense of abandonment was not available where defendant knew of his accomplice's intent to rob someone, went with the accomplice to the crime scene, waited across the street until the crime was committed, fled with the accomplice, and later returned to conceal or remove evidence. *People v. Nicholas*, 950 P.2d 634 (Colo. App. 1997), rev'd on other grounds, 973 P.2d 1213 (Colo. 1999).

To present an affirmative defense for abandonment to the jury, defendant must present "some credible evidence" on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O'Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

Culpable state of knowledge sufficient to support criminal attempt liability. A knowing attempt to attain a proscribed result is sufficient culpable mental state to justify imposition by the legislature of attempt liability. *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

Conviction of conspiracy to commit a robbery is totally inconsistent with an acquittal of attempt to commit aggravated robbery. *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976).

For conviction under subsection (1) of this section or § 18-4-410 (1), relating to theft by receiving, it is irrelevant whether the goods are recovered stolen goods or have never been stolen. The intent and acts of the defendant, not the surrounding circumstances, are the crucial elements of the attempt offense. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

The portion of subsection (1) which provides that impossibility "is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to

be" in effect substitutes "believing" the goods to be stolen, the element of culpability required in attempted theft by receiving, for "knowing" the goods to be stolen, the element of culpability for a completed theft by receiving. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

Where the defendant did every act within his power to commit the offense of theft by receiving and would have committed the completed offense had the jewelry been stolen as he believed it to be, these acts evidenced an intent to commit the offense, and the defendant comes within the letter of this section. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

Proof of intent insufficient. Where testimony of complaining parties negates any intent on the part of defendant to commit attempted theft and sole evidence of intent comes from defendant, requisite independent corroborative evidence of corpus delicti is lacking. *Martin v. People*, 179 Colo. 237, 499 P.2d 606 (1972).

Where a defendant engages in only one assaultive act, he or she cannot simultaneously have a specific intent to harm a particular person and universal malice that is not directed at a particular person. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Attempt to commit rape is crime. The contention that there is no crime of attempt to commit rape under this section in view of the existence of the crime of assault with intent to commit rape under § 18-3-202 is without merit, for these are separate and distinct offenses. *Clark v. People*, 176 Colo. 48, 488 P.2d 1097 (1971).

For attempt to commit an assault with a deadly weapon, see *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Attempt to commit sexual assault on child is offense under Colorado law. *People v. Martinez*, 42 Colo. App. 257, 592 P.2d 1358 (1979).

Person is guilty of attempted second degree kidnapping if he knowingly engaged in conduct which is strongly corroborative of the firmness of his purpose to knowingly seize or carry another person from one place to another without his consent and without lawful justification. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980); *Apodaca v. People*, 712 P.2d 467 (Colo. 1985).

Intent required for attempted first degree murder. Intent required for attempted first degree murder is the intent to commit the underlying offense of first degree murder. Defendant must have acted after deliberation, and must have intended to cause the death of another person. *People v. Juvenile Court*, 813 P.2d 326 (Colo. 1991).

Attempted reckless manslaughter is a cognizable crime in Colorado. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

When one engages in conduct that involves a risk of death that is both substantial and unjustified,

tified and is conscious of the nature and extent of the risk, the actor demonstrates such a disregard for the likelihood that another will die as to evince a degree of dangerousness hardly less threatening to society than if the actor had chosen to cause death and, as such, justifies the conclusion that attempt liability may be founded on the substantive offense of reckless manslaughter. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

Intent required for attempted reckless manslaughter is the intent to commit the underlying offense of reckless manslaughter, that is, the intent to engage in and complete the risk-producing act or conduct. It does not include an intent that death occur even though the underlying crime, reckless manslaughter, has death as an essential element. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

The crime of attempted reckless manslaughter also requires that the risk-producing act or conduct be commenced and sufficiently pursued to constitute a substantial step toward the commission of the offense. That is, the act or conduct must proceed far enough to be strongly corroborative of the firmness of the actor's purpose to complete those acts that will produce a substantial and unjustifiable risk of death to another. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

Finally, in order to be guilty of attempted reckless manslaughter, the actor must engage in the requisite acts or conduct with the kind of culpability otherwise required for the commission of the underlying offense, that is, with a conscious disregard of a substantial and unjustifiable risk that the acts or conduct will cause the death of another person. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).

Court's response to jury inquiry on attempted reckless manslaughter, although a comment on the evidence and not a proper instruction on the law, did not constitute plain error. Hypothetical given by the court, when considered in the context of the jury instructions as a whole, neither misled the jury nor cast serious doubt on the verdict. *People v. Allen*, 43 P.3d 689 (Colo. App. 2001).

Colorado does not recognize the offense of attempted felony murder. Because criminal attempt requires a defendant to possess the culpable mental state for the attempted offense and felony murder does not require a mental state, it is impossible to convict a person of attempting to commit an act that the person was not intending. *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997).

Third degree criminal trespass is not a lesser included offense of attempted first degree criminal trespass. While unlawful entry upon the premises is a necessary element of the completed offense of third degree criminal trespass, it is not a necessary element of attempted

first degree criminal trespass. *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

Section 18-1-105 (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of criminal attempt to commit escape under this section. *People v. Lobato*, 703 P.2d 623 (Colo. App. 1985).

Substantial step required for conviction of attempted extreme indifference murder is conduct which poses a real and proximate risk of death to the victim. *People v. Castro*, 657 P.2d 932 (Colo. 1983).

In applying this test, the court should consider the nature of the defendant's conduct as well as the extent of the victim's injuries. *People v. Ramos*, 708 P.2d 1347 (Colo. 1985).

Substantial step. Evidence was sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendants engaged in conduct which constituted a substantial step toward the underlying offense of first degree murder. *People v. Juvenile Court*, 813 P.2d 326 (Colo. 1991).

Evidence sufficiently demonstrated that defendant, by seizing and carrying the victim from the kitchen to the bedroom and unsuccessfully attempting to have sexual relations despite the victim's protests and resistance, engaged in a substantial step toward the commission of sexual assault. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Submission of attempt and lesser included offenses to jury. Where it was possible for the jury to entertain a reasonable doubt as to defendant's guilt of attempted robbery, and at the same time to be convinced by reason of defendant's admissions that he was guilty of making an assault upon the complaining witness, the evidence justified the giving of an instruction on simple assault as requested in order to submit the lesser included offense to a jury. *People v. Velasquez*, 178 Colo. 264, 497 P.2d 12 (1972).

A defendant could commit the crime of attempted theft without having first committed the crime of joyriding or attempted joyriding, which are not lesser included offenses of theft. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference when the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

The question of whether felony menacing is a lesser included offense of attempted second degree murder is an issue of first impression in Colorado. *People v. Torres*, 224 P.3d 267 (Colo. App. 2009).

The offense of second degree murder does not establish every element of felony menacing. Attempted second degree murder requires a

defendant to knowingly engage in conduct that is a substantial step toward causing the death of a person. There is no requirement that the victim be in fear of imminent serious bodily injury. Thus, an attempted second degree murder conviction does not necessarily establish all the elements of menacing. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Elements constituting the crime of theft must be explained to the jury when that is the ulterior crime in a case alleging a burglary offense. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

Jury instruction which erroneously omitted element for attempted first degree murder was not plain error because jury instructions read as a whole sufficiently communicated to the jury the culpability elements required to convict the defendant of attempted first degree murder. *People v. Key*, 851 P.2d 228 (Colo. App. 1992).

Jury instruction on attempted first degree murder that omitted the required element of "after deliberation", when taken together with first degree murder jury instruction that expressly mentioned "after deliberation", adequately advised the jury of the required mens rea for attempted first degree murder. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002); *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004); *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

Crimes of violence include attempts of crimes listed in § 18-1.3-406 (2)(a)(II). *People v. Laurson*, 70 P.3d 564 (Colo. App. 2002).

The general rule applies that abandonment is not available for completed crimes where the general assembly specifically limited the affirmative defense of abandonment to "a charge under this section" and no other legislative enactment makes abandonment an affirma-

tive defense for tampering with a witness. *People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. Attempted first degree assault requires that a defendant act with the intent to cause serious bodily injury to another person by means of a deadly weapon. Use of a deadly weapon is not an element of attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Applied in *People v. Montoya*, 196 Colo. 111, 582 P.2d 673 (1978); *Hudson v. People*, 196 Colo. 211, 585 P.2d 580 (1978); *People v. Dowdell*, 197 Colo. 76, 589 P.2d 948 (1979); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *Pigford v. People*, 197 Colo. 358, 593 P.2d 354 (1979); *People v. Honey*, 198 Colo. 64, 596 P.2d 751 (1979); *People v. Elkhatib*, 198 Colo. 287, 599 P.2d 897 (1979); *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980); *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Elkhatib*, 632 P.2d 275 (Colo. 1981); *People v. Walters*, 632 P.2d 566 (Colo. 1981); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Franklin*, 640 P.2d 226 (Colo. 1982); *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. Madonna*, 651 P.2d 378 (Colo. 1982); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. Hoffman*, 655 P.2d 393 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983); *People v. Freiman*, 657 P.2d 452 (Colo. 1983); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Tate*, 657 P.2d 955 (Colo. 1983); *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983).

PART 2

CRIMINAL CONSPIRACY

18-2-201. Conspiracy. (1) A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime.

(2) No person may be convicted of conspiracy to commit a crime, unless an overt act in pursuance of that conspiracy is proved to have been done by him or by a person with whom he conspired.

(3) If a person knows that one with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring to commit a crime with the other person or persons, whether or not he knows their identity.

(4) If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are part of a single criminal episode.

(4.5) Conspiracy to commit any crime for which a court is required to sentence a

defendant for a crime of violence in accordance with section 18-1.3-406 is itself a crime of violence for the purposes of that section.

(5) If a person conspires to commit a felony which is defined by any statute other than one contained in this title and for which conspiracy no penalty is specifically provided, he is guilty of a class 6 felony. If a person conspires to commit a misdemeanor which is defined by any statute other than one contained in this title and for which conspiracy no penalty is specifically provided, he is guilty of a class 3 misdemeanor.

Source: L. 71: R&RE, p. 415, § 1. C.R.S. 1963: § 40-2-201. L. 74: (5) added, p. 250, § 1, effective February 13. L. 89, 1st Ex. Sess.: (5) amended, p. 21, § 12, effective July 1. L. 95: (4.5) added, p. 1250, § 5, effective July 1. L. 2002: (4.5) amended, p. 1512, § 183, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4.5), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

- I. General Consideration.
- II. Essential Elements of Crime.
- III. Trial and Punishment.
 - A. In General.
 - B. Evidence.
 - C. Instructions and Jury.
 - D. Verdict and Sentence.
- IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with conspiracy, see 62 Den. U. L. Rev. 125 (1985).

Annotator's note. Since § 18-2-201 is similar to former § 40-7-35, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Conspiracy has legal significance only with respect to some other crime which is the object of the conspiracy. *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

Conspiracy and commission of contemplated crime are different and distinct offenses. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

The charge of conspiracy to commit confidence game and the charge of confidence game are separate and distinct offenses, and proof of one does not hinge upon proof of the other. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955).

The crime of conspiracy to commit burglary and burglary are distinct and separate offenses. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

The commission of a substantive offense and a conspiracy to commit the same crime are separate and distinct offenses, since the proof of the substantive offense rests on separate facts and does not hinge upon the proof of the conspiracy. *DeBose v. People*, 175 Colo. 356, 488

P.2d 69 (1971); *People v. Steele*, 193 Colo. 187, 563 P.2d 6 (1977).

Conspiracy and crime which is the object of the conspiracy are different and distinct offenses. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972); *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Conspiracy is a substantive offense, separate from the underlying charge itself, which punishes an agreement intentionally entered into for the purpose of promoting criminal acts. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

One can be convicted of a conspiracy and not of the offense which is the object of the conspiracy, if the evidence implicates the defendant in a conspiracy separate and apart from the evidence offered to prove the substantive offense. *People v. Leonard*, 644 P.2d 85 (Colo. App. 1982).

However, conviction of conspiracy cannot stand absent conviction of the substantive offense. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Complicity distinguished. Under the complicity statute, a defendant is held accountable for a criminal offense committed by another if the defendant participates in the criminal act, i.e., intentionally aids, abets, or advises the other person in planning or committing the offense. In contrast, the essence of the crime of conspiracy is an illegal agreement or combination, plus an overt act in furtherance of that agreement. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Solicitation distinguished. A conspiracy may be committed without the inducement required for the crime of solicitation, and solicitation may be committed without the parties ever reaching an agreement or without any overt act taken to complete the object of the solicitation. Therefore, neither crime is included in the other and the two crimes do not merge. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Verdict acquitting defendant of conspiracy not inconsistent with verdict convicting the

defendant of distribution of a controlled substance. *People v. Saldana*, 899 P.2d 208 (Colo. 1995).

Consistency of verdicts is not required. The court of appeals erred in holding that the defendant could attack his conviction for distribution of a controlled substance on the ground that it is inconsistent with his acquittal on the conspiracy offense. *People v. Saldana*, 899 P.2d 208 (Colo. 1995).

Section proscribes a conspiracy to commit any conduct which constitutes a crime, and not merely those acts designated as criminal in this title. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

It is not a violation of double jeopardy to be convicted of both aggravated robbery and conspiracy to commit robbery. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Defendant charged with assault with a deadly weapon and conspiracy to assault with deadly weapon was not subjected to double jeopardy by conspiracy instruction in combination with accessory instruction. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Conspiracy to commit reckless manslaughter is not a crime in Colorado. *Palmer v. People*, 964 P.2d 524 (Colo. 1998).

Where the underlying substantive criminal offense is of no effect, the conspiracy to commit it is likewise void. *People v. Larkin*, 183 Colo. 363, 517 P.2d 389 (1973).

Conviction on a charge of conspiracy to commit assault to rape was not inconsistent with an acquittal on a substantive charge of assault with intent to commit rape. *People v. Walker*, 182 Colo. 317, 512 P.2d 1243 (1973).

Acquittal of substantive offense forecloses conviction of conspiracy to commit that offense, if the identical evidence relied upon to establish the conspiracy is the same evidence which proved insufficient to establish the substantive offense. *People v. Albers*, 196 Colo. 66, 582 P.2d 667 (1978).

When conspiracy terminates. Although a conspiracy need not necessarily terminate with the completion of its targeted crime, nor even the arrest of a conspirator, when it does terminate depends upon the "particular facts and purposes of such conspiracy". *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Actions which establish continuing conspiracy. It is the actions taken in concert by the conspirators which alone can establish that the conspiracy was to continue beyond the completion of the substantive crime. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The mere recognition that a desire to conceal participation in a crime is generally present does not constitute sufficient basis to conclude that each and every criminal conspiracy survives the completion of the crime at which it

was directed. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

A conspiracy to commit theft does not continue, per se, until the proceeds are returned. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Without evidence to support the contention that the defendants cooperated to effect the concealment of the crime, conspiracy ended upon the division of the proceeds of the robbery. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Whether single set of facts constitutes one criminal episode. *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

Case remanded to district court for a new preliminary hearing because district court had interrupted prior hearing before a proper determination of probable cause for conspiracy could be made. *People v. Nygren*, 696 P.2d 270 (Colo. 1985).

Conspiracy to commit second degree burglary is not a violent felony for purposes of the federal Armed Career Criminal Act. The ordinary Colorado case of conspiracy to commit second burglary does not present a risk of violent confrontation comparable to the risk inherent in a completed burglary. Accordingly, defendant's Colorado conviction is not a violent felony as that term is defined in 18 U.S.C. § 924(e)(2)(B), and it should not have been used as a basis for the imposition of the armed career criminal enhancement. *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007).

Applied in *Powers v. People*, 53 Colo. 43, 123 P. 642 (1912); *West v. People*, 60 Colo. 488, 156 P. 137 (1915); *Bunch v. People*, 87 Colo. 84, 284 P. 766 (1930); *Vigil v. People*, 150 Colo. 582, 375 P.2d 103 (1962); *People v. Mojo*, 173 Colo. 422, 480 P.2d 571 (1971); *People v. Mangum*, 189 Colo. 246, 539 P.2d 120 (1975); *People v. Schuemann*, 190 Colo. 474, 548 P.2d 911 (1976); *People v. Talarico*, 192 Colo. 445, 560 P.2d 90 (1977); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People in Interest of C.B.*, 196 Colo. 362, 585 P.2d 281 (1978); *People ex rel. Brown v. District Court*, 196 Colo. 359, 585 P.2d 593 (1978); *Goodwin v. District Court*, 196 Colo. 246, 586 P.2d 2 (1978); *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978); *Goodwin v. District Court*, 197 Colo. 6, 588 P.2d 874 (1979); *Hughes v. District Court*, 197 Colo. 396, 593 P.2d 702 (1979); *People v. Smith*, 198 Colo. 120, 597 P.2d 204 (1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *People v. Myers*, 43 Colo. App. 256, 609 P.2d 1104 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980); *People v. Hearty*, 644 P.2d 302 (Colo. 1982); *People v. Franklin*, 645 P.2d 1 (Colo. 1982); *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982);

People v. Sanchez, 649 P.2d 1049 (Colo. 1982); People in Interest of R.M.S., 651 P.2d 377 (Colo. 1982); People v. Hoffman, 655 P.2d 393 (Colo. 1982); People v. Luciano, 662 P.2d 480 (Colo. 1983); Holmes v. District Court, 668 P.2d 11 (Colo. 1983); People v. Rivera, 56 P.3d 1155 (Colo. App. 2002).

II. ESSENTIAL ELEMENTS OF CRIME.

Crime of conspiracy is a crime of specific intent. Watkins v. People, 655 P.2d 834 (Colo. 1982).

A different specific intent is required for accessory offenses than for the crime of conspiracy; one cannot commit both by performing the same act. People v. Broom, 797 P.2d 754 (Colo. App. 1990).

Charge of conspiracy has legal significance only with respect to some other crime which is the object of the conspiracy. People v. Montoya, 667 P.2d 1377 (Colo. 1983); People v. Finnessey, 747 P.2d 673 (Colo. 1987).

In proving that a "wheel and hub" conspiracy is a single conspiracy rather than multiple conspiracies, it is not necessary to prove that each conspirator knew every other conspirator so long as an overall plan with a common object is shown. People v. Serrano, 804 P.2d 253 (Colo. App. 1990).

The unlawful agreement is the gist of the crime of conspiracy. Short v. People, 27 Colo. 175, 60 P. 350 (1900); Roll v. People, 132 Colo. 1, 284 P.2d 665 (1955).

The gravamen of the crime of conspiracy is the illicit agreement to commit a felony. DeBose v. People, 175 Colo. 356, 488 P.2d 69 (1971).

Essence of the crime of conspiracy is the illegal agreement or combination. People v. Grass, 180 Colo. 346, 505 P.2d 1301 (1973).

The relationship between coconspirators is part and parcel of the first element of conspiracy, which involves an agreement, combination, or confederation between two or more persons. People v. Johnson, 189 Colo. 28, 536 P.2d 44 (1975).

There must be a combination of two or more persons; one person cannot conspire with himself. Archuleta v. People, 149 Colo. 206, 368 P.2d 422 (1962).

The essential elements of conspiracy are: (1) An agreement; (2) a common design between two or more persons; and (3) an unlawful purpose to be accomplished, which purpose amounts to a crime in Colorado. Pooley v. People, 164 Colo. 484, 436 P.2d 118 (1968).

To constitute the crime of conspiracy there must be a combination of two or more persons, the existence of an unlawful purpose to be accomplished, which in Colorado must amount to a crime, and a real agreement, combination, or confederation with a common design; mere passive cognizance of the crime to be committed or

mere negative acquiescence is not sufficient. Salazar v. People, 166 Colo. 508, 445 P.2d 60 (1968); Dressel v. People, 174 Colo. 238, 483 P.2d 367 (1971); Davis v. People, 176 Colo. 378, 490 P.2d 948 (1971).

The three elements necessary to prove a conspiracy are: (1) A real agreement, combination, or confederation, (2) with a common design between two or more persons, (3) to accomplish an unlawful purpose amounting to a crime. Digiallonardo v. People, 175 Colo. 560, 488 P.2d 1109 (1971); People v. Albers, 196 Colo. 66, 582 P.2d 667 (1978); People v. Williams, 707 P.2d 1023 (Colo. App. 1985).

The three elements necessary to prove a conspiracy are: (1) An agreement, combination, or confederation, (2) between two or more persons, (3) to accomplish an unlawful purpose which must amount to a crime. People v. Dowell, 182 Colo. 11, 510 P.2d 436 (1973).

The elements of a conspiracy are: (1) An agreement, (2) between two or more persons, (3) to commit a crime. Young v. People, 180 Colo. 62, 502 P.2d 81 (1972); People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972).

An agreement with common design between defendant and his coconspirator to engage in conduct which constitutes a crime or to aid in the planning or commission of the crime must be proven to establish a conspiracy. People v. Wilkinson, 38 Colo. App. 365, 561 P.2d 347 (1976).

Intent to promote or facilitate commission of a crime is a necessary element of the crime of conspiracy. People v. Wilkinson, 38 Colo. App. 365, 561 P.2d 347 (1976).

To establish conspiracy there need only be circumstantial evidence that indicates that the conspirators, by their acts, pursued the same objective, with a view toward attainment of the same objective. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to convict the defendant on the conspiracy counts. There was evidence that the defendant and his gang agreed to kill two people and that he and others tried to kill those people. People v. McGlotten, 166 P.3d 182 (Colo. App. 2007).

These elements must be proven beyond a reasonable doubt. To convict anyone of conspiracy, the state must prove beyond a reasonable doubt that there was a real agreement, combination, or federation with a common design between two or more persons to accomplish an unlawful purpose, which must amount to a crime. People v. Armijo, 176 Colo. 547, 491 P.2d 1384 (1971); Feltes v. People, 178 Colo. 409, 498 P.2d 1128 (1972); Bates v. People, 179 Colo. 81, 498 P.2d 1136 (1972).

Where the evidence showed that defendant approached the money bag on two occasions, looked into the cars surrounding the drop site, and pointed out a car containing the officers to

the man who eventually attempted to retrieve the money, a jury could reasonably conclude that each material element of conspiracy to commit criminal extortion had been proven beyond a reasonable doubt. *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Concerted commission of crime is not necessarily conspiracy. If people act in concert in the commission of a crime, it does not follow that they must have had a conspiracy as that term is defined in the statutes. *Jacobs v. People*, 174 Colo. 403, 484 P.2d 107 (1971).

As to when crime requires two persons to participate. An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. Conspiracy charges may be filed when more or different people participate in the conspiracy than are necessary to commit the substantive offense. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

The "Wharton" rule states generally that one may not be convicted of conspiracy when the principal crime charged is one that must necessarily be committed by two or more persons agreeing among themselves, such as adultery or common-law bribery, and the agreement did not exist between parties other than those committing the underlying crime. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

An exception to the "Wharton" rule permits conspiracy charges to be filed when more or different people participate in the conspiracy than are necessary to commit the substantive offense. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Success or failure of object of conspiracy does not determine guilt or innocence of conspirators. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

When conspirators agree to engage in conduct that would result in crime if facts were as conspirators believe them to be, and take step towards completion, danger is manifest and conspiracy is consummated. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

Coconspirator need not be specifically named. Where information named an alleged coconspirator, but evidence created the possibility that defendant had conspired with another person or persons and jury instruction did not name any specific person, there was no reasonable probability that defendant was convicted of an offense for which she was not charged. *People v. Kurz*, 847 P.2d 194 (Colo. App. 1992).

Although a criminal attempt is not readily understandable to a person of ordinary intelligence without some further explanation by the court, the trial court's failure to instruct on "attempt" was harmless error, as the jury specifically found defendant guilty of first-de-

gree murder after deliberation. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

III. TRIAL AND PUNISHMENT.

A. In General.

Crime is not readily understandable. The crime of conspiracy to commit burglary is not the type of offense readily understandable from a mere reading of the information at a guilty plea hearing without further explanation of its elements. *People v. Leonard*, 673 P.2d 37 (Colo. 1983).

One conspiracy does not become several because it may involve the violation of several statutes. The principle that no one shall be twice put in jeopardy is guaranteed and prohibits double punishment for the same crime. *People v. Bradley*, 169 Colo. 262, 455 P.2d 199 (1969).

One conspiracy may be formed to commit a number of offenses. The conspiracy is one offense and a single offense, no matter how many repeated violations of the law may have been the object of the conspiracy. *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965).

Although there may have been several unlawful objects of the conspiracy, there is only one conspiracy. *People v. Brown*, 185 Colo. 272, 523 P.2d 986 (1974), overruled in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which this section punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. *People v. Brown*, 185 Colo. 272, 523 P.2d 986 (1974) overruled in *Villafranca v. People*, 573 P.2d 540 (1978).

Conspiracy constitutes a single offense even though the agreement upon which the charge is founded contemplates the performance of several criminal acts. *People v. Forbes*, 185 Colo. 410, 524 P.2d 1377 (1974); *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975).

A single conspiracy may have more than one crime as its object. *People v. Leonard*, 644 P.2d 85 (Colo. App. 1982).

One who is not a conspirator is not of necessity precluded from being an accessory. *Jacobs v. People*, 174 Colo. 403, 484 P.2d 107 (1971).

A husband and wife may conspire to commit a criminal offense. *Dalton v. People*, 68 Colo. 44, 189 P. 37 (1920).

Indictment must contain every element necessary to constitute crime. In an indictment for conspiracy to commit a crime under this section, the indictment must contain every element necessary to constitute that crime, as fully as if the indictment was for its perpetration.

Lipschitz v. People, 25 Colo. 261, 53 P. 1111 (1898).

A district attorney need not inform against other conspirators. Bradley v. People, 157 Colo. 530, 403 P.2d 876 (1965).

Dismissal before trial is same as not filing charges. Where there was no judgment of acquittal or dismissal against the conspirators other than defendant, but a dismissal before trial, it is as though no charge of conspiracy had ever been filed against any of the conspirators other than defendant. Bradley v. People, 157 Colo. 530, 403 P.2d 876 (1965).

A person may be convicted of conspiracy without others being tried for the same crime, as in the case where the count of conspiracy has been dismissed against the other codefendants. Salazar v. People, 166 Colo. 508, 445 P.2d 60 (1968).

A failure to charge coconspirators or the dismissal of conspiracy charges before trial against coconspirators does not require dismissal of conspiracy charges against the remaining coconspirators or render invalid a verdict of guilty against the remaining coconspirators. Hughes v. People, 175 Colo. 351, 487 P.2d 810 (1971).

Coconspirators may be alleged to be unknown in a conspiracy count. People v. Holter, 185 Colo. 47, 521 P.2d 765 (1974).

Variance in burglary charge fatal to conspiracy charge. Where defendant was not guilty of burglary as charged in the information because the locale was not a building, it necessarily follows that he was not guilty of conspiracy to commit burglary. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

Defendant's involvement as a conspirator and as a complicitor was tied to separate and distinct crimes, and the doctrine of merger did not apply. People v. Shannon, 189 Colo. 287, 539 P.2d 480 (1975).

Conspiracy punishable even if underlying crime not contained in criminal code. The general assembly intended that the conspiracy to commit a crime be punishable even if the underlying crime is proscribed by some section other than one contained in this title. People v. Cabus, 626 P.2d 1159 (Colo. App. 1980).

Explicit mention of conspiracy in narcotics violation's provision carries out legislative intent. The explicit mention of conspiracy in § 12-22-322 (1)(h), setting out the penalties for a narcotics violation, was necessary to carry out the general assembly's intent to punish narcotics conspiracies as severely as the underlying offenses. People v. Cabus, 626 P.2d 1159 (Colo. App. 1980).

Obscenity provisions cannot support injunction or criminal charge. The Colorado obscenity statute, § 18-7-101 et seq., cannot be relied upon to support either a civil injunction or a criminal charge. People v. New Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980).

Procuring agent defense requires that defendant act as exclusive agent for the buyer.

As such, the defendant becomes a principal, or a conspirator, in the purchase rather than in the sale of the narcotics and, therefore, he cannot be convicted of sale or conspiracy to sell. People v. Smith, 623 P.2d 404 (Colo. 1981).

B. Evidence.

In a prosecution for conspiracy, considerable latitude is allowed because of the inherent problems of proof involved in proving a crime, the veil around which is secrecy. People v. Broncucia, 189 Colo. 334, 540 P.2d 1101 (1975), cert. denied, 431 U.S. 937, 97 S. Ct. 2647, 53 L. Ed.2d 254, reh'g denied, 433 U.S. 915, 97 S. Ct. 2989, 53 L. Ed.2d 1101 (1977).

A conspiracy need not be proved directly, but may be inferred by the jury from the facts proved. Gomez v. People, 152 Colo. 309, 381 P.2d 816 (1963).

Conspiracy is generally covert and consequently must be established in most cases by circumstantial evidence. Medina v. People, 154 Colo. 4, 387 P.2d 733 (1963), cert. denied, 379 U.S. 848, 85 S. Ct. 88, 13 L. Ed.2d 52 (1964); People v. In Interest of A.G., 43 Colo. App. 514, 605 P.2d 487 (1979).

The evidence in proof of a conspiracy will generally be circumstantial. Abeyta v. People, 156 Colo. 440, 400 P.2d 431 (1965).

Direct testimony that the parties charged with conspiracy entered into a specific agreement to commit the crime is not necessary. It is sufficient if there is evidence in the record from which the jury can infer such an agreement or meeting of the minds. Griffin v. People, 157 Colo. 72, 400 P.2d 928 (1965); Pooley v. People, 164 Colo. 484, 436 P.2d 118 (1968); Salazar v. People, 16 Colo. 508, 445 P.2d 60 (1968).

The proof necessary to support a conviction for conspiracy is necessarily not direct or clear. The nature of the offense and the secrecy involved require that the elements of the crime be established by circumstantial evidence. Pooley v. People, 164 Colo. 484, 436 P.2d 118 (1968).

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Grass v. People, 172 Colo. 223, 471 P.2d 602 (1970).

The existence of the agreement or assent of minds necessary to constitute a conspiracy need not be proved directly, but may be inferred from the facts provided. People v. Johnson, 189 Colo. 28, 536 P.2d 44 (1975).

Although elements of a conspiracy must be proven beyond a reasonable doubt, they may be proven by circumstantial evidence. People v. LeFebvre, 190 Colo. 307, 546 P.2d 952 (1976).

Conspiracies by their very nature are often covert and surreptitious in nature, and for that reason, conspiracies may be established by cir-

cumstantial evidence alone. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Because of the nature of conspiracy, it often may only be proven by circumstantial evidence of involvement, which gives rise to the inference that an agreement to promote or facilitate the commission of the underlying crime was present. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Proof in a conspiracy case will necessarily be mostly circumstantial due to the covert and secretive nature of the offense. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Since most conspiracies are covert, agreement frequently must be proven by circumstantial evidence. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976).

In a prosecution for conspiracy, proof of an agreement may be shown by circumstantial evidence which indicates that the conspirators, by their acts, pursued the same objective, with a view toward obtaining a common goal. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

The circumstances necessary to support a conviction for conspiracy are those which show that the alleged conspirators pursued by their acts the same objective, one performing one part, and the other another part, with a view to completing the acts and attaining the common objective. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Proof of common design. A common design is the essence of a conspiracy and must be proved, and such proof may be fashioned from evidence other than that the parties came together and actually agreed upon a method of operation for the accomplishment of an offense. If it be shown that the defendants pursued by their acts the same object, often by the same means, one performing one part and another part of the same so as to complete it, the question of the existence of a conspiracy is presented and may be inferred by the jury. *Medina v. People*, 154 Colo. 4, 387 P.2d 733 (1963), cert. denied, 379 US 848, 85 S. Ct. 88, 13 L. Ed.2d 52 (1964); *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965); *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965); *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970); *Husar v. People*, 178 Colo. 300, 496 P.2d 1035 (1972).

A criminal conspiracy need not be proved by direct evidence, and a common purpose or plan may be inferred from the development or the combination of circumstances. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Although the facts as shown do not reflect an expressed agreement, this is not required if the evidence portrays facts from which clear inferences can be drawn that a plan to rob the victim was the subject of at least a tacit or implied understanding or agreement between them.

Morehead v. People, 167 Colo. 287, 447 P.2d 215 (1968).

Prosecution showed an agreement, a common design between the defendants, and an unlawful purpose and the evidence was sufficient to sustain a conviction of conspiracy to commit theft. *People v. Todd*, 189 Colo. 117, 538 P.2d 433 (1975).

Evidence of the consummation of the conspiracy is admissible as a circumstance tending to prove, and as throwing light upon it. *Short v. People*, 27 Colo. 175, 60 P. 350 (1900); *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Acts and declarations of coconspirator admissible upon proof of conspiracy. The declarations of a defendant are not admissible in evidence against his codefendants under a charge of conspiracy until there be prima facie proof of the existence of the alleged conspiracy. A concert of action between the defendants in the unlawful enterprise as charged being shown to the satisfaction of the trial court, the acts and declarations of each conspirator in furtherance of the unlawful object may be given in evidence against all the coconspirators. *Rollins v. Bd. of Comm'rs*, 15 Colo. 103, 25 P. 319 (1890); *Smith v. People*, 38 Colo. 509, 88 P. 453 (1906).

In a prosecution for conspiracy when the fact of a conspiracy is shown, the acts and declarations of the conspirators, or of any of them, in furtherance of the conspiracy, are admissible in evidence not only against the persons who originally conspired together, but also against any person who joined with them in the consummation or attempt at consummation of the conspiracy. *Moore v. People*, 31 Colo. 336, 73 P. 30 (1903).

Where in a prosecution for larceny a conspiracy between defendant and another party to steal had been shown by the admissions of defendant to the witness, it was not error to permit the witness to testify to admissions made by the coconspirator relative to the transaction, made when the defendant was not present, but previous to the consummation of the crime. *Porter v. People*, 31 Colo. 508, 74 P. 879 (1903).

The decisions of the court of appeals for the tenth circuit adhere to the conservative requirements of a subsisting conspiracy and statements in furtherance of it before admitting the declarations of a coconspirator. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed.2d 564 (1969).

To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged coconspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

The acts and utterances of one conspirator become the acts and utterances of all conspirators if such are done during the existence and the furtherance of the conspiracy. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973).

Evidence tended to show a continuing plan, scheme, design, and intent on the part of the coconspirators to deal in illicit drugs with an undercover agent over a period of time which extended from January, 1973, to the date of the defendant's arrest. Given these facts, the testimony of conversations and transactions between the principals was properly admitted, and a limiting instruction was not necessary after the testimony was offered and received in evidence. *People v. Geller*, 189 Colo. 338, 540 P.2d 334 (1975).

The declarations of an alleged conspirator are admissible against an alleged coconspirator only when the existence of the conspiracy is shown by independent evidence. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

To be admissible under the coconspirator exception to the hearsay rule, the coconspirator's out-of-court statement must be made during the course and in furtherance of the conspiracy. *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Likewise, exhibits admissible in trial of accomplices to common plan. Defendant and his codefendant jointly participated in the criminal venture which resulted in the homicide. They acted in concert in furtherance of a common illegal purpose, and each, as to the other, was an accomplice. Admitting in evidence as against defendant the articles found in the possession of his codefendant was not error where they were a part of the people's case against both defendants. *Miller v. People*, 141 Colo. 576, 349 P.2d 685, cert. denied, 364 U.S. 851, 5 L. Ed.2d 75, 81 S. Ct. 97 (1960).

The exhibits were admissible to establish the guilt of the principal and therefore relevant to the trial of defendant as an accessory and coconspirator. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Admission of postconspiracy statements was reversible error. When the conspiracy ends the theory that the participants are agents for each other has no further validity, and statements thereafter made are not admissible against the others. Such statements are then no different from any other hearsay. After the conspiracy has come to an end, as when defendants had been arrested and jailed, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed.2d 564 (1969).

Acts or declarations made by one of the conspirators outside of the presence of other con-

spirators after the consummation of the conspiracy are inadmissible against other conspirators jointly charged. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

Statements of coconspirators admissible where conspiracy was continuing. The acts and statements after the completion of the offense were admissible and in furtherance of a going conspiracy because: (1) There is ample evidence that the defendants were continuing to act in concert after the robbery and prior to their arrest, in that they attempted to conceal a joint buying spree, they acted on behalf of one another and maintained communications; (2) the utterances were made in close proximity in time and space; and, (3) the utterances were circumstantial and spontaneous rather than testimonial or narrative. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed.2d 564 (1969).

Evidence must establish particular conspiracy charged. To sustain a verdict on an information charging one particular conspiracy, the evidence must establish the conspiracy charged; evidence that establishes another conspiracy or several other conspiracies will not sustain a verdict. *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971).

Evidence of conspiracy is not inadmissible because of failure of crime. Evidence of conspiracy to commit aggravated robbery is not inadmissible and is not meaningless and to be ignored merely because plans to commit robbery were frustrated and ended with commission of second-degree assault. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Properly instructed, a jury may convict upon the uncorroborated testimony of an accomplice. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Admissibility of hearsay. Although the court may, in its discretion, allow hearsay to be introduced, the independent proof requirement must be met before the jury may consider hearsay statements of the alleged coconspirator against the defendant. If sufficient independent proof is not shown, then the jury must be instructed to disregard the testimony. Although the proof of the existence of the conspiracy may be circumstantial, it must be independent of the hearsay statements. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

If the court, in its discretion, admits the hearsay first, and independent evidence is not later introduced to support the initial determination by the court that the conspiracy continued, the jury must be instructed to disregard the testimony. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Admissibility is question for judge. While the issue of whether the conspiracy had ended at

the time of the declaration may properly be submitted to the jury, the issue of admissibility of the testimony initially presented a question of law to be decided by the trial judge. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The alleged unreliability of a coconspirator's testimony involved a determination by the jury of the weight to be given this testimony. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed.2d 167 (1976).

The criminal record and admitted prior perjury of a coconspirator do not go to the admissibility of his testimony but rather to the weight to be given it, which was properly left for the jury's determination. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed.2d 167 (1976).

Coconspirator's mental state not relevant. Only the defendant's mental state is relevant in proving a charge of conspiracy. Accordingly, it is no defense that the person with whom the defendant acted is legally not responsible for the crime. *People v. McCoy*, 944 P.2d 577 (Colo. App. 1996).

Mere presence does not amount to sufficient independent evidence to support the existence of the conspiracy to sell narcotics. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

The same circumstantial evidence may provide the basis for a conviction of both the substantive crime and conspiracy. *People v. O'Neill*, 185 Colo. 202, 523 P.2d 123 (1974).

An acquittal of a substantive offense forecloses conviction on a conspiracy if, and only if, the only evidence relied on to prove the existence of the conspiracy was also the only evidence used to prove the substantive offense. *People v. Gallegos*, 181 Colo. 264, 509 P.2d 596 (1973).

Where alleged coconspirators are tried in separate proceedings, the rule of consistency is inapplicable, and an alleged coconspirator may be found guilty despite the acquittal of his alleged coconspirator. *People v. Marquiz*, 726 P.2d 1105 (Colo. 1986).

Evidence sufficient to uphold conviction. Evidence showed that informant set up a drug deal between two people, the two people showed up at the drug deal with the drugs, and there were scales in the car. Based on that evidence the jury could infer an agreement to sell drugs and the overt act of traveling to the location. *People v. Robinson*, 226 P.3d 1145 (Colo. App. 2009).

C. Instructions and Jury.

Instruction on elements of conspiracy held sufficient. *Young v. People*, 180 Colo. 62, 502 P.2d 81 (1972).

An instruction that to find defendant guilty of conspiracy the jury must find beyond a reasonable doubt that there was a common design or purpose to commit an unlawful act by concert of action, although not a model of preciseness, does set forth the essential elements of the offense charged in understandable language. The law does not require more. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Instruction on conspiracy to commit a misdemeanor properly refused. *Goddard v. People*, 172 Colo. 498, 474 P.2d 210 (1970).

Erroneous instruction on intent requires reversal. A verdict of guilty cannot stand where the element of specific intent is material as to one count of the information or indictment which is related to and joined with a count on conspiracy, when the court's instructions on intent covering either count are erroneous. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

Finding of jury conclusive. Where the question of the existence of a conspiracy is clearly presented by the evidence and is properly submitted to the jury, the finding of the jury is conclusive. *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

Failure to instruct the jury in meaning of "overt act" harmless error since the plain meaning of "overt act" is not so abstruse as to be incomprehensible to the average juror. *People v. Schruder*, 735 P.2d 905 (Colo. App. 1986).

D. Verdict and Sentence.

Conspiracy and object crime are separately punishable. Since the substantive offense and the conspiracy are separate and distinct crimes, the doctrine of merger does not apply and the crimes are separately punishable. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955); *DeBose v. People*, 175 Colo. 356, 488 P.2d 69 (1971).

Conspiracy is a separate and distinct offense from that which is the object of the conspiracy, and as such may be punishable by a consecutive sentence. *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975); *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

Accused may be convicted of both crimes. Accused who participates in a crime as a principal may be convicted of both the substantive offense and conspiracy to commit such substantive offense. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Where conspiracy verdict failed to specify the crime which was the subject of the conspiracy, it is a nullity. *People v. Pleasant*, 182 Colo. 144, 511 P.2d 488 (1973).

An acquittal of all conspirators but one renders verdict of guilty invalid as to him since he cannot conspire with himself. *Bradley v. People*, 157 Colo. 530, 403 P.2d 876 (1965).

Where defendant and others were jointly charged with conspiracy to commit larceny from the person, and others were found not guilty of conspiring with defendant or with each other, a conviction of defendant of such offense was without sanction in law or fact. *Archuleta v. People*, 149 Colo. 206, 368 P.2d 422 (1962).

Where alleged coconspirators are tried in separate proceedings, the rule of consistency is inapplicable, and an alleged coconspirator may be found guilty despite the acquittal of his alleged coconspirator. *People v. Marquiz*, 726 P.2d 1105 (Colo. 1986).

Summary judgment inappropriate. Even where it is extremely doubtful that a genuine issue of fact exists as to whether all defendants joined in a conspiracy to libel, even assuming that libel can be proven, summary judgment is not appropriate. *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

Conviction on a charge of conspiracy to commit assault on a rape was not inconsistent with an acquittal on a substantive charge of assault with intent to commit rape. *People v. Walker*, 182 Colo. 317, 512 P.2d 1243 (1973).

Conviction of conspiracy to commit a robbery is totally inconsistent with an acquittal of attempt to commit aggravated robbery. *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976).

An erroneous conspiracy conviction must be reversed regardless of the fact that concurrent sentences were imposed for the conspiracy and for the underlying substantive crime. *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Under subsection (4.5), conspiracy to commit a per se crime of violence is itself a crime of violence to which the sentence enhancing provisions of § 16-11-309 apply. *Terry v. People*, 977 P.2d 145 (Colo. 1999).

IV. ILLUSTRATIVE CASES.

Agreement not established. When there is no evidence to suggest an agreement to commit a crime other than that the defendants wanted to get some money, the evidence does not rise to the dignity of agreeing to commit a crime. *People v. Armijo*, 176 Colo. 547, 491 P.2d 1384 (1971).

Proof of conspiracy to bribe. Where jury does not find defendant guilty of bribery but does find that defendant had agreed with other person to bribe a judge, defendant's conviction of conspiracy to commit bribery of a judge is proper. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

Conspiracy to commit perjury. Although defendant contends that there was a fatal variance between the charge contained in the indictment and the proof, and that although one con-

spiracy, involving all the alleged perjurers, was charged, the prosecution proved at least four conspiracies, only one of which involved the defendant where there was a single overall plan with a common object, and the success or failure of the conspiracy depended upon the successful linkage of each member's testimony, and the perjury of one person was not and could not have been an end in itself, the testimony was sufficient to establish circumstantially a single conspiracy to commit perjury involving all the defendants. *People v. Quintana*, 189 Colo. 330, 540 P.2d 1097 (1975).

Conspiracy to commit burglary. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Conspiracy to commit third degree arson. The main object of a conspiracy to commit third degree arson is not the burning of a building, but the collection of insurance proceeds. *People v. Peltz*, 701 P.2d 98 (Colo. App. 1984).

Conviction did not deny due process. The evidence of conspiracy between the two defendants to possess narcotics is very weak but not totally nonexistent. Appellants were each in possession of the same prohibited drug and each in possession of crude but common instruments associated with the use and possession of narcotics. Federal due process is denied when conviction results without any evidence of guilt, but not otherwise. *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968), cert. denied, 393 U.S. 1108, 89 S. Ct. 918, 21 L. Ed.2d 804 (1969).

Evidence sufficient for submission to jury. *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973).

The evidence shown that the four who took part in the robbery entered the store simultaneously, that each performed a given task toward the accomplishment of the robbery, and that they all fled together was sufficient to submit the charge of conspiracy to the jury. *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965).

Evidence did not present jury question. There was some evidence of conspiracy to buy or receive stolen property, but that was not the charge. The evidence of conspiracy to commit the larceny was insufficient as a matter of law to submit that issue to the jury, particularly since the district attorney absolved those to whom the evidence pointed as being coconspirators. *Attwood v. People*, 165 Colo. 345, 439 P.2d 40 (1968).

Where the evidence was not sufficient to establish, either directly or by legitimate inference, a real agreement, combination, or confederation between the defendant and his alleged conspirator with the common purpose of embezzling the grain of a third person stored in an elevator, as charged, the question was not one for the jury's determination, and the defendant's motion for judgment of acquittal should have been sustained. *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971).

Evidence sufficient to establish conspiracy. Roll v. People, 132 Colo. 1, 284 P.2d 665 (1955); Hughes v. People, 175 Colo. 351, 487 P.2d 810 (1971); Husar v. People, 178 Colo. 300, 496 P.2d 1035 (1972); People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972); People v. Incerto, 180 Colo. 366, 505 P.2d 1309 (1973); People v. Vandiver, 191 Colo. 263, 552 P.2d 6 (1976).

Even though the defendants may have offered their help to the victim separately, as claimed, they then cooperated with each other in carrying the drunk victim out of the club and they both participated in assaulting him. This constitutes sufficient and independent evidence of conspiracy to rob. Morehead v. People, 167 Colo. 287, 447 P.2d 215 (1968).

Where defendant's fingerprints were found on the inside of the entry door and on an envelope normally kept in a desk drawer in the victim's bedroom, and where defendants theorize that the prints could have been made at a time other than during the commission of the crime, but did not

testify nor present other testimony to buttress the theory, the evidence was sufficient for conviction of robbery. People v. Hannaman, 181 Colo. 82, 507 P.2d 466 (1973).

Evidence held insufficient to establish conspiracy. Ziatz v. People, 171 Colo. 58, 465 P.2d 406 (1970).

Evidence that defendant has physical makeup fitting witnesses' general physical description of one of the robbers, without witness' statement to police linking defendant to robbery or testimony being offered at trial, is insufficient to support defendant's conviction for robbery and conspiracy to commit robbery. Velarde v. People, 179 Colo. 207, 500 P.2d 125 (1972).

Subsection (5) did not lower the classification of the offense of the defendant. The defendant pled guilty to a conspiracy to commit the class 4 felony of distribution and sale of marijuana and thus was convicted of a class 5 felony. People v. Hartkemeyer, 843 P.2d 92 (Colo. App. 1992).

18-2-202. Joinder and venue in conspiracy prosecutions. (1) Subject to the provisions of subsection (2) of this section, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

- (a) They are charged with conspiring with one another; or
- (b) They are charged with being involved in conspiracies that are so related as to constitute different aspects of a scheme of organized criminal conduct. In such case it is immaterial that the persons charged are not parties to the same conspiracy.
- (2) In any joint prosecution under subsection (1) of this section:
 - (a) No defendant shall be charged with a conspiracy in any judicial district other than one in which he entered into the conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and
 - (b) Neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by this joinder; and
 - (c) The court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence.

Source: L. 71: R&RE, p. 415, § 1. C.R.S. 1963: § 40-2-202.

18-2-203. Renunciation of criminal purpose. It is an affirmative defense to a charge of conspiracy that the offender, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

Source: L. 71: R&RE, p. 416, § 1. C.R.S. 1963: § 40-2-203.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-2-204. Duration of conspiracy. (1) Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired.

(2) Abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation.

(3) If an individual abandons the agreement, the conspiracy is terminated as to him only if and when he gives timely notice to those with whom he conspired of his abandonment and the notice is evidenced by circumstances corroborating the giving of the same, or he informs the law enforcement authorities, having jurisdiction, of the existence of the conspiracy and of his participation therein.

Source: L. 71: R&RE, p. 416, § 1. C.R.S. 1963: § 40-2-204.

ANNOTATION

Completion of the object of the conspiracy completes the conspiracy. United States v. Mares, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed.2d 564 (1969).

The ending of a conspiracy depends upon the particular facts and purposes of such conspiracy. The conspiracy does not come to an abrupt and automatic end simultaneously with the completion of the offense nor even the arrest of a conspirator. United States v. Mares, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed.2d 564 (1969).

A conspiracy to commit a crime of stealth for material gain usually has a minimum routine development from plan, to commission, to division of fruits, if any, among the conspirators. United States v. Mares, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed.2d 564 (1969).

District court has proper jurisdiction over conspiracy charge that began when defendant was a juvenile but continued after defendant became an adult. People v. McGlotten, 166 P.3d 182 (Colo. App. 2007).

Applied in Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); Corr v. District Court, 661 P.2d 668 (Colo. 1983).

18-2-205. Incapacity, irresponsibility, or immunity of party to conspiracy. (1) It is immaterial to the liability of a person who conspires with another to commit a crime that:

(a) He or the person with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of the crime, if he believes that one of them does; or

(b) The person with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

Source: L. 71: R&RE, p. 416, § 1. C.R.S. 1963: § 40-2-205.

18-2-206. Penalties for criminal conspiracy - when convictions barred. (1) Conspiracy to commit a class 1 felony is a class 2 felony; conspiracy to commit a class 2 felony is a class 3 felony; conspiracy to commit a class 3 felony is a class 4 felony; conspiracy to commit a class 4 felony is a class 5 felony; conspiracy to commit a class 5 or 6 felony is a class 6 felony.

(2) A person may not be convicted of conspiracy to commit an offense if he is acquitted of the offense which is the object of the conspiracy where the sole evidence of conspiracy is the evidence establishing the commission of the offense which is the object of the conspiracy.

(3) If the particular conduct charged to constitute a criminal conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither that conduct nor the offender presents a public danger warranting the grading of the offense under this section, the court may enter judgment and impose sentence for a crime of a lesser class or, in extreme cases, may dismiss the prosecution.

(4) Conspiracy to commit a class 1 misdemeanor is a class 2 misdemeanor.

(5) Conspiracy to commit a misdemeanor other than a class 1 misdemeanor is a class 3 misdemeanor.

(6) Conspiracy to commit a petty offense is a crime of the same class as the offense itself.

Source: L. 71: R&RE, p. 416, § 1. C.R.S. 1963: § 40-2-206. L. 75: (1) amended and (4) to (6) added, p. 617, § 4, effective July 21. L. 89, 1st Ex. Sess.: (1) amended, p. 22, § 13, effective July 1.

ANNOTATION

Annotator's note. Since § 18-2-206 is similar to former § 40-7-35, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Acquittal of crime and conviction of conspiracy inconsistent where evidence same as to both. Where the very same evidence which the jury apparently did not believe was sufficient to prove that the defendant participated in the robbery was the only evidence which could prove him guilty of conspiracy, the conspiracy verdict of guilty cannot stand. *Robles v. People*, 160 Colo. 297, 417 P.2d 232 (1966); *People v. Way*, 165 Colo. 161, 437 P.2d 535 (1968); *Attwood v. People*, 165 Colo. 345, 439 P.2d 40 (1968); *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

The jury may not convict a defendant of conspiracy to commit a crime when under the same evidence they acquitted him of the substantive crime when the only evidence of the conspiracy was the evidence of the robbery itself. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

The only evidence of conspiracy was that two people were acting in concert for a common cause. Since the jury found that defendant was not guilty of robbery and since the only evidence of conspiracy was that he participated in the robbery, the verdict on the charge of conspiracy cannot stand. *Carter v. People*, 169 Colo. 531, 458 P.2d 236 (1969).

If only one fund of evidence is utilized to prove both the substantive offense and conspiracy charge, and a jury disbelieves this evidence or has a reasonable doubt that it is sufficient to prove the substantive offense, it logically follows that it is likewise unbelievable or insufficient to support a verdict of guilty to the conspiracy charge. *Armijo v. People*, 170 Colo. 411, 462 P.2d 500 (1969).

Where one of the defendants asserted that because the jury found him not guilty of possession of a narcotic drug, the guilty verdict of conspiracy to possess was inconsistent and his conviction should be reversed, it was held that since there was no evidence of conspiracy apart from that introduced in support of the substantive crime of possession as to the defendant, and the jury found the evidence was insufficient to establish the defendant's guilt as to the possession charge, it followed that the conviction on the conspiracy count must fall as well. *Fagin v. People*, 174 Colo. 540, 484 P.2d 1216 (1971).

The jury cannot be permitted to believe testimony for the purposes of the conspiracy and disbelieve the same testimony for purposes of the substantive crime. *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971).

An acquittal of a substantive offense forecloses conviction on a conspiracy charge if, and only if, the only evidence relied upon to prove the existence of the conspiracy was also the only evidence used to prove the substantive offense. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973); *People v. Samora*, 188 Colo. 74, 532 P.2d 946 (1975).

Conviction of conspiracy to commit a robbery is totally inconsistent with an acquittal of attempt to commit aggravated robbery. *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976).

Jury may be so instructed. If counsel for the people insist upon submitting to the jury a count of conspiracy as well as a count of robbery where the evidence which would convict upon either charge is exactly the same, the jury should be instructed that it cannot convict on one count and acquit on the other. *People v. Way*, 165 Colo. 161, 437 P.2d 535 (1968).

Different rule applies where evidence different. The basic reason for the rule in *Robles v. People* (160 Colo. 297, 417 P.2d 232 (1966)) disappears when the evidence can be segmented or is different as to both offenses. *Armijo v. People*, 170 Colo. 411, 462 P.2d 500 (1969).

Where there is different evidence relating to the conspiracy and the substantive crime, the jury may return different verdicts as to the two charges. *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971).

When a defendant is acquitted of a substantive offense, he can still be convicted of conspiracy to commit the offense if in addition to the evidence offered to prove the substantive offense, there exists evidence to prove the conspiracy. *Bates v. People*, 179 Colo. 81, 498 P.2d 1136 (1972).

Where there is different evidence relating to the conspiracy, separate and independent from that of participation in the substantive offense, the jury may properly return a verdict of guilty to the conspiracy charge and not guilty to the substantive charge. *People v. Coca*, 185 Colo. 10, 521 P.2d 781 (1974).

Jury verdicts acquitting a defendant of burglary and finding guilt as to a conspiracy to commit burglary are not inconsistent so long as there is independent evidence in the record implicating the defendant in a conspiracy separate and apart from the evidence offered to prove the

substantive offense. *People v. In Interest of A.G.*, 43 Colo. App. 514, 605 P.2d 487 (1979).

Where the defendant was seen checking the drop site for money and the police testified he was seen talking to both the man identified as placing the extortion call and the man that attempted to pick of the money, there was sufficient independent proof of conspiracy to sustain the conspiracy, despite the acquittal on the extortion charge. *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Where sufficient independent evidence exists, including testimony of accomplice, defendant may be convicted of conspiracy even if acquitted on the substantive charge of arson. *People v. Harrison*, 746 P.2d 66 (Colo. App. 1987); *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Defendant may be convicted of conspiracy to commit attempted murder even though acquitted of attempted murder charge. Evidence of attempted murder is not sole evidence for conspiracy charge, conspiracy charge was supported by additional evidence of an agreement to kill a person. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

Subsection (2) codifies the rule of *Robles v. People*. *People v. Frye*, 898 P.2d 559 (Colo. 1995).

Robles rule should be strictly limited to the terms of subsection (2). *People v. Frye*, 898 P.2d 559 (Colo. 1995).

Subsection (2) not applicable and defendant not acquitted where jury was deadlocked on the first degree arson charge and the prosecution

dismissed such charge and the court accepted the unanimous verdict on the conspiracy charge. *People v. Espinoza*, 989 P.2d 178 (Colo. App. 1999).

Vague evidence insufficient to support conspiracy after acquittal of substantive crime. Where the so-called independent evidence from which it might be inferred that the defendant was a participant in a conspiracy was vague and inconclusive, such evidence is totally insufficient to support the defendant's conviction on the conspiracy charge after his acquittal on the substantive charge. *People v. Samora*, 188 Colo. 74, 532 P.2d 946 (1975).

Jury may not believe evidence for conspiracy and disbelieve for substantive crime. A jury will not be permitted to believe the evidence for the purpose of a conspiracy count and disbelieve the evidence for the purpose of the substantive crime count. *People v. Coca*, 185 Colo. 10, 521 P.2d 781 (1974).

Court erred in prohibiting defendant, on hearsay grounds, from eliciting evidence of what he and an alleged coconspirator said to one another. Nonhearsay verbal act evidence is admissible on the issue of whether a conspiratorial agreement existed because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it. *People v. Scarce*, 87 P.3d 228 (Colo. App. 2003).

Applied in *People v. Albers*, 196 Colo. 66, 582 P.2d 667 (1978); *People v. Hoffman*, 655 P.2d 393 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

PART 3

CRIMINAL SOLICITATION

18-2-301. Criminal solicitation. (1) Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if he or she commands, induces, entreats, or otherwise attempts to persuade another person, or offers his or her services or another's services to a third person, to commit a felony, whether as principal or accomplice, with intent to promote or facilitate the commission of that crime, and under circumstances strongly corroborative of that intent.

(2) It is a defense to a prosecution under this section that, if the criminal object were achieved, the defendant would be the sole victim of the offense or the offense is so defined that his conduct would be inevitably incident to its commission or he otherwise would not be guilty under the statute defining the offense or under section 18-1-603 dealing with complicity.

(3) It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility or culpability, or other incapacity.

(4) It is an affirmative defense to a prosecution under this section that the defendant, after soliciting another person to commit a felony, persuaded him not to do so or otherwise prevented the commission of the felony, under circumstances manifesting a complete and voluntary renunciation of the defendant's criminal intent.

(5) Criminal solicitation is subject to the penalties provided for criminal attempt in section 18-2-101.

Source: L. 71: R&RE, p. 417, § 1. C.R.S. 1963: § 40-2-301. L. 98: (1) amended, p. 1443, § 29, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For note, "Comment: Constitutional Law — Symbolic Speech — Colorado Flag Desecration Statute", see 48 Den. L. J. 451 (1971). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

This section is constitutional. *People v. Latsis*, 195 Colo. 411, 578 P.2d 1055 (1978).

Section is constitutional even though it fails to expressly require a close temporal proximity between the "strongly corroborative" circumstances and this particular act of solicitation. *People v. Aalbu*, 696 P.2d 796 (Colo. 1985).

Section distinguished from complicity statute. Although encouragement of a criminal offense is prohibited under both this section and § 18-1-603, this statute concerns incomplete acts, while the complicity statute covers consummated criminal offenses. Because the provisions proscribe distinguishable behavior, there is no violation of equal protection. *Alonzi v. People*, 198 Colo. 160, 597 P.2d 560 (1979).

Section distinguished from attempt statute. Degree of "preparation" involved, while relevant to crime of attempt, is not relevant to crime of solicitation. *People v. Washington*, 865 P.2d 145 (Colo. 1994).

Identity or motive of the person solicited is irrelevant. Where defendant was charged with soliciting an undercover police officer for the purchase of drugs, fact that officer was already "passing himself off as a drug dealer" did not affect question of whether probable cause existed for defendant's arrest. *People v. Washington*, 865 P.2d 145 (Colo. 1994).

Conspiracy distinguished. A conspiracy may be committed without the inducement required for the crime of solicitation, and solicitation may be committed without the parties ever reaching an agreement or without any overt act taken to complete the object of the solicitation. Therefore, neither crime is included in the other and the two crimes do not merge. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

The statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution. The offense of soliciting for child prostitution is an offense in and of itself with its own designated penalty level. *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

Solicitation for deviate sexual intercourse is no longer prohibited. *People v. Gibson*, 184 Colo. 444, 521 P.2d 774 (1974).

PART 4

RENUNCIATION AND ABANDONMENT

18-2-401. Nonavailability of defenses. (1) Renunciation and abandonment are not voluntary and complete so as to be a defense to prosecution under this article if they are motivated in whole or in part by:

(a) A belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another or which makes more difficult the consummation of the crime; or

(b) A decision to postpone the crime until another time or to substitute another victim or another but similar objective.

Source: L. 71: R&RE, p. 417, § 1. C.R.S. 1963: § 40-2-401.

ANNOTATION

Where defense of abandonment available in attempt cases. Even though the crime of attempt is complete once the actor intentionally takes a substantial step towards the commission of the crime, the affirmative defense of abandonment is present if he thereafter voluntarily renounces his criminal intent. *People v. Johnson*, 41 Colo. App. 220, 585 P.2d 306 (1978).

A defendant cannot abandon and renounce the crimes charged after they are completed. *People v. Mason*, 642 P.2d 8 (Colo. 1982); *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

Abandonment is no defense to completed crime of criminal mischief. *People v. Johnson*, 41 Colo. App. 220, 585 P.2d 306 (1978).

To present an affirmative defense for aban-

donment to the jury, defendant must present “some credible evidence” on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not

available once defendant has injured the victim. O’Shaughnessy v. People, 2012 CO 9, 269 P.3d 1233.

ARTICLE 3

Offenses Against the Person

Editor’s note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor’s note following the title heading.

PART 1		18-3-403.	Sexual assault in the second degree. (Repealed)
HOMICIDE AND RELATED OFFENSES		18-3-404.	Unlawful sexual contact.
18-3-101.	Definition of terms.	18-3-405.	Sexual assault on a child.
18-3-102.	Murder in the first degree.	18-3-405.3.	Sexual assault on a child by one in a position of trust.
18-3-103.	Murder in the second degree.	18-3-405.4.	Internet sexual exploitation of a child.
18-3-104.	Manslaughter.	18-3-405.5.	Sexual assault on a client by a psychotherapist.
18-3-105.	Criminally negligent homicide.	18-3-405.6.	Invasion of privacy for sexual gratification.
18-3-106.	Vehicular homicide.	18-3-406.	Criminality of conduct. (Repealed)
18-3-107.	First degree murder of a peace officer or firefighter - legislative declaration.	18-3-407.	Victim’s and witness’s prior history - evidentiary hearing - victim’s identity - protective order.
PART 2		18-3-407.5.	Victim evidence - forensic evidence - electronic lie detector exam without victim’s consent prohibited.
ASSAULTS		18-3-408.	Jury instruction prohibited.
18-3-201.	Definitions.	18-3-408.5.	Jury instruction on consent - when required.
18-3-202.	Assault in the first degree.	18-3-409.	Marital defense.
18-3-203.	Assault in the second degree.	18-3-410.	Medical exception.
18-3-204.	Assault in the third degree.	18-3-411.	Sex offenses against children - “unlawful sexual offense” defined - limitation for commencing proceedings - evidence - statutory privilege.
18-3-205.	Vehicular assault.	18-3-412.	Habitual sex offenders against children - indictment or information - verdict of the jury.
18-3-206.	Menacing.	18-3-412.5.	Failure to register as a sex offender.
18-3-207.	Criminal extortion - aggravated extortion.	18-3-412.6.	Failure to verify location as a sex offender.
18-3-208.	Reckless endangerment.	18-3-413.	Video tape depositions - children - victims of sexual offenses.
18-3-209.	Assault on the elderly or persons with disabilities - legislative declaration. (Repealed)	18-3-413.5.	Use of closed circuit television - child victims of sexual offenses. (Repealed)
PART 3		18-3-414.	Payment of treatment costs for the victim or victims of a sexual offense against a child.
KIDNAPPING			
18-3-301.	First degree kidnapping.		
18-3-302.	Second degree kidnapping.		
18-3-303.	False imprisonment.		
18-3-304.	Violation of custody order or order relating to parental responsibilities.		
18-3-305.	Enticement of a child.		
18-3-306.	Internet luring of a child.		
PART 4			
UNLAWFUL SEXUAL BEHAVIOR			
18-3-401.	Definitions.		
18-3-402.	Sexual assault.		

18-3-414.5.	Sexually violent predators - assessment - annual report.	PART 5
18-3-415.	Acquired immune deficiency syndrome testing for persons charged with any sexual offense.	HUMAN TRAFFICKING AND SLAVERY
		18-3-501. Trafficking in adults.
		18-3-502. Trafficking in children.
18-3-415.5.	Acquired immune deficiency syndrome testing for persons charged with certain sexual offenses - mandatory sentencing.	18-3-503. Coercion of involuntary servitude.
		PART 6
18-3-416.	Reports of convictions to department of education.	STALKING
18-3-417.	Reports of sexual assault by applicants, registrants, or licensed professionals.	18-3-601. Legislative declaration.
		18-3-602. Stalking - penalty - definitions - Vonnie's law.

PART 1

HOMICIDE AND RELATED OFFENSES

18-3-101. Definition of terms. As used in this part 1, unless the context otherwise requires:

- (1) "Homicide" means the killing of a person by another.
- (2) "Person", when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.
- (2.5) One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.
- (3) The term "after deliberation" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

Source: **L. 71:** R&RE, p. 417, § 1. **C.R.S. 1963:** § 40-3-101. **L. 74:** (1)(c) R&RE, p. 251, § 1, effective January 1, 1975. **L. 95:** (2.5) added, p. 1221, § 1, effective July 1.

Cross references: For the statutory provision which declares that the withholding or withdrawal of life-sustaining procedures does not constitute suicide or homicide, see § 15-18-111; for the effect of homicide on probate matters, see § 15-11-803.

ANNOTATION

Meaningful distinction between first and second degree murder intended. The general assembly intended that there be a meaningful distinction between first and second degree murder. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

Killing may be perpetrated by any means by which death may be occasioned. The unlawful killing may be perpetrated by poisoning, sticking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and

death thereby occasioned. *May v. People*, 8 Colo. 210, 6 P. 816 (1885).

"Person" does not include a fetus, even if the child is born following the injury which ultimately results in its death. "Born and was alive at the time of the homicidal act" is clear and unambiguous in its temporal limitation. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009).

Court incorrectly applied in pari materia doctrine by concluding temporal limitation within this section's definition of "person" could be inferred into other statutory definitions

of “person” outside of this part 1. Statutory language here places an explicit limitation on the application of the definitions contained in this section. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009).

Use of a deadly weapon is not in itself sufficient to show deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff’d*, 624 P.2d 1320 (Colo. 1981).

Instruction given in prosecution for murder in the first degree erroneously defined “after deliberation” as an interval sufficient for one thought to follow another, but although of constitutional dimension, such error was harmless beyond a reasonable doubt where the erroneous language in the challenged instruction did not so distort the definition in another distinction that the prosecution was relieved of its burden of proving the mental culpability requirement beyond a reasonable doubt and where evidence on the issue of deliberation was overwhelming. *Key v. People*, 715 P.2d 319 (Colo. 1986); *People v. Tyler*, 728 P.2d 314 (Colo. 1986).

Evidence supports the element of deliberation. Evidence that defendant shot at the victim three times, twice from behind, is sufficient to

support the element of deliberation. *People v. Cisneros*, 720 P.2d 982 (Colo. App.), *cert. denied*, 479 U.S. 887, 107 S. Ct. 282, 93 L.Ed.2d 257 (1986).

The term “after deliberation” means “not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act.” *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

“After deliberation” is part of the specific intent element of first degree murder. *People v. Harlan*, 8 P.3d 448 (Colo. 2000) (disapproving *People v. Orona*, 907 P.2d 659 (Colo. App. 1995)).

Prosecution’s closing arguments that exercising judgment and reflection to decide whether to drive through a yellow light could occur as “fast” as “[a] second” distorted a key element of attempted first degree murder. *People v. McBride*, 228 P.3d 216 (Colo. App. 2009).

Applied in *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

18-3-102. Murder in the first degree. (1) A person commits the crime of murder in the first degree if:

(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Acting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault as prohibited by section 18-3-402, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403 as those sections existed prior to July 1, 2000, or a class 3 felony for sexual assault on a child as provided in section 18-3-405 (2), or the crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

(d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another; or

(e) He or she commits unlawful distribution, dispensation, or sale of a controlled substance to a person under the age of eighteen years on school grounds as provided in section 18-18-407 (2), and the death of such person is caused by the use of such controlled substance; or

(f) The person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the victim.

(2) It is an affirmative defense to a charge of violating subsection (1) (b) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(c) Was not armed with a deadly weapon; and

(d) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(e) Did not engage himself in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury; and

(f) Endeavored to disengage himself from the commission of the underlying crime or flight therefrom immediately upon having reasonable grounds to believe that another participant is armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.

(3) Murder in the first degree is a class 1 felony.

(4) The statutory privilege between patient and physician and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for the crime of murder in the first degree as described in paragraph (f) of subsection (1) of this section.

Source: **L. 71:** R&RE, p. 418, § 1. **C.R.S. 1963:** § 40-3-102. **L. 74:** (1)(a) amended, p. 251, § 2, effective January 1, 1975. **L. 75:** (1)(b) amended, p. 632, § 5, effective July 1; (1)(b) amended, p. 617, § 5, effective July 21. **L. 77:** (1)(d) amended, p. 960, § 5, effective July 1. **L. 81:** (1)(d) amended, p. 973, § 4, effective July 1. **L. 88:** (1)(b) amended, p. 712, § 16, effective July 1. **L. 90:** (1)(e) added, p. 1006, § 2, effective July 1. **L. 92:** (1)(e) amended, p. 392, § 20, effective July 1. **L. 95:** (1)(f) and (4) added, pp. 1221, 1222, §§ 2, 3, effective July 1. **L. 97:** (1)(e) amended, p. 1543, § 11, effective July 1. **L. 2000:** (1)(b) amended, p. 703, § 28, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for the statutory privilege between patient and physician and between husband and wife, see § 13-90-107.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
 - A. In General.
 - B. Premeditation.
 - C. Felony Murder.
 - D. Extreme Indifference to Life.
- III. Trial and Prosecution.
 - A. In General.
 - B. Indictment or Information.
 - C. Evidence.
 - D. Jury.
 - E. Instructions.
 - F. Affirmative Defense.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Should Ralph Fleagle Hang?", see 7 Dicta 10 (Nov. 1929); 7 Dicta 17 (Jan. 1930). For comment on *Reppin v. People* (95 Colo. 192, 34 P.2d 71 (1934)), see 7 Rocky Mt. L. Rev. 209 (1935). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment on *Bizup v. People* (150 Colo. 214, 371 P.2d 786 (1962)), see 35 U. Colo.

L. Rev. 435 (1963). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979). For note, "Extreme-Indifference Murder: The Impact of *People v. Marcy*", see 54 U. Colo. L. Rev. 83 (1982).

Annotator's note. Since § 18-3-102 is similar to former §§ 40-2-1 and 40-2-3, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section constitutional. Since there is a rational difference expressed by the general assembly between first degree murder and second degree murder, the first degree murder statute is constitutional. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776 (1973).

No equal protection violation where felony first degree murder carries a greater punishment than aggravated vehicular homicide. These offenses are distinguished by the level of intent, the actus reus (commission or omission), the requirement that the actor operate or drive a motor vehicle for vehicular homicide, and the predicate felonies. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

This section defines murder. *Sawyer v. People*, 173 Colo. 351, 478 P.2d 672 (1970).

Murder after deliberation and felony murder are not separate and independent offenses, but only ways in which criminal liability for first degree murder may be charged and prosecuted. *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *People v. Brown*, 731 P.2d 763 (Colo. App. 1986).

Election of theories not required. The prosecution should be allowed to charge multiple theories of first degree murder in separate counts, and it may, but should not be required to, elect among theories after the evidence is closed. *People v. Freeman*, 668 P.2d 1371 (Colo. 1983).

Defendant can be convicted only of one first degree murder for one killing, as two convictions for one killing would result in enhanced collateral punishment. *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *People v. Ragland*, 747 P.2d 4 (Colo. App. 1987); *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990).

The rule of lenity prohibits the entry of dual convictions and sentences for felony murder and murder after deliberation when the convictions and sentences are predicated upon the killing of a single victim. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

Dual convictions and sentences may not be entered on the murder after deliberation and felony murder counts with respect to a single killing. *People v. Freeman*, 668 P.2d 1371 (Colo. 1983).

A defendant may not be convicted of both first degree felony murder and first degree murder after deliberation for a single homicide nor may a defendant be convicted of both first degree and second degree murder for the killing of one person. *People v. Hickam*, 684 P.2d 228 (Colo. 1984).

General assembly was competent to adopt the definition of murder under this section. Early v. *People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

The purpose of distinctions in degrees of murder is to fix the punishment which shall be inflicted according to the circumstances in which the murder was committed. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905).

The general assembly intended that there be two grades of murder. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776 (1973).

Meaningful distinction intended. The general assembly intended that there be a meaningful distinction between first and second degree murder. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

The distinctions between this section and § 18-3-103 are not inconsequential and satisfy due process requirements and the informational requirements of § 16 of art. II, Colo. Const. *People v. Mendoza*, 195 Colo. 19, 575 P.2d 403 (1978).

Second degree murder is lesser included offense. The difference in substance between first degree murder and second degree murder is that first degree murder requires the additional element of premeditation. Since proof of first degree murder necessarily establishes every element of second degree murder, the latter is necessarily a lesser included offense of the former. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977), cert. denied, 434 U.S. 1038, 98 S. Ct. 776, 54 L. Ed. 2d 787 (1978).

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference where the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

First degree murder and manslaughter impose different standards of care. As to the distinction between first degree murder and manslaughter, the two statutes impose different standards of care in that the manslaughter statute requires that the cause of death be recklessly done, while in comparison an extreme indifference to human life in the first degree murder statute is clearly a more culpable standard of conduct, especially where necessarily coupled with the additional requirement that there be created a grave risk of death. *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

Nothing in the language of § 18-1.3-401(8)(g) or § 18-3-106 suggests a legislative intent to preempt the felony murder statute. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

The statutory language in this section and §§ 18-3-104 and 18-3-105 creates distinguishable standards which can be fairly applied by jurors. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

Failure to instruct on less serious offense did not deny due process. Failure to instruct on an even less serious offense than second degree murder, in light of the jury's verdict for the most serious possible offense, first degree murder, does not comport with an inference of prejudice and did not deny the defendant a fair trial. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

No standing to attack constitutionality. In view of the fact that the jury did not convict the defendant under this statute, arguments attacking the constitutionality of this section cannot be properly considered on appeal. *People v. Webb*, 189 Colo. 400, 542 P.2d 77 (1975).

Where defendant was convicted of reckless manslaughter, robbery, and felony murder, appellate court could choose to give effect to the jury's finding that the defendant acted knowingly in committing a robbery and that a death occurred in the course of the robbery. The court could appropriately vacate the jury's finding of

reckless manslaughter conviction. *People v. Jones*, 990 P.2d 1098 (Colo. App. 1999).

Applied in *In re Tyson*, 13 Colo. 482, 22 P. 810 (1889); *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893); *Schneider v. People*, 118 Colo. 543, 199 P.2d 873 (1948); *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962); *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966); *People v. Schuemann*, 190 Colo. 474, 548 P.2d 911 (1976); *Reliford v. People*, 195 Colo. 549, 579 P.2d 1145 (1978); *Goodwin v. District Court*, 196 Colo. 246, 586 P.2d 2 (1978); *People v. Campbell*, 196 Colo. 390, 589 P.2d 1360 (1978); *Goodwin v. District Court*, 197 Colo. 6, 588 P.2d 874 (1979); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. District Court*, 198 Colo. 70, 595 P.2d 1045 (1979); *Gonzales v. District Court*, 198 Colo. 505, 602 P.2d 857 (1979); *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Lee*, 630 P.2d 583 (Colo. 1981); *People v. Small*, 631 P.2d 148 (Colo. 1981); *Conston v. People*, 633 P.2d 470 (Colo. 1981); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People v. Fetty*, 650 P.2d 541 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983); *People ex rel. Gallagher v. District Court*, 656 P.2d 1287 (Colo. 1983); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Fish*, 660 P.2d 505 (Colo. 1983); *People v. McCall*, 662 P.2d 178 (Colo. 1983); *People v. Moore*, 701 P.2d 1249 (Colo. App. 1985), cert. denied, 706 P.2d 802 (Colo. 1985); *People v. Bowman*, 738 P.2d 387 (Colo. App. 1987).

II. ELEMENTS OF OFFENSE.

A. In General.

Degrees of murder distinguished. The distinguishing feature between murder in the first degree and murder in the second degree is that to constitute murder in the first degree the jury must find "premeditation", but if said fact is not found, it is murder in the second degree. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885); *Carlson v. People*, 91 Colo. 418, 15 P.2d 625 (1932).

Proof of killing alone is not murder. Proof of the mere abstract fact that the accused killed the deceased will not sustain a guilty verdict of first or second degree murder based on instructions thereto. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

First degree murder is the deliberate and premeditated killing of a human being. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966).

Murder in the first degree, other than in the commission of a felony, is the deliberate and premeditated killing of a human being. *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969), cert. denied, 397 U.S. 1047, 90 S. Ct. 1375, 25 L. Ed. 2d 659 (1970).

To constitute murder under a statute, it is necessary that the killing be done in the mode described by the statute. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885).

First degree murder is a specific intent crime; the prosecution must establish not only that the defendant intended to cause the death of another person, but that he acted after deliberation. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

First degree murder statutes contain rationally different elements than first degree assault statute, § 18-3-202, and thus a defendant sentenced under the former and not the latter was not denied equal protection of law. *People v. Brewer*, 720 P.2d 596 (Colo. App. 1985).

Culpability cannot be determined on basis of presumption. The essential culpability for first degree murder cannot be determined on the basis of a presumption of law; rather, the requisite culpability must be proven as a matter of fact. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Generally, the crimes of second degree murder and attempted second degree murder are, respectively, lesser included offenses of first degree murder or attempted first degree murder under any theory and second degree murder is a lesser included offense of first degree murder by extreme indifference. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. Attempted first degree assault requires that a defendant act with the intent to cause serious bodily injury to another person by means of a deadly weapon. Use of a deadly weapon is not an element of attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Illegal discharge of a firearm is not a lesser included offense of attempted first degree murder after deliberation. Discharge of a firearm is not an element of attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Second degree murder is a lesser included offense of first degree murder as well as the associated attempt offenses. *Brown v. People*, 239 P.3d 764 (Colo. 2010).

It is not necessary to prove a motive as an essential element in the crime of murder. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Proof of motive is not an essential part of the state's case in a murder prosecution. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962),

overruled on other grounds, *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Death in course of unjustified arrest by private person. A private person who, without any excuse or justification, in order to accomplish the arrest of another not shown to have been guilty of any crime, shoots, merely intending to wound, is guilty of murder if the shot takes fatal effect. *Demato v. People*, 49 Colo. 147, 111 P. 703 (1910).

Defendant must take his victim as he finds him, and it is no defense that the victim is suffering from physical infirmities. *Hamrick v. People*, 624 P.2d 1320 (Colo. 1981).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion, the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either assault charge. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time. Therefore, jury's guilty verdicts for attempted first degree murder and first degree assault based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree assault based on defendant's stabbing of a second person are not necessarily inconsistent. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Guilty verdicts for both attempted after deliberation first degree murder and attempted extreme indifference first degree murder did not require inconsistent findings of fact; therefore, the sentences were not illegal. The information alleged different victims for the different charges, so it is not inconsistent to conclude that defendant had the specific intent to take the life of the specific targets and also showed an extreme indifference to life in general as to the other persons. *People v. Stovall*, 2012 COA 7, __ P.3d __.

B. Premeditation.

Law reviews. For note, "The Role of Mental Disorder in Showing the Absence of Premeditation and Deliberation in Murder Trials", see 29 *Rocky Mt. L. Rev.* 396 (1957).

Annotator's note. Most of the cases cited below were decided prior to the 1974 amendment of this section, which substituted "After deliberation and with the intent" for "with premeditated intent" in paragraph (a) of subsection (1).

Premeditation required. Prior to the 1975 amendment, to be guilty of murder of the first degree a person had to not only be sane, but in killing he had to have acted with premeditation.

Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

In order to make out first degree murder under this section, other than in the commission of a felony, there was the requirement of a premeditated killing. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

To be convicted of murder, the state must prove deliberation and intent to cause death. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

Premeditation directed against one other than victim sufficed. If a shot was fired, without justification, and a killing resulted, the homicide was first degree murder, although the premeditation was directed against one other than the person actually killed. *Ryan v. People*, 50 Colo. 99, 114 P. 306 (1911).

"Premeditated intent" and "intentionally, but without premeditation" are sufficiently different elements to be a constitutionally acceptable basis for defining two distinct crimes. *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

Words such as "deliberate" and "premeditated" refer to the intention of the accused at the time of the killing. *Hill v. People*, 1 Colo. 436 (1872).

They are matters of inference and presumption. Premeditation and deliberation are matters of inference and presumption to be drawn by the jury from the facts and circumstances leading up to, surrounding, and explanatory of the homicide. *Van Houton v. People*, 22 Colo. 53, 43 P. 137 (1895); *Robinson v. People*, 76 Colo. 416, 232 P. 672 (1925).

The element of deliberation, like intent, can rarely be proven other than through circumstantial or indirect evidence. *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. District Court*, 779 P.2d 385 (Colo. 1989); *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Thus, intent may be inferred from act. Premeditation does not require positive proof of an intent prior to the commission of the act, as such prior intent may be inferred from the act. *Robinson v. People*, 76 Colo. 416, 232 P. 672 (1925).

Intent, like deliberation, can be proven through means other than direct evidence. *People v. Juvenile Court*, 813 P.2d 326 (Colo. 1991); *People v. Valenzuela*, 825 P.2d 1015 (Colo. App. 1991), *aff'd*, 856 P.2d 805 (Colo. 1993).

The fact finder may infer an intent to cause the natural and probable consequences of unlawful voluntary acts. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Where there is close temporal and spatial relationship between a killing and a subsequent felony, defendant's intent to commit the underlying felony may be inferred from

the circumstances. *People v. Phillips*, 219 P.3d 798 (Colo. App. 2009).

Malice, premeditation, and deliberation may be inferred from use of a deadly weapon. *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970); *Lopez v. People*, 175 Colo. 503, 488 P.2d 892 (1971).

Intent to kill and premeditation may be inferred from the intentional use of a deadly weapon in a deadly manner. *Mills v. People*, 146 Colo. 457, 362 P.2d 152 (1961), cert. denied, 369 U.S. 841, 82 S. Ct. 869, 7 L. Ed. 2d 846 (1962).

Where evidence established that defendant approached the deceased brandishing a gun after having threatened deceased's friends, and that a shot was fired killing deceased, the jury could have found premeditation or lack of considerable provocation for killing. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962).

Evidence of the manner in which the weapon is used may furnish some proof of the requisite culpability for first degree murder. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Use of a deadly weapon is not in itself sufficient to show deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), aff'd, 624 P.2d 1320 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981).

The use of a deadly weapon, while not giving rise to a legal presumption of deliberation, may nevertheless be considered, along with other circumstances attending the killing, in determining whether sufficient evidence exists for submission of the issue of deliberation to the jury. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

Not from mere blow by hand or fist. A conviction for first degree murder will not stand when the blow was struck on being aroused from sleep, probably in anger, but certainly without plan, deliberation, or premeditation. A blow with a fist and a fortiori with the open hand is not calculated to cause death to a person in good health and of mature age; death is not the natural consequence of such a blow. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Flight is not evidence of premeditation and deliberation. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Shortness of time between purpose and act immaterial. If one actually forms the purpose to kill another, premeditates upon it before performing the act, and then performs it, he is guilty of murder in the first degree no matter how short the time may have been between the purpose and its execution. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907); *People v. Valenzuela*, 825 P.2d 1015 (Colo. App. 1991).

Time is not essential if there was a design and determination to kill formed in the mind of the defendant previous to or at the time the mortal

wound was given. *Van Houton v. People*, 22 Colo. 53, 43 P. 137 (1895).

The element of deliberation requires that the decision to commit the act is made after the exercise of reflection and judgment concerning the act; however, the length of time required for deliberation need not be long. *People v. District Court*, 779 P.2d 385 (Colo. 1989).

Premeditation requires time for one thought to follow another. No particular time need pass in order to establish deliberation and premeditation. The important thing is that there must be at least enough time to permit one thought to follow another. An impulsive killing cannot be first degree murder. The law does not demand that a defendant shall have premeditated for any period of time, but that the defendant shall have committed the act deliberately and with premeditation. *Hammil v. People*, 145 Colo. 577, 361 P.2d 117, cert. denied, 368 U.S. 903, 82 S. Ct. 182, 7 L. Ed. 2d 98 (1961); *Bradney v. People*, 162 Colo. 403, 426 P.2d 765 (1967).

The deliberation and formed design need not have existed at the inception of the transaction which finally resulted in the homicide. It matters not how short the interval between the formation of the design and the death if it included the time necessary for one thought to follow another. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

The elements of deliberation and premeditation are established by proof of the formed design to kill, and length of time is not a determinative factor. The only time requirement for deliberation and premeditation within the meaning of the first degree murder statute is an interval sufficient for one thought to follow another. *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969), cert. denied, 397 U.S. 1047, 90 S. Ct. 1375, 25 L. Ed. 2d 659 (1970).

Appreciable length of time required. Premeditation required that the design to kill precede the killing by an appreciable length of time; but the time need not be long. *People v. Duran*, 40 Colo. App. 302, 577 P.2d 307 (1978).

The circumstances surrounding a victim's death may permit the reasonable inference that the defendant had adequate time for the exercise of reflection and judgment concerning the fatal act. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Intoxication cannot negate "after deliberation" element of first degree murder. "After deliberation" is not part of the culpable mental state required for first degree murder, therefore voluntary intoxication cannot negate this element. *People v. Orona*, 907 P.2d 659 (Colo. App. 1995) (disapproved in *People v. Harlan*, 8 P.3d 448 (Colo. 2000)).

For requirement of malice under former statute, see *May v. People*, 8 Colo. 210, 6 P. 816

(1885); *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1886); *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905); *McAndrews v. People*, 71 Colo. 542, 208 P. 486 (1922); *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933); *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945); *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Kukuljan v. People*, 129 Colo. 116, 267 P.2d 1017 (1954); *Beckstead v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *Lutz v. People*, 133 Colo. 229, 293 P.2d 646 (1956); *Castro v. People*, 140 Colo. 493, 346 P.2d 1020 (1959); *Smith v. People*, 142 Colo. 523, 351 P.2d 457 (1960); *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled on other grounds, *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971); *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964); *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965); *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967); *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969); *Hinton v. People*, 169 Colo. 545, 458 P.2d 611 (1969), cert. denied, 397 U.S. 1047, 90 S. Ct. 1375, 25 L. Ed. 2d 659 (1970); *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970); *Moya v. People*, 174 Colo. 435, 484 P.2d 788 (1971); *Lopez v. People*, 175 Colo. 503, 488 P.2d 892 (1971); *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971); *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972).

C. Felony Murder.

Law reviews. For article, "Stretching Liability Too Far: Colorado's Felony Murder Statute in Light of *Auman*", see 83 Den. U.L. Rev. 639 (2005).

Self-defense is not available as an affirmative defense for felony murder. *People v. Burns*, 686 P.2d 1360 (Colo. App. 1983).

Provision does not violate equal protection. Failure to require proof of a culpable mental state for a conviction of felony murder does not violate equal protection. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

Definition of felony murder does not deny due process. Defining felony murder as being of the grade of first degree and as precluding a verdict of second degree does not violate substantive due process. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), aff'd, 316 F.2d 284 (10th Cir. 1963).

This section is not unconstitutional in that it defines murder committed in the perpetration of a robbery as murder in the first degree. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

Or right to jury trial. The claim that this section which classifies murder committed in the perpetration of certain crimes as first degree murder is unconstitutional in that it deprived the accused of his right to a jury trial with respect to

the essential element of intent, and is thus in violation of the fourteenth amendment of the constitution of the United States and § 23 of art. II, Colo. Const., is without merit. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

Or substitute presumption for proof. This section defining murder committed in the perpetration of a robbery as murder in the first degree is a substantive definition of murder and is not unconstitutional as substituting a presumption of malice for proof thereof. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

The general assembly may provide that a murder committed during the perpetration of robbery is murder in the first degree, and this in no way establishes a presumption as a substitute for proof of a culpable mental state, as the prosecution still has to prove the homicide and all elements of the underlying felony beyond a reasonable doubt. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

First degree felony murder is clearly and precisely defined in this section. *Sawyer v. People*, 173 Colo. 351, 478 P.2d 672 (1970).

The purpose of the felony murder provision was to make every homicide committed in the perpetration or attempt to perpetrate certain felonies murder, which may be punished by death, if the jury so determines, without regard to premeditation. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905); *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

The underlying purpose of the felony murder statute is to imply the element of deliberation where the commission of certain crimes of violence result in a death. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), aff'd, 662 P.2d 1066 (Colo. 1983).

The purpose of the felony murder statute is to hold a participating robber accountable for a nonparticipant's death, even though unintended, as long as death is caused by an act committed in the course of or in furtherance of the robbery or in the course of immediate flight therefrom. *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Felony murder occurs when a murder is committed in the commission of certain designated felonies. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

There can be no exact measure of time or distance which is dispositive of whether felony murder exists. *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

Defendant's liability for felony murder not terminated upon defendant's arrest. Phrase "immediate flight therefrom" is set off by commas and is not restricted to defendant's own immediate flight. Jury may look to the totality of

the circumstances to determine when felony murder liability terminates. Murder committed shortly after defendant's arrest may be a natural and probable consequence of defendant's actions. *People v. Auman*, 67 P.3d 741 (Colo. App. 2002), rev'd on other grounds, 109 P.3d 647 (Colo. 2005).

All that is necessary to sustain a charge of felony murder is that a life be taken during the course of a felony in which the defendant was engaged. *People v. Scheer*, 184 Colo. 15, 518 P.2d 833 (1974).

Any death that results in the course of any type of robbery may serve as a basis for a felony murder conviction. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), aff'd, 662 P.2d 1066 (Colo. 1983).

Defendant may be guilty of felony murder where the death of a security guard occurred while the defendant was in immediate flight from a robbery and where the shooting of the guard was intended to facilitate his flight and enhance his chance of escape, and shots fired by the guard were not an intervening event which caused the guard's death to be outside of the scope of the felony. *People v. Hickam*, 684 P.2d 228 (Colo. 1984).

"Acting either alone or with one or more persons" does not define an element of the offense of felony murder, but merely makes clear that guilt results in either case. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

Specific intent not an element of felony murder. In felony murder, specific intent to take a human life with malice is not an element of the crime. *People v. Scheer*, 184 Colo. 15, 518 P.2d 833 (1974).

Defendant may be convicted of first degree felony murder where only showing of mental culpability is for the underlying general intent felony. *People v. Hickam*, 684 P.2d 228 (Colo. 1984).

Participation in felony substituted for mens rea. The felony murder statute substitutes participation in the underlying felony for the mens rea otherwise required to support a murder charge. *People v. Priest*, 672 P.2d 539 (Colo. App. 1983).

Proof beyond reasonable doubt required of homicide, felony, and connection of both. The prosecution is required to prove the homicide beyond a reasonable doubt and is also required to establish to the same degree of proof the commission of the named felony and the commission of the homicide in the perpetration of the said felony. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960); *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

A robbery and killing which followed were all part of same transaction where they were so closely connected in point of time, place, and continuity of action as to be one continuous

transaction. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), aff'd, 316 F.2d 284 (10th Cir. 1963); *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

The perpetration of a robbery does not come to an end the split second the victim surrenders his money to the gunman, and most certainly the robbery continues where the robbers are trying to avoid arrest by police officers who are in extremely hot pursuit, and cause the death of an innocent motorist. *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

If defendant was an accessory to aggravated robbery which resulted in murder, it follows that he was guilty of murder. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

Defendant may not be simultaneously convicted of felony murder and the felony on which the felony murder conviction rests. Where a defendant is convicted of multiple felonies, all of which are alleged as the legal predicates for the commission of felony murder, only that felony that most directly contributes to the death of the victim should be vacated. *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004).

Aggravated robbery is merged in the offense of felony murder and the constitutional protection against double jeopardy precludes conviction for both offenses. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), aff'd, 662 P.2d 1066 (Colo. 1983); *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Felony murder based on robbery precludes conviction for robbery. The defendant's conviction of the greater offense of felony murder, predicated as it is upon his killing of the robbery victim, precludes his simultaneous conviction of the lesser included offense of robbery. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

There is no logic or reason to preclude a felony murder charge from being based upon a burglary charge that, in turn, is based upon either an intent to assault or an intent to murder inasmuch as both murder and assault are crimes which may underlie a felony burglary. *People v. Lewis*, 791 P.2d 1152 (Colo. App. 1989); *People v. Medina*, 260 P.3d 42 (Colo. App. 2010).

Sequence of events is irrelevant as long as sufficient evidence is produced to show that a felony was committed by defendant and that a death occurred during the commission of that felony. *People v. Braxton*, 807 P.2d 1214 (Colo. App. 1990).

Or for aggravated robbery. Where the defendant's conviction for felony murder is based upon the causation of the robbery victim's death during the course of the robbery, a charge of aggravated robbery of the same victim is a lesser included offense of the felony murder charge within the meaning of § 18-1-408 (5)(c). *People v. Raymer*, 662 P.2d 1066 (Colo. 1983); *People v. Guffie*, 749 P.2d 976 (Colo. App. 1987).

Subsection (1)(b) is not so limited as to allow conviction only if there is a finding that defendant was committing or attempting to commit the crime at the time he caused the death. A death caused in the furtherance of a robbery or a death caused in the immediate flight from a robbery falls squarely within the edict of this section. *People v. Kittrell*, 786 P.2d 467 (Colo. App. 1989).

Or for rape. The defendant's conviction of the greater offense of felony murder, predicated as it is upon his killing of the sexual assault victim, precludes his simultaneous conviction of the lesser included offense of first degree sexual assault. *People v. Horton*, 683 P.2d 358 (Colo. App. 1984).

Felony murder can be predicated upon an assault directed at the person who was killed. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996); *People v. Medina*, 260 P.3d 42 (Colo. App. 2010).

Robbery conviction is not precluded by conviction for murder of another after deliberation. Although a separate judgment of conviction for robbery may not simultaneously exist with a judgment of conviction for first degree murder predicated upon the killing of the robbery victim, there is no such impediment to the entry of both a judgment of conviction for first degree murder based upon the killing of another after deliberation and a separate judgment of conviction for the robbery of the same victim. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

Premeditation not an element of felony murder. When the proof is undisputed that the homicide was committed in an attempt to perpetrate robbery which the defendants had conspired to commit, it is not necessary to prove any facts from which malice, deliberation, or premeditation could be inferred. *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Oaks v. People*, 161 Colo. 561, 424 P.2d 115 (1967).

A particular or specific intent to kill is not an ingredient of murder committed in the perpetration of a robbery. This section makes the taking of human life in an attempt to perpetrate a robbery murder in the first degree without regard to the questions of intent, premeditation, or deliberation. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

Attempted robbery is a predicate felony for felony murder. *People v. Renaud*, 942 P.2d 1253 (Colo. App. 1996).

The turpitude of the felonious act supplies the element of deliberation and design to effect death, and, therefore, no express or implied design to effect death is essential; the murder is still of first degree though casual and unintentional. *Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966).

Murder to facilitate escape. Escape from the scene of the underlying felony is part of the res

gestae of a crime so that a murder committed to facilitate the flight can be felony murder. *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

All forms of escape under § 18-8-208 are predicate offenses for first degree felony murder. The clear and unambiguous language of the statute contemplates an escape penalized as a petty offense as a predicate offense for first degree felony murder. *People v. Stovall*, 2012 COA 7, ___ P.3d __.

All members of a conspiracy to rob are guilty of first degree murder. Where two or more persons conspired to commit a robbery and went to the place where the robbery was to have been committed, armed with deadly weapons, and in an attempt to perpetrate the robbery one of them committed murder, all are guilty of murder of the first degree, whether or not they intended to commit murder. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905).

If a homicide is committed by one of defendant's associates while engaged in a robbery in furtherance of a common purpose, defendant is guilty of murder in the first degree. *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

If a defendant and an accomplice were participating in a robbery during the commission of which the accomplice killed the deceased, the defendant is guilty as a principal. If there is direct evidence of the crime, he is subject to the death penalty. *Mitchell v. People*, 173 Colo. 217, 476 P.2d 1000 (1970).

Colorado does not recognize the offense of attempted felony murder. Because criminal attempt requires a defendant to possess the culpable mental state for the attempted offense and felony murder does not require a mental state, it is impossible to convict a person of attempting to commit an act that the person was not intending. *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997).

When aider and abettor not guilty of murder. One cannot be held guilty of murder as an aider and abettor if he has acted without knowledge or malice on his part and was ignorant of the malicious motives and felonious intent on the part of the actual slayer. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Complicitor included in felony murder statute. A complicitor, being a principal, is included in the felony murder statute as one who commits or attempts to commit the underlying felony. *People v. Saiz*, 42 Colo. App. 469, 600 P.2d 97 (1979).

A complicitor, being a principal, is included in the felony murder statute as one who "commits or attempts to commit [the underlying felony]" , whether he is near the scene of the underlying felony or not. *People v. Priest*, 672 P.2d 539 (Colo. App. 1983).

A defendant who acts as a complicitor in the underlying felony may be held criminally

liable for felony murder. It is not legally nor logically impossible to be a complicitor to felony murder. *People v. Fisher*, 9 P.3d 1189 (Colo. App. 2000).

D. Extreme Indifference to Life.

Subsection (1)(d) (as it existed prior to the 1977 amendment that substituted “knowingly” for “intentionally”) was not constitutionally void for vagueness. *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

Conviction under subsection (1)(d) (as it existed prior to the 1977 amendment that substituted “knowingly” for “intentionally”) did not deny equal protection. The standards of culpability in subsection (1)(d) and § 18-3-105 (1)(a) are distinct enough to be intelligently understood and applied, and therefore, the defendant was not denied equal protection of the law by virtue of his conviction under subsection (1)(d) of this section. *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (1977).

Statutory definition of extreme indifference murder (as it existed prior to the 1981 amendment) violated equal protection of the laws under § 25 of art. II, Colo. Const., because that crime was not sufficiently distinguishable from second degree murder to warrant the substantial differential in penalty authorized by the statutory scheme. *People v. Curtis*, 627 P.2d 734 (Colo. 1981); *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

The statutory prohibition of extreme indifference murder violated equal protection of the laws because it could not reasonably be distinguished from the lesser offense of second degree murder as defined in § 18-3-103 (1)(a). *People v. Marcy*, 628 P.2d 69 (Colo. 1981); *People v. Roark*, 643 P.2d 756 (Colo. 1982).

The statutory definition of extreme indifference murder violated equal protection of the laws under the Colorado constitution because it was not sufficiently distinguishable from second degree murder to warrant the substantial differential in penalty authorized by the statutory scheme. *People v. Gurule*, 628 P.2d 99 (Colo. 1981).

Statutory definition of extreme indifference murder in 1981 amendment is not violative of equal protection of the laws under § 25 of art. II, Colo. Const., because it is sufficiently distinguishable from second degree murder to warrant difference in penalty. *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988).

Defendant’s due process rights not to be charged with a multiplicitous information were not violated when defendant was charged and convicted of two counts of attempted extreme indifference murder for firing multiple shots at a door and injuring one victim and shooting towards, but not injuring, another vic-

tim. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

Both first degree murder by extreme indifference and second degree murder are committed “knowingly” and are thus general intent crimes. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

If perpetrator possesses the specific intent under subsection (1)(a) to kill the individual whose death occurs as a result of the perpetrator’s actions, the perpetrator cannot also be convicted for extreme indifference murder under subsection (1)(d). *People v. Atkins*, 844 P.2d 1196 (Colo. App. 1992); *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

Where defendant knew the victim and his conduct was directed toward that particular person, evidence of the element of universal malice under subsection (1)(d) was lacking. *People v. Perez*, 972 P.2d 1072 (Colo. App. 1998).

There is no logical inconsistency with a perpetrator having both the specific intent under subsection (1)(a) to kill an individual and exhibiting an extreme indifference to murder under subsection (1)(d). There are situations in which a perpetrator can have both the specific intent to kill an individual and also show an extreme indifference to the lives around the individual targeted for death. *Candelaria v. People*, 148 P.3d 178 (Colo. 2006) (disagreeing with *People v. Atkins* cited above).

Unlike intentional first degree murder after deliberation, crime of extreme indifference first degree murder does not require proof that defendant intended to cause the death of another. Instead, it requires proof that defendant knowingly engaged in conduct that created a grave risk of death to one or more persons and demonstrated extreme indifference to the value of human life generally. *Candelaria v. People*, 148 P.3d 178 (Colo. 2006); *People v. Reynolds*, 252 P.3d 1128 (Colo. App. 2010).

Extreme indifference murder is evinced by acts that are calculated to put the lives of many persons in danger, without being aimed at anyone in particular. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

Defendant firing at a group of persons running out doorway of bar was sufficient evidence to prove universal malice element of extreme indifference murder. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

A defendant may be charged with and convicted of multiple counts of attempted extreme indifference murder where his or her conduct endangers several people. Accordingly, defendant was properly convicted of multiple counts of attempted extreme indifference murder for shooting into a car with multiple passengers. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

“Knowingly” requirement is satisfied in an

attempted extreme indifference murder case by proving that defendant's conduct in fact created a grave risk of death. Defendant need not have known that his or her conduct was practically certain to cause death. *People v. Rubio*, 222 P.3d 355 (Colo. App. 2009).

Despite fact that defendant was angry with victims, defendant's act of firing at closed door upon leaving house and admitting that he was not directing his fire at any particular individual displayed the requisite universal malice and that he knowingly engaged in conduct creating a grave risk of death to others required for the crime of extreme indifference murder. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

Second degree murder is a lesser included offense of extreme indifference murder. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

Menacing is not a lesser included offense of attempted extreme indifference murder. *People v. Portillo*, 251 P.3d 483 (Colo. App. 2010).

There is a significant difference between the elements of extreme indifference murder and reckless manslaughter. Extreme indifference murder requires proof of circumstances showing an attitude of universal malice with extreme indifference to the value of human life generally. Reckless manslaughter lacks this element. *People v. Alvarado-Juarez*, 252 P.3d 1135 (Colo. App. 2010).

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference where the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Defendant firing at a moving vehicle with passengers where path of bullet endangered both passengers of vehicle and people near defendants house was sufficient evidence to prove universal malice element of extreme indifference murder. *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991).

Voluntary intoxication not to be considered as a defense or mitigating factor to the crime of extreme indifference murder. Voluntary intoxication only a defense to specific intent crimes such as homicide with deliberation. Extreme indifference murder requires only that defendant have the general intent to act "knowingly". *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991).

Self-defense is not available as a defense for extreme indifference murder. For certain actions to constitute self-defense, defendant must have acted in a reasonable manner. Finding a defendant guilty of extreme indifference murder necessarily precludes a finding that his actions were reasonable, as the "universal malice" element of the offense requires the jury to conclude that the defendant acted with aggravated recklessness. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

The affirmative defense of self-defense is not consistent with charges of first degree extreme indifference murder and attempted first degree extreme indifference murder. Thus, as it relates to those charges, any evidence reflective of an apprehension of imminent danger is immaterial. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Jury's consideration not limited to evidence of blows inflicted upon the victim immediately before the victim's death. Jury could have concluded that defendant had indiscriminately shoved, hit, kicked, and threatened one or more other persons without provocation near the time of the victim's death, thus indicating excessively reckless conduct. Testimony that the defendant had worked himself into a frenzy and that he did not know the victim or any of the other people he hit, kicked, or shoved, tended to establish extreme indifference to the value of human life. *People v. Moore*, 902 P.2d 366 (Colo. App. 1994).

This section does not include every act dangerous to life of person killed. This section does not include in its definition of murder in the first degree every act that is dangerous to the life of the person killed. Every act that results in the death of a person is greatly dangerous to the life of such person, but the section intended that there should be an act which shows the accused to have had a depraved mind, regardless of human life, and is intended to include those cases where a person has no deliberate intention to kill any particular individual. *Longinotti v. People*, 46 Colo. 173, 102 P. 165 (1909).

It is inapplicable to homicide resulting from direct assault. The provision relating to acts gravely dangerous to life cannot, without violence to the intention of the general assembly as evinced by the language, be applied to the case of homicide resulting from a direct assault by one person upon another. *Longinotti v. People*, 46 Colo. 173, 102 P. 165 (1909).

Felony child abuse not inconsistent with acquittal of extreme indifference murder. A guilty verdict for felony child abuse is not inconsistent with an acquittal of extreme indifference murder nor second degree murder. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Death or great bodily harm must be the reasonable or probable consequence of the act to constitute murder. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Element addresses itself to human life generally. The element of "extreme indifference to human life", by definition, does not address itself to the life of the victim, but to human life generally. *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

No requirement that knowing conduct directed against person actually killed. There is no requirement that the knowing conduct essential to extreme indifference murder and second

degree murder be directed against the person actually killed. On the contrary, both offenses are general intent crimes, and as long as the offender knowingly acts in the proscribed manner and causes the death of another, he is guilty of the crime, even though the person killed is not the person against whom the criminal conduct was directed. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

Defendant's intent may vary in committing crimes against separate victims. The jury could have found that the shots other than the one hitting the intended victim were not specifically intended to harm any of the other victims, but instead were fired generally in their direction. While the defendant did not have the specific intent to harm any of the other victims, the jury could have properly determined that the defendant was guilty of extreme indifference murder and attempted extreme indifference murder as to those victims. *People v. Lee*, 914 P.2d 441 (Colo. App. 1995).

Standard of conduct more culpable than that involved in manslaughter. The term "under circumstances ... manifesting extreme indifference to the value of human life" connotes a heightened awareness and disregard of a fatal risk and is clearly a more culpable standard of conduct than the reckless conduct involved in manslaughter. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

For the definition of "intentionally", which was replaced by "knowingly" by the 1977 amendment, see *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

Evidence was sufficient for jury to find that defendant acted with universal malice for the purposes of subsection (1)(d). Even though defendant argued heatedly with victim shortly before victim was shot by the defendant, evidence sufficiently showed that the defendant knew the rifle he shot was dangerous and that more than one person could be struck with each bullet fired, that the defendant shot the rifle toward a moving pickup with a number of passengers, and that the path of the bullet fired from the rifle endangered numerous lives of persons in the pickup and standing in the area in which the rifle was shot. *People v. Zekany*, 833 P.2d 774 (Colo. App. 1991).

The element of universal of malice required for extreme indifference murder, defined as aggravated or extremely reckless conduct, was present where defendant, in a knowing effort to scare the crowd, fired shots with his right hand, although he was left-handed, while his head was placed between his knees. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Voluntary intoxication is not available as a defense for extreme indifference murder. Voluntary intoxication is available only for specific intent crimes. The term "universal malice" under subsection (1)(d), does not make murder

under section a specific intent crime. *People v. Zekany*, 833 P.2d 774 (Colo. App. 1992).

III. TRIAL AND PROSECUTION.

A. In General.

In order for an accessory to be convicted of murder where the principal is found not guilty by reason of insanity, it must be shown beyond a reasonable doubt that, except for the insanity, the principal committed a murder. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974).

The burden of proof rests upon the state to prove to the satisfaction of the jury, beyond a reasonable doubt, the existence of all the material elements necessary to constitute the crime of murder as defined by this section. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885).

It is the people's burden to make out a case that would have sustained a verdict of guilty of first or second degree murder before the prosecution is entitled to instructions thereto. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Before a jury can convict a defendant on any one of the counts of homicide, it must be satisfied that each and every material allegation of that count has been proven beyond a reasonable doubt. *Jorgensen v. People*, 178 Colo. 8, 495 P.2d 1130 (1972).

An arrest without warrant is not a defense to a charge of first degree murder. *Moore v. Tinsley*, 142 Colo. 516, 351 P.2d 456 (1960).

Cross-examination. In a murder case a wide latitude should be permitted on cross-examination of prosecution witnesses. *McCune v. People*, 179 Colo. 262, 499 P.2d 1184 (1972).

It is not unconstitutional to try the felony murder and first degree kidnapping charges together under the current statutory scheme. *People v. Cunningham*, 194 Colo. 198, 570 P.2d 1086 (1977).

Defendant's federal prosecution under the Racketeer Influenced and Corrupt Organizations Act (RICO) and subsequent state conviction for first degree murder for the same incident do not constitute double jeopardy, as the RICO conviction required proof of facts not necessary for the state murder conviction, and the two laws seek to prohibit substantially different evils. *People v. Gladney*, 250 P.3d 762 (Colo. App. 2010).

B. Indictment or Information.

Notice of the specific charge is a matter of procedural due process. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

Indictment which simply charged that defendant murdered the victim was upheld as constitutional. *Bizup v. Tinsley*, 211 F. Supp.

545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

Indictment or information in the words of the statute is sufficient. In an indictment for murder, it is not necessary to state more than the statute provides in order to sustain a conviction of murder in the first degree. *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905).

Information charging felony murder was substantively sufficient and therefore conferred jurisdiction on the trial court as it specifically named the underlying offense, burglary, and otherwise tracked the felony murder statute. *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003).

As information charging murder includes all degrees of criminal homicide. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

Where an information charged murder in the first degree, it included all the lower grades of criminal homicide. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

Indictment charging murder supports verdict of felony murder. A prosecution on an information charging that on a certain date defendant did feloniously, willfully, and of his premeditated malice aforethought, kill and murder a named person, and defendant was convicted of felony murder. Where the information contained every essential element demanded by the Colorado statutes and demanded also by generally approved principles of criminal pleading, and apprised the defendant of the nature of the charge, the date and place, described the victim, and further alleged that the killing was with malice aforethought, but failed to pinpoint the allegation that the homicide occurred incident to a known felony, due process was not violated. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

Defective charge not cured by verdict. When one is tried as on a charge of murder in the first degree, but the jury finds a verdict of murder in the second degree, the error is not cured if the indictment fails to describe the higher grade of the crime. *Redus v. People*, 10 Colo. 208, 14 P. 323 (1887).

Words "malice aforethought" are coextensive with deliberation and premeditation. The words "malice aforethought" in the indictment are coextensive in meaning with the words "deliberate" and "premeditated", and a charge that a homicide was committed with malice aforethought comprehends a case of deliberate and premeditated killing. *Hill v. People*, 1 Colo. 436 (1872).

An indictment charging that defendant unlawfully, feloniously, willfully, purposely, and of his malice aforethought, did kill and murder the deceased, is sufficient to warrant a verdict finding that the homicide was committed with de-

liberation and premeditation within the terms of this section. *Redus v. People*, 10 Colo. 208, 14 P. 323 (1887).

C. Evidence.

Conviction of a crime may be based on circumstantial evidence, and a conviction for first degree murder will be affirmed where review of the record indicates that the people's circumstantial case fully excluded all reasonable hypotheses of innocence. *Moore v. People*, 174 Colo. 286, 483 P.2d 1340 (1971).

Wholly circumstantial evidence is sufficient to prove guilt beyond a reasonable doubt in prosecution for felony murder. *People v. Sanchez*, 184 Colo. 25, 518 P.2d 818 (1974).

As may instructions on crimes. Circumstantial evidence, when tied together, can support and provide a foundation for instructions on each of the crimes of first degree murder, first degree burglary, and theft arising out of the same transaction. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Test for evidence on appeal. The critical inquiry on appeal is whether the evidence, when reviewed in a light most favorable to the prosecution, is substantial and sufficient to permit a reasonable person to conclude beyond a reasonable doubt that the defendant intentionally caused the victim's death and that the decision to kill was made after the exercise of reflection and judgment. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Proof must establish premeditation to support verdict of murder in the first degree. *Van Houton v. People*, 22 Colo. 53, 43 P. 137 (1895).

The elements of deliberation, premeditation, and express malice must be manifested by external circumstances capable of proof to justify submitting the charge of first degree murder to the jury. *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972).

Presumption of intent will not support conviction of first degree murder. *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972).

The ultimate point which the evidence must extend to and establish is not the use of a deadly weapon, but the deliberation or premeditation with which the fatal act is done. *Hill v. People*, 1 Colo. 436 (1872).

Intent must be determined from all circumstances. Where pertinent, the question of intent of a defendant in a criminal case must be determined from all the circumstances connected with the perpetration of the offense with which he is charged. *Leopold v. People*, 105 Colo. 147, 95 P.2d 811 (1939).

Evidence supporting first degree conviction supports second degree conviction. It is illogical to say that the evidence is sufficient to support a conviction of first degree murder but insufficient to support the lesser included of-

fense of second degree murder. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Proof of motive will not be excluded merely because it may be prejudicial to the defendant so long as it is relevant and material. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

In a homicide case, it is proper to show an antecedent grudge borne by the accused against the deceased to establish a motive for the alleged homicide. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Also, evidence of a prior argument was clearly admissible to show a possible motive, and the fact that the argument occurred approximately two months before the shooting affected only the weight of the evidence, not its admissibility. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Insanity resulting from voluntary intoxication mitigates first degree murder. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

If defendant is voluntarily under the influence of an intoxicant so as to be unable to form the intent required for a conviction, he cannot be guilty. *People v. Manier*, 184 Colo. 44, 518 P.2d 811 (1974).

Evidence of intoxication admissible only to determine if accused was capable of premeditation and deliberation. *Brennan v. People*, 37 Colo. 256, 86 P. 79 (1906); *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966).

It is only because of the specific intent required for first degree murder that voluntary drunkenness is an excuse even for that crime. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Drunkenness is not an excuse for crime, but when a particular intent forms the gist of the offense, as distinguished from general criminal intent, and is made to depend on the state and condition of the mind of the accused at the time, drunkenness as a fact affecting the control of the mind is proper for the consideration of the jury in determining whether the accused was capable of entertaining the positive and particular intent requisite to make out the offense. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Likewise, mental deficiency admissible as to intent. A defendant in a first degree murder case has the right, without reference to a plea of insanity, to establish mental deficiency as bearing upon his capacity to form the specific intent essential to first degree murder. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

For evidence of insanity, see *Beckstead v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

Evidence of general depravity is not admissible to prove guilt of one charged with a crime. While a defendant who takes the stand may be impeached in this state by showing former convictions of a felony, the rule does not extend to admission of acts or occurrences which show bad character on the part of the defendant. *Romero v. People*, 170 Colo. 234, 460 P.2d 784 (1969).

Acts prior to crime admissible to show intent. In order to show intent, it is not error to permit third parties to testify as to fighting and stabbing by defendants just prior to defendant's fatal attack on deceased. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Evidence of any crime committed by a defendant prior to the acts charged must not be considered for any purpose except that of determining the intent with which the acts charged in the information is done. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

In marital homicide cases, any fact or circumstance relating to ill-feeling, ill-treatment, jealousy, prior assaults, personal violence, threats, or any similar conduct of attitude by the husband toward the wife are relevant to show motive and malice in such crimes and are not evidence of mere general depravity which is not admissible. *Romero v. People*, 170 Colo. 234, 460 P.2d 784 (1969).

Admissibility of other connected crimes. In the trial of a homicide case, evidence of other crimes which were indivisibly connected with, incidental to, and in furtherance of the plan of defendant to rob a bank and flee, and which are a part of a single transaction, is admissible. *Abshier v. People*, 87 Colo. 507, 289 P. 1081 (1930).

Other offenses may be offered in evidence where so interwoven with principal transaction that it is necessary to show them in order to give a fair and true understanding of offense charged, particularly where the other transactions were so connected in point of time with the offense under investigation, and so similar in character, that the same motive could be imputed as to all of them. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Evidence presented at trial established conduct that was so closely connected to the main criminal transaction that evidence of it was necessary to complete the story of the crime. Without that evidence, the murder might not be properly understood as the jury would have no basis upon which it could determine the reasons behind defendant's conduct. *People v. Gladney*, 250 P.3d 762 (Colo. App. 2010).

Actions subsequent to crime admissible to show guilt. The fact that the defendant buried the body, repeatedly lied concerning the disappearance of his wife, went under an assumed name, and, while awaiting trial, escaped from jail, was properly submitted to the jury as evi-

dence of guilt and consciousness of guilt, but the same does not serve to supply the missing element of malice. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

The flight of a person immediately after the commission of a crime is a circumstance establishing his guilt. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Ballistic test conditions must be substantially similar to the conditions when the shooting occurred in order to be admissible. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971).

Admission of real evidence. In order to be material and relevant, real evidence must only be connected with the perpetrator, the victim, or the crime. The clothing worn by the victim the night of the crime meets these tests and is properly admitted. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971).

Pictures can be admitted to show anything a witness would be allowed to testify about. Certainly a doctor could testify to the location of the wounds and the cause of death. The fact that the defendant admitted the killing, relying on self-defense, does not prevent the state from showing the circumstances surrounding it, and the pictures were properly admitted. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971).

Unless there is an abuse of discretion, the trial court's decision as to admissibility of a large color photograph of the deceased will not be disturbed on review. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Articles and statements of codefendants admissible. Defendant and his codefendant jointly participated in the criminal venture which resulted in the homicide. They acted in concert in furtherance of a common illegal purpose, and each, as to the other, was an accomplice. Admitting in evidence as against defendant the articles found in the possession of his codefendant was not error where they were a part of the people's case against both defendants. *Miller v. People*, 141 Colo. 576, 349 P.2d 685, cert. denied, 364 U.S. 851, 81 S. Ct. 97, 5 L. Ed. 2d 75 (1960).

Error in admitting testimony as to admissions made by codefendant who under prosecution theory was principal perpetrator of robbery and murder where defendant was charged as an accessory, which indicated that another person was present and the admission of which allegedly violated defendant's sixth amendment right of confrontation, was harmless where additional evidence consisting of testimony of three eyewitnesses also established that the robbery was committed by two men. *People v. Knapp*, 180 Colo. 280, 505 P.2d 7 (1973).

Statements and physical evidence constitute direct evidence. Where a defendant and his codefendant plan the death of defendant's wife and both participate in the execution of the plan,

it is immaterial which of them actually strangled the deceased, and where each of them make signed statements and the defendant makes verbal statements to a police officer, such statements, together with the physical evidence in the case, constitute sufficient direct evidence to sustain the death penalty. *Leick v. People*, 136 Colo. 535, 322 P.2d 674 (1958).

Confession held involuntary and invalid. *Oaks v. Patterson*, 278 F. Supp. 703 (D. Colo. 1968), aff'd, 400 F.2d 392 (10th Cir. 1968).

Statements taken in violation of Miranda's procedural safeguards are admissible for impeachment purposes. *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971), overruling *Velarde v. People*, 171 Colo. 261, 466 P.2d 919 (1970).

Admission of hearsay referring to defendant's prior act of homicide held reversible error. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Evidence sufficient to show expressed malice. Where all the evidence is strongly indicative of the fact that the defendant aimed the vehicle at the victim and struck him, and did not apply brakes nor stop immediately after striking the victim, the evidence is sufficient to show express malice. *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974).

Circumstantial evidence held sufficient. *Morse v. People*, 168 Colo. 494, 452 P.2d 3 (1969).

While there is no direct evidence of defendant's intent, there is enough circumstantial evidence from which the jury can infer that defendant intended to commit either burglary or robbery prior to or concurrent with the shooting. *People v. Phillips*, 219 P.3d 798 (Colo. App. 2009).

Colorado supreme court will refuse to give an advisory opinion on the interpretation of subsection (1)(d), as it relates to the evidence presented in the case, as it would serve little purpose and would have no significant precedential value. *People v. Lyle*, 200 Colo. 236, 613 P.2d 896 (1980).

Evidence held sufficient to support conviction of first degree murder. *Moya v. People*, 88 Colo. 139, 293 P. 335 (1930); *Frady v. People*, 96 Colo. 43, 40 P.2d 606 (1934); *Sullivan v. People*, 111 Colo. 205, 139 P.2d 876 (1943); *Mayer v. People*, 116 Colo. 284, 180 P.2d 1017 (1947).

Where the circumstances shown by the evidence were such that the jury could well have been satisfied beyond a reasonable doubt that defendant fired the shot resulting in the death of deceased, it was sufficient to sustain a conviction. *Atencio v. People*, 147 Colo. 566, 364 P.2d 575 (1961).

Evidence sufficient to show victim was killed during robbery. *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972).

Evidence sufficient to convict defendant of felony murder. *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

Evidence sufficient to establish deliberation. Where a witness testified that the defendant left the room for a moment and returned carrying a wooden stick, that when the victim saw the stick, he asked the defendant, "Where did you get that?" and to this question the defendant replied, "In the bedroom" and began hitting the victim, this evidence was sufficient to establish that the defendant acted after deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff'd*, 624 P.2d 1320 (Colo. 1981).

Viewed in the light most favorable to the prosecution, the evidence was sufficient to induce a person of ordinary prudence to entertain a reasonable belief that defendant committed murder in the first degree where testimony indicated defendant was fighting with victim, threatened to kill victim, obtained a butcher knife, waved the knife at victim, and stabbed victim not once, but twice in the abdominal area, and where circumstances, such as the length of the struggle between defendant and victim permitted the reasonable inference that defendant had adequate time for the exercise of reflection and judgment concerning the fatal act. *People v. District Ct., 17th Jud. Dist.*, 926 P.2d 567 (Colo. 1996).

D. Jury.

The right of the prosecution to qualify the jury has consistently been upheld. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970); *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

The trial judge's questioning of prospective jurors as to their views regarding capital punishment is relevant and proper in prosecution for first degree murder. *People v. Mackey*, 185 Colo. 24, 521 P.2d 910 (1974).

Juror who would refuse to inflict death penalty is properly excused. A juror who declares that, notwithstanding evidence and instructions, he would under no circumstances vote to inflict the death penalty is properly excused. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Trial court properly sustained the challenge for cause of jurors who stated upon voir dire that under no circumstances would they vote to impose the death penalty, as a juror with such convictions would exclude from his consideration one of the penalties prescribed by law. *Gallegos v. People*, 116 Colo. 129, 179 P.2d 272 (1947).

The test for qualifying the jury for imposition of the death penalty is whether, regardless of his personal beliefs or convictions, a venireman could impose the death penalty. If he cannot set aside those convictions and impose sentence in

accord with his oath as a juror, it is not error to exclude him, not because of his beliefs and convictions, but because of his inability to perform his oath as a juror. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Such exclusion does not deny trial by jury. A constitutional right to a trial by a jury of his peers is not denied a defendant because 29.3 percent of the jury panel were excluded on challenge for cause because of their unwillingness to consider under any circumstances the imposition of the death penalty. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Trial by jury may be waived. Since under the statutes, there are no mandatory requirements for the jury to determine the degree of murder or to determine the class of felony and because the criminal defendant has a substantive right to waive a jury trial, defendant could properly waive his right to a jury trial even though he was convicted of a class 1 felony. *People v. Cisneros*, 720 P.2d 982 (Colo. App.), *cert. denied*, 479 U.S. 887, 107 S. Ct. 282, 93 L. Ed. 2d 257 (1986).

Juror who merely opposes capital punishment not excludable for cause. A death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. This decision does not govern where the jury recommended a sentence of life imprisonment. *Padilla v. People*, 171 Colo. 521, 470 P.2d 846 (1970).

Voir dire on death penalty proper. Where charge was murder in the first degree, it was not improper to permit prosecuting attorney to qualify jurors to return the death penalty, where evidence to be presented was wholly circumstantial, since at the time of examination of jurors it was possible that witness would be found to give direct evidence, or that defendant, upon direct or cross-examination, might incriminate himself to the extent that death penalty could be sought. *Atencio v. People*, 147 Colo. 566, 364 P.2d 575 (1961).

Court may not invade province of jury. A person charged with murder is tried by a jury; they alone must determine the facts, and no court, either trial or appellate, has a right to constitute itself a trier of facts, and thus invade the province of a jury. The question of the weight of testimony and the credibility of the witnesses is to be determined by the jury, properly instructed as to the law. Unless this course is followed, a defendant is deprived of his constitutional right of a trial by jury. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957).

Jury sequestration. Trial of a first degree murder charge is a "capital case" for purposes of jury sequestration under Crim. P. 24(f) (as it existed prior to the 1983 amendment) even

though the district attorney does not intend to qualify the jury for consideration of the death penalty or to seek the imposition of the death penalty in the event of a conviction. *People ex rel. Faulk v. District Court*, 667 P.2d 1384 (Colo. 1983).

Intention is question to be submitted to jury. Whether intention is shown by evidence of antecedent menaces, former grudges, the means employed to effect the homicide, or any other circumstances which may give assurance of it, it is to be submitted to the jury to find the fact under the direction of the law. *Hill v. People*, 1 Colo. 436 (1872).

If there was evidence relevant to the issue of manslaughter, its credibility and force were for the jury to consider in determining the facts, and not as a matter of law for the decision of the court. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

Whether defendant acted with premeditation is for the jury to determine after a consideration of all the facts and circumstances in evidence, including those affecting his mental condition at the time. *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933).

Where from this evidence the jury could have found that defendant had formed a premeditated design to take the life of the deceased or that there was no considerable provocation for the killing, it was not for the trial court to determine as a matter of law, but for the jury under proper instructions to resolve as a matter of fact, the question of whether premeditation existed. *People v. Spinuzzi*, 149 Colo. 391, 369 P.2d 427 (1962), overruled on another point in *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Express malice is a question of fact to be determined by the jury on all the evidence in the case. *Lopez v. People*, 175 Colo. 503, 488 P.2d 892 (1971).

Facts other than killing must exist to submit charge of murder. It is only when, in addition to the killing, facts and circumstances attending or surrounding the homicide are laid before the jury that the necessary inferences of fact to complete the crime of murder can be rightfully drawn. *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885).

There being no evidence of malice, premeditation, deliberation, intention to kill, or killing showing an abandoned and malignant heart, it was error to submit to the jury instructions defining murder and forms of verdict whereby they could find the defendant guilty of murder. *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964).

Intoxication is question for jury. Where there was evidence tending to prove drunkenness, it was for the jury to determine whether the defendant was so intoxicated as to be unable to form the deliberate intent necessary. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

Whether injuries inflicted began chain of events causing death is question for jury. Where the defendant attacked an epileptic who had consumed a considerable amount of whiskey and had failed to take his prescribed medication, the question for the jury's determination was whether the injuries inflicted by the defendant began a chain of events which in their natural and probable consequences caused the victim's death. *Hamrick v. People*, 624 P.2d 1320 (Colo. 1981).

E. Instructions.

Courts should excise irrelevant portions of a murder instruction to conform to the evidence in the case. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Use of word "homicide" is preferred to term "murder". A homicide is the killing of a human being by another. It is the unlawful commission of homicide that renders the perpetrator guilty of a crime, and consequently in court instructions to a jury concerning the law as to this offense the use of the word "homicide" is proper and to be preferred to the term "murder". *Leopold v. People*, 105 Colo. 147, 95 P.2d 811 (1939).

"After deliberation" needs no elaboration, unless requested. The phrase "after deliberation" is neither so unusual nor so unfamiliar as to require elaboration, although a trial court should give an instruction on the meaning of this statutory phrase if requested by a defendant. *People v. Beltran*, 634 P.2d 1003 (Colo. App. 1981).

"Acting either alone or with one or more persons" does not define an element of the offense, but merely makes clear that guilt results in either case. *People v. Bastin*, 937 P.2d 761 (Colo. App. 1996).

Instruction on first degree murder and felony murder held proper. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

Instruction on elements of felony murder proper. Instruction that if homicide was committed in perpetrating robbery, premeditation and intent are not necessary elements of the crime charged and need not be proved, is held proper in view of this section. *Frady v. People*, 96 Colo. 43, 40 P.2d 606 (1934).

Instruction on circumstantial evidence. In the trial of any murder case, where the prosecution relies in whole or in part on circumstantial evidence, if defendant's counsel desires an instruction on such evidence, it is his duty to prepare and tender such, and its refusal may constitute error. *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950).

Instruction on intent. Upon the trial of an information for homicide, the accused is entitled to an instruction that the intent of the prisoner is for the jury, and that the presumption of inno-

cence attends the prisoner throughout the trial and must be overcome by evidence excluding reasonable doubt. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910).

Defendant's failure at trial to object to the lack of a "specific intent" definition instruction and a voluntary intoxication instruction makes constitutional harmless error review inapplicable. Under plain error review, trial court's failure to properly instruct the jury that "after deliberation" is an element of first degree murder that is negated by voluntary intoxication did not constitute plain error. *People v. Miller*, 113 P.3d 743 (Colo. 2005).

Instructions adequately advised jury on premeditation and presumption of innocence. *Carroll v. People*, 177 Colo. 288, 494 P.2d 80 (1972).

Where instruction refers to crimes proscribed by section, general verdict form not error. Where the trial court's instruction on the charge of first degree murder stated clearly that the jury was entitled to find the defendant guilty of that crime if it determined that he had committed the crime proscribed by (1)(a) or the crime proscribed by subsection (1)(b), the use of a general verdict form referring to the crime "as charged in count one of the indictment" was not error. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Instructions on flight. *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Stafford v. People*, 154 Colo. 113, 388 P.2d 774 (1964); *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

No jury instruction explaining or defining "immediate flight" is necessary. These are words of common meaning, not a legal term of art. *People v. Auman*, 67 P.3d 741 (Colo. App. 2002), rev'd on other grounds, 109 P.3d 647 (Colo. 2005).

Reversal of second degree burglary conviction because of erroneous theft instruction required reversal of felony murder conviction. *Auman v. People*, 109 P.3d 647 (Colo. 2005).

Instruction based on statutory presumptions of intoxication not applicable to issue of first degree murder. *Roybal v. People*, 177 Colo. 144, 493 P.2d 9 (1972).

Instruction held not to express court's belief in guilt of accused. An instruction declared that "deliberately" does not mean brooded over, or reflected upon, for a week, day or hour, "but an intent to kill executed by the defendant" in cold blood. The use of the definite article in referring to the accused was held not to be taken as the court's expression of a belief in his guilt. *King v. People*, 54 Colo. 122, 129 P. 235 (1912).

Court is not required to instruct as to grade unsupported by evidence. In a homicide case, the court is not required to instruct on second degree murder where there is no evidence upon which to base such an instruction.

Jones v. People, 93 Colo. 282, 26 P.2d 103 (1933); *Reppin v. People*, 95 Colo. 192, 34 P.2d 71 (1934).

In a prosecution for murder where there is no evidence from which a jury would be justified in finding the defendant guilty of manslaughter, a trial judge is not required to instruct upon that grade of homicide. *Crawford v. People*, 12 Colo. 290, 20 P. 769 (1888); *Mow v. People*, 31 Colo. 351, 72 P. 1069 (1903); *Carpenter v. People*, 31 Colo. 284, 72 P. 1072 (1903); *Demato v. People*, 49 Colo. 147, 111 P. 703 (1910).

In a case of felonious homicide, if the evidence shows the killing to have been deliberate and intentional, there is no question of manslaughter presented, and therefore no reason for submitting that question to the jury. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Murder in the second degree is not an issue where there are no facts in the record justifying submission of instructions and a verdict defining second degree murder. *Early v. People*, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

An instruction on second degree murder is improper where, by the evidence, the crime was perpetrated in the commission of one of the felonies named, for in such circumstances the verdict must be first degree murder or acquittal. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

But prerogative should be exercised with caution. Where there is an affray and where self-defense is relied on, the court exercises an exceedingly dangerous prerogative in refusing to charge upon the minor as well as the graver offenses covered by the indictment. He should be absolutely certain that there is an entire absence of evidence bearing upon the particular grade or grades omitted. *Young v. People*, 47 Colo. 352, 107 P. 274 (1910); *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957).

Instruction on manslaughter held properly refused. *Shank v. People*, 79 Colo. 576, 247 P. 559 (1926).

Where the evidence reveals that defendant participated in a brutal and heartless assault and robbery committed on the person of the deceased, no other verdict than that of first degree murder would have been justified, and it was not error to omit instruction on the lesser degrees of homicide. *Ceja v. People*, 142 Colo. 447, 351 P.2d 271 (1960).

Failure of trial court to give instruction relating to fists as a deadly weapon was not error where the evidence presented did not justify the giving of such instruction. *People v. Duran*, 185 Colo. 359, 524 P.2d 296 (1974).

Error not to instruct on manslaughter. When there is competent evidence which could conceivably reduce a homicide to manslaughter, the defendant is entitled to an instruction thereon, as where homicides occur during an

affray and are unintentional, accidental, a result of misadventure, or in self-defense. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

When there is any evidence, however improbable, unreasonable, or slight, which tends to reduce a homicide to the grade of manslaughter, a defendant is entitled to an instruction thereon upon the hypothesis that the same is true, and that it is for the jury, under proper instructions, and not the trial judge, to weigh and consider the evidence and determine therefrom what grade of crime, if any, was committed, and a court's refusal to instruct thereon is reversible error. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957); *People v. Maes*, 43 Colo. App. 426, 609 P.2d 1105 (1979).

Refusal to instruct on a lesser included offense in a homicide case is reversible error as long as there is some evidence, however slight, tending to establish the lesser included offense. *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

If there is evidence tending to establish a statutory grade of homicide, the court's refusal to instruct thereon is error. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Where during the trial for first degree murder defendant presented a plausible case for self-defense, which even if the jury deemed it to be an overreaction, nevertheless would negate the elements of murder, the trial court should have instructed the jury on the lesser offense of manslaughter, as defendant requested. *People v. Miller*, 187 Colo. 239, 529 P.2d 648 (1974).

Jury may be instructed that there is no evidence of manslaughter. If there was no evidence upon which a verdict of manslaughter could be based, then the trial court was justified in instructing the jury to that effect. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

In a murder trial an erroneous instruction taking from the jury the consideration of all degrees of murder, excepting the first, is not grounds for reversing a conviction in the first degree and a sentence of life imprisonment, where the entire evidence, including that of the accused, excludes the idea of manslaughter and fully warrants the conviction and the infliction of the death penalty. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907).

Refusal to instruct that there can be no conviction for less than first degree murder may be error. Where upon the trial of an indictment for murder, the evidence shows that the crime was deliberate, and no fact is shown leading to a contrary inference, there should be no conviction of the crime in any less degree. The refusal of the court below to instruct accordingly on request of the prisoner is prejudicial error. *Dickens v. People*, 67 Colo. 409, 186 P. 277 (1919).

Or that only issue for determination is whether punishment shall be death or life imprisonment. Where, in a homicide case, it is

admitted that the killing was done in the perpetration of a robbery and in no other way, the offense being murder of the first degree, the trial court properly instructed the jury that the only issue for them to determine was whether the punishment to be inflicted should be death or imprisonment for life. *Reppin v. People*, 95 Colo. 192, 34 P.2d 71 (1934).

No error in failing to instruct jury on attempted first degree murder where victim's injuries were such that no rational jury could have found the shooter acted with anything but a premeditated intent to cause death. *People v. Brown*, 218 P.3d 733 (Colo. App. 2009), *aff'd*, 239 P.3d 764 (Colo. 2010).

When court must instruct jury on second degree murder. Trial court does not have to instruct jury on the lesser included offense when there is no evidence to support the instruction. *People v. Jones*, 677 P.2d 383 (Colo. App. 1983), *rev'd*, 711 P.2d 1270 (Colo. 1986).

Error to submit nonfelony murder to jury. Where a petitioner's acts from the time he took money from the victim until he shot the victim were one continuous integrated attempt to successfully complete his crime and escape detection, and the escape with ill-gotten gains was as important to the execution of the robbery as gaining possession of the property, robbery and homicide were not distinct transactions, and, therefore, submission of a nonfelony murder to jury would not have been justified. *Bizup v. Tinsley*, 211 F. Supp. 545 (D. Colo. 1962), *aff'd*, 316 F.2d 284 (10th Cir. 1963).

Where the charge is first degree murder occurring during the commission of a felony, lesser included offenses need not be submitted to the jury. *Kurtz v. People*, 177 Colo. 306, 494 P.2d 97 (1972).

Felony murder conviction based upon crime of simple robbery sustained without jury finding existence of aggravation even though jury instruction included allegation of aggravation. *People v. Driggers*, 812 P.2d 702 (Colo. App. 1991).

Where jury was instructed that if it found the People had failed to prove the elements of first degree murder beyond a reasonable doubt, it should consider any of the lesser offenses, not just second degree murder but also provoked passion manslaughter, the instructions adequately described the prosecution's burden of proof and did not unconstitutionally shift the burden of proof to the defendant in violation of his due process rights. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

Defendant is not entitled to an instruction on the affirmative defense of disengagement from the crime for a charge of felony murder where the defendant failed to present evidence of each of the elements listed in subsection (2).

People v. Lucas, 992 P.2d 619 (Colo. App. 1999).

Defendant is not entitled to an instruction on self-defense in trial for extreme indifference murder. For certain actions to constitute self-defense, defendant must have acted in a reasonable manner. Finding a defendant guilty of extreme indifference murder necessarily precludes a finding that his actions were reasonable, as the "universal malice" element of the offense requires the jury to conclude that the defendant acted with aggravated recklessness. People v. Fernandez, 883 P.2d 491 (Colo. App. 1994).

Defendant not entitled to instruction that jury must reach unanimous decision as to whether defendant committed first degree murder after deliberation either as a complicitor or as principal. Those alternative legal theories are two means of committing a single offense, and are not an impermissible distinction requiring a unanimity instruction. People v. Hall, 60 P.3d 728 (Colo. App. 2002).

F. Affirmative Defense.

Self-defense may be available as an affirmative defense to a predicate felony but not as to the resulting death. People v. Renaud, 942 P.2d 1253 (Colo. App. 1996).

Self-defense does not apply to felony murder. Trial court merged the second degree murder charge into the felony murder charge, thus, the only murder charge remaining was felony murder. As a result, any error in the self-defense instruction as given was harmless. People v. Palmer, 87 P.3d 137 (Colo. App. 2003).

IV. VERDICT AND SENTENCE.

It was error to grant a motion for a directed verdict in a murder prosecution on the ground that there was no evidence of premeditation based on fact that there was no acquaintanceship between defendant and deceased and no evidence of animosity between them, since malice is not synonymous with motive, and motive is not essential in murder prosecution. People v. Spinuzzi, 149 Colo. 391, 369 P.2d 427 (1962), overruled on other grounds, People v. Kirkland, 174 Colo. 362, 483 P.2d 1349 (1971).

No verdict other than first degree murder possible where the evidence overwhelmingly establishes the guilt of the defendant in a brutal and heartless assault and robbery committed upon the person of the deceased, and the defendant had a fair trial, one that was conducted in all respects pursuant to law. Ceja v. People, 142 Colo. 447, 351 P.2d 271 (1960).

Where murder is committed in the perpetration or attempt to perpetrate one of the felonies specified in this section, there is only one degree of murder, namely, murder of the first degree. If the uncontradicted evidence is to the effect that

murder was committed in one of the ways specified above, and in no other way, the question of second degree murder is not in the case, and the defendant should be found guilty of murder of the first degree or acquitted; there is no middle course. Jones v. People, 93 Colo. 282, 26 P.2d 103 (1933); Early v. People, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

In a capital case the punishment to be inflicted rests with the jury, and refusal of the trial court to accept a plea of guilty of second degree murder on recommendation of the district attorney was upheld. Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934).

One of the appointed functions of jurors is to fix the penalty in first degree murder cases. Fleagle v. People, 87 Colo. 532, 289 P. 1078 (1930).

The particular manner in which a murder is committed does not govern the penalty when a verdict in the first degree is returned, but the penalty to be imposed is a matter solely for the jury to fix, either at imprisonment for life, or death. Henwood v. People, 57 Colo. 544, 143 P. 373 (1914).

Term of imprisonment is within discretion of court. The term of imprisonment within the limits prescribed is wholly within the discretion of the court. Arrano v. People, 24 Colo. 233, 49 P. 271 (1897).

Life imprisonment is minimum sentence for first degree murder. People v. Pacheco, 41 Colo. App. 188, 581 P.2d 741 (1978).

Error in enhancement of sentence for crime of violence. Where a defendant is convicted of first degree murder, and the mittimus reads that he was found to have committed a "crime of violence", but the jury was not instructed on the elements of crime of violence nor given a separate verdict form or interrogatory as required, enhancement of sentence for having committed a crime of violence would be plain error. The cause must be remanded for correction of the mittimus to show conviction of first degree murder only, and for imposition of sentence on that crime only. People v. Thrower, 670 P.2d 1251 (Colo. App. 1983).

Although defendant could not be convicted for felony-murder and murder after deliberation based on killing of single victim, sufficient evidence existed to sustain defendant's conviction for first degree murder, and thus judgment of conviction for first degree murder after deliberation and sentence imposed thereon would be affirmed while judgment of conviction and sentence for felony-murder would be vacated. People v. Brown, 731 P.2d 763 (Colo. App. 1986).

Although a finding of specific intent to kill a particular victim precludes a simultaneous finding of extreme indifference to the value of human life generally, it is permissible nonetheless for the People to charge on two different

theories of first degree murder. After the close of evidence, the People may, but are not required to, elect between the theories charged. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

Defendant's remedy was not a new trial where jury returned guilty verdicts on the theory of first degree murder and attempted first degree murder by extreme indifference and on the lesser included offenses, under either theory of first degree murder, of second degree murder and attempted second degree murder; rather, the remedy is to merge the lesser offense of second degree murder into the greater. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

A verdict of guilt on second degree murder, as a lesser included offense to a charge of first degree murder after deliberation is not legally inconsistent with a verdict of guilt on a charge of first degree murder by extreme indifference. No simultaneous acceptance and rejection by the jury of evidence relied upon for these convictions occurred since the jury's determination that defendant did not act with deliberation did not require rejection of evidence that he acted knowingly and with universal malice. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994); *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

Jury's province to determine degree of murder evidence justifies. Assuming the sufficiency of the evidence to support first degree murder, it is strictly within the province of the jury to evaluate the evidence and say by its

verdict whether the evidence justifies a verdict of first or second degree murder. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Sentences concurrent with life sentence proper. Where the defendant was sentenced for life imprisonment for first degree murder and lesser sentences for first degree burglary and theft which the jury found he had committed, and all sentences were imposed concurrently with the life sentence which the jury ordered, there was no error. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Defective sentence may be amended to supply minimum. *Smith v. Best*, 115 Colo. 494, 176 P.2d 686 (1946).

Trial court may correct sentence where punishment only reversed. In a first degree murder case when the United States supreme court affirms the guilt verdict, and invalidates the punishment portion of the verdict only because the jury was not constitutionally qualified to fix the death penalty, and the sole alternative under the statute as to punishment available to the jury is life imprisonment, the entry by the trial court of such a judgment is a mere ministerial act within the power and authority of the trial judge under the terms and within the contemplation of Crim. P. 35. *Segura v. District Court*, 179 Colo. 20, 498 P.2d 926 (1972).

Sentence of life imprisonment with no possibility of parole for a juvenile offender was not disproportionate to offense under this section. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).

18-3-103. Murder in the second degree. (1) A person commits the crime of murder in the second degree if the person knowingly causes the death of a person.

(2) Diminished responsibility due to self-induced intoxication is not a defense to murder in the second degree.

(2.5) (Deleted by amendment, L. 96, p. 1844, § 12, effective July 1, 1996.)

(3) (a) Except as otherwise provided in paragraph (b) of this subsection (3), murder in the second degree is a class 2 felony.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (3), murder in the second degree is a class 3 felony where the act causing the death was performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the defendant sufficiently to excite an irresistible passion in a reasonable person; but, if between the provocation and the killing there is an interval sufficient for the voice of reason and humanity to be heard, the killing is a class 2 felony.

(4) A defendant convicted pursuant to subsection (1) of this section shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

Source: L. 71: R&RE, p. 418, § 1. C.R.S. 1963: § 40-3-103. L. 75: (1)(a) amended, p. 622, § 1, effective March 19. L. 77: (1)(a) amended and (1)(b) repealed, pp. 960, 971, §§ 6, 67, effective July 1. L. 86: (4) added, p. 776, § 1, effective July 1. L. 95: IP(1) amended and (2.5) added, p. 1222, § 5, effective July 1. L. 96: Entire section amended, p. 1844, § 12, effective July 1. L. 2002: (4) amended, p. 1512, § 184, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- III. Trial and Prosecution.
 - A. Evidence.
 - B. Defenses.
 - C. Instructions.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For note, "Extreme-Indifference Murder: The Impact of *People v. Marcy*", see 54 U. Colo. L. Rev. 83 (1982).

Annotator's note. Since § 18-3-103 is similar to former § 40-2-3, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not unconstitutionally overbroad. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977), cert. denied, 434 U.S. 1038, 98 S. Ct. 776, 54 L. Ed. 2d 787 (1978).

Subsection (2) is not violative of the due process clause of the Colorado Constitution. *People v. Campisi*, 649 P.2d 1053 (Colo. 1982).

This section does not violate due process rights by rendering irrelevant evidence concerning an impaired mental condition due to voluntary intoxication. *People v. Loscutoff*, 661 P.2d 274 (Colo. 1983).

Distinction between second degree murder and manslaughter constitutional. The difference between the mental states required for second degree murder (knowingly) and manslaughter (recklessly) mirrors the distinction between practically certain of result on the one hand, and probability or contingency of result on the other, and this difference is sufficient to avoid an equal protection violation. *People v. Padilla*, 638 P.2d 15 (Colo. 1981).

Section constitutionally distinguishable from manslaughter statute, § 18-3-104 (1)(a), because the two statutes require different mens rea elements for conviction. *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. Padilla*, 638 P.2d 15 (Colo. 1981). See *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980).

Statutory prohibition of extreme indifference murder in § 18-3-102 (1)(d) (as it existed prior to the 1983 amendment) violated equal protection of the laws because it could not reasonably be distinguished from the lesser offense of second degree murder as defined in this section. *People v. Marcy*, 628 P.2d 69 (Colo. 1981); *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

Both first degree murder by extreme indifference and second degree murder are committed "knowingly" and are thus general intent crimes. *People v. Rodriguez*, 888 P.2d 278 (Colo. App. 1994).

The general assembly intended that there be two grades of murder. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776 (1973).

Distinction intended to be meaningful. The general assembly intended that there be a meaningful distinction between first and second degree murder. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

The distinctions between § 18-3-102 and this section are not inconsequential and satisfy due process requirements and the informational requirements of § 16 of art. II, Colo. Const. *People v. Mendoza*, 195 Colo. 19, 575 P.2d 403 (1978).

Lesser included offense of first degree murder. The difference in substance between first degree murder and second degree murder is that first degree murder requires the additional element of premeditation. Since proof of first degree murder necessarily establishes every element of second degree murder, the latter is necessarily a lesser included offense of the former. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977), cert. denied, 434 U.S. 1038, 98 S. Ct. 776, 54 L. Ed. 2d 787 (1978).

A conviction for attempted second degree murder cannot merge with a conviction for attempted first degree murder with extreme indifference when the offenses had different victims. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Felony menacing is not a lesser included offense of attempted second degree murder. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

The offense of second degree murder does not establish every element of felony menacing. Attempted second degree murder requires a defendant to knowingly engage in conduct that is a substantial step toward causing the death of a person. There is no requirement that the victim be in fear of imminent serious bodily injury. Thus, an attempted second degree murder conviction does not necessarily establish all the elements of menacing. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Second degree murder as defined in this section is "conceptually distinguishable" from intentional manslaughter. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977), cert. denied, 434 U.S. 1038, 98 S. Ct. 776, 54 L. Ed. 2d 787 (1978).

Applied in *Salas v. District Court*, 190 Colo. 447, 548 P.2d 605 (1976); *Reliford v. People*, 195 Colo. 549, 579 P.2d 1145 (1978); *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978);

People v. Fink, 41 Colo. App. 47, 579 P.2d 659 (1978); People v. Parsons, 199 Colo. 421, 610 P.2d 93 (1980); People v. Botham, 629 P.2d 589 (Colo. 1981); People v. Chavez, 629 P.2d 1040 (Colo. 1981); People v. Lee, 630 P.2d 583 (Colo. 1981); Coston v. People, 633 P.2d 470 (Colo. 1981); People v. Harris, 633 P.2d 1095 (Colo. App. 1981); People v. District Court, 652 P.2d 582 (Colo. 1982); People ex rel. Gallagher v. District Court, 656 P.2d 1287 (Colo. 1983); People v. Clark, 662 P.2d 1100 (Colo. App. 1982); People v. Bartowsheski, 661 P.2d 235 (Colo. 1983); People v. Fisher, 759 P.2d 33 (Colo. 1988).

II. ELEMENTS OF OFFENSE.

Term “knowingly” describes the requisite culpability for second degree murder. People v. Marcy, 628 P.2d 69 (Colo. 1981).

No requirement that knowing conduct be directed against person actually killed. There is no requirement that the knowing conduct essential to second degree murder be directed against the person actually killed. On the contrary, the offense is a general intent crime, and as long as the offender knowingly acts in the proscribed manner and causes the death of another, he is guilty of the crime, even though the person killed is not the person against whom the criminal conduct was directed. People v. Marcy, 628 P.2d 69 (Colo. 1981).

Elements of murder in second degree concerning defendant’s state of mind are: (1) That the death was more than merely a probable result of the defendant’s actions; and (2) that the defendant was aware of the circumstances which made death practically certain. The first is an objective standard; the second, a subjective standard. People v. Mingo, 196 Colo. 315, 584 P.2d 632 (1978); People v. District Court, 198 Colo. 70, 595 P.2d 1045 (1979).

The express statutory definition of second degree murder does not include malice as an element. People v. Gladney, 194 Colo. 68, 570 P.2d 231 (1977), cert. denied, 434 U.S. 1038, 98 S. Ct. 776, 54 L. Ed. 2d 787 (1978).

For discussion of element of implied malice required by former statute, see Walker v. People, 175 Colo. 173, 489 P.2d 584 (1971); People v. Morant, 179 Colo. 287, 499 P.2d 1173 (1972); People v. Gallegos, 180 Colo. 238, 504 P.2d 343 (1972); People v. Tapia, 183 Colo. 141, 515 P.2d 453 (1973); People v. Garcia, 186 Colo. 167, 526 P.2d 292 (1974).

Application of specific intent as element. Specific intent as an element of second degree murder applies whenever the events giving rise to a second degree murder charge occurred after the 1973 amendments. People v. Stitt, 40 Colo. App. 355, 575 P.2d 446 (1978).

Second degree murder is general intent crime which entails being aware that one’s ac-

tions are practically certain to result in another’s death. People v. Mingo, 196 Colo. 315, 584 P.2d 632 (1978).

Second degree murder consists of an unlawful killing without premeditation and deliberation. Washington v. People, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966).

Conviction requires proof that death natural consequence of unlawful act. A conviction for criminal homicide requires proof beyond a reasonable doubt that the death was a natural and probable consequence of the defendant’s unlawful act. People v. Fite, 627 P.2d 761 (Colo. 1981).

Unlawful infliction of wound which develops into fatal infection renders offender criminally responsible for the consequential death. People v. Fite, 627 P.2d 761 (Colo. 1981).

For “premeditated intent” and “intentionally, but without premeditation” as different elements, prior to the 1975 amendment of § 18-3-102, see People v. Pearson, 190 Colo. 313, 546 P.2d 1259 (1976).

There is no crime of second degree felony murder in the state of Colorado. Sawyer v. People, 173 Colo. 351, 478 P.2d 672 (1970).

Subsection (3) sets forth the elements of provocation, which is a mitigating factor and not a separate crime or a lesser included offense of murder in the second degree. If proven, provocation is a statutory mitigating factor that will reduce a defendant’s sentence for second degree murder, but it is not an element of a separate offense. Further, to secure a conviction of second degree murder, the prosecution must prove a lack of provocation beyond a reasonable doubt. People v. Garcia, 1 P.3d 214 (Colo. App. 1999), aff’d, 28 P.3d 340 (Colo. 2001).

The general assembly intended to eliminate the offense of heat of passion manslaughter and create a single crime of second degree murder with two different felony levels by making provocation, or acting in the heat of passion, a factor in mitigation of second degree murder. People v. Martinez, 32 P.3d 582 (Colo. App. 2001).

Second degree murder is a per se crime of violence, even if committed in the heat of passion. People v. Martinez, 32 P.3d 582 (Colo. App. 2001).

Second degree murder is a lesser included offense of first degree murder as well as the associated attempt offenses. Brown v. People, 239 P.3d 764 (Colo. 2010).

III. TRIAL AND PROSECUTION.

A. Evidence.

It is the people’s burden to make out a case that would have sustained a verdict of guilty of

first or second degree murder before the prosecution is entitled to instructions thereto. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Subsection (2) does not create any presumption of culpability, conclusive or otherwise, and the prosecution retains the burden of establishing the defendant's guilt as to all elements of the crime beyond a reasonable doubt. *People v. Morgan*, 637 P.2d 338 (Colo. 1981).

Prosecution's burden of proving "knowingly". Subsection (2) does not lessen the prosecution's constitutional burden to prove the requisite culpability of "knowingly" for a second-degree murder. *People v. Gallegos*, 628 P.2d 999 (Colo. 1981).

Where the trial court admits evidence as to the defendant's diminished mental capacity and such evidence is considered as to the charge of murder in the second degree, subsection (2) does not unconstitutionally restrict the defense in contesting the culpability element of the charge nor does it lessen the prosecution's burden of proving guilt beyond a reasonable doubt. *People v. Gallegos*, 628 P.2d 999 (Colo. 1981).

Proof of killing alone is not murder. Proof of the mere abstract fact that the accused killed the deceased will not sustain a verdict of guilty of first or second degree murder based on instructions thereto. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Presumption of intent to kill may be presumed or implied as inference of fact from act itself with regard to second degree murder. *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972).

The use of a deadly weapon is sufficient to support finding of second degree murder. *Hervey v. People*, 178 Colo. 38, 495 P.2d 204 (1972).

Use of a deadly weapon is not in itself sufficient to show deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff'd*, 624 P.2d 1320 (Colo. 1981).

Evidence sustaining first degree verdict sustains verdict in second degree. When evidence viewed in its most favorable light was sufficient to sustain a verdict of first degree murder, that evidence must perforce sustain a finding of second degree murder. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

Jury's province to determine degree evidence justifies. Assuming the sufficiency of the evidence to support first degree murder, it is strictly within the province of the jury to evaluate the evidence and say by its verdict whether the evidence justifies a verdict of first or second degree murder. *People v. Lankford*, 185 Colo. 445, 524 P.2d 1382 (1974).

First and second degree murder properly submitted to jury. Where there was sufficient evidence to support the contention of the prosecution that the offense of murder in the first degree had been committed, but a jury could

find from the evidence that because defendant had been the victim of a robbery at the hands of decedent he was seeking revenge, it was within the province of the jury to determine whether the evidence established beyond a reasonable doubt that there was no justification or considerable provocation in the circumstances of the homicide; hence, an instruction and form of verdict on second degree murder was proper. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Court properly excluded defendant's expert heat of passion testimony because the heat of passion mitigator does not apply when a person seeks out the highly provoking act in question, as defendant did here. Therefore, trial court properly excluded the testimony since it would not have been helpful to the jury. *People v. Valdez*, 183 P.3d 720 (Colo. App. 2008).

After properly refusing to allow defendant's expert heat of passion testimony, trial court erred by instructing the jury on the heat of passion mitigator. *People v. Valdez*, 183 P.3d 720 (Colo. App. 2008).

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Court may deny admitting testimony that alcohol found in victim's bloodstream. As a matter of law, a trial court does not abuse its discretion in denying the admission of an expert's testimony that some alcohol and drug traces were found in the murder victim's bloodstream without any effort to show how such substances might have affected the victim's behavior. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

The perpetrator may testify to his state of mind at the time of the homicide, but the jury is not bound by this statement and may consider the attendant circumstances in resolving the matter. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965), *cert. denied*, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966).

Evidence sufficient to establish deliberation. Where a witness testified that the defendant left the room for a moment and returned carrying a wooden stick, that when the victim saw the stick he asked the defendant, "Where did you get that?" and to this question the defendant replied, "In the bedroom", and began

hitting the victim, this evidence was sufficient to establish that the defendant acted after deliberation. *People v. Hamrick*, 624 P.2d 1333 (Colo. App. 1979), *aff'd*, 624 P.2d 1320 (Colo. 1981).

Jury had sufficient evidence to determine that defendant was aware his conduct was practically certain to result in victim's death. *People v. Fry*, 74 P.3d 360 (Colo. App. 2002), *aff'd* on other grounds, 92 P.3d 970 (Colo. 2004).

Sufficient evidence to support a jury finding that defendant knew his conduct was practically certain to cause death. Evidence of the size differential between the defendant and victim, the way the defendant struck the victim, and the defendant's effort to conceal the crime afterwards was sufficient to support a jury finding that defendant knew his actions would cause death. *Mata-Medina v. People*, 71 P.3d 973 (Colo. 2003).

Evidence sufficient for conviction of second degree murder. *People v. Naranjo*, 181 Colo. 273, 509 P.2d 1235 (1973); *People v. Garcia*, 186 Colo. 167, 526 P.2d 292 (1974); *Crespin v. People*, 721 P.2d 688 (Colo. 1986); *People v. Sepulveda*, 65 P.3d 1002 (Colo. 2003).

B. Defenses.

Gross negligence constitutes defense. Gross negligence, not being reasonably foreseeable, constitutes a defense to criminal homicide under those circumstances where, but for the gross negligence, death would not have resulted. *People v. Fite*, 627 P.2d 761 (Colo. 1981).

Intoxication does not negative the necessary capacity to be guilty of second degree murder. *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

Even if lack of deliberation and premeditation because of intoxication is shown, second degree murder can be proved. *Washington v. People*, 158 Colo. 115, 405 P.2d 735 (1965), *cert. denied*, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966).

An instruction limiting voluntary intoxication as an affirmative defense to second degree murder does not constitute a violation of due process by reducing the people's burden of proving every element of the crime beyond a reasonable doubt. *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979). See *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980); *People v. Lee*, 199 Colo. 301, 607 P.2d 998 (1980).

Subsection (2) prohibits admission of evidence of voluntary intoxication to contest the general intent required for second degree murder. *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006).

For voluntary intoxication as an affirmative defense prior to the 1977 amendment of

this section, see *People v. Cornelison*, 192 Colo. 337, 559 P.2d 1102 (1977).

Killing in self-defense justified. A general fight ensued under circumstances which could lead only to the conclusion on the part of defendant that he was being set upon by at least three assailants. Defendant made his way out of the booth and was obviously trying to get out of the tavern. There was scuffling outside and defendant fired a second shot which fatally wounded deceased. Under the law and the circumstances, defendant had the right to defend himself against the threatened assault of those whose lawlessness and utter disregard of his right resulted in the justifiable killing of one of their number. The conviction of second degree murder is reversed and defendant discharged. *Maes v. People*, 166 Colo. 15, 441 P.2d 1 (1968).

Intentional death not result of mutual combat. A defendant cannot avoid the consequences of a deliberate, intentional act of murder on grounds of mutual combat or hot state of blood when the person killed was not a party to the mutual combat nor a bystander accidentally and unintentionally slain. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Attack by policeman was murder. A policeman who, without justification, strikes a citizen with his billy, in a manner calculated to produce death, but without deliberation or premeditation, is guilty of murder in the second degree if death ensues. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

The refusal of a marriage proposal and the request or demand to leave one's home cannot under any circumstances rise to the level of provocation that would justify a reasonable person to use violence. Thus, there was not sufficient evidence to support the heat of passion mitigator. *People v. Ramirez*, 56 P.3d 89 (Colo. App. 2002).

C. Instructions.

Error to charge conviction of second degree murder required if killing was without deliberation. It is error to charge the jury that, if they believe the killing was without any deliberation or premeditation whatever, they should convict of murder of the second degree; and such charge must be considered erroneous, even when the conviction is murder of the first degree. *Babcock v. People*, 13 Colo. 515, 22 P. 817 (1889).

Error to instruct upon higher degree of homicide when evidence will not support such instructions. *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962).

Error in instruction on higher degree of crime not prejudicial to one convicted of lesser crime. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

The accused cannot complain of an error in instructing the jury as to the higher degree of the crime charged where the jury is properly instructed as to the lower degree and returns a verdict of guilty of the lower degree, especially with respect to charges upon the different grades and degrees of culpable homicide. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952); *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956); *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

Error to instruct that the prosecution was required to prove the elements of provocation beyond a reasonable doubt. Since provocation is a mitigating factor, not a separate offense, the prosecution must prove a lack of provocation in order to secure a conviction of second degree murder. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd*, 28 P.3d 340 (Colo. 2001).

A provocation instruction is warranted whenever a defendant shows some supporting evidence—regardless of how incredible, unreasonable, improbable, or slight it may be—to establish each factor described in subsection (3)(b). *Cassels v. People*, 92 P.3d 951 (Colo. 2004).

Instruction on involuntary manslaughter should have been granted. Where one of the defense theories was that the grade of the crime, if there was a crime, was at most involuntary manslaughter because the shooting of the victim was unintentional according to some of the defense evidence presented to the jury, the defendant's request for an instruction on involuntary manslaughter should have been granted in prosecution for second degree murder. *People v. Travis*, 183 Colo. 255, 516 P.2d 121 (1973).

Refusal of trial court to instruct on the lesser included offense not in error when there is no evidence to support the instruction. *Jones v. People*, 711 P.2d 1270 (Colo. 1986).

Where jury was instructed that if it found the People had failed to prove the elements of first degree murder beyond a reasonable doubt, it should consider any of the lesser offenses, not just second degree murder but also provoked passion manslaughter, the instructions adequately described the prosecution's burden of proof and did not unconstitutionally shift the burden of proof to the defendant in violation of his due process rights. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

Failure to give instruction on lesser included offense of criminally negligent homicide was harmless, even if assumed to be erroneous, where jury convicted defendant of second degree murder and rejected charge of reckless manslaughter because criminally negligent homicide is a lesser included offense of reckless manslaughter. Jury's selection of the highest available grade of offense was a rejection of the next lower included offense and of all

lesser offenses included in the latter. *People v. Medina*, 51 P.3d 1006 (Colo. App. 2001), *aff'd*, 71 P.3d 973 (Colo. 2003).

IV. VERDICT AND SENTENCE.

Trial court retains jurisdiction to correct erroneous sentence. Where the court has jurisdiction of the person and subject matter and has entered an erroneous judgment, it retains jurisdiction to correct, modify, and alter it in accordance with the statute. This rule is applicable to the judgment of a district court erroneously sentencing one guilty of second degree murder to life imprisonment, where defendant applied for rendition of a valid judgment after serving several years of the erroneous sentence. *People ex rel. Best v. District Court*, 115 Colo. 240, 171 P.2d 774 (1946).

One can be guilty of first degree assault but not attempted second degree murder. A jury's verdict of guilty of first degree assault under § 18-3-202 (1)(e) is not irreconcilable and inconsistent with its verdict of not guilty on the charge of attempted second degree murder under this section. These crimes require different elements of proof, and the jury can find from the very same evidence that an element of one crime is present while an element of another charged crime is absent. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

One is guilty of attempted second degree murder when it is established that the person acted with an awareness that death is certain to result, and proceeds to engage in conduct constituting a substantial step toward causing the death of a person. Because these are not the same elements of first degree assault, attempted second degree murder is not a lesser-included offense to first degree assault. *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000).

Conviction for first degree assault is not inconsistent with conviction for attempted second degree murder. A defendant can engage in conduct with the intent to cause serious bodily injury while knowing but not caring that the conduct is practically certain to result in death. In such circumstances, the defendant may be found guilty of attempted second degree murder, even though lacking the specific intent to cause death. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

Felony child abuse not inconsistent with acquittal of second degree murder. A guilty verdict for felony child abuse is not inconsistent with an acquittal of extreme indifference murder nor second degree murder. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Overtaken first degree murder conviction resulting in conviction and sentence for second degree murder. Prosecution has discretion to decide whether case with conviction overturned, because of trial court's submission of

extreme indifference murder, should be retried on other theories of first degree murder that were originally charged or whether defendant should be convicted and resentenced for second degree murder. *Crespin v. People*, 721 P.2d 688 (Colo. 1986).

Where conviction was overturned because of jury instruction regarding "after deliberation" element of first degree murder, prosecution has discretion to decide whether case should be

retried or whether defendant should be convicted and resentenced for second degree murder. *People v. Sepulveda*, 65 P.3d 1002 (Colo. 2003).

Second degree murder is a per se crime of violence, even if committed in the heat of passion. Heat of passion is a sentence mitigating factor rather than a separate offense. *People v. Darbe*, 62 P.3d 1006 (Colo. App. 2002).

18-3-104. Manslaughter. (1) A person commits the crime of manslaughter if:

- (a) Such person recklessly causes the death of another person; or
- (b) Such person intentionally causes or aids another person to commit suicide.
- (c) (Deleted by amendment, L. 96, p. 1844, § 13, effective July 1, 1996.)
- (2) Manslaughter is a class 4 felony.

(3) This section shall not apply to a person, including a proxy decision-maker as such person is described in section 15-18.5-103, C.R.S., who complies with any advance medical directive in accordance with the provisions of title 15, C.R.S., including a medical durable power of attorney, a living will, or a cardiopulmonary resuscitation (CPR) directive.

(4) (a) This section shall not apply to a medical caregiver with prescriptive authority or authority to administer medication who prescribes or administers medication for palliative care to a terminally ill patient with the consent of the terminally ill patient or his or her agent.

(b) For purposes of this subsection (4):

(I) "Agent" means a person appointed to represent the interests of the terminally ill patient by a medical power of attorney, power of attorney, health care proxy, or any other similar statutory or regular procedure used for designation of such person.

(II) "Medical caregiver" means a physician, registered nurse, nurse practitioner, physician assistant, or anesthesiologist assistant licensed by this state.

(III) "Palliative care" means medical care and treatment provided by a licensed medical caregiver to a patient with an advanced chronic or terminal illness whose condition may not be responsive to curative treatment and who is, therefore, receiving treatment that relieves pain and suffering and supports the best possible quality of his or her life.

(c) Paragraph (a) of this subsection (4) shall not be interpreted to permit a medical caregiver to assist in the suicide of the patient.

Source: L. 71: R&RE, p. 419, § 1. C.R.S. 1963: § 40-3-104. L. 75: (1)(c) amended, p. 623, § 1, effective March 19; (1)(c) amended, p. 618, § 6, effective July 21. L. 79: (1)(c) amended, p. 726, § 3, effective July 1. L. 86: (1)(c) amended, p. 770, § 4, effective July 1. L. 93: Entire section amended, p. 1986, § 13, effective July 1. L. 94: (3) added, p. 1059, § 3, effective May 4. L. 96: (1)(b), (1)(c), and (2) amended, p. 1844, § 13, effective July 1. L. 2006: (4) added, p. 313, § 1, effective July 1. L. 2012: (4)(b)(II) amended, (HB 12-1332), ch. 238, p. 1059, § 15, effective August 8.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- III. Trial and Prosecution.
 - A. Indictment and Information.
 - B. Evidence.
 - C. Defenses.
 - D. Instructions.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 38 *Dicta*

65 (1961). For article, "Homicides Under the Colorado Criminal Code", see 49 *Den. L.J.* 137 (1972). For article, "Mens Rea and the Colorado Criminal Code", see 52 *U. Colo. L. Rev.* 167 (1981).

Annotator's note. Since § 18-3-104 is similar to former § 40-2-4 to 40-2-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section is a valid, religiously neutral, and generally applicable criminal statute that

prohibits conduct a state is free to regulate, and was not a violation of petitioners rights under the free exercise clause of the first amendment to the United States Constitution. *Sanderson v. People*, 12 P.3d 851 (Colo. 2000).

As to the distinction between first degree murder and manslaughter, the two statutes impose different standards of care in that the manslaughter statute requires that the cause of death be recklessly done, while in comparison, an extreme indifference to human life in the first degree murder statute is clearly a more culpable standard of conduct, especially where necessarily coupled with the additional requirement that there be created a grave risk of death. *People v. District Court*, 185 Colo. 78, 521 P.2d 1254 (1974).

The term "under circumstances ... manifesting extreme indifference to the value of human life", contained in § 18-3-102, connotes a heightened awareness and disregard of a fatal risk and is clearly a more culpable standard of conduct than the reckless conduct involved in manslaughter. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

Second degree murder as defined in § 18-3-103 is "conceptually distinguishable" from intentional manslaughter. *People v. Gladney*, 194 Colo. 68, 570 P.2d 231 (1977), cert. denied, 434 U.S. 1038, 98 S. Ct. 776, 54 L. Ed. 2d 787 (1978).

Distinction between manslaughter and second degree murder constitutional. The difference between the mental states required for second degree murder (knowingly) and manslaughter (recklessly) mirrors the distinction between practically certain of result on the one hand, and probability or contingency of result on the other and this difference is sufficient to avoid an equal protection violation. *People v. Padilla*, 638 P.2d 15 (Colo. 1981).

Section constitutionally distinguishable from second degree murder statute, § 18-3-103 (1)(a), because the two statutes require different mens rea elements for conviction. *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. Padilla*, 638 P.2d 15 (Colo. 1981).

Convictions for felony child abuse and reckless manslaughter not inconsistent. There is no logical inconsistency between the guilty verdicts for the crimes of felony child abuse and reckless manslaughter. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

The statutory language in this section and §§ 18-3-102 and 18-3-105 creates distinguishable standards which can be fairly applied by jurors. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

Prior to the 1975 amendment to § 18-1-501, subsection (1)(a) was unconstitutional. Subsection (1)(a) is unconstitutional, in that the requirement to sustain a conviction under that

statute (recklessness) is indistinguishable from the requirement to sustain a conviction for criminally negligent homicide (criminal negligence). *People v. Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975); *People v. Webb*, 189 Colo. 400, 542 P.2d 77 (1975); *Till v. People*, 196 Colo. 126, 581 P.2d 299 (1978).

Jury could not distinguish between manslaughter and criminally negligent homicide. Where the court submitted instructions to the jury on second-degree murder and on the lesser included offenses of manslaughter and criminally negligent homicide, the jury could not rationally distinguish between the crimes of manslaughter and criminally negligent homicide, the lesser included offenses on which it was instructed. *People v. Horrocks*, 190 Colo. 501, 549 P.2d 400 (1976).

Reckless manslaughter and heat of passion manslaughter are of equal grade and neither is included within the other nor is reckless manslaughter included in criminally negligent homicide. *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Reckless manslaughter and criminally negligent homicide distinguished. *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

Conviction of criminally negligent homicide held constitutional. Where defendant was charged with manslaughter and convicted of criminally negligent homicide as an included offense, the conviction was constitutional. *People v. Palumbo*, 192 Colo. 7, 555 P.2d 521 (1976).

There is a significant difference between the elements of extreme indifference murder and reckless manslaughter. Extreme indifference murder requires proof of circumstances showing an attitude of universal malice with extreme indifference to the value of human life generally. Reckless manslaughter lacks this element. *People v. Alvarado-Juarez*, 252 P.3d 1135 (Colo. App. 2010).

Where penalty for first degree assault limited. A person charged with first degree assault, who can establish that he acted in "heat of passion", is constitutionally protected against receiving a greater penalty than he could have received had he caused the death of his victim. *People v. Montoya*, 196 Colo. 111, 582 P.2d 673 (1978).

Selection by jury of highest available grade of offense constitutes rejection of next lower included offense and all lesser offenses included within latter. *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Trial court did not abuse its discretion in excluding psychiatrist from testifying as an expert witness to explain to the jury the meaning of the terms "heat of passion" and "irresistible impulse". Such issues were of an understandable nature to the jury without expert testimony.

People v. Lanari, 811 P.2d 399 (Colo. App. 1989), *aff'd*, 827 P.2d 495 (Colo. 1992).

Vacating jury's finding that defendant recklessly caused the victim's death did not violate the defendant's right to a trial by jury. Where defendant was convicted of reckless manslaughter, robbery, and felony murder, appellate court could choose to give effect to the jury's finding that the defendant acted knowingly in committing a robbery and that a death occurred in the course of the robbery. The court could appropriately vacate the jury's finding of reckless manslaughter conviction. *People v. Jones*, 990 P.2d 1098 (Colo. App. 1999).

Manslaughter is not a crime of violence for purposes of the United States sentencing guidelines. Because this state's version of manslaughter involves only reckless conduct, not intentional or purposeful behavior as required under the guidelines, it is not a crime of violence. *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011).

Applied in *May v. People*, 8 Colo. 210, 6 P. 816 (1885); *St. Louis v. People*, 120 Colo. 345, 209 P.2d 538 (1949); *Hardy v. People*, 133 Colo. 201, 292 P.2d 973 (1956); *Robbins v. People*, 142 Colo. 254, 350 P.2d 818 (1960); *Edwards v. People*, 160 Colo. 395, 418 P.2d 174 (1966); *Romero v. People*, 170 Colo. 234, 460 P.2d 784 (1969); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Grable*, 43 Colo. App. 518, 611 P.2d 588 (1979); *People v. Gallegos*, 628 P.2d 999 (Colo. 1981); *People v. Lee*, 630 P.2d 583 (Colo. 1981); *People v. Beland*, 631 P.2d 1130 (Colo. 1981); *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Madson*, 638 P.2d 18 (Colo. 1981); *People v. Bookman*, 646 P.2d 924 (Colo. 1982); *People v. Sanchez*, 644 P.2d 95 (Colo. App. 1982); *People v. Police*, 651 P.2d 430 (Colo. App. 1982); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

II. ELEMENTS OF OFFENSE.

Common law rule of provocation. At common law, words of reproach, however grievous, were not provocation sufficient to free the killing party from the guilt of murder, nor were indecent, provoking actions and gestures, expressive of contempt or reproach, without an assault on the person. *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1887).

The provisions of this section do not recognize provocation less in degree than that recognized as sufficient at common law. *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1887).

This provision is a recognition of the frailty of human nature, the purpose of which is to reduce a homicide committed in the circumstances therein contemplated to the grade of manslaughter. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

Manslaughter defined. This section states that in order to be manslaughter, the killing must be the result of a sudden, violent impulse of passion. *Sawyer v. People*, 173 Colo. 351, 478 P.2d 672 (1970).

Element of deliberation lacking. A distinguishing feature between murder of either the first or second degree and manslaughter are the ingredients of premeditation and deliberation required in the former which are absent in the latter. *Beckstead v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *Bertalotto v. People*, 175 Colo. 557, 488 P.2d 1100 (1971).

Attempted reckless manslaughter is a legally cognizable offense. *People v. Thomas*, 729 P.2d 972 (Colo. 1986); *People v. Palmer*, 944 P.2d 634 (Colo. App. 1997), *aff'd* in part and *rev'd* in part on other grounds, 964 P.2d 524 (Colo. 1998).

Provocation need not immediately precede act. The provocation or the injury inflicted on the killer by the victim, whether real or threatened, need not immediately precede the act. *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967); *Coston v. People*, 633 P.2d 470 (Colo. 1981).

Where manslaughter is charged, while there is no strict requirement that the act constituting the provocation occur immediately before the killing, if there is evidence of a sufficient interval between the provocation and the killing for reason to prevail, the killing is murder and not manslaughter. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

Three-week interval sufficient to allow voice of reason. The record revealed no evidence which would support a verdict of manslaughter where the acts of provocation by the victim and his threats against the defendant all occurred no later than three weeks before the time of the shooting, which interval was sufficient for the voice of reason and humanity to be heard, and, this being so, the killing must be attributed to deliberate revenge punishable as murder. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

The term "reasonable person" as it refers to subsection (1)(c) refers to an objectively reasonable person. Therefore, even if a particular defendant was provoked to kill in a sudden heat of passion, the evidence must also establish that an objectively reasonable person would have similarly suffered an irresistible passion to kill. *People v. Dooley*, 944 P.2d 590 (Colo. App. 1997) (decided under law as it existed prior to the 1996 repeal of subsection (1)(c)).

Discussion of element of implied malice required by former statute. *People v. Hosier*, 186 Colo. 116, 525 P.2d 1161 (1974).

The phrase "aids another to commit suicide" evidences a clear and unambiguous intent to apply only to persons who provide indirect types of aid or assistance to others who then kill

themselves and not to persons who actively participate in the death of a suicidal person. *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

Manslaughter is sufficiently charged in indictment for murder. Manslaughter has always been recognized as an included offense in the crime and charge of murder, and to be sufficiently charged and covered by a good indictment for murder. *Packer v. People*, 8 Colo. 361, 8 P. 564 (1885).

An information charging murder in the first degree includes all the lower grades of criminal homicide. *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945).

B. Evidence.

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Court may deny admitting testimony that alcohol found in victim's bloodstream. As a matter of law, a trial court does not abuse its discretion in denying the admission of an expert's testimony that some alcohol and drug traces were found in the murder victim's bloodstream without any effort to show how such substances might have affected the victim's behavior. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Sufficient evidence of provocation. *Walker v. People*, 175 Colo. 173, 489 P.2d 584 (1971).

The term "reasonable person" as it refers to subsection (1)(c) refers to an objectively reasonable person. Therefore, even if a particular defendant was provoked to kill in a sudden heat of passion, the evidence must also establish that an objectively reasonable person would have similarly suffered an irresistible passion to kill. *People v. Dooley*, 944 P.2d 590 (Colo. App. 1997) (decided under law as it existed prior to 1996 repeal of subsection (1)(c)).

Question of provocation is for jury. The jury are the judges of the sufficiency of the provocation and passion that reduce a homicide to the grade of manslaughter. *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1887).

Whether certain circumstances amounted to the statutory provocation or caused the passion which the section denominates irresistible was not for the court to determine, but is properly a question for the jury. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

Likewise, credibility and force of evidence as to manslaughter. On the trial of a person indicted for murder, although the evidence may overwhelmingly show that the killing was in fact murder and not manslaughter, or an act performed in self-defense, so long as there is evidence relevant to the issue of manslaughter, its credibility and force are for the jury, and cannot be matter of law for the decision of the court. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

If there is evidence relative to manslaughter offered by either the people or the defendant charged with first degree murder, its credibility and weight is for the jury to consider in determining the facts, and proper instructions upon manslaughter should be given. *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945); *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

A person charged with murder is triable by a jury. They alone must determine the facts, and no court, either trial or appellate, has a right to constitute itself a trier of facts, and thus invade the province of a jury. Where there is testimony tending to prove manslaughter, whether or not it is sufficient to justify a verdict of manslaughter is for the jury to determine, and not the court. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957); *Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970).

Accused cannot complain where evidence warranted conviction of higher degree. The evidence warranting a conviction for murder in the second degree, the accused has no ground to complain of a conviction of manslaughter. *Campbell v. People*, 55 Colo. 302, 133 P. 1043 (1913).

"Cooling time" not precisely defined. No precise formulation may be offered to define what "cooling time" constitutes a sufficient interval to allow a person to function rationally after having been seriously provoked. This judgment depends upon human nature as it is generally understood, the particular emotional state of the offender, and, especially, upon the surrounding circumstances of the case. *Coston v. People*, 633 P.2d 470 (Colo. 1981).

"Cooling time" is a question of law for the court, and not a question for the jury. *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907).

The question of whether there has been a sufficient cooling off period is one of law for the court. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

The question of whether there is sufficient evidence of a cooling off period between provocation and killing is initially one of law for the court. *Coston v. People*, 633 P.2d 470 (Colo. 1981).

C. Defenses.

Mutual combat no excuse for murder of nonparticipant. A defendant cannot avoid the

consequences of a deliberate, intentional act of murder on grounds of “mutual combat” or “hot state of blood” when the person killed was not a party to the mutual combat nor a bystander accidentally and unintentionally slain. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Self-defense may be asserted as a defense to attempted heat of passion manslaughter. *Thomas v. People*, 820 P.2d 656 (Colo. 1991).

For a crime requiring recklessness, criminal negligence, or extreme indifference, like reckless manslaughter, self-defense is not an affirmative defense; rather, it is an element-negating traverse. The prosecution bears no burden in disproving self-defense when self-defense is not an affirmative defense. The court did not err in instructing the jury that the prosecution did not bear the burden of disproving self-defense in relation to the reckless manslaughter charge. *People v. Pickering*, __ P.3d __ (Colo. 2011) (overruling *People v. Lara*, 224 P.3d 388 (Colo. App. 2009) and *People v. Taylor*, 230 P.3d 1227 (Colo. App. 2009)).

No defense to manslaughter indictment that evidence shows homicide was murder. It is no defense to an indictment for manslaughter that the homicide therein alleged appears by the evidence to have been murder. In re *Garvey*, 7 Colo. 384, 3 P. 903 (1884); *Murphy v. People*, 9 Colo. 435, 13 P. 528 (1887).

D. Instructions.

Defendant entitled to jury instruction on lesser included offense where jury could reasonably doubt defendant’s guilt of greater offense but be persuaded beyond a reasonable doubt of defendant’s guilt of lesser included offense. *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

The very essence of the manslaughter instruction is that the killing must be preceded by a serious and highly provocative injury inflicted upon the person committing the homicide. *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967).

Evidence of provocation should not be omitted from instructions. *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972).

Defense of accidental or excusable killing does not waive the question of manslaughter, and did not make unnecessary the giving of instructions thereon. *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945); *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Where homicides occurring during an affray are unintentional, accidental, a result of misadventure, or in self-defense, it is error not to instruct as to manslaughter. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Under a variety of fact situations in a homicide case, the self-defense evidence could conceivably also be a basis for a manslaughter

instruction. *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972).

When defendant entitled to manslaughter instruction. To be entitled to a manslaughter instruction, the defendant must be able to point to some evidence presented at trial which would permit a jury to find, in addition to concluding that the defendant intentionally killed the victim, that all the elements listed in subsection (1)(c) existed at the time the offense was committed. *Coston v. People*, 633 P.2d 470 (Colo. 1981); *People v. Garcia*, 826 P.2d 1259 (Colo. 1992).

Evidence held to support instruction on manslaughter. *Abila v. People*, 80 Colo. 169, 249 P. 649 (1926).

Error for court to take question of manslaughter from the jury, as there was not an entire absence of evidence tending to establish manslaughter. *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913).

If the evidence tends to prove a case of manslaughter, or if, upon the evidence, there is any doubt whatever as to the grade of the crime, the question of manslaughter ought to be submitted to the jury. *Jones v. People*, 93 Colo. 282, 26 P.2d 103 (1933).

When there is competent evidence which could conceivably reduce a homicide to manslaughter, the defendant is entitled to an instruction thereon. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

When there is any evidence, however improbable, unreasonable, or slight, which tends to reduce a homicide to the grade of manslaughter, a defendant is entitled to an instruction thereon upon the hypothesis that the same is true, and that it is for the jury, under proper instructions, and not the trial judge, to weigh and consider the evidence and determine therefrom what grade of crime, if any, was committed; and a court’s refusal to instruct thereon is reversible error. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957); *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967); *Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970); *English v. People*, 178 Colo. 325, 497 P.2d 691 (1972); *People v. Maes*, 43 Colo. App. 426, 609 P.2d 1105 (Colo. 1979); *People v. Garcia*, 826 P.2d 1259 (Colo. 1992).

A defendant in a homicide case is entitled to an instruction on lesser included offenses when there is evidence, however manifested, whether presented by the people, or by the defense, to indicate the commission of the lesser offense. *Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970); *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Only in those cases where there is evidence — even though it be slight — that there was a serious and highly provoking act by the victim against the accused which could possibly excite an irresistible passion is a manslaughter instruc-

tion required when requested. *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975).

Refusal to instruct on lesser offense is reversible error. *People v. Gordon*, 765 P.2d 633 (Colo. App. 1988).

Defendant was not entitled to an instruction on reckless manslaughter where the evidence showed that the defendant did not intend to kill her husband when she picked up the axe, but that something "just snapped" and she hit him. The court found that there was no evidence that, when the defendant hit her husband with the axe, she was conscious of the risk of death. *People v. Garcia*, 1 P.3d 214 (Colo. App. 1999), *aff'd* on other grounds, 28 P.3d 340 (Colo. 2001).

Trial court not required to give a lesser offense instruction requested by a defendant unless there is some evidence tending to establish the lesser offense and a rational basis upon which the jury may acquit the defendant of the greater offense but convict him or her of the lesser. *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

Defendant not entitled to jury instruction on aiding suicide manslaughter where the trial court found no evidence to support defendant's request because the aiding suicide manslaughter instruction applies only to a defendant who furnishes a person with a means of committing suicide, but instead of passively or indirectly participating in the suicidal person's death, defendant actively participated in causing the death of the victim. *People v. Gordon*, 32 P.3d 575 (Colo. App. 2001).

There is no right to a jury instruction on a lesser included offense if the element that distinguishes the greater from the lesser is uncontested. Where it is undisputed that death occurred as a result of defendant's conduct, there is no right to an instruction on reckless endangerment in a reckless manslaughter case. *People v. Hall*, 59 P.3d 298 (Colo. App. 2002).

Where jury was instructed that if it found the people had failed to prove the elements of first degree murder beyond a reasonable doubt, it should consider any of the lesser offenses, not just second degree murder but also provoked passion manslaughter, the instructions adequately described the prosecution's burden of proof and did not unconstitutionally shift the burden of proof to the defendant in violation of his due process rights. *People v. Seigler*, 832 P.2d 980 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993); *People v. Wadley*, 890 P.2d 151 (Colo. App. 1994).

Where defense did not contemporaneously object, prosecutor's statement in closing arguments that he had not proved heat of passion manslaughter beyond a reasonable doubt was not plain error. Prosecutor also reminded the jury that he had the burden of proving all elements of an offense and the court

found that in light of the evidence presented at trial, the prosecutor's comment did not cast doubt on the reliability of the conviction. *People v. Wadley*, 890 P.2d 151 (Colo. App. 1994).

Where court's heat of passion manslaughter instruction was based on language of § 18-3-104 and terms used were susceptible to general understanding, defendant's tendered instruction which contained definitions of terms used in the "heat of passion manslaughter" instruction was not necessary. *People v. Ferrero*, 874 P.2d 468 (Colo. App. 1993).

Defendant's tendered instruction defining "cooling time" was not necessary where the court's instruction was based on the language of § 18-3-104 and words used were understandable to person of common intelligence. *People v. Wadley*, 890 P.2d 151 (Colo. App. 1994).

Jury instruction on a lesser included offense on attempted heat of passion manslaughter is not required to be given unless the defendant requests it. Where no request was made, it was presumed that the defendant elected to take his or her chances on an outright acquittal on an attempted second degree murder charge. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

Heat of passion manslaughter was a specific, lesser, nonincluded offense of second degree murder rather than a statutory mitigating factor. *Walker v. People*, 932 P.2d 303 (Colo. 1997) (decided under law in effect prior to deletion by amendment of subsection (1)(c)).

Court may exclude question of manslaughter when no evidence thereof. Notwithstanding the provisions of this section, the court may exclude from the jury the question of manslaughter where there is no evidence of that degree of the crime or the defense is upon a theory having no relation thereto. *Sevilla v. People*, 65 Colo. 437, 177 P. 135 (1918).

Failure to charge on manslaughter held no error. Under the evidence where there is no element of manslaughter involved, there is no error in the failure of the court to submit that question to the jury. *Edwards v. People*, 73 Colo. 377, 215 P. 855 (1923).

Under facts of this case, instruction on manslaughter was not necessary. *Williams v. People*, 114 Colo. 207, 158 P.2d 447 (1945).

Evidence failed to warrant submission of instruction to jury on manslaughter. *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950).

Where no instruction on manslaughter was tendered or requested, even if such an instruction was proper, mere nondirection would not constitute error. *Berger v. People*, 122 Colo. 367, 224 P.2d 228 (1950).

Where the evidence only shows the killing to have been deliberate and intentional, there is no question of manslaughter present and no reason to submit it to the jury. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

If there be a total absence of evidence relating to the particular grade of homicide disregarded, the charge to the jury cannot be successfully challenged on the ground of such omission. *Gallegos v. People*, 136 Colo. 321, 316 P.2d 884 (1957).

Where the record is devoid of any evidence which would have supported a verdict of guilty of manslaughter, the court was not obliged to instruct thereon. *Hampton v. People*, 171 Colo. 153, 465 P.2d 394 (1970).

No error in failing to give self-defense instruction. When an element of the crime charged is that the defendant acted in a reckless or criminally negligent manner, and the trial court properly instructs the jury as to each element, no error results from the court's failure to give a self-defense instruction. *People v. Fink*, 194 Colo. 516, 574 P.2d 81 (1978).

To entitle a defendant to a heat of passion instruction, the supporting evidence must tend to establish the four elements of subsection (1)(c). *People v. Dooley*, 944 P.2d 590 (Colo. App. 1997) (decided under law as it existed prior to the 1996 repeal of subsection (1)(c)).

Instruction on mental condition required if

any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Error in charge on first-degree murder not prejudicial to one convicted of lower degree of murder or manslaughter. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

Court's response to jury inquiry on attempted reckless manslaughter, although a comment on the evidence and not a proper instruction on the law, did not constitute plain error. Hypothetical given by the court, when considered in the context of the jury instructions as a whole, neither misled the jury nor cast serious doubt on the verdict. *People v. Allen*, 43 P.3d 689 (Colo. App. 2001).

Instruction on elements of manslaughter under previous statute held erroneous. *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972).

Instructions held proper. *Balltrip v. People*, 157 Colo. 108, 401 P.2d 259 (1965).

18-3-105. Criminally negligent homicide. Any person who causes the death of another person by conduct amounting to criminal negligence commits criminally negligent homicide which is a class 5 felony.

Source: L. 71: R&RE, p. 419, § 1. C.R.S. 1963: § 40-3-105. L. 77: (1)(b) amended, p. 960, § 7, effective July 1. L. 81: Entire section R&RE, p. 973, § 5, effective July 1. L. 85: Entire section amended, p. 665, § 1, effective July 1.

ANNOTATION

Law reviews. For note, "Correcting an Erroneous Judgment in a Criminal Case", see 19 *Rocky Mt. L. Rev.* 295 (1947). For article, "Homicides Under the Colorado Criminal Code", see 49 *Den. L. J.* 137 (1972). For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 *U. Colo. L. Rev.* 17 (1979).

Annotator's note. Since § 18-3-105 is similar to former § 40-2-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Classification of first-degree assault as more serious than negligent homicide constitutional. The culpable mental state required for first-degree assault is sufficiently distinguishable from that required for criminally negligent homicide to justify a harsher sentence for the former. *People v. Lucero*, 714 P.2d 498 (Colo. App. 1985).

To be guilty of criminally negligent homicide, the defendant must fail to perceive a substantial and unjustifiable risk that a certain result will occur, and the risk must be of such a nature

that the defendant's failure to perceive it constitutes a gross deviation from a reasonable person's standard of care. *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (1977).

The defendant's guilt in criminally negligent homicide stems from his culpable failure to perceive the risk. *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (1977).

Criminally negligent homicide is an unintentional killing caused by the actor's failure to perceive a substantial and unjustifiable risk that a certain result will occur. *People v. Hernandez*, 44 Colo. App. 161, 614 P.2d 900 (1980).

Criminal negligence, as applied to homicide, means a failure to perceive, through a gross deviation from the standard of reasonable care, a substantial and unjustifiable risk that death will result from certain conduct. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

Attempted criminally negligent homicide logical and legal impossibility. Where the trial court joined criminally negligent homicide and attempt and charged the jury on attempted criminally negligent homicide, the charge was a log-

ical and legal impossibility. *People v. Hernandez*, 44 Colo. App. 161, 614 P.2d 900 (1980).

Defendant cannot avoid his conviction on the ground that he did not intend death to result from his act. *People v. Palumbo*, 192 Colo. 7, 555 P.2d 521 (1976).

In this section and § 18-3-106 there is a crucial difference in that the vehicular homicide statute requires for conviction that the prosecution prove the additional element of a death caused through the use of a motor vehicle. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

More severe penalty for vehicular homicide does not deny equal protection. It cannot be said that the legislature's decision to provide a more severe penalty for vehicular homicide than for criminal negligent homicide is arbitrary or unreasonable. The state has a legitimate interest in discouraging a specific evil which it believes to be of greater societal consequence. This choice does not offend equal protection. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

Classification of child abuse as more serious than negligent homicide constitutional. The legislative classification of child abuse as a crime more serious in penalty than the offense of criminally negligent homicide is neither arbitrary nor unreasonable and does not violate equal protection of the laws. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Sections 18-6-401 and 18-3-405 do not proscribe identical conduct. The proscriptions of § 18-6-401 encompass conduct that is particularly abusive to children, that is directed specifically against a child, and that results in injury to that child. Criminally negligent homicide, on the other hand, proscribes in general terms a gross carelessness that causes death to anyone, adult or child. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Equal protection violated by provisions setting forth same conduct with different sanctions. It is only where the same acts or conduct are set forth in two sections with different criminal sanctions or to which different defenses are available that equal protection guarantees are violated. *People v. Gibson*, 623 P.2d 391 (Colo. 1981).

Divergent penalties in former versions of criminally negligent homicide and first degree assault violated equal protection because both statutes proscribed similar conduct and intent. *People v. Jackson*, 198 Colo. 193, 601 P.2d 622 (1979).

The statutory language in this section and §§ 18-3-102 and 18-3-104 creates distinguishable standards which can be fairly applied by jurors. *People v. Favors*, 192 Colo. 136, 556 P.2d 72 (1976).

The standards of culpability in this section and § 18-3-102 (1)(d) are distinct enough to be

intelligently understood and applied, and therefore, the defendant was not denied equal protection of the law by virtue of his conviction under subsection (1)(d) of § 18-3-102. *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (1977).

Liability due to mechanical failure of motor vehicles and appurtenances is not conclusive of negligence, criminal or otherwise, where the failure occurred under circumstances beyond one's control. Where acts or circumstances are attributable to either an innocent or a criminal cause, the innocent hypothesis will be adopted. *Bennett v. People*, 155 Colo. 101, 392 P.2d 657 (1964).

Section 18-1-803 does not require evidence of any psychiatric abnormality or independent testimony to analyze the effect of a blow on the defendant's mental state. This effect may be inferred from the evidence present. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Court may deny admitting testimony that alcohol found in victim's bloodstream. As a matter of law, a trial court does not abuse its discretion in denying the admission of an expert's testimony that some alcohol and drug traces were found in the murder victim's bloodstream without any effort to show how such substances might have affected the victim's behavior. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Instruction on mental condition required if any evidence tends to establish impairment. An instruction on impaired mental condition is required if there is any evidence tending to establish that a blow to the defendant's head impaired his mental condition sufficiently to preclude formation of a conscious objective to cause the victim's death. *People v. Delaney*, 44 Colo. App. 366, 620 P.2d 44 (1980).

Theory of accidental killing should be submitted to jury. In a prosecution for murder where defendant testified that he did not think the gun used in the killing was loaded, and that he was merely waving it around to scare the deceased away when it was discharged accidentally, refusal to instruct the jury on this theory was error, as the drawing of the weapon could be considered by the jury as a proper and lawful act. *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

Because this section contains all of the elements of the crime in § 18-3-104(1)(a) and is a lesser included offense, the same abundance of competent evidence supports conviction of criminal negligence. *People v. Webb*, 189 Colo. 400, 542 P.2d 77 (1975).

Failure to give instruction on criminally negligent homicide was harmless, even if assumed to be erroneous, where jury convicted defendant of second degree murder and rejected charge of reckless manslaughter because criminally negligent homicide is a lesser included offense of reckless manslaughter. Jury's selec-

tion of the highest available grade of offense was a rejection of the next lower included offense and of all lesser offenses included in the latter. *People v. Medina*, 51 P.3d 1006 (Colo. App. 2001), *aff'd*, 71 P.3d 973 (Colo. 2003).

Conviction held constitutional. Where defendant was charged with manslaughter and convicted of criminally negligent homicide as an included offense, the conviction was constitutional. *People v. Palumbo*, 192 Colo. 17, 555 P.2d 521 (1976).

Conviction not inconsistent with acquittal on charge of vehicular homicide. A conviction on a charge of criminally negligent homicide is not inconsistent with an acquittal on a charge of vehicular homicide. *People v. Bettis*, 43 Colo. App. 104, 602 P.2d 877 (1979).

Where defendant is charged with reckless manslaughter and criminally negligent homicide, no error occurred where the trial court allowed defendant to present evidence of self defense at trial and properly instructed the jury on the elements of crimes charged. Under these circumstances the trial court is not required to submit defendant's tendered self defense instruction to the jury. *Case v. People*, 774 P.2d 866 (Colo. 1989).

However, a defendant may present evidence that he was acting in self-defense and such evidence may be considered by the jury in its determination of whether the defendant was acting recklessly or in a criminally negligent manner. When such evidence is presented, the jury should be informed of the right of a defendant to put himself in a position of reasonably defending himself. *People v. Roberts*, 983 P.2d 11 (Colo. App. 1998).

Criminally negligent homicide is not a lesser included offense of vehicular homicide. *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984).

Criminally negligent homicide is not an enumerated offense for purposes of the direct

file statute. The offense is not a per se crime of violence and merely alleging use of deadly weapon as part of the factual basis does not satisfy the requirement of the crime of violence statute. In addition, the elements of the crime do not include the use, possession, or threatened use of a deadly weapon. *People v. Vickers*, 168 P.3d 9 (Colo. App. 2007).

Reckless manslaughter and criminally negligent homicide distinguished. *People v. Shaw*, 646 P.2d 375 (Colo. 1982).

The actions of a defendant convicted under this section may be the same as a person convicted of § 42-4-1402 (2), careless driving resulting in death. The enactment by the general assembly of a specific criminal statute does not preclude prosecution under a general criminal statute unless a legislative intent to limit prosecution to the specific statute is shown. Here no such intent is found. *People v. Tow*, 992 P.2d 665 (Colo. App. 1999).

Elements supported by credible evidence. *People v. Palumbo*, 192 Colo. 17, 555 P.2d 521 (1976).

Conviction as bar to prosecution for assault on another. A conviction of former crime of involuntary manslaughter for fatally wounding one person while shooting at another bars a prosecution upon a charge of assault to kill and murder the person at whom defendant shot. *Carson v. People*, 4 Colo. App. 463, 36 P. 551 (1894).

Applied in *People in Interest of M.A.L.*, 37 Colo. App. 307, 592 P.2d 415 (1976); *People v. District Court*, 196 Colo. 116, 581 P.2d 300 (1978); *People v. District Court*, 198 Colo. 70, 595 P.2d 1045 (1979); *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1979); *People v. White*, 199 Colo. 82, 606 P.2d 847 (1980); *People v. Lee*, 630 P.2d 583 (Colo. 1981). *People v. Mumaugh*, 644 P.2d 299 (Colo. 1982); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *Castro v. District Court*, 656 P.2d 1283 (Colo. 1982).

18-3-106. Vehicular homicide. (1) (a) If a person operates or drives a motor vehicle in a reckless manner, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide.

(b) (I) If a person operates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. This is a strict liability crime.

(II) For the purposes of this subsection (1), one or more drugs shall mean all substances defined as a drug in section 27-80-203 (13), C.R.S., and all controlled substances defined in section 18-18-102 (5), and glue-sniffing, aerosol inhalation, or the inhalation of any other toxic vapor or vapors as defined in section 18-18-412.

(III) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state shall not constitute a defense against any charge of violating this subsection (1).

(IV) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more

drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(c) Vehicular homicide, in violation of paragraph (a) of this subsection (1), is a class 4 felony. Vehicular homicide, in violation of paragraph (b) of this subsection (1), is a class 3 felony.

(2) In any prosecution for a violation of subsection (1) of this section, the amount of alcohol in the defendant's blood or breath at the time of the commission of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, shall give rise to the following presumptions:

(a) If there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was not under the influence of alcohol.

(b) If there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was under the influence of alcohol.

(3) The limitations of subsection (2) of this section shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol.

(4) (a) If a law enforcement officer has probable cause to believe that any person was driving a motor vehicle in violation of paragraph (b) of subsection (1) of this section, the person, upon the request of the law enforcement officer, shall take, and complete, and cooperate in the completing of any test or tests of the person's blood, breath, saliva, or urine for the purpose of determining the alcoholic or drug content within his or her system. The type of test or tests shall be determined by the law enforcement officer requiring the test or tests. If the person refuses to take, or to complete, or to cooperate in the completing of any test or tests, the test or tests may be performed at the direction of a law enforcement officer having probable cause, without the person's authorization or consent. If any person refuses to take or complete, or cooperate in the taking or completing of any test or tests required by this paragraph (a), the person shall be subject to license revocation pursuant to the provisions of section 42-2-126 (3), C.R.S. When the test or tests show that the amount of alcohol in a person's blood was in violation of the limits provided for in section 42-2-126 (3) (a), (3) (b), (3) (d), or (3) (e), C.R.S., the person shall be subject to license revocation pursuant to the provisions of section 42-2-126, C.R.S.

(b) Any person who is required to submit to testing shall cooperate with the person authorized to obtain specimens of his blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing.

(c) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person committed a violation of subparagraph (I) of paragraph (b) of subsection (1) of this section and in accordance with rules and regulations prescribed by the state board of health concerning the health of the person being tested and the accuracy of such testing. Strict compliance with such rules and regulations shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results. It shall not be a prerequisite to the admissibility of test results at trial that the

prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(d) No person except a physician, a registered nurse, a paramedic as certified in part 2 of article 3.5 of title 25, C.R.S., an emergency medical service provider as defined in part 1 of article 3.5 of title 25, C.R.S., or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse is entitled to withdraw blood for the purpose of determining the alcoholic or drug content of the blood for purposes of this section. In a trial for a violation of paragraph (b) of subsection (1) of this section, testimony of a law enforcement officer that he or she witnessed the taking of a blood specimen by a person who he or she reasonably believed was authorized to withdraw blood specimens is sufficient evidence that the person was authorized, and testimony from the person who obtained the blood specimens concerning the person's authorization to obtain blood specimens is not a prerequisite to the admissibility of test results concerning the blood specimens obtained. No civil liability shall attach to any person authorized to obtain blood, breath, saliva, or urine specimens or to any hospital, clinic, or association in or for which such specimens are obtained pursuant to this subsection (4) as a result of the act of obtaining the specimens from a person if the specimens were obtained according to the rules prescribed by the state board of health; except that such provision does not relieve the person from liability for negligence in obtaining any specimen sample.

(e) Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of his blood or any drug content of his system as provided in this subsection (4). If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency shall be allowed to test any blood, urine, or saliva which was obtained and not utilized by a health care provider and shall have access to that portion of the analysis and results of any tests administered by such provider which shows the alcohol or drug content of the person's blood or any drug content within his system. Such test results shall not be considered privileged communications and the provisions of section 13-90-107, C.R.S., relating to the physician-patient privilege shall not apply. Any person who is dead, in addition to the tests prescribed, shall also have his blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Such information obtained shall be made a part of the accident report.

(f) If a person refuses to take, or to complete, or to cooperate in the completing of any test or tests as provided in this subsection (4) and such person subsequently stands trial for a violation of subsection (1) (b) of this section, the refusal to take or to complete, or to cooperate with the completing of any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to the admission of his refusal to take, or to complete, or to cooperate with the completing of any test or tests.

(g) Notwithstanding any provision in section 42-4-1301.1, C.R.S., concerning requirements which relate to the manner in which tests are administered, the test or tests taken pursuant to the provisions of this section may be used for the purposes of driver's license revocation proceedings under section 42-2-126, C.R.S., and for the purposes of prosecutions for violations of section 42-4-1301 (1) or (2), C.R.S.

(5) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine his alcohol or drug level. This subsection (5) shall not prevent the necessity of establishing during a trial that the testing

devices used were working properly and that such testing devices were properly operated. Nothing in this subsection (5) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

Source: **L. 71:** R&RE, p. 419, § 1. **C.R.S. 1963:** § 40-3-106. **L. 75:** Entire section amended, p. 624, § 1, effective June 26. **L. 77:** (1) R&RE, p. 960, § 8, effective July 1. **L. 81:** (1)(b) amended, p. 1992, § 4, effective June 19. **L. 83:** (4) added, p. 1648, § 17, effective July 1. **L. 88:** IP(2) amended, p. 1365, § 5, effective July 1. **L. 89:** (1)(b), (2), and (3) amended, (4) R&RE, and (5) added, pp. 893, 894, §§ 1, 2, effective July 1. **L. 93:** (1) amended, p. 1986, § 14, effective July 1; (1)(b)(II) amended, p. 1731, § 13, effective July 1. **L. 94:** (4)(c), (4)(e), and (5) amended, p. 2733, § 356, effective July 1; (4)(a) and (4)(g) amended, p. 2551, § 40, effective January 1, 1995. **L. 97:** (4)(a) amended, p. 1470, § 18, effective July 1. **L. 2002:** (4)(g) amended, p. 1915, § 4, effective July 1. **L. 2004:** (2)(b) and (2)(c) amended, p. 781, § 3, effective July 1. **L. 2008:** (4)(a) amended, p. 243, § 3, effective July 1. **L. 2012:** (1)(b)(II) amended, (HB 12-1311), ch. 281, p. 1618, § 38, effective July 1; (4)(d) amended, (HB 12-1059), ch. 271, p. 1434, § 12, effective July 1.

Editor's note: (1) Amendments to subsection (1) in House Bill 93-1302 and House Bill 93-1088 were harmonized.

(2) Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (4)(d) applies to acts committed on or after July 1, 2012.

Cross references: (1) For penalties for driving under the influence of intoxicating liquor, see § 42-4-1301.

(2) For the legislative declaration contained in the 1994 act amending subsections (4)(c), (4)(e), and (5), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- III. Trial and Prosecution.
 - A. Indictment and Information.
 - B. Evidence.
 - C. Jury.
 - D. Instructions.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Body Fluid Tests for Intoxication", see 22 Rocky Mt. L. Rev. 91 (1949). For comment on *Kallnbach v. People* (125 Colo. 144, 242 P.2d 222 (1952)), see 24 Rocky Mt. L. Rev. 391 (1952). For comment on *Goodell v. People* (137 Colo. 507, 327 P.2d 279 (1958)), see 31 Rocky Mt. L. Rev. 104 (1958). For article, "One Year Review of Criminal Law and Procedure", see 36 *Dicta* 34 (1959). For comment on *Espinosa v. People* (142 Colo. 96, 349 P.2d 689 (1960)), see 33 Rocky Mt. L. Rev. 425 (1961). For article, "One Year Review of Criminal Law and Procedure", see 38 *Dicta* 65 (1961). For article, "Homicides Under the Colorado Criminal Code", see 49 Den. L. J. 137 (1972). For article, "Drinking and Driving: An Update on the 1989 Legislation", see 18 Colo. Law. 1943 (1989).

Annotator's note. Since § 18-3-106 is similar to former § 40-2-10, C.R.S. 1963, and laws antecedent thereto, relevant cases construing

those provisions have been included in the annotations to this section.

Purpose of section. The offense of driving an automobile in a careless and reckless manner and at an excessive rate of speed, especially when under the influence of intoxicating liquor, was created for the very purpose of preventing collisions and consequent injury to others who may be on the highway. *Daniels v. People*, 159 Colo. 190, 411 P.2d 316 (1966).

Constitutionality. The requirement of proof of proximate cause in this section is sufficiently intelligible to satisfy both federal and state constitutional standards of due process of law. *People v. Rostad*, 669 P.2d 126 (Colo. 1983); *People v. Baca*, 668 P.2d 1370 (Colo. 1983); *People v. Ray*, 678 P.2d 1019 (Colo. 1984); *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984); *People v. Deadmond*, 683 P.2d 763 (Colo. 1984); *People v. Sutherland*, 683 P.2d 1192 (Colo. 1984).

This section is not unconstitutional on the grounds that it denies the accused the opportunity to rebut the presumption raised by his or her blood alcohol content. *People v. Rostad*, 669 P.2d 126 (Colo. 1983); *People v. Ray*, 678 P.2d 1019 (Colo. 1984).

Subsection (1) does not violate equal protection rights or due process even though paragraph (c) calls for disparate sentences for violations outlined in paragraphs (a) and (b). *People v. Loeser*, 981 P.2d 197 (Colo. App. 1998).

No equal protection violation where felony first degree murder carries a greater punishment than aggravated vehicular homicide. These offenses are distinguished by the level of intent, the actus reus (commission or omission), the requirement that the actor operate or drive a motor vehicle for vehicular homicide, and the predicate felonies. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

Nothing in the language of this section or § 18-1.3-401(8)(g) suggests a legislative intent to preempt the felony murder statute. *People v. Prieto*, 124 P.3d 842 (Colo. App. 2005).

The gravamen of both this section and vehicular assault, § 18-3-205, is the "reckless" operation or driving of a motor vehicle, which results in the death of or serious bodily injury to another. *People v. Sexton*, 192 Colo. 81, 555 P.2d 1151 (1976).

Reckless operation of a motor vehicle and driving under the influence are not separate and independent offenses, but alternatives by which criminal liability for vehicular homicide or vehicular assault may be charged and proven. Therefore a defendant may not be convicted under subsection (1)(a) and (1)(b) for the same actions. *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999).

In this section and § 18-3-105 there is a crucial difference in that the vehicular homicide statute requires for conviction that the prosecution prove the additional element of a death caused through the use of a motor vehicle. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

Offenses of vehicular homicide and driving under influence proscribe dissimilar conduct. Because the death of another is an essential element of vehicular homicide, but not of driving under the influence, the offenses proscribe dissimilar conduct and a person prosecuted under this section is not situated similarly to a person charged with driving under the influence. *People v. Duemig*, 620 P.2d 240 (Colo. 1980), cert. denied, 451 U.S. 971, 101 S. Ct. 2048, 68 L. Ed.2d 350 (1981).

Driving under the influence is a lesser included offense of vehicular homicide. *People v. Grassi*, 192 P.3d 496 (Colo. App. 2008).

Statutory right to refuse blood test not extended to this offense. The general assembly need not extend the legislative grace of a right to refuse a blood test, a test which is constitutionally permissible, to those charged with vehicular homicide or vehicular assault. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

The general assembly may legitimately decline to extend the privilege to refuse a blood test granted by § 42-4-1202 to persons accused of vehicular homicide. *People v. Duemig*, 620 P.2d 240 (Colo. 1980), cert. denied, 451 U.S. 971, 101 S. Ct. 2048, 68 L. Ed.2d 350 (1981).

Consent is not a prerequisite to the performance of a chemical test to determine the alcohol content of a defendant's blood when the defendant is charged with this offense. *People v. Deadmond*, 683 P.2d 763 (Colo. 1984).

Consent is not constitutionally required. Equal protection is not violated by the failure of this section and § 18-3-205 to afford an accused the right to refuse a blood test afforded by § 42-4-1202. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

The general assembly's decision to permit one charged with the less grievous offense of driving under the influence to refuse a blood test while not likewise permitting one charged with felonious vehicular homicide or felonious vehicular assault to refuse the test is not arbitrary or unreasonable. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

Blood test may precede formal arrest of defendant. The formal arrest of a defendant is not a prerequisite to obtaining a blood sample under this section as long as probable cause exists for such arrest. *People v. Sutherland*, 683 P.2d 1192 (Colo. 1984); *People v. MacCallum*, 925 P.2d 758 (Colo. 1996).

Regulations promulgated pursuant to implied consent statute apply to offenses charged under it and not to felonies charged under this section. *People v. Acosta*, 620 P.2d 55 (Colo. App. 1980); *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984).

More severe penalty for vehicular homicide does not deny equal protection. It cannot be said that the legislature's decision to provide a more severe penalty for vehicular homicide than for criminal negligent homicide is arbitrary or unreasonable. The state has a legitimate interest in discouraging a specific evil which it believes to be of greater societal consequence. This choice does not offend equal protection. *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976).

Vehicular homicide while driving under the influence is grave and serious per se for purposes of a proportionality review because of the grave harm caused, the death of a person, and the culpability of the defendant's conduct, to drive while intoxicated. *People v. Strock*, 252 P.3d 1148 (Colo. App. 2010).

Acquittal not inconsistent with conviction for criminally negligent homicide. A conviction on a charge of criminally negligent homicide is not inconsistent with an acquittal on a charge of vehicular homicide. *People v. Bettis*, 43 Colo. App. 104, 602 P.2d 877 (1979).

When driver is "intoxicated." When a driver is so under the influence of intoxicating liquor that his capacity to operate an automobile is impaired, he is "intoxicated" within the meaning of that term as used in this section. *Stevens v. People*, 97 Colo. 559, 51 P.2d 1022 (1935).

"Intoxication" probably covers every condition from slight inebriation to complete paralysis. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946).

Former offense of involuntary manslaughter was not a lesser included offense in a charge based on this section. *Daniels v. People*, 159 Colo. 190, 411 P.2d 316 (1966).

Criminally negligent homicide is not a lesser included offense of vehicular homicide. *People v. Nhan Dao Van*, 681 P.2d 932 (Colo. 1984).

Reckless driving is not a lesser included offense of vehicular homicide or vehicular assault. *People v. Clary*, 950 P.2d 654 (Colo. App. 1997).

Vehicular homicide is not a lesser included offense of aggravated motor vehicle theft under the strict elements test even if its proof might satisfy an element of aggravated motor vehicle theft under the facts of a particular case. *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

For former distinction between causing death and causing injury, see *People v. Olona*, 180 Colo. 299, 505 P.2d 372 (1973).

Both subsection (2) and § 42-2-1202 (2) permit a jury to infer that a defendant was under the influence of alcohol if it finds that the amount of alcohol in his blood at the time of the commission of the alleged offense "or within a reasonable time thereafter," as shown by chemical analysis of the defendant's blood, is 0.10 percent or more. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

The delay in obtaining samples did not affect the validity or reliability of the test nor did it affect the admissibility of the test results. The "reasonable time" limitation is to ensure that the request for the test is made close enough in time to the alleged offense that the results will be relevant in the determination of defendant's sobriety at the time of the incident. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

While the timeliness of the blood test may affect its accuracy, evidence which relates to the accuracy of a chemical test affects the weight to be accorded the evidence, rather than its admissibility. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

Former "percent by weight" language of subsection (2)(c) intended to mean a "weight per volume" measure and 1989 amendment of statute was clarification of meaning. *Rickstrew v. People*, 822 P.2d 505 (Colo. 1991) (decided under law in effect prior to 1989 amendment).

Since former "percent by weight" language of subsection (2)(c) establishes sufficient standard by which to measure blood alcohol levels, such language is not vague and does not violate due process. *Rickstrew v. People*, 822 P.2d 505 (Colo. 1991) (decided under law in effect prior to 1989 amendment).

Applied in *St. Louis v. People*, 120 Colo. 345, 209 P.2d 538 (1949); *Jones v. People*, 149 Colo. 338, 369 P.2d 65 (1962); *People v. Fidler*, 175 Colo. 90, 485 P.2d 725 (1971); *People v. Dunhill*, 40 Colo. App. 137, 570 P.2d 1097 (1977); *People v. District Court*, 195 Colo. 14, 580 P.2d 388 (1978); *Riboni v. District Court*, 196 Colo. 272, 586 P.2d 9 (1978); *People v. Beltran*, 634 P.2d 1003 (Colo. App. 1981); *People v. Perez*, 644 P.2d 40 (Colo. App. 1981).

II. ELEMENTS OF OFFENSE.

The use of the disjunctive "or" in this section cannot be ignored, nor can it be construed to mean "and". *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

Section sets forth more than one means of causing death. In adopting this section, the general assembly intended to set forth more than one means by which the offense of causing a death while operating an automobile could be committed. *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

Only one offense, with one punishment, is described in this section, although the offense can be committed in either one of the two ways detailed. *People v. Viduya*, 703 P.2d 1281 (Colo. 1985).

Death occasioned by specified acts constitutes felony. Neither of the offenses of driving under the influence of alcohol, nor reckless driving, nor causing an accident while under the influence of alcohol or by reckless driving, constitutes felonious acts. Only when these events caused a death or injury to another person does this section specifically provide that a felony had been committed. *Penn Mut. Life Ins. Co. v. Gibson*, 160 Colo. 462, 418 P.2d 50 (1966).

Elements of offense. To sustain a charge of causing a death while driving under the influence of intoxicating liquor, it must be established that an accident occurred, that there is evidence that a defendant was intoxicated, that a death resulted, and that the acts or conduct of the defendant were the sole proximate cause of the accident. *Goodell v. People*, 137 Colo. 507, 327 P.2d 279 (1958).

More than one proximate cause may exist. The function of the concept of proximate cause, to establish a causal connection between conduct and injury, is the same in both civil law and criminal law. In civil tort law there can be more than one proximate cause. Thus, in criminal law there can be more than one proximate cause of death, and defendant's conduct does not have to be the only, nearest, or last cause of death, so long as it is a cause but for which the death would not have occurred. *People v. Lopez*, 97 P.3d 277 (Colo. App. 2004).

Elements to be proven. In order to obtain a conviction under this statute, the prosecution must prove that the defendant voluntarily drove

while intoxicated and that his driving resulted in the victim's death. *People v. Garner*, 781 P.2d 87 (Colo. 1989).

Unlawful conduct which is broken by independent intervening cause cannot be proximate cause of death of another. *People v. Gentry*, 738 P.2d 1188 (Colo. 1987).

Negligence plus intoxication constitute offense. A death caused by simple negligence committed by a driver while under the influence of liquor is an offense within the contemplation of this section. *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

A prosecution under this section may be predicated on only negligent or careless driving, i.e., ordinary or simple negligence, as opposed to gross or criminal negligence. *Daniels v. People*, 159 Colo. 190, 411 P.2d 316 (1966).

Change should be alleged in the conjunctive. To validate an information based upon a statute such as this under which the several means by which a crime may be committed are set forth in the disjunctive, the charge should be alleged in the conjunctive. *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

Defendant's fatigue could not be considered an independent intervening cause which would relieve the defendant from liability under the vehicular homicide statute. *People v. Chopra*, 782 P.2d 879 (Colo. App. 1989).

Failure of victim to employ a seatbelt not an intervening cause that would shield or partially shield the defendant from liability for a collision that resulted in a charge of vehicular homicide. *People v. Lopez*, 97 P.3d 277 (Colo. App. 2004).

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

Judicial notice of fact that information was based on section. The supreme court will take judicial notice of the fact that an information on which a defendant was tried and found guilty by a jury is based on this section. *Hart v. Best*, 119 Colo. 569, 205 P.2d 787 (1949).

B. Evidence.

Burden of proof. It is incumbent upon the people to establish beyond a reasonable doubt that the defendant violated the provisions of this section. *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952).

In a prosecution for causing a death while driving under the influence of intoxicating liquor, proof of guilt must be established beyond a reasonable doubt, and where the evidence is such that a jury can only speculate as to the proximate cause of the accident, it is insufficient to support a conviction. *Goodell v. People*, 137 Colo. 507, 327 P.2d 279 (1958).

Since vehicular homicide is a strict liability crime, the contributory negligence of the victim is not a defense. *People v. Maire*, 705 P.2d 1023 (Colo. App. 1985).

Testimony concerning defendant's drinking admissible as a factor for consideration by the jury in determining the issue of defendant's recklessness. *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971).

Subsection (3) pertains to admissibility of evidence of intoxication other than blood test, not the evidentiary significance the jury should accord such evidence. *People v. Duemig*, 620 P.2d 240 (Colo. 1980), cert. denied, 451 U.S. 971, 101 S. Ct. 2048, 68 L. Ed.2d 350 (1981).

Evidence of blood analysis admissible. The evidence of a registered medical technologist concerning a blood analysis of a defendant being prosecuted under this section is competent. *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952).

Admission of blood analysis is not violative of § 18 of art. II, Colo. Const. *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952); *Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968); *Gibbons v. People*, 167 Colo. 83, 445 P.2d 408 (1968).

Method of driving near scene admissible. A drunken man's method of driving half a mile from where he collided with another machine is admissible as evidence of negligence, recklessness, or want of care at the time of the collision. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946).

Officer permitted to express opinion of speed. In view of his training, experience, and on-the-scene investigation of the physical facts involved in the accident, the trial court did not abuse its discretion in permitting a police officer to express his opinion concerning the speed of the vehicle at the time of the accident. The weight to be accorded his opinion was solely a question for the jury. *Meador v. People*, 178 Colo. 383, 497 P.2d 1010 (1972).

Death certificate admissible. Where the death certificate showed the cause of death to be cerebral hemorrhage due to compound skull fractures due to or as a consequence of crushing beneath car, it would have been better to have deleted the phrase "crushing beneath car" from the death certificate before it was admitted into evidence, but since no request on the part of the defendant was made to do so, and the record shows no issue was raised by the defendant as to the cause of death, and it is clear that the victim was a passenger in the vehicle from which he was thrown, and as a consequence was killed, there was no prejudicial error. *Meador v. People*, 178 Colo. 383, 497 P.2d 1010 (1972).

It was not error to admit photographs taken of automobile involved in the accident after it had been removed from a creek and towed to a nearby filling station, where a proper

foundation was laid showing that the automobile was in the same condition at the filling station as it was when resting upside down in the middle of the creek, and the photographs were used to depict facts which are relevant to the issue of recklessness. *Meader v. People*, 178 Colo. 383, 497 P.2d 1010 (1972).

Automobile scraps near scene of collision one week thereafter were properly rejected when offered as evidence of the place and manner in which the collision occurred, where shortly thereafter highway patrolmen picked up and threw aside, without regard to direction, practically all such debris left by the accident. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946).

Weight of toxicologist's testimony for trier of fact. The weight of a toxicologist's testimony for purposes of establishing whether the defendant was under the influence of intoxicating liquor in prosecution for vehicular homicide is for the trier of fact. *People v. Mascarenas*, 181 Colo. 268, 509 P.2d 303 (1973).

Evidence sufficient to sustain conviction. *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946); *Yerby v. People*, 176 Colo. 115, 489 P.2d 1308 (1971); *People v. McCollum*, 38 Colo. App. 283, 555 P.2d 184 (1976); *People v. Rodriguez*, 645 P.2d 857 (Colo. App. 1982).

When the toxicologist's testimony is considered together with the testimony of the two investigating officers concerning the alcoholic odor about the defendant immediately after the accident, and the testimony that defendant was driving on the wrong side of the road, the evidence of defendant being under the influence of intoxicating liquor is abundant and sustains the verdict of guilty of vehicular homicide. *People v. Mascarenas*, 181 Colo. 268, 509 P.2d 303 (1973).

Insufficient evidence to show occupant of automobile was accessory. Where two men were charged with operating a car in a reckless manner while intoxicated, and the only evidence supporting the charge that defendant was an accessory was that he was in the car, and was under the influence of intoxicating liquor at the time of the accident, it was held that it could not be successfully contended from the evidence that defendant in any way aided and abetted in that regard. *Quintana v. People*, 106 Colo. 174, 102 P.2d 486 (1940).

Evidence did not support jury instructions in lesser nonincluded offenses of either careless driving or improper left turn. *People v. Sisneros*, 738 P.2d 1196 (Colo. App. 1987).

Admission of blood test results does not limit any efforts by the defendant to challenge the accuracy the results, or the weight they are to be given. Nor does it prohibit the jury from considering any other competent evidence regarding the inference of intoxication. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

The blood alcohol test results are statutorily deemed to relate back to the alleged offense for purposes of applying the statutory inferences. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

Jury could infer that the defendant was under the influence at the time of the offense where the prosecution presented evidence that approximately three hours after the accident, defendant's blood alcohol level was above the statutory percentage. Because the circumstances at issue permitted the jury to make such inference, the extrapolation evidence offered to establish a still higher blood alcohol level was neither necessary nor relevant and the admission thereof was harmless error. *People v. Emery*, 812 P.2d 665 (Colo. App. 1990).

C. Jury.

Connection of injuries to death a jury question. Where defendant struck decedent who was lying injured on street as a result of a prior accident, the question of which accident resulted in decedent's death should be determined by jury, and they should consider not whether injuries inflicted by defendant were the proximate cause of death, but whether they hastened or contributed to death. *People v. Cox*, 123 Colo. 179, 228 P.2d 163 (1951).

D. Instructions.

Approved instructions. In a prosecution for causing the death of another by driving a motor vehicle while under the influence of intoxicating liquor, a given instruction that a person is intoxicated within the meaning of the law when he is so under the influence of intoxicating liquor that his capacity to operate the automobile is impaired, approved. *Rinehart v. People*, 105 Colo. 123, 95 P.2d 10 (1939); *Block v. People*, 125 Colo. 36, 240 P.2d 512 (1951), cert. denied, 343 U.S. 978, 72 S. Ct. 1076, 96 L. Ed. 1370, reh'g denied, 344 U.S. 848, 73 S. Ct. 6, 97 L. Ed. 659 (1952); *Kallnbach v. People*, 125 Colo. 144, 242 P.2d 222 (1952).

Court properly rejected a tendered instruction that provided that a person was not under the influence or impaired by the ingestion of alcohol or drugs unless such influence or impairment is caused by the psychoactive properties of the substance ingested. Prosecution argued that use of cocaine the day before caused defendant to fall asleep. *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999).

Failure to instruct on DUI and DWAI as lesser included offenses, if error, was harmless. Section creates strict liability crimes. When fact of collision and death are undisputed, the only issue was whether defendant was intoxicated or impaired. *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999).

The court of appeals declined to judicially legislate a modification of this section and require an instruction on the elements of the offense of vehicular homicide to include a finding of unsafe or negligent driving. *People v. McCollum*, 38 Colo. App. 283, 555 P.2d 184 (1976).

Instructions on elements of offense insufficient. *Goodell v. People*, 137 Colo. 507, 327 P.2d 279 (1958); *Espinosa v. People*, 142 Colo. 96, 349 P.2d 689 (1960).

For discussion of appropriate jury instructions, see *People v. Deadmond*, 683 P.2d 763 (Colo. 1984).

18-3-107. First degree murder of a peace officer or firefighter - legislative declaration. (1) A person who commits murder in the first degree, as defined in section 18-3-102, and the victim is a peace officer or firefighter engaged in the performance of his or her duties, commits the felony crime of first degree murder of a peace officer or firefighter.

(2) As used in this section, “peace officer or firefighter engaged in the performance of his or her duties” means a peace officer as described in section 16-2.5-101, C.R.S., or a firefighter, as defined in section 18-3-201 (1), who is engaged or acting in, or who is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer or firefighter, whether or not the peace officer or firefighter is within the territorial limits of his or her jurisdiction, if the peace officer or firefighter is in uniform or the person committing an assault upon or offense against or otherwise acting toward such peace officer or firefighter knows or reasonably should know that the victim is a peace officer or firefighter.

(3) A person convicted of first degree murder of a peace officer or firefighter shall be punished by life imprisonment without the possibility of parole for the rest of his or her natural life, unless a proceeding held to determine sentence according to the procedure set forth in section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102 results in a verdict that requires imposition of the death penalty, in which event such person shall be sentenced to death. Nothing in this subsection (3) shall be construed as limiting the power of the governor to grant reprieves, commutations, and pardons pursuant to section 7 of article IV of the Colorado constitution.

(4) In the event the death penalty as provided for in this section is held to be unconstitutional by the Colorado supreme court or the United States supreme court, a person convicted of first degree murder of a peace officer or firefighter under subsection (1) of this section shall be punished by life imprisonment without the possibility of parole. In such circumstance, the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment without the possibility of parole.

(5) The general assembly recognizes that protection of peace officers and firefighters from crime is a major concern of our state because society depends on peace officers and firefighters for protection against crime and other dangers and because peace officers and firefighters are disproportionately damaged by crime because their duty to protect society often places them in dangerous circumstances. Society as a whole benefits from affording special protection to peace officers and firefighters because such protection deters crimes against them and allows them to better serve and protect our state. The general assembly therefore finds that the penalties for first degree murder of a peace officer or firefighter should be more severe than the penalty for first degree murder of other members of society.

Source: **L. 88:** Entire section added, p. 718, § 5, effective July 1. **L. 95:** (3) amended, p. 1294, § 4, effective July 1. **L. 97:** Entire section amended, p. 1010, § 13, effective August 6. **L. 2002:** (3) amended, p. 1512, § 185, effective October 1. **L. 2002, 3rd Ex. Sess.:** (3) amended, p. 15, §§ 9, 10, effective July 12. **L. 2003:** (2) amended, p. 1624, § 45, effective August 6.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsection (3), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session.

PART 2

ASSAULTS

18-3-201. Definitions. As used in sections 18-3-201 to 18-3-203, unless the context otherwise requires:

(1) "Firefighter" means an officer or member of a fire department or fire protection or fire-fighting agency of the state, or any municipal or quasi-municipal corporation in this state, whether that person is a volunteer or receives compensation for services rendered as such firefighter.

(2) "Peace officer or firefighter engaged in the performance of his or her duties" means a peace officer, as described in section 16-2.5-101, C.R.S., or firefighter who is engaged or acting in, or who is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer or firefighter, whether or not the peace officer or firefighter is within the territorial limits of his or her jurisdiction, if the peace officer or firefighter is in uniform or the person committing an assault upon or offense against or otherwise acting toward such peace officer or firefighter knows or reasonably should know that the victim is a peace officer or firefighter. For the purposes of this subsection (2) and this part 2, the term "peace officer" shall include county enforcement personnel designated pursuant to section 29-7-101 (3), C.R.S.

Source: L. 71: R&RE, p. 419, § 1. C.R.S. 1963: § 40-3-201. L. 96: (2) amended, p. 588, § 2, effective May 1. L. 97: Entire section amended, p. 1011, § 14, effective August 6. L. 2003: (2) amended, p. 1628, § 62, effective August 6.

ANNOTATION

Off-duty peace officer included. An off-duty peace officer may be a "peace officer or fireman engaged in the performance of his duties" as defined in this section. *People v. Rael*, 198 Colo. 225, 597 P.2d 584 (1979).

Paramedic employed by the fire department included. Definition of "peace officer or firefighter engaged in the performance of his or

her duties" includes a paramedic employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. *People v. Montoya*, 104 P.3d 303 (Colo. App. 2004).

Applied in *People v. Mason*, 632 P.2d 616 (Colo. App. 1981).

18-3-202. Assault in the first degree. (1) A person commits the crime of assault in the first degree if:

(a) With intent to cause serious bodily injury to another person, he causes serious bodily injury to any person by means of a deadly weapon; or

(b) With intent to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of his body, he causes such an injury to any person; or

(c) Under circumstances manifesting extreme indifference to the value of human life, he knowingly engages in conduct which creates a grave risk of death to another person, and thereby causes serious bodily injury to any person; or

(d) Repealed.

(e) With intent to cause serious bodily injury upon the person of a peace officer or firefighter, he or she threatens with a deadly weapon a peace officer or firefighter engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties; or

(e.5) With intent to cause serious bodily injury upon the person of a judge of a court of competent jurisdiction or an officer of said court, he threatens with a deadly weapon a judge of a court of competent jurisdiction or an officer of said court, and the offender knows or reasonably should know that the victim is a judge of a court of competent jurisdiction or an officer of said court; or

(f) While lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent child and with intent to cause serious bodily injury to a person employed by or under contract with a detention facility, as defined in section 18-8-203 (3), or to a person employed by the division in the department of human services responsible for youth services and who is a youth services counselor or is in the youth services worker classification series, he or she threatens with a deadly weapon such a person engaged in the performance of his or her duties and the offender knows or reasonably should know that the victim is such a person engaged in the performance of his or her duties while employed by or under contract with a detention facility or while employed by the division in the department of human services responsible for youth services. A sentence imposed pursuant to this paragraph (f) shall be served in the department of corrections and shall run consecutively with any sentences being served by the offender. A person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility, as defined in section 18-8-203 (3), and who is required to report back to the detention facility at a specified time shall be deemed to be in custody.

(2) (a) If assault in the first degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the person causing the injury sufficiently to excite an irresistible passion in a reasonable person, and without an interval between the provocation and the injury sufficient for the voice of reason and humanity to be heard, it is a class 5 felony.

(b) If assault in the first degree is committed without the circumstances provided in paragraph (a) of this subsection (2), it is a class 3 felony.

(c) If a defendant is convicted of assault in the first degree pursuant to subsection (1) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(d) Repealed.

Source: **L. 71:** R&RE, p. 420, § 1. **C.R.S. 1963:** § 40-3-202. **L. 75:** (1)(d) amended, p. 632, § 6, effective July 1; (1)(a) amended, p. 618, § 7, effective July 21. **L. 76, Ex. Sess.:** (1)(f) added, p. 8, § 1, effective September 18. **L. 77:** (1)(c) amended, p. 961, § 9, effective July 1. **L. 79:** (2) R&RE, p. 732, § 1, effective May 18. **L. 81:** (1)(d) R&RE, p. 973, § 6, effective July 1. **L. 86:** (1)(d) amended, p. 770, § 5, effective July 1; (1)(f) amended, p. 789, § 1, effective July 1; (2)(c) and (2)(d) added, p. 776, § 2, effective July 1. **L. 90:** (1)(f) amended, p. 991, § 1, effective April 5; (1)(e.5) added and (2)(c) amended, p. 986, §§ 7, 8, effective April 24. **L. 94:** (1)(f) amended, p. 2655, § 137, effective July 1. **L. 95:** (1)(d) and (2)(d) repealed, p. 1250, § 6, effective July 1. **L. 97:** (2)(a) amended, p. 1544, § 13, effective July 1; (1)(e) amended, p. 1011, § 15, effective August 6. **L. 98:** (2)(c) amended, p. 1441, § 25, effective July 1. **L. 2002:** (2)(c) amended, p. 1512, § 186, effective October 1. **L. 2003:** (1)(f) amended, p. 1430, § 16, effective April 29.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1)(f), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (2)(c), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

III. Trial and Prosecution.

A. In General.

B. Indictment or Information.

C. Evidence.

D. Jury.

E. Instructions.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta

117 (1953). For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law, 1663 (1986).

Annotator's note. Since § 18-3-202 is similar to former § 40-2-34, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (1)(b) is unconstitutional as violative of a person's right to equal protection of the laws. *People v. Dominguez*, 193 Colo. 468, 568 P.2d 54 (1977).

Subsection (1)(b) is unconstitutional because it imposes a higher penalty for essentially the same conduct proscribed in § 18-3-203(1)(a). *People v. Dominguez*, 193 Colo. 468, 568 P.2d 54 (1977).

Subsection (1)(e) is not unconstitutionally vague. *People v. Jackson*, 194 Colo. 93, 570 P.2d 527 (1977).

There is a sufficient pragmatic difference between the first degree assault statute and the second degree assault statute so as not to violate the defendant's constitutional guarantee of equal protection. *People v. Jackson*, 194 Colo. 93, 570 P.2d 527 (1977).

Divergent penalties in former versions of criminally negligent homicide and first degree assault violated equal protection because both statutes proscribed similar conduct and intent. *People v. Jackson*, 198 Colo. 193, 601 P.2d 622 (1979).

Different mental states required for first degree assault and criminally negligent homicide justify different penalties, and thus harsher penalty for first degree assault does not violate equal protection. *People v. Lucero*, 714 P.2d 498 (Colo. App. 1985).

This section does not proscribe conduct identical to § 18-3-203 and therefore does not violate equal protection. *People v. Brake*, 196 Colo. 575, 588 P.2d 869 (1979); *People v. Montoya*, 709 P.2d 58 (Colo. App. 1985), rev'd on other grounds, 736 P.2d 1208 (Colo. 1987); *People v. Johnson*, 923 P.2d 342 (Colo. App. 1996).

Requirement for proof of "extreme indifference to human life" is a sufficient differentiation between first and second degree assault and the statutes do not violate the equal protection clause. *People v. Johnson*, 923 P.2d 342 (Colo. App. 1996).

The extreme indifference first degree assault statute contains no requirement that universal malice be proved. Therefore, a conviction for extreme indifference first degree assault may be upheld where defendant's conduct is directed at a single individual. Unlike the first degree extreme indifference murder statute, which requires proof of universal malice against human life generally, the assault statute contains

no similar language. *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007).

Special protection of peace officers reasonable. The general assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an assault upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Assault on off-duty peace officer who is attempting to perform a law enforcement function violates this section. *People v. Rael*, 198 Colo. 225, 597 P.2d 584 (1979).

Scope of police duties for purposes of assault statutes. A law enforcement officer is "engaged in the performance of his duties" while making in good faith an arrest or stop which may be later adjudged to be invalid, unless he is on a personal frolic or resorts to unreasonable or excessive force. *People v. Johnson*, 677 P.2d 424 (Colo. App. 1983).

Every attempt to do personal injury involves an assault. Every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an assault, either actual or constructive. *McNamara v. People*, 24 Colo. 61, 48 P. 541 (1897).

Section applies to murder in either of the degrees. In a prosecution under this section it is not required that in order to sustain a conviction an attempt to commit murder in the first degree should be shown. This section applies to murder in either of the degrees. *Dillulo v. People*, 56 Colo. 339, 138 P. 33 (1914).

A simple assault is necessarily included as a part of aggravated assault. *Lane v. People*, 102 Colo. 83, 77 P.2d 121 (1938).

Reason for distinction among degrees of assault. This statutory scheme distinguishes between the degrees of assault based upon whether the injury was inflicted by means of a deadly weapon and whether the victim's injuries were so severe as to constitute "serious bodily injury" under the statutory definition. *Stroup v. People*, 656 P.2d 680 (Colo. 1982); *People v. Tyler*, 728 P.2d 314 (Colo. 1986).

Under subsection (2), heat of passion is not an affirmative defense to first degree assault. If found by the jury, it merely results in a reduction of penalty. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

Under subsection (1)(d), because defendant could not be convicted of first degree assault without proof that he committed a class 3 felony sexual assault, the latter offense was a lesser included offense of the first degree assault charge and he could not, therefore, be convicted of both offenses. *People v. Moore*, 860 P.2d 549 (Colo. App. 1993).

By enacting subsection (2)(a), the general assembly maintained the offense of first degree assault, while providing for a lesser sen-

tence if the additional mitigating factor of heat of passion was present. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

If first degree assault is committed under heat of passion, it is still a crime of violence and defendant must be sentenced in accordance with § 16-11-309. *People v. Farbes*, 973 P.2d 704 (Colo. App. 1998); *People v. Ferguson*, 43 P.3d 705 (Colo. App. 2001).

The general assembly did not intend for heat of passion to be an affirmative defense to the offense of first degree assault. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

The predicate offenses for "felony" first degree assault under this section fit the statutory test for a lesser included offense. As such, the conviction of the predicate offense must merge into the conviction for "felony" first degree assault, even though the predicate offense is a more serious offense and carries a greater punishment. *People v. Halstead*, 881 P.2d 401 (Colo. App. 1994).

Second degree assault is a lesser included offense of first degree assault. *People v. Martinez*, 189 Colo. 408, 540 P.2d 1091 (1975).

Assault with intent to rob is lesser included offense of aggravated robbery. Therefore, since assault with intent to rob is a lesser included offense of aggravated robbery, it was error for the court to permit both verdicts to stand. Thus, the conviction on the lesser included offense must be set aside. *People v. Stephens*, 188 Colo. 8, 532 P.2d 728 (1975).

Doctrine of merger required convictions for attempted aggravated robbery to be vacated where separately charged crime of attempted aggravated robbery of each victim was lesser included offense of crime of first degree assault on each victim. *People v. Griffin*, 867 P.2d 27 (Colo. App. 1993); *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of subsection (1)(d)).

There is no offense of attempt to commit an assault with a deadly weapon in Colorado. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

There is no crime of attempted assault in Colorado. *People v. Gordon*, 178 Colo. 406, 498 P.2d 341 (1972).

There is a crime of attempt to commit rape under § 18-2-101 despite the existence of the crime of assault with intent to commit rape under this section for these are separate and distinct offenses. *Clark v. People*, 176 Colo. 48, 488 P.2d 1097 (1971).

A deadly weapon is one which is likely to produce death or great bodily injury from the manner in which it is used. *Armijo v. People*, 134 Colo. 344, 304 P.2d 633 (1956).

The offense of assault and battery is a matter of mixed state and local concern. City

of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

"Unreasonable but good faith belief" defense not available. The general assembly excluded in this section the defense of "unreasonable but good faith belief", inasmuch as a conviction is required if the jury should find that the defendant should reasonably have known that the police officers were acting within their lawful duties. *People v. Estrada*, 198 Colo. 188, 601 P.2d 619 (1979).

Applied in *Zeiler v. People*, 157 Colo. 332, 403 P.2d 439 (1965); *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966); *Hammond v. People*, 161 Colo. 532, 423 P.2d 331 (1967); *People in Interest of D.G.P.*, 194 Colo. 238, 570 P.2d 1293 (1977); *Jones v. District Court*, 196 Colo. 261, 584 P.2d 81 (1978); *People v. Watkins*, 196 Colo. 377, 586 P.2d 43 (1978); *People v. Dowdell*, 197 Colo. 76, 589 P.2d 948 (1979); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Trout*, 198 Colo. 98, 596 P.2d 762 (1979); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *Kreiser v. People*, 199 Colo. 20, 604 P.2d 27 (1979); *People v. Hoehl*, 629 P.2d 1083 (Colo. 1980); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Valencia*, 630 P.2d 85 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Walker*, 634 P.2d 1026 (Colo. App. 1981); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *People v. Cole*, 654 P.2d 830 (Colo. 1982); *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Castro*, 657 P.2d 932 (Colo. 1983); *People v. Martinez*, 660 P.2d 1292 (Colo. 1983); *People v. Brandt*, 664 P.2d 712 (Colo. 1983); *People v. Reed*, 695 P.2d 806 (Colo. App. 1984), cert. denied, 701 P.2d 603 (Colo. 1985).

II. ELEMENTS OF OFFENSE.

Assault under this section is in part a specific-intent crime, requiring the prosecution to prove that the defendant had the conscious objective to cause serious bodily injury. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

First degree murder statutes (§§ 18-2-101 and 18-3-102) contain rationally different elements than this first degree assault statute, and thus a defendant sentenced under the former and not the latter was not denied equal protection of law. *People v. Brewer*, 720 P.2d 596 (Colo. App. 1985).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. Attempted first degree assault requires that a defendant act with the intent to cause serious bodily injury to another person by means of a deadly weapon. Use of a deadly weapon is not an element of

attempted first degree murder after deliberation. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

Proof of actual ability to inflict injury not necessarily essential. The crime of assault with intent to rob under this section may be committed by intimidation as well as by actual force, and the intimidation may be as effectually accomplished by apparent as by actual ability to inflict the injury, hence, proof of actual ability to inflict the injury in the manner threatened is not necessarily essential. *McNamara v. People*, 24 Colo. 61, 48 P. 541 (1897).

Assault to commit murder requires evidence of defendant's present ability to commit an assault on the victim and specific intent to murder. *People v. Baca*, 179 Colo. 166, 503 P.2d 348 (1972).

Conviction under this section is not inconsistent with conviction for attempted second degree murder. A defendant can engage in conduct with the intent to cause serious bodily injury while knowing but not caring that the conduct is practically certain to result in death. In such circumstances, the defendant may be found guilty of attempted second degree murder, even though lacking the specific intent to cause death. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

However, attempted second degree murder is not a lesser-included offense of first degree assault. *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000).

Intent to cause serious bodily injury is not necessarily an intent to cause only serious bodily injury. *People v. Gonzales*, 926 P.2d 153 (Colo. App. 1996).

Present ability must be construed in the light of the particular situation. In construing the criminal assault statute, therefore, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor's present ability. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971); *People v. Gordon*, 178 Colo. 406, 498 P.2d 341 (1972).

Essential elements of assault are an unlawful attempt to commit a violent injury and the present ability to commit a violent injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

The absence of heat of passion provocation is neither an element nor a sentencing enhancer of first degree assault. *People v. Villarreal*, 131 P.3d 1119 (Colo. App. 2005).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion, the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either assault charge. *Peo-*

ple v. Sanchez, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time. Therefore, jury's guilty verdicts for attempted first degree murder and first degree assault based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree assault based on defendant's stabbing of a second person are not necessarily inconsistent. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Specific intent is element of offense. Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952).

"Specific", as applied to intent to do great bodily harm is an adjective which distinguishes the intent to do great bodily harm from other intentions in the defendant's mind at the time of the commission of the crime, and to require that intention to be in actual existence in defendant's mind at the time of the commission of the alleged crime. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Moyer v. People*, 165 Colo. 583, 440 P.2d 783 (1968).

The elements of assault and specific intent on the part of the assaulter must coexist in order to constitute the crime. *Crump v. People*, 129 Colo. 58, 266 P.2d 1100 (1954); *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

The specific intent to commit bodily injury upon the person of another is a necessary and essential element of assault with a deadly weapon. *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965); *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

Specific intent is an essential element of the crime of assault with a deadly weapon. *Duran v. People*, 156 Colo. 385, 399 P.2d 412 (1965).

Intent to rob requires knowing, deliberate action. *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970).

The specific intent to do bodily injury to another person is an essential element of the offense of assault with a deadly weapon. *People v. Garcia*, 186 Colo. 167, 526 P.2d 292 (1974).

Where a defendant engages in only one assaultive act, he or she cannot simultaneously have a specific intent to harm a particular person and universal malice that is not directed at a particular person. *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003).

"Serious bodily injury" is an element of first degree assault, which the people must prove beyond a reasonable doubt. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

"Serious bodily injury" is defined as bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or

organ of the body. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

“Serious bodily injury” and “bodily injury” constitutionally distinguishable. Sections 18-3-202 (1)(a) and 18-3-203 (1)(a), thus, do not proscribe identical conduct and therefore do not violate equal protection. *People v. Elam*, 198 Colo. 170, 597 P.2d 571 (1979).

The basic element in both first and second degree assault is injury to a person’s body, the difference being one of the degree of the injury. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

By establishing all of the essential elements of first degree assault, all of the essential elements of second degree assault would necessarily be proven. *People v. Martinez*, 189 Colo. 287, 540 P.2d 1091 (1975).

First degree assault and burglary each require proving additional fact. First degree assault and first degree burglary each require proof of an additional fact not necessary in proof of the other. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

In order to prove first degree assault and crime of violence instead of second degree assault and crime of violence, an additional element must be proven — that the use of the deadly weapon actually caused the serious bodily injury. *People v. Mozee*, 723 P.2d 117 (Colo. 1986).

The elements of assault with intent to commit rape are: (1) The assault; (2) the intent to commit rape; and (3) the purpose to effect such intent. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

Unnecessary to show witness in fact resisted. If defendant made the assault with the specific intent to commit rape and to overcome resistance with force, it is unnecessary in a prosecution under this section to establish that the prosecuting witness in fact resisted, or that she failed to resist because of threats of bodily harm. *Crump v. People*, 129 Colo. 58, 266 P.2d 1100 (1954).

Conditional threat of death will suffice to establish assault against a jail guard even though no attempt was made to commit a battery on the guard. *People v. Goff*, 187 Colo. 57, 530 P.2d 512 (1974).

Wounds resulting in disfigurement of leg. Pictures of wounds as exhibited to the jury justified the reasonable inference that the wounds resulted in disfigurement of the leg, a necessary element of proof under this section. *People v. Strohm*, 185 Colo. 260, 523 P.2d 973 (1974).

Requirement of knowledge that victim of assault was peace officer is not constitutionally required and the general assembly could have made the commission of the act as such a crime without regard to the knowledge of the doer that

the victim was a peace officer. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Defendant committed first degree extreme indifference assault when he fired into a closed door upon leaving house and admitted that he was not directing his fire at any particular individual, despite fact that he knew some of the victims inside the house. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001).

III. TRIAL AND PROSECUTION.

A. In General.

Proof beyond reasonable doubt required.

In order to find one guilty of a violation of this section, it is incumbent upon the people to prove beyond a reasonable doubt that the defendant violated the statute with a specific intent so to do. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

A showing of actual knowledge that the one assaulted was a peace officer engaged in his official duties or proof of the probability of such knowledge beyond a reasonable doubt must precede conviction of assault of a peace officer. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

It is no defense to show that specific intent to do bodily harm was directed at someone else other than victim. *Medina v. People*, 133 Colo. 67, 291 P.2d 1061 (1956); *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Failure to advise pleading defendant of specific intent element not “fundamental defect”. The sentencing court’s failure explicitly to advise the defendant of the element of specific intent in the crime of aggravated assault was not such a “fundamental defect” that would result in a “complete miscarriage of justice” upon the defendant’s plea of guilty. *Martinez v. Ricketts*, 498 F. Supp. 893 (D. Colo. 1980).

Elements of first degree assault are readily understandable to persons of ordinary intelligence and pleading defendant was properly advised of the critical elements through the reading of the information by the district court. *People v. Cabral*, 698 P.2d 234 (Colo. 1985).

Conviction for both first degree assault and first degree burglary does not violate constitutional guarantee against double jeopardy. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

Under subsection (1)(d) when there are separate victims for each crime an underlying conviction of sexual assault on a child does not merge into a conviction of first degree assault while committing a crime. *People v. Moore*, 877 P.2d 840 (Colo. 1994).

Prosecution need not prove, and the jury need not be instructed about, the absence of heat of passion provocation as a sentence

enhancer under Apprendi. *People v. Villarreal*, 131 P.3d 1119 (Colo. App. 2005).

B. Indictment or Information.

Several counts may be united. It is proper to unite in one information counts charging an assault, an assault with a deadly weapon with intent to do bodily injury, and an assault with intent to commit murder, where all refer to the same transaction. *Rice v. People*, 55 Colo. 506, 136 P. 74 (1913).

Allegation that defendant "did make an assault" sufficient. An indictment for assault with intent to rob under this section, which alleges, as to the assault, that the defendant "did make an assault", without stating all of the particulars comprehended by the statutory definition of that term is sufficient. *McNamara v. People*, 24 Colo. 61, 48 P. 541 (1897).

Indictment for assault with intent to murder, where word "feloniously" is unnecessarily used, is good. *Gile v. People*, 1 Colo. 60 (1867).

Information held sufficient. *Mayer v. People*, 116 Colo. 284, 180 P.2d 1017 (1947).

C. Evidence.

Specific intent not presumed from act. Proof of the commission of the act does not warrant the presumption that accused had the requisite specific intent. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965).

Intent may be inferred from all circumstances. Intent is usually manifested by circumstances and proof thereof necessarily is by circumstantial evidence, and, of course, such intent is ordinarily inferable from the facts. *Peterson v. People*, 133 Colo. 516, 297 P.2d 529 (1956); *Moyer v. People*, 165 Colo. 583, 440 P.2d 783 (1968).

Proof of specific intent is necessarily circumstantial and inferable from all the facts and circumstances surrounding the doing of the act. *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969).

On a charge of assault with a deadly weapon, while the mere commission of the act does not necessarily mean that the defendant had the requisite specific intent to harm, this intent may nonetheless be found from the defendant's actions and the reasonable inferences which may be drawn from the circumstances of the case. *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

Specific intent to do great bodily harm may be supplied by inferences drawn from the circumstances of the case. *People v. Focht*, 180 Colo. 259, 504 P.2d 1096 (1972).

It is clear that specific intent may be inferred from the facts and circumstances surrounding

the commission of an assault. *People v. Edwards*, 184 Colo. 440, 520 P.2d 1041 (1974).

While specific intent must be established beyond a reasonable doubt, it may be proven by circumstantial evidence. *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975).

Intent shown by direct or circumstantial evidence. Under this section general criminal intent is insufficient and there must be a showing of specific intent by direct or circumstantial evidence. *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952); *Peterson v. People*, 133 Colo. 516, 297 P.2d 529 (1956); *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965).

On a charge of assault with a deadly weapon, specific intent to do bodily harm need not be proved by direct substantive evidence. *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971).

Intent to cause serious bodily injury may be proven by circumstantial evidence. *People v. Olinger*, 180 Colo. 58, 502 P.2d 79 (1972).

Evidence which tends to establish motive or intent is not rendered inadmissible merely because it may tend to show commission by the accused of a crime different from the one with which he is charged. *Swift v. People*, 171 Colo. 178, 465 P.2d 391 (1970).

Evidence of uncommunicated threats by deceased shortly before the killing, together with acts and conduct indicating an intention to put the threats into execution, may be admissible as part of the *res gestae*. This does not mean, however, that all uncommunicated threats are admissible, for they have to be offered for a proper purpose. *Sowards v. People*, 158 Colo. 557, 408 P.2d 441 (1965).

A defendant's character, temperament, and status, as well as his reason for acting as he did, are important to enable the jury to arrive at a proper verdict. *Sowards v. People*, 158 Colo. 557, 408 P.2d 441 (1965).

Section requires sufficient evidence of force. All that is necessary to sustain a verdict of assault with intent to commit rape is that there should be sufficient evidence of force from which the jury can justly find that the defendant intended to overcome the resistance of the woman by the necessary force. *Crump v. People*, 129 Colo. 58, 266 P.2d 1100 (1954).

Complaint of rape victim corroborates her testimony. In criminal trials for rape, where rape was attempted but not consummated, it may be shown by the testimony of the prosecuting witness or that of other witnesses that the alleged victim made complaint of the outrage soon after its commission for the purpose of corroborating her testimony. *Padilla v. People*, 156 Colo. 186, 397 P.2d 741 (1964).

Evidence of the failure of the person assaulted to make complaint soon after the commission of the outrage is a circumstance which tends to discredit her testimony. *Padilla v. People*, 156 Colo. 186, 397 P.2d 741 (1964).

It is not independent evidence of the offense charged. *Padilla v. People*, 156 Colo. 186, 397 P.2d 741 (1964).

Evidence sufficient to submit to jury issue of intent. *People v. Olinger*, 180 Colo. 58, 502 P.2d 79 (1972).

Evidence sufficient to show specific intent. *Swift v. People*, 171 Colo. 178, 465 P.2d 391 (1970); *Baker v. People*, 176 Colo. 99, 489 P.2d 196 (1971); *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972); *People v. Focht*, 180 Colo. 259, 504 P.2d 1096 (1972).

Eyewitness testimony established use of weapon. Where three witnesses for the people testified only that they did not see the defendant with a knife, a fourth witness testified unequivocally to possession of a knife by the defendant, and no witness of the people stated that the defendant did not have a knife, there is no internal contradiction, and the evidence of one eyewitness, if believed by the jury, is sufficient to establish that defendant had in his possession a knife and used it to inflict the wounds on the victim of the assault. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Impeachment of victim's reputation and credibility. When the reputation and credibility of the victim of an assault is sought to be impeached, the general rule is that evidence as to such reputation must be confined to the community in which the person, whose reputation is sought to be shown, lives, and limited to some reasonable time previous to the time of the present criminal act. However, the general rule does not apply if the defendant contends that he acted in self-defense, and at the time of the criminal act the defendant was aware of the victim's prior acts of violence upon a third person. *People v. Burress*, 183 Colo. 146, 515 P.2d 460 (1973).

Sufficiency of present ability and intent. When a defendant who threatens to kill a police officer places both hands on the officer's revolver in an attempt to remove it, the evidence of defendant's present ability to commit assault with a deadly weapon as well as possession and control of the weapon by defendant is sufficient to sustain a conviction. *People v. Gordon*, 178 Colo. 406, 498 P.2d 341 (1972).

When there is no evidence of any nature that a defendant possessed a gun or had the present ability to inflict the victim's injury, and there is no evidence whatsoever from which the jury could draw an inference that the defendant had the specific intent to murder the victim, defendant cannot be convicted of assault to commit murder. *People v. Baca*, 180 Colo. 166, 503 P.2d 348 (1972).

Evidence of act giving rise to self-defense. Before the defendant, whose defense to an assault is self-defense, can impeach the credibility of the victim by a prior specific violent act, the defendant must lay a proper foundation, and the

trial court is justified in excluding the specific act evidence until such time as the defendant establishes that he was aware that the specific violent act took place, and that either the act occurred, or the defendant became aware of its occurrence within a reasonable time of his use of force in self-defense. *People v. Burress*, 183 Colo. 146, 515 P.2d 460 (1973).

Photographs as evidence. In a child abuse prosecution, the trial court did not err in admitting into evidence photographs of the body of the deceased child. The photographs accurately depicted the burns and the bruises, contusions and abrasions on the child's body. They were relevant and had probative value concerning the nature and permanency of the injuries inflicted upon the child. *People v. Strohm*, 185 Colo. 260, 523 P.2d 973 (1974).

Testimony of emergency room physician related to substantial risk of permanent injury based upon points of bullet entry and exit, taking into account the structures and vessels in or near the path to the extent that such path could be determined, held proper. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

Granting motion for judgment of acquittal was error. Where evidence in prosecution for first degree assault was held sufficient to support jury verdict of guilty, the granting of motion for judgment of acquittal by the trial judge was error. *People v. Martinez*, 191 Colo. 428, 553 P.2d 774 (1976).

Evidence sufficient to support conviction. Where defendant said that he was going home to get a gun and would be back, and afterwards returned with a gun and stated to complaining witness, "I told you I would do it", the evidence was sufficient to support a verdict of guilty of assault with a deadly weapon. *Peterson v. People*, 133 Colo. 516, 297 P.2d 529 (1956).

Testimony of an eyewitness in which she spontaneously and unequivocally identified the defendant as the culprit, the testimony of the police officers as to apprehension of the defendant almost immediately after the commission of the offense in the vicinity of the victim's home, and the condition of the defendant's clothing, was sufficient evidence to support the verdict of the jury of guilty of assault with a deadly weapon. *Harris v. People*, 174 Colo. 483, 484 P.2d 1223 (1971).

Evidence that defendant drove recklessly and with extreme indifference through business and residential areas was sufficient to uphold defendant's conviction for first degree assault. *People v. Esparza-Treto*, __ P.3d __ (Colo. App. 2011).

D. Jury.

Whether fight was by consent is jury question. A fight by consent is a fight had upon a

mutual agreement to fight together. As a proof of such agreement may be direct or circumstantial, it is ordinarily a proper question to be submitted to the jury. *Carpenter v. People*, 31 Colo. 284, 72 P. 1072 (1903).

As is issue of specific intent. The question of whether there was sufficient evidence to sustain an allegation as to specific intent under this section is not a question of law but a question of fact which rests entirely within the competency of the trier of fact, whether it be a jury or a court, and was thus not reviewable by the supreme court. *People v. Archer*, 173 Colo. 299, 477 P.2d 791 (1970), overruled on other grounds, *People v. Kirkland*, 174 Colo. 362, 483 P.2d 1349 (1971).

Knowledge that victim was officer. The question of whether one knew or should have known another to be a peace officer is a purely factual issue and it is the jury's duty to resolve the conflict in evidence on this question. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Likewise, credibility and weight of testimony. Where a genuine issue as to facts exists, the jury as trier of the facts must be the judge of the credibility of the witnesses and the weight to be accorded their testimony. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Whether defendant established heat of passion claim was issue for jury to determine. *Thompson v. Ricketts*, 500 F. Supp. 688 (D. Colo. 1980).

Determination of issue by jury is not vague guide. The fact that a penal statute is framed in a way such as to require a jury to determine a question of reasonableness does not make it too vague to afford a practical guide to acceptable behavior. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Jury verdict not defective, where record reflects verdict form allowed jury, if it found the defendant guilty of first or second degree assault, to assign the mitigator of heat of passion. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

Record supported jury's determination that defendant was guilty beyond a reasonable doubt of first degree assault where defendant was a complicitor in the robbery of the victim, and in the course of or in furtherance of that crime, the victim was seriously injured by one of the individuals involved in the robbery. *People v. Fisher*, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of subsection (1)(d)).

E. Instructions.

Instruction which fails to define all necessary elements of crime is deficient. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

The failure to give an instruction which informed the jury that an essential ingredient of

the crime was the specific intent to commit bodily injury upon the person of another and that it was incumbent upon the people to prove, beyond a reasonable doubt, such specific intent was reversible error. *Armijo v. People*, 157 Colo. 217, 402 P.2d 79 (1965).

Inadequate instruction on specific intent. Instruction on specific intent in prosecution for assault with intent to commit murder which read, "Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. In such cases, mere general intent is insufficient, and the requisite specific intent must be shown as a matter of fact, either by direct or circumstantial evidence", was too general and failed to advise the jury as to what the requisite specific intent was. *People v. Nace*, 182 Colo. 127, 511 P.2d 501 (1973).

Instruction on possession of knife erroneous. It was error to instruct the jury that it was unlawful to possess or carry a pocket knife, the blade of which can be opened by mechanical contrivance, where the information charged the defendant with an alleged assault with a deadly weapon, and not with violating such statute. *Watts v. People*, 159 Colo. 347, 411 P.2d 335 (1966).

Where evidence justifies it, simple assault may be submitted as lesser included offense of an aggravated assault such as assault with a deadly weapon, and an instruction thereon is proper. However, in those cases where the defendant must either be guilty of the offense charged or not guilty of any offense, it is error to submit to the jury an instruction on simple assault as a lesser included offense. *Sims v. People*, 177 Colo. 279, 493 P.2d 365 (1972).

Where the elements of assault are common in both offenses, the jury should have been instructed on the crime of simple assault as a lesser included offense to the crime of assault with intent to rape and a verdict on simple assault should have been submitted. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

Where defendant was charged with an alleged assault with a deadly weapon, it was not error to refuse to submit an instruction on the lesser included offense of simple assault where there was nothing in the evidence warranting the submission to the jury of that question. *Watts v. People*, 159 Colo. 347, 411 P.2d 335 (1966).

The court need not invariably submit lesser included assault to the jury. There remains the question whether the evidence justifies this action. Oftentimes the evidence precludes submission even when the offense is charged in a separate count, and in some cases the evidence is such that the jury must determine the case on the greater offense and that alone. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Where the trial judge submitted to the jury not only the offense of assault with a deadly

weapon, but also simple assault as a lesser included offense, this was not error. Plainly, an instruction on general intent was necessary for simple assault, and it was also necessary for the court to instruct on specific intent for the charge of assault with a deadly weapon. *Arellano v. People*, 174 Colo. 456, 484 P.2d 801 (1971).

Failure to give instruction without request not error. Failure of court to instruct on assault with intent to commit rape as a lesser included offense of forcible rape, where defendant does not request such an instruction or raise this point in motion for new trial, does not constitute reversible error and absent a showing of plain error it will not be considered on appeal. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Instruction based on information count proper. Where defendant who was charged duplicitously in one and the same count with assault with intent to murder and assault with a deadly weapon failed to object before trial, it was not error to instruct jury on crime of assault with a deadly weapon. *Russell v. People*, 155 Colo. 422, 395 P.2d 16 (1964).

Defendant charged with assault with a deadly weapon and conspiracy to assault with deadly weapon was not subjected to double jeopardy by conspiracy instruction in combination with accessory instruction. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Instructions taken as whole adequate. In a prosecution for assault with intent to murder, an instruction is not erroneous because omitting the element of defendant's ability to carry his intention into effect at the time, where such element was specifically called to the jury's attention by a subsequent instruction, as the instructions must be considered as a whole. *Warford v. People*, 43 Colo. 107, 96 P. 556 (1908).

In prosecution for assault on peace officer, trial court did not err in rejecting defendant's tendered instruction on lesser degree of assault, in refusing to limit instruction on general intent to lesser degree of assault, and in dealing with legal effect of intoxication on element of specific intent, where instructions considered as a whole adequately covered law and advised jury as to specific intent and where there was no evidence on lesser degree of assault. *People v. Olinger*, 180 Colo. 58, 502 P.2d 79 (1972).

Jury was properly instructed to consider whether defendant acted in the heat of passion only after deciding whether defendant committed first degree assault. Under subsection (2)(a), heat of passion is not an affirmative defense, but merely results in the decrease of penalty. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

No error in instructions directing jury to consider whether the People had proven the elements of first degree assault before considering heat of passion and provocation, where the general assembly has not chosen to classify heat of passion as an affirmative defense that

exonerates offenders from the offense of first degree assault, but rather, reduces the penalty if an assault occurs in the heat of passion. *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

No error in refusal of trial court to deliver an instruction stating that the definition of serious bodily injury focuses on the injury which the victim actually suffered and the damage actually caused rather than the risk to the victim and the damages that might have occurred. *People v. Covington*, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

Heat of passion instruction. A defendant charged with assault is entitled to a special interrogatory on heat of passion if the evidence supports it. *People v. Rowe*, 837 P.2d 260 (Colo. App. 1992), rev'd on other grounds, 856 P.2d 486 (Colo. 1993).

Since defendant did not request an instruction or a special interrogatory on sudden heat of passion, no plain error occurred when the trial court did not sua sponte instruct the jury on that theory of the defense. *People v. Lee*, 18 P.3d 192 (Colo. App. 2000).

Since the general assembly did not intend to create a new offense of first degree assault committed under heat of passion when it enacted subsection (2)(a), there is no chargeable offense of first degree assault committed under heat of passion nor a separate offense to classify as a "lesser included offense" or a "lesser nonincluded offense" of first degree assault; rather, there is only one single crime of first degree assault, albeit one that may have different sentences depending on whether the mitigating factor of heat of passion has been established. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

The district court erroneously instructed the jury that first degree assault committed under heat of passion was a lesser included offense of first degree assault. *Rowe v. People*, 856 P.2d 486 (Colo. 1993).

Court did not err in failing to include jury instructions on the meaning of "extreme indifference" and "grave risk of death". The terms are not so technical or mysterious that a reasonable person of common intelligence would not know what they mean. *People v. Esparza-Treto*, __ P.3d __ (Colo. App. 2011).

IV. VERDICT AND SENTENCE.

Defendant did not receive aggravated sentence for first degree assault crime, therefore, Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply. First degree assault is a class 3 felony that is a per se crime of violence and an extraordinary risk crime that triggers a special legislatively created penalty range, not a judicially imposed aggravated sentence. Since defendant was sentenced within special penalty

range created by the legislature, there was no Apprendi violation. *People v. Trujillo*, 169 P.3d 235 (Colo. App. 2007).

Consecutive sentences for burglary and assault upheld. Conviction and sentences for two distinct offenses did not put appellees twice in jeopardy as the Colorado statutes separately define the offenses of burglary and assault with intent to rob. The imposition of two consecutive sentences did not constitute a violation of any federally protected right. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967); *Trujillo v. People*, 178 Colo. 136, 496 P.2d 1026 (1972).

The offense of assault with intent to murder requires proof of a specific intent to kill, a fact not necessary to sustain a charge of aggravated robbery. On the other hand, aggravated robbery requires proof of a robbery, a fact not necessary for assault. Therefore, punishment for both of these offenses committed during one course of conduct does not violate the constitutional prohibition against double jeopardy for the same offense. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

Evidence determines if acquittal of lesser offense necessary upon acquittal of greater. It is the character of the evidence which must control in determining whether the lesser included offense of assault with intent to commit rape can stand alone or fall on acquittal of rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Where penalty for conviction limited. A person charged with first degree assault, who can establish that he acted in "heat of passion", is constitutionally protected against receiving a greater penalty than he could have received had he caused the death of his victim. *People v. Montoya*, 196 Colo. 111, 582 P.2d 673 (1978).

18-3-203. Assault in the second degree. (1) A person commits the crime of assault in the second degree if:

- (a) Repealed.
- (b) With intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon; or
- (c) With intent to prevent one whom he or she knows, or should know, to be a peace officer or firefighter from performing a lawful duty, he or she intentionally causes bodily injury to any person; or
- (d) He recklessly causes serious bodily injury to another person by means of a deadly weapon; or
- (e) For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance, or preparation capable of producing the intended harm; or
- (f) While lawfully confined or in custody, he or she knowingly and violently applies physical force against the person of a peace officer or firefighter engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or, while lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent child, he or she knowingly and violently applies physical force against a person

Maximum sentence where defendant claims self-defense. A defendant who raises the affirmative defense of self-defense and who was convicted of first degree assault should receive no greater sentence than he could have received if he had been convicted of the criminally negligent homicide statute in effect prior to July 1, 1977. *People v. Estrada*, 198 Colo. 188, 601 P.2d 619 (1979).

One can be guilty of first degree assault but not attempted second degree murder. A jury's verdict of guilty of first degree assault under this section is not irreconcilable and inconsistent with its verdict of not guilty on the charge of attempted second degree murder under § 18-3-103. These crimes require different elements of proof, and the jury can find from the very same evidence that an element of one crime is present while an element of another charged crime is absent. *People v. Ward*, 673 P.2d 47 (Colo. App. 1983).

If first degree assault is committed under heat of passion, it is still a crime of violence and defendant must be sentenced in accordance with § 16-11-309. *People v. Farbes*, 973 P.2d 704 (Colo. App. 1998); *People v. Ferguson*, 43 P.3d 705 (Colo. App. 2001).

Convictions for both first degree assault and first degree assault extreme indifference cannot be upheld if there is only one victim and one criminal act. *People v. Baird*, 66 P.3d 183 (Colo. App. 2002).

First degree assault with intent to cause serious bodily injury and first degree assault-extreme indifference are alternative means of committing the same offense; therefore, one of the first degree assault convictions must be vacated. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005).

engaged in the performance of his or her duties while employed by or under contract with a detention facility, as defined in section 18-8-203 (3), or while employed by the division in the department of human services responsible for youth services and who is a youth services counselor or is in the youth services worker classification series, and the person committing the offense knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or a person engaged in the performance of his or her duties while employed by or under contract with a detention facility or while employed by the division in the department of human services responsible for youth services. A sentence imposed pursuant to this paragraph (f) shall be served in the department of corrections and shall run consecutively with any sentences being served by the offender; except that, if the offense is committed against a person employed by the division in the department of human services responsible for youth services, the court may grant probation or a suspended sentence in whole or in part, and such sentence may run concurrently or consecutively with any sentences being served. A person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility, as defined in section 18-8-203 (3), and who is required to report back to the detention facility at a specified time shall be deemed to be in custody.

(f.5) (I) While lawfully confined in a detention facility within this state, a person with intent to infect, injure, harm, harass, annoy, threaten, or alarm a person in a detention facility whom the actor knows or reasonably should know to be an employee of a detention facility, causes such employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material by any means, including but not limited to throwing, tossing, or expelling such fluid or material.

(II) (A) Any adult or juvenile who is bound over for trial for the offense described in subparagraph (I) of this paragraph (f.5) subsequent to a preliminary hearing or after having waived the right to a preliminary hearing, any person who is indicted for or is convicted of any such offense, or any person who is determined to have provided blood, seminal fluid, urine, feces, saliva, mucus, or vomit to a person bound over for trial for, indicted for, or convicted of such an offense shall be ordered by the court to submit to a medical test for communicable diseases and to supply blood, feces, urine, saliva, or other bodily fluid required for the test. The results of such test shall be reported to the court or the court's designee, who shall then disclose the results to any victim of the offense who requests such disclosure. Review and disclosure of medical test results by the court shall be closed and confidential, and any transaction records relating thereto shall also be closed and confidential. If a person subject to a medical test for communicable diseases pursuant this sub-subparagraph (A) voluntarily submits to a medical test for communicable diseases, the fact of such person's voluntary submission shall be admissible in mitigation of sentence if the person is convicted of the charged offense.

(B) In addition to any other penalty provided by law, the court may order any person who is convicted of the offense described in subparagraph (I) of this paragraph (f.5) to meet all or any portion of the financial obligations of medical tests performed on and treatment prescribed for the victim or victims of the offense.

(C) At the time of sentencing, the court may order that an offender described in sub-subparagraph (B) of this subparagraph (II) be put on a period of probation for the purpose of paying the testing and treatment costs of the victim or victims; except that the period of probation, when added to any time served, shall not exceed the maximum sentence that can be imposed for the offense.

(III) (A) As used in this paragraph (f.5), "detention facility" means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

(B) As used in this paragraph (f.5), “employee of a detention facility” includes employees of the department of corrections, employees of any agency or person operating a detention facility, law enforcement personnel, and any other persons who are present in or in the vicinity of a detention facility and are performing services for a detention facility. “Employee of a detention facility” does not include a person lawfully confined in a detention facility.

(g) With intent to cause bodily injury to another person, he causes serious bodily injury to that person or another.

(2) (a) If assault in the second degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the person causing the injury sufficiently to excite an irresistible passion in a reasonable person, and without an interval between the provocation and the injury sufficient for the voice of reason and humanity to be heard, it is a class 6 felony.

(b) If assault in the second degree is committed without the circumstances provided in paragraph (a) of this subsection (2), it is a class 4 felony.

(b.5) Assault in the second degree by any person under subsection (1) of this section without the circumstances provided in paragraph (a) of this subsection (2) is a class 3 felony if the person who is assaulted, other than a participant in the crime, suffered serious bodily injury during the commission or attempted commission of or flight from the commission or attempted commission of murder, robbery, arson, burglary, escape, kidnapping in the first degree, sexual assault, sexual assault in the first or second degree as such offenses existed prior to July 1, 2000, or class 3 felony sexual assault on a child.

(c) If a defendant is convicted of assault in the second degree pursuant to paragraph (b), (c), (d), or (g) of subsection (1) of this section or paragraph (b.5) of this subsection (2), except with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406. A defendant convicted of assault in the second degree pursuant to paragraph (b.5) of this subsection (2) with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, shall be sentenced in accordance with section 18-1.3-401 (8) (e) or (8) (e.5).

Source: **L. 71:** R&RE, p. 420, § 1. **C.R.S. 1963:** § 40-3-203. **L. 76, Ex. Sess.:** (1)(f) amended, p. 8, § 2, effective September 18. **L. 79:** (2) R&RE, p. 732, § 2, effective May 18. **L. 81:** (1)(f) amended and (1)(g) added, p. 973, § 7, effective July 1. **L. 86:** (1)(f) amended, p. 789, § 2, effective July 1; (2)(c) added, p. 777, § 3, effective July 1. **L. 88:** (2)(c) amended, p. 717, § 4, effective July 1. **L. 90:** (1)(f) amended, p. 992, § 2, effective April 5; (1)(f) amended, p. 986, § 9, effective April 24. **L. 91:** (2)(a) and (2)(c) amended, p. 405, § 9, effective June 6. **L. 94:** (1)(a) repealed, p. 1717, § 8, effective July 1; (1)(f) amended, p. 2655, § 138, effective July 1. **L. 95:** (1)(b) and (2)(c) amended and (2)(b.5) added, p. 1250, § 7, effective July 1. **L. 97:** (1)(f.5) added, p. 1591, § 1, effective July 1; (2)(a) amended, p. 1544, § 14, effective July 1; (1)(c) and (1)(f) amended, p. 1011, § 16, effective August 6. **L. 98:** (2)(c) amended, p. 1441, § 26, effective July 1. **L. 2000:** (1)(f) amended, p. 693, § 3, effective July 1. **L. 2002:** (2)(b.5) and (2)(c) amended, p. 757, § 2, effective July 1; (2)(c) amended, p. 1512, § 187, effective October 1. **L. 2003:** (1)(f) amended, p. 1430, § 17, effective April 29.

Editor’s note: Amendments to subsection (1)(f) in Senate Bill 90-58 and House Bill 90-1255 were harmonized. Amendments to subsection (2)(c) in House Bill 02-1046 and House Bill 02-1225 were harmonized.

Cross references: For the legislative declaration contained in the 1994 act amending subsection (1)(f), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (2)(c), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- III. Trial and Prosecution.
 - A. Evidence.
 - B. Jury.
 - C. Instructions.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For comment, "Colorado's First Degree Assault Statute", see 65 U. Colo. L. Rev. 975 (1994).

Annotator's note. Since § 18-3-203 is similar to former § 40-2-34, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Second degree assault is a lesser included offense of first degree assault. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

But second degree assault is not a lesser included offense of second degree murder because the mens rea for the two crimes is different. People v. Fry, 74 P.3d 360 (Colo. App. 2002), aff'd on other grounds, 92 P.3d 970 (Colo. 2004).

By establishing all of the essential elements of first degree assault, all of the essential elements of second degree assault would necessarily be proven. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

When the pertinent provisions of the first and second degree assault statutes are placed parallel to one another, it is obvious that the establishment of the essential elements of the greater necessarily establishes all of the elements required to prove the lesser. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The basic element in both first and second degree assault is injury to a person's body, the difference being one of the degree of the injury. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The means of committing the injury under second degree assault subsection (1)(b) is identical to first degree assault. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The only difference in first and second degree assault under subsection (1)(a) of each section is that in first degree assault the serious bodily injury must be "by means of a deadly weapon", whereas under second degree assault the cause of serious bodily injury may be by any means. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The mental state "knowingly" is implied by the statute and is required for a conviction of second degree assault on a police officer under subsection (1)(f). People v. Hart, 658 P.2d 857 (Colo. 1983).

Application of physical force, rather than a mere attempt to apply force, is required. People v. Schoondermark, 699 P.2d 411 (Colo. 1985).

Subsection (1)(f) creates a separate and distinct offense which turns on substantial differences which have a reasonable relationship to the persons involved and the public purposes to be achieved. People v. Gibson, 623 P.2d 391 (Colo. 1981).

The term "serious bodily injury" is not facially unconstitutionally vague. Defendant's challenge that "serious bodily injury" included subjective undefined terms making it constitutionally infirm did not show the term was so vague that a person of ordinary intelligence must guess at its meaning and may differ as to its application. The term was also constitutional as applied to the defendant. People v. Summitt, 104 P.3d 232 (Colo. App. 2004), aff'd in part and rev'd in part on other grounds, 132 P.3d 320 (Colo. 2006).

The terms "serious bodily injury" and "bodily injury" do not suffer from an equal protection problem, because they only overlap if serious bodily injury is given an unreasonably broad interpretation. People v. Summitt, 104 P.3d 232 (Colo. App. 2004), aff'd in part and rev'd in part on other grounds, 132 P.3d 320 (Colo. 2006).

"Serious bodily injury" and "bodily injury" constitutionally distinguishable. Section 18-3-202 (1)(a) and subsection (1)(a) of this section, thus, do not proscribe identical conduct and therefore do not violate equal protection. People v. Elam, 198 Colo. 170, 597 P.2d 571 (1979).

Any break or fracture is sufficient to establish "serious bodily injury". The term "of the second or third degree" refers only to burns and not to breaks or fractures. People v. Daniels, 240 P.3d 409 (Colo. App. 2009).

"Violently applies physical force". The phrase "violently applies physical force", in subsection (1)(f), does not connote a specific intent to inflict serious bodily injury. People v. Walker, 634 P.2d 1026 (Colo. App. 1981).

In subsection (1)(f), the mental state of "knowingly" also applies to the element of violently applying physical force. People v. Saiz, 660 P.2d 2 (Colo. App. 1982).

There is a sufficient pragmatic difference between subsection (1)(e) of the first degree assault statute and the second degree assault statute so as not to violate the defendant's constitutional guarantee of equal protection. People v. Jackson, 194 Colo. 93, 570 P.2d 527 (1977).

Equal protection not violated by general criminal attempt statute. There was no violation of equal protection in defendant's conviction under the specific attempt provision of sec-

ond degree assault statute, despite defendant's contention that the general criminal attempt statute, § 18-2-101, proscribes the same conduct. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

This section does not proscribe conduct identical to § 18-3-202 and therefore does not violate equal protection. *People v. Brake*, 196 Colo. 575, 588 P.2d 869 (1979).

Subsection (1)(b) and § 18-2-101 (1) do not proscribe the same conduct, and disparity in applicable punishment does not violate equal protection guarantees. *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

But the sentencing scheme established in subsection (2)(c) did not meet the requirements of equal protection as applied to defendant's sentences because it mandated the imposition of a greater punishment for an attempt to cause bodily injury than for an attempt to cause serious bodily injury. *People v. Marez*, 916 P.2d 543 (Colo. App. 1995).

Subsection (1)(c) does not violate equal protection by punishing a person who assaults a firefighter acting as a paramedic more severely than a person who assaults a non-firefighter paramedic. The more serious class of assault created by subsection (1)(c) is based on differences that are real and reasonably related to the purposes of the statute. *People v. Montoya*, 104 P.3d 303 (Colo. App. 2004).

Second degree assault on a peace officer is distinguishable from both third degree assault, as described in § 18-3-204, and resisting arrest, as described in § 18-8-103, and therefore these sections do not violate equal protection. This section requires that the defendant act intentionally, whereas both third degree assault and resisting arrest require only that the defendant act knowingly. Further, this section requires proof that the defendant intended to prevent a police officer from performing a lawful duty, which is not required for a conviction for third degree assault. And finally, this section requires the defendant to intend to cause bodily harm, while resisting arrest requires only that the defendant use or threaten to use physical force. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

Second degree assault described under subsection (1)(d) of this section is distinguishable from vehicular assault, described in § 18-3-205, and therefore these sections do not violate equal protection. The statutes differ in three primary ways. Second degree assault applies to a range of unspecified conduct, while vehicular assault applies narrowly to driving or operating a motor vehicle. Second degree assault can apply to acts of omission, while vehicular assault requires acts of commission. Second degree assault applies to any deadly weapon, which may include a motor vehicle, while vehicular assault requires the defendant's reckless driving or operation of a motor vehicle to have

proximately caused the serious bodily injury. *People v. Stewart*, 55 P.3d 107 (Colo. 2002).

The general assembly is free to prescribe different punishments for conduct prescribed to result in varying degrees of social consequences, and the distinction between this section and § 18-8-103 is not arbitrary or inadvertent. Therefore this section is not unconstitutional. *People v. Wieder*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986).

Conviction not reversed when first degree assault statute declared unconstitutional. A conviction on second degree assault where defendant was charged with both first degree and second degree assault is not an inconsistent verdict requiring reversal when the first degree assault statute is later declared unconstitutional by reason of not being distinguishable from the second degree assault statute because the implicit acquittal of first degree assault is not a verdict with which the conviction can be inconsistent. *People v. Trout*, 198 Colo. 98, 596 P.2d 762 (1979).

Constitutionality of 1976 amendment. Because the call of the governor generally concerned protection of police officers and others while carrying out their duties, the 1976 amendment adding the words "or in custody" to the statute governing assaults upon police officers definitely fell within the subject matter of the call and was therefore constitutional. *People v. Wieder*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986).

Subsection (1)(b) violates equal protection guarantees, because a more severe sentence is imposed for an attempt to commit bodily injury than an attempt to commit serious bodily injury. *People v. Duc Nguyen*, 900 P.2d 37 (Colo. 1995); *People v. Gallegos*, 904 P.2d 486 (Colo. 1995); *People v. Mitchell*, 904 P.2d 486 (Colo. 1995); *People v. Palmer*, 944 P.2d 634 (Colo. App. 1997), *aff'd* in part and *rev'd* in part on other grounds, 964 P.2d 524 (Colo. 1998).

The only distinction between conduct proscribed under subsection (1)(a) and under subsection (1)(g) is that subsection (1)(a) requires the intent to cause serious bodily injury whereas subsection (1)(g) requires the intent to cause only bodily injury. Subsection (2)(c), however, mandates the imposition of a more severe sentence for a crime under subsection (1)(g) than for one under subsection (1)(a). When an offender who acts with a less culpable intent may receive a greater penalty than the offender who acts with a greater culpable intent, such a statutory scheme is unreasonably structured and does not meet the requirements of equal protection, even though the two offenses result in the same harm. *Smith v. People*, 852 P.2d 420 (Colo. 1993); *People v. Blizzard*, 852 P.2d 418 (Colo. 1993) (decided under law in effect prior to 1991 amendment).

Fists may be a deadly weapon, for purposes of subsection (1)(b), if in the manner they are used or intended to be used they are capable of producing death or serious bodily injury. *People v. Ross*, 831 P.2d 1310 (Colo. 1992).

Under subsection (1)(d), any object, including a foot, may be a deadly weapon when used to start an unbroken, foreseeable chain of events that results in serious bodily injury. The object does not have to be the direct cause of the injury. Where defendant kicked the victim in the back, causing her to fall down a flight of stairs, it was irrelevant that her injuries were caused by the stairs rather than the defendant's foot. The defendant's foot qualified as a deadly weapon because he used it to set in motion a sequence of events causing a serious bodily injury. *People v. Saleh*, 45 P.3d 1272 (Colo. 2002).

Subsection (1)(f) applies to field arrest situation. The first clause of (1)(f) which makes no reference to a detention facility employee and uses the disjunctive "or", in addition to a court of appeal's case holding that "confined" has a meaning different from and more restrictive than "custody", makes it plain that (1)(f) applies to field arrest situations as well as to detention facilities. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986); *Wieder v. People*, 722 P.2d 396 (Colo. 1986).

An arrest precedes "in custody" for purposes of subsection (1)(f). What constitutes an arrest and what constitutes in custody turn on the same standard, and it is for the trier of fact to determine whether, under the totality of the circumstances, the defendant was under arrest and thus may be guilty of second degree assault. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986).

When defendant was charged with both resisting arrest and second degree assault, one of the factors in determining whether the defendant is guilty of one or both of the charges shall be whether the actions of the defendant, which caused injury to the officers, were continuous, stemming from his efforts to resist arrest, or whether there was a break between his actions to thwart the officers' efforts to arrest him and the actions which lead to the injury of the officers. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986).

Once an arrest is made, a person in custody who uses violence against a peace officer commits second degree assault under subsection (1)(f). *People v. Stanley*, 56 P.3d 1241 (Colo. App. 2002).

The unlawfulness of a detention does not absolve a person of liability for criminal conduct committed during that detention. *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

Subsection (1)(f) is not unconstitutionally vague, in violation of the due process clauses of the Colorado and United States Constitutions. *People v. Schoondermark*, 699 P.2d 411 (Colo. 1985).

Constitution proscribes retrial when conviction impliedly acquits defendant. The double jeopardy clause proscribes retrial when a felony menacing conviction impliedly acquits the defendant of a second degree assault charge. *Ortiz v. District Court*, 626 P.2d 642 (Colo. 1981).

The specific intent required for second degree assault is sufficiently distinguishable from the less culpable mental state required for third degree assault to justify a harsher penalty for the former. *People v. Sparks*, 914 P.2d 544 (Colo. App. 1996).

Third degree assault is lesser included offense of second degree assault. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975).

Because two counts of second degree assault were premised on identical evidence, once the trial court concluded that the evidence was sufficient to submit an instruction regarding third degree assault as a lesser included offense to count one, it was obligated to make the same conclusion with respect to the defendant's request for a lesser nonincluded instruction as to count two. *People v. Castro*, 952 P.2d 762 (Colo. App. 1998).

Third degree assault held to be lesser included offense. The offense of assault in the third degree is a lesser included offense of assault in the second degree upon a peace officer. *People v. Annan*, 665 P.2d 629 (Colo. App. 1983).

Only difference between second and third degree assault is degree of injury. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975).

Assault is lesser included offense of robbery. Since simple assault contains no elements not contained within attempted aggravated robbery, while the latter contains more elements than the former, the former is included within the latter as a lesser offense. *People v. Velasquez*, 178 Colo. 264, 497 P.2d 12 (1972).

Assault with a deadly weapon is a lesser included offense of aggravated robbery and since the jury convicted the defendant of aggravated robbery, his conviction for the included offense of assault with a deadly weapon must be set aside. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

It is possible to commit an aggravated robbery without contemporaneously perpetrating a second degree assault. *People v. Grant*, 40 Colo. App. 46, 571 P.2d 1111 (1977); *People v. Toomer*, 43 Colo. App. 182, 604 P.2d 1180 (1979).

There is no offense of attempt to commit an assault with a deadly weapon in Colorado. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Offense of assault and battery is a matter of mixed state and local concern. *City of Au-*

rora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

In determining whether to accept a plea of *nolo contendere*, the court must inquire of the defendant as to whether he understands the nature of the charge and its elements, and this is of utmost importance in connection with a felony assault charge with a specific intent to prevent a police officer from performing his lawful duty and to cause bodily injury. *People v. Kelly*, 189 Colo. 31, 536 P.2d 39 (1975).

Statement of elements of the charge of second degree assault did not give pleading defendant notice of the true nature of the charge when, by way of further explanation, the court misstated the deadly weapon element as mere possession. *People v. Cabral*, 698 P.2d 234 (Colo. 1985).

Case remanded to district court for a new preliminary hearing because district court had interrupted prior hearing before a proper determination of probable cause for second degree assault charges could be made. *People v. Nygren*, 696 P.2d 270 (Colo. 1985).

The word "confined" in subsection (1)(f) connotes detention in an institution. *People v. Olinger*, 39 Colo. App. 491, 566 P.2d 1367 (1977).

Applied in *People v. Trujillo*, 190 Colo. 45, 543 P.2d 523 (1975); *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977); *People v. Conner*, 195 Colo. 525, 579 P.2d 1160 (1978); *Brutcher v. District Court*, 195 Colo. 579, 580 P.2d 396 (1978); *People v. Kreiser*, 41 Colo. App. 210, 585 P.2d 301 (1978); *People v. Thompson*, 197 Colo. 299, 592 P.2d 803 (1979); *People v. Waggoner*, 196 Colo. 578, 595 P.2d 217 (1979); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *People v. Martinez*, 43 Colo. App. 419, 608 P.2d 359 (1979); *People v. Parsons*, 199 Colo. 421, 610 P.2d 93 (1980); *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980); *People v. Tijerina*, 632 P.2d 570 (Colo. 1981); *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981); *People in Interest of R.G.*, 630 P.2d 89 (Colo. App. 1981); *People v. District Court*, 652 P.2d 582 (Colo. 1982); *People v. Dillon*, 655 P.2d 841 (Colo. 1982); *People v. Hamilton*, 662 P.2d 177 (Colo. 1983); *People v. Reedy*, 705 P.2d 1032 (Colo. App. 1985).

II. ELEMENTS OF OFFENSE.

Essential elements of assault are an unlawful attempt to commit a violent injury and the present ability to commit a violent injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

"Reasonable person" means an objectively reasonable individual and not a subjectively reasonable one possessing the individual de-

fendant's personality traits or defects. Under the circumstances, the defendant did not act as a reasonable person would in the same situation. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

Defendant was unreasonable in believing that police officer was not performing lawful duty and intended to commit crime of kidnapping when officer, in full police uniform, explained purpose of warrantless entry to check on safety of an infant at the mother's request. *People v. Malczewski*, 744 P.2d 62 (Colo. 1987).

A paramedic employed by the fire department is included as a "firefighter" for purposes of subsection (1)(c). The statute is not limited to firefighters performing fire suppression functions. *People v. Montoya*, 104 P.3d 303 (Colo. App. 2004).

An attempt only requires some overt act beyond mere preparation. *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976); *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

And it need not be the last proximate act necessary to consummate a battery. *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976).

Certain weapons are by their very design and make lethal in nature and a trial court should rule as a matter of law that they are deadly weapons. Other instruments or things, including shoes, though perhaps not deadly weapons per se, are within the meaning of our assault with a deadly weapon statute, depending upon the nature of the instrument and the manner in which the instrument or thing is used in accomplishing the assault. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

In order to prove first degree assault and crime of violence instead of second degree assault and crime of violence, an additional element must be proven — that the use of the deadly weapon actually caused the serious bodily injury. *People v. Mozee*, 723 P.2d 117 (Colo. 1986).

Specific intent to do bodily injury can be inferred from the circumstances of the case where testimony showed that the defendant stabbed victim with a hunting knife. *People v. Borrego*, 187 Colo. 217, 529 P.2d 639 (1974).

Requisite intent to sustain a conviction under this section may be inferred from the circumstances of the case. *People v. Borrego*, 187 Colo. 217, 529 P.2d 639 (1974).

Specific intent to cause bodily injury may be found from the defendant's actions and the reasonable inferences which may be drawn from the circumstances of the case. *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976).

Where the defendant was screaming and yelling at the victim and the victim's injuries showed he was struck with a powerful force directly in the face, the evidence was sufficient to establish specific intent to cause bodily injury. *People v. Ross*, 819 P.2d 507 (Colo. App. 1991).

Defendant's conscious objective to cause father physical pain can be inferred from the defendant's conduct and the overall circumstances of the case where defendant had medical training and recognized that father's condition was worsening, left father bedridden for a significant length of time without proper change of clothing, toileting, or hygiene, failed to seek professional care for father, and verbally abused father, causing him to fear defendant. *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

Present ability must be construed in the light of the particular situation when a person is charged with an assault. In construing the criminal assault statute, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor's present ability. *Allen v. People*, 175 Colo. 113, 485 P.2d 886 (1971).

Specific intent is an essential element of the proof of assault to be established beyond a reasonable doubt, but this requisite specific intent may be drawn from the circumstances of the case. *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

Trial court did not err in declining defendant's proffered instruction where the jury instruction given accurately informed the jury of the governing law and defendant was not impeded in his ability to convey to the jury his theory of defense. *People v. Wylie*, 260 P.3d 57 (Colo. App. 2010).

The mental state "intentionally" applies to each element of the offense. For jury instructions, the best practice is to offset the mental state requirement so that it applies to all elements. Failure to do so does not constitute plain error. *People v. Rivas*, 77 P.3d 882 (Colo. App. 2003).

"Attempted to cause" should not be included in the jury instruction for second degree assault. However, error was not plain error since the defendant did not contest that element at trial. *People v. Rivas*, 77 P.3d 882 (Colo. App. 2003).

Conviction for "second degree assault with intent to cause bodily injury" not legally sufficient. Where the jury finds the accused guilty of "second degree assault with intent to cause bodily injury" and the verdict omits the word "serious", it is not clear from the language of the verdict whether the jury concluded that the accused, in committing the assault, had the intent to cause serious bodily injury, and, thus, is guilty of second degree assault or whether he intended to cause only bodily injury and, thus, is guilty of third degree assault; therefore, the verdict is too uncertain to be legally sufficient. *Kreiser v. People*, 199 Colo. 20, 604 P.2d 27 (1979).

Subsection (1)(d) requires that a defendant consciously disregard a substantial and unjustifiable risk that a result will occur (or that a

circumstance exists), not that a defendant disregard the result that ultimately does occur. Therefore, the people did not have to prove that defendant had knowledge of the existence of the specific deadly weapon held by the victim of the assault. *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Elements of subsection (1)(f). One of the elements of assault in the second degree is that the person committing the offense knows or reasonably should know that the victim is a person engaged in the performance of duties while employed by or under contract with a detention facility. *People v. Akers*, 712 P.2d 1058 (Colo. App. 1985).

Because the statute includes the phrase "lawfully confined or in custody," it is not necessary that defendant be incarcerated at the time of the assault, but may merely be in the lawful custody of a peace officer. *People v. Marquez-Lopez*, 952 P.2d 788 (Colo. App. 1997).

Detention of a suspect for further investigation rather than arrest is sufficient to establish custody under subsection (1)(f). *People v. Ortega*, 899 P.2d 236 (Colo. App. 1994); *People v. Marquez-Lopez*, 952 P.2d 788 (Colo. App. 1997).

Formal arrest not required by subsection (1)(f); peace officer need only apply a level of physical control over the person being detained so as reasonably to ensure that the person does not leave. *People v. Rawson*, 97 P.3d 315 (Colo. App. 2004).

Subsection (1)(f.5) applies to an individual lawfully confined in a vehicle who is lawfully held in custody and whose victim is a law enforcement officer. Although the language "in custody" contained in subsection (1)(f) is not included in subsection (1)(f.5), the legislature intended that the statute would apply to individuals under arrest and confined to a patrol vehicle. *People v. Miller*, 97 P.3d 171 (Colo. App. 2003).

Felony menacing is not a lesser included offense of second-degree assault. The offense of second-degree assault does not establish every essential element of felony menacing and, therefore, the merger doctrine does not apply. *People v. Truesdale*, 804 P.2d 287 (Colo. App. 1990).

Obstruction of a peace officer under § 18-8-104 is a lesser included offense of second degree assault under subsection (1)(c) and (1)(f) since all of the elements contained in the definition of obstruction of a peace officer would be necessarily established by the proof of the elements of second degree assault. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under § 18-8-104 was a lesser included offense of second degree assault under subsection (1)(c) was error requiring a new trial where defen-

dant acknowledged the officers sustained bodily injury but there was no admission that he intended to act in a manner that would cause the injury. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under § 18-8-104 was a lesser included offense of second degree assault under subsection (1)(f) was error requiring a new trial where defendant testified that the only action he volitionally took after the first officer entered the cell was to raise his arms. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Crime of second-degree assault requires the intent to cause bodily injury to another person and causing such injury to any person by means of a deadly weapon. *People v. Chavez*, 730 P.2d 321 (Colo. 1986).

Trial court's instruction to jury that second-degree assault involved force or violence as a matter of law was proper for conviction under statute prohibiting possession of weapons by previous offenders notwithstanding fact that second degree assault could involve injury to another resulting from the administration of a drug or other substance. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

Equal protection principles are violated by § 18-3-209 (3), which provides that persons charged with third degree assault against the elderly commit a greater classification of crime and may not raise the issue of provocation, while provocation may be raised by a person charged with second degree assault, which is classified as a lower class crime than third degree assault. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993) (decided under law in effect prior to 1991 amendment).

Provocation as used in this section is neither a culpable mental state nor part of a culpable mental state. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993).

In addition, this section does not require that the actor know the age of the victim. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993).

The provocation language in subsection (2)(b) is a sentence mitigating factor that does not involve an element of the offense, give rise to an affirmative defense, or create a separate offense. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

The provocation language in subsection (2)(b) is not a sentence enhancer requiring an Apprendi jury finding. An Apprendi jury finding is only necessary when the determination of a fact increases the punishment beyond the range the defendant is already subject to. In the case of second degree assault, before the jury can consider the issue of provocation, they have to find the defendant guilty of second degree assault — subjecting the defendant to a class 4 felony. At that point, the jury may consider

provocation, and if they find provocation the defendant is subject to a class 6 felony. So, the factual issue of provocation decreases the punishment range making Apprendi inapplicable. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

A fist is not a deadly weapon for the purposes of subsection (1)(b). *People v. Ross*, 819 P.2d 507 (Colo. App. 1991).

To be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended opponent or adversary. *People v. Esparza-Treto*, __ P.3d __ (Colo. App. 2011).

It is no defense to show that specific intent was directed at someone else other than the victim. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

The department of corrections cannot be the "intended victim", within the meaning of subsection (2)(a), and therefore a trial court's refusal to allow defendant to present a provocation defense was not error. *People v. Akers*, 712 P.2d 1058 (Colo. App. 1985).

Under subsection (2)(a), the class of the felony may be reduced even though the person committing the assault has still engaged in the same conduct with the same mental culpability required for conviction of second degree assault. *People v. Duran*, 991 P.2d 313 (Colo. App. 1999).

Extent of wound does not negate intent. The extent of the resulting wound from stabbing by defendant does not negate the defendant's intent necessary for conviction under this section. *People v. Borrego*, 187 Colo. 217, 529 P.2d 639 (1974).

Requirement of custody or confinement. When assaults on police officers occurred, the defendant's arrest was complete and he was not free to leave the presence of the officers, and thus he was in custody for purposes of the statute. *People v. Weider*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986).

A formal arrest is not always required before a person may be deemed to be in custody. What is required is that the peace officer have applied a level of physical control over the person being detained so as reasonably to ensure that the person does not leave. *People v. Ortega*, 899 P.2d 236 (Colo. App. 1994); *People ex rel. D.S.L.*, 134 P.3d 522 (Colo. App. 2006).

Evidence sufficient to show specific intent. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Because one of the powers exercised by defendant under father's power of attorney, dealing with personal and family maintenance, required him to maintain father's standard of living, he had a legal duty to exercise that power with due care for father's benefit. *People v. Madison*, 176 P.3d 793 (Colo. App. 2007).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion, the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either assault charge. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time. Therefore, jury's guilty verdicts for attempted first degree murder and first degree assault based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree assault based on defendant's stabbing of a second person are not necessarily inconsistent. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

Evidence insufficient to support conviction for second degree assault. There was no evidence that defendant used his car as a deadly weapon, specifically there was no evidence that defendant used his vehicle with assaultive conduct specifically directed toward the other driver. The evidence, in fact, was to the contrary that defendant attempted to avoid the other driver. *People v. Esparza-Treto*, ___ P.3d ___ (Colo. App. 2011).

III. TRIAL AND PROSECUTION.

A. Evidence.

Eyewitness testimony established use of weapon. Where three witnesses for the people testified only that they did not see the defendant with a knife, a fourth witness testified unequivocally to possession of a knife by the defendant, and no witness of the people stated that the defendant did not have a knife, there is no internal contradiction, and the evidence of one eyewitness, if believed by the jury, is sufficient to establish that defendant had in his possession a knife and used it to inflict the wounds on the victim of the assault. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Evidence sufficient to sustain convictions. *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976); *People v. Mason*, 632 P.2d 616 (Colo. App. 1981).

Sufficient evidence that defendant intended to cause bodily injury where officers present during altercation testified that during the struggle defendant was kicking at all of the officers and continued to kick during efforts to subdue him. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Evidence sufficient to establish specific intent to cause injury. The evidence presented at trial, considered in the light most favorable to the people, showed the defendant was oriented

and had control over his body and speech. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

B. Jury.

Whether defendant established heat of passion claim is issue for jury to determine. *Thompson v. Ricketts*, 500 F. Supp. 688 (D. Colo. 1980).

When lesser offense submitted to jury. Where there is no evidence of the specific intent required to determine the defendant guilty of the precise offense charged in the information, or where the evidence might be insufficient to remove the reasonable doubt which might be in the minds of the jury as to the intent, under the same evidence the defendant might be found guilty of simple assault. *Barnhisel v. People*, 141 Colo. 243, 347 P.2d 915 (1959).

Trial by jury of less than twelve. A person who is charged with second degree assault, which is a class 4 felony, may elect to be tried by a jury of fewer than 12, but not less than six persons. *People v. Byerley*, 635 P.2d 542 (Colo. 1981).

C. Instructions.

Where it was possible for the jury to entertain a reasonable doubt as to defendant's guilt of attempted robbery, and at the same time to be convinced by reason of defendant's admissions that he was guilty of making an assault upon the complaining witness, the evidence justified the giving of an instruction on simple assault as requested in order to submit the lesser included offense to a jury. *People v. Velasquez*, 177 Colo. 264, 497 P.2d 12 (1972).

Where the jury is unable to unanimously find all the elements of a particular offense, the trial court should instruct the jury to return a guilty verdict on the lesser offense so long as the jurors agree that the defendant is guilty of each element of the lesser offense. *People v. Brighi*, 755 P.2d 1218 (Colo. 1988).

An optimal instruction would state that attempt requires some substantial step, or some overt act beyond mere preparation. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

But court is not required to give the definition of attempt found in the general criminal attempt statute, § 18-2-101. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

No plain error found when court failed to instruct on the mental state needed to commit second degree assault. *People v. Wells*, 734 P.2d 655 (Colo. App. 1986).

When there is no doubt on intent, court should deny third degree assault instruction. *People v. Gibson*, 623 P.2d 391 (Colo. 1981).

Where there was no evidence that the defendant's assault with a deadly weapon was made with anything less than a conscious disregard to

the risk to the victim, the court did not err in refusing to instruct the jury on the lesser included offense of third degree assault. *People v. Workman*, 885 P.2d 298 (Colo. App. 1994).

Plain error found when court failed to instruct the jury on the mental state needed for the act of “violently apply[ing] physical force”. *People v. Stafford*, 890 P.2d 244 (Colo. App. 1994).

Court’s use of a repealed version of the second degree assault statute in defendant’s self-defense instruction was plain error. The instruction lessened the prosecution’s burden of disproving defendant’s claim of self-defense. *Kaufman v. People*, 202 P.3d 542 (Colo. 2009).

Instruction on deadly weapons proper. The trial court did not err in generally instructing the jury that a shoe was not in and of itself a deadly or dangerous weapon and that in determining whether an instrument, not inherently deadly or dangerous, assumes the characteristics of a deadly weapon the jury should consider the nature of the instrument or thing, the manner of its use, the location on the body of the injuries inflicted and the extent of such injuries. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

A defendant’s learning of an injury to a close relative may create a jury question as to provocation in assault cases. No requirement, however, exists under this section for the fact finder to determine whether a sufficient interval has passed for the “voice of reason and humanity to be heard”. Although, as a matter of law, the court may find a sufficient “cooling off” period has occurred. *People v. Suazo*, 867 P.2d 161 (Colo. App. 1993).

Trial court had no duty to provide an instruction regarding the elements of lesser, non-included offense of obstructing a peace officer. The evidence was undisputed that defendant was in custody. There was no rational basis on which the jury could have acquitted defendant of second degree assault and convicted him of obstructing a police officer. *People v. Ortega*, 899 P.2d 236 (Colo. App. 1994).

IV. VERDICT AND SENTENCE.

Subsection (2)(c) requires mandatory sentencing under the provisions of § 16-11-309. The intent of the legislature was to mandate sentencing under § 16-11-309 irrespective of any allegation of a violent crime and irrespective of a specific finding by the trial court that a violent crime has been committed. *People v. Terry*, 791 P.2d 374 (Colo. 1990).

Thus, trial court’s enhanced sentence for second degree assault with a deadly weapon was not error even though jury did not specifically find that defendant had committed a crime of violence. An offense committed under subsection (1)(b) is a per se crime of violence under subsection (2)(c) and requires enhanced sen-

tencing under § 16-11-309 without the necessity of pleading or proving a separate crime of violence. *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002).

Subsection (1)(b), which includes attempted assault, combined with the sentencing requirements of subsection (2)(c) violates equal protection requirements because attempted second degree assault, when treated as a crime of violence, would carry a presumptive penalty of five to sixteen years imprisonment and attempted first degree assault would carry a presumptive penalty of two to eight years imprisonment. *People v. Nguyen*, 900 P.2d 37 (Colo. 1995) (decided under former subsection (1)(b) as it existed prior to amendment in 1995).

The appropriate cure for the constitutional infirmity of subsection (1)(b), consistent with legislative intent, is to strike the crime of violence sentencing as it applies to attempted second degree assault. *People v. Nguyen*, 900 P.2d 37 (Colo. 1995) (decided under former subsection (1)(b) as it existed prior to amendment in 1995).

A defendant who is convicted of second degree assault on a police officer is subject to the mandatory sentencing range specified for crimes of violence in § 16-11-309, due to the mandatory language of subsection (2)(c). However, the defendant is not subject to sentencing for an extraordinary risk crime under § 18-1-105 (9.7) unless the prosecution has alleged and proved the elements of a crime of violence, as described in § 16-11-309. In sentencing the defendant, the trial court stated that it was sentencing him to a minimum mandatory sentence of five years. Since this sentence presumes application of the sentence enhancing provisions for extraordinary risk crimes, the sentence was imposed in error and the case was remanded for resentencing. *People v. Banks*, 9 P.3d 1125 (Colo. 2000).

Trial court did not erroneously apply the general sentence enhancer in § 18-1.3-401 (8)(a)(IV) to defendant’s assault conviction under subsection (1)(f.5) of this section. Application of the sentence enhancement provisions of § 18-1.3-401 did not have the effect of raising the class of felony for which defendant was convicted. Plus, the elemental statute under which defendant was charged did not contain specific sentencing requirements that would have superseded the provisions of the sentencing statute. *People v. Wylie*, 260 P.3d 57 (Colo. App. 2010).

The specific aggravator in subsection (1)(f) applies as opposed to any general aggravator found in § 18-1.3-401. Subsection (1)(f) refers to the second degree assault on a correctional officer and contains its own aggravator. Therefore, the specific aggravator applies, not a general one. *People v. Willcoxon*, 80 P.3d 817 (Colo. App. 2002).

The consecutive sentencing provision in subsection (1)(f) does not apply to juveniles who are adjudicated delinquent and sentenced to the department of human services. People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006).

Section requires consecutive sentences even when in custody only as a result of being

charged with a crime. People v. Benavidez, 222 P.3d 391 (Colo. App. 2009).

Third degree assault is a lesser included offense of second degree assault. The third degree assault conviction merges into the conviction for second degree assault. People v. Howard, 89 P.3d 441 (Colo. App. 2003).

18-3-204. Assault in the third degree. (1) A person commits the crime of assault in the third degree if:

(a) The person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon; or

(b) The person, with intent to infect, injure, harm, harass, annoy, threaten, or alarm another person whom the actor knows or reasonably should know to be a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider, causes the other person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or toxic, caustic, or hazardous material by any means, including throwing, tossing, or expelling the fluid or material.

(2) (a) An adult or juvenile who has had a court find that there is probable cause to believe that he or she has committed an offense pursuant to paragraph (b) of subsection (1) of this section or is convicted of an offense pursuant to paragraph (b) of subsection (1) of this section or any person who is determined to have provided blood, seminal fluid, urine, feces, saliva, mucus, or vomit to a person for whom probable cause has been found or been convicted of such an offense shall be ordered by the court to submit to a medical test for communicable diseases and to supply blood, feces, urine, saliva, or other bodily fluid required for the test. The results of such test shall be reported to the court or the court's designee, who shall then disclose the results to any victim of the offense who requests such disclosure. Review and disclosure of medical test results by the court shall be closed and confidential, and any transaction records relating thereto shall also be closed and confidential. If a person subject to a medical test for communicable diseases pursuant to this subsection (2) voluntarily submits to a medical test for communicable diseases, the fact of the person's voluntary submission shall be admissible in mitigation of sentence if the person is convicted of the charged offense.

(b) In addition to any other penalty provided by law, the court may order any person who is convicted of the offense described in paragraph (b) of subsection (1) of this section to meet all or any portion of the financial obligations of medical tests performed on and treatment prescribed for the victim or victims of the offense.

(3) Assault in the third degree is a class 1 misdemeanor and is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(4) "Emergency medical care provider" means a doctor, intern, nurse, nurse's aid, physician's assistant, ambulance attendant or operator, air ambulance pilot, paramedic, or any other member of a hospital or health care facility staff or security force who is involved in providing emergency medical care at a hospital or health care facility, or in an air ambulance or ambulance as defined in section 25-3.5-103 (1) and (1.5), C.R.S.

Source: L. 71: R&RE, p. 421, § 1. C.R.S. 1963: § 40-3-204. L. 77: Entire section amended, p. 961, § 10, effective July 1. L. 2004: Entire section amended, p. 635, § 4, effective August 4. L. 2009: Entire section amended, (HB 09-1120), ch. 305, p. 1649, § 1, effective July 1. L. 2011: (1)(b) amended and (4) added, (HB 11-1105), ch. 250, p. 1088, § 2, effective August 10. L. 2012: (1)(b) amended, (HB 12-1059), ch. 271, p. 1435, § 13, effective July 1.

Editor's note: Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (1)(b) applies to acts committed on or after July 1, 2012.

ANNOTATION

Annotator's note. Since § 18-3-204 is similar to former § 40-2-35, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Essential elements of assault are an unlawful attempt to commit a violent injury and the present ability to commit a violent injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Assault is an unlawful attempt coupled with a present ability to commit a violent injury on the person of another. *Sims v. People*, 177 Colo. 229, 493 P.2d 365 (1972).

Conduct which creates substantial risk of serious bodily injury not element of offense. The establishment of every element of third degree assault would not necessarily include proving conduct which creates a substantial risk of serious bodily injury, an element of reckless endangerment. Third degree assault requires proof of bodily injury but not proof of a substantial risk of serious bodily injury. Therefore reckless endangerment is not a lesser included offense of third degree assault. *People v. Berner*, 42 Colo. App. 520, 600 P.2d 112 (1979).

Separate blows in single criminal transaction are single offense. Where two blows were delivered to the same person within a short period of time as part of a continuous harangue to extract information, these two blows were not separate transactions but were part of a single criminal transaction arising from a single impulse. Therefore it was error to charge and convict defendant twice for the same transaction. *People v. Berner*, 42 Colo. App. 520, 600 P.2d 112 (1979).

Offense of assault and battery is a matter of mixed state and local concern. *City of Aurora v. Martin*, 181 Colo. 72, 507 P.2d 868 (1973).

It is no defense to show that the specific intent was directed at someone else other than the victim. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Mental impairment evidence admissible to negate mens rea. Opinion evidence of a mental impairment due to a mental disease or defect may be admitted to negate the mens rea for a nonspecific intent crime such as assault in the third degree. *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S. Ct. 1232, 75 L. Ed.2d 466 (1983).

Evidence sufficient to show specific intent. *People v. Tafoya*, 179 Colo. 438, 501 P.2d 118 (1972).

Bodily injury need not be of a crippling or otherwise incapacitating nature to be within the statutory prohibition. *People v. Lobato*, 187 Colo. 285, 530 P.2d 493 (1975).

To be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended opponent or adversary. *People v. Esparza-Treto*, ___ P.3d ___ (Colo. App. 2011).

BB gun can be a deadly weapon. Testimony that if a person hit with a BB in a vulnerable area of the body, such as the eyes, the BB could cause serious bodily injury was sufficient to prove that the BB gun was a deadly weapon. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

The issue in evaluating whether a device is a deadly weapon is whether, in the manner it was used, the device could have caused death or serious bodily injury. The fact that in this particular case death or serious bodily injury did not occur is irrelevant. *People in Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993).

Third degree assault is a lesser included offense of second degree assault. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975); *People v. Annan*, 665 P.2d 629 (Colo. App. 1983); *People v. Brown*, 677 P.2d 406 (Colo. App. 1983); *People v. Smith*, 682 P.2d 493 (Colo. App. 1983); *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

The third degree assault conviction merges into the conviction for second degree assault. *People v. Howard*, 89 P.3d 441 (Colo. App. 2003).

And only difference between second and third degree assault is degree of injury. *People v. Thompson*, 187 Colo. 252, 529 P.2d 1314 (1975); *People v. Brown*, 677 P.2d 406 (Colo. App. 1983).

Third degree assault is distinguishable from second degree assault on a peace officer, as described in § 18-3-203, and resisting arrest, as described in § 18-8-103, and therefore these sections do not violate equal protection. This section and § 18-8-103 require that the defendant act knowingly, whereas § 18-3-203 requires that the defendant act intentionally. Further, § 18-3-203 requires proof that the defendant intended to prevent a police officer from performing a lawful duty, which is not required for a conviction under this section. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

Proper to submit different degrees of assault to jury. Where the trial judge submitted to the jury not only the offense of assault with a deadly weapon, but also simple assault as a lesser included offense, this was not error. Plainly, an instruction on general intent was necessary for simple assault, and it was also necessary for the court to instruct on specific intent for the charge of assault with a deadly weapon. *Arellano v. People*, 174 Colo. 456, 484 P.2d 801 (1971).

Because two counts of second degree assault were premised on identical evidence, once the trial court concluded that the evidence was sufficient to submit an instruction regarding third degree assault as a lesser included offense to count one, it was obligated to make the same conclusion with respect to the defendant's request for a lesser nonincluded instruction as to count two. *People v. Castro*, 952 P.2d 762 (Colo. App. 1998).

Defendant's prior conviction of assault did not bar his subsequent conviction of sexual assault, as offenses had distinct elements that were not subsumed by each other. *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986).

When there is no doubt on intent, court should deny third degree assault instruction. *People v. Gibson*, 623 P.2d 391 (Colo. 1981).

When court instructed jury on third degree assault relating to intentional conduct on lesser-included offense of second degree assault, but refused to instruct on third degree assault relating to criminal negligence, see *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976).

Third degree assault not included in robbery. Third degree assault requires proof of bodily injury, an element not necessary to culpability under robbery, and therefore, the former offense is not included within the latter. *People v. Flores*, 39 Colo. App. 556, 575 P.2d 11 (1977).

A misdemeanor conviction under this section for third degree assault involves a crime

of violence for purposes of § 4B1.2(a)(2) of the United States sentencing guidelines. *United States v. Krejcarek*, 453 F.3d 1290 (10th Cir. 2006).

Evidence insufficient to support conviction for second degree assault. There was no evidence that defendant used his car as a deadly weapon, specifically there was no evidence that defendant used his vehicle with assaultive conduct specifically directed toward the other driver. The evidence, in fact, was to the contrary that defendant attempted to avoid the other driver. *People v. Esparza-Treto*, ___ P.3d ___ (Colo. App. 2011).

Applied in *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978); *People in Interest of C.B.*, 196 Colo. 362, 585 P.2d 281 (1978); *People v. Kreiser*, 41 Colo. App. 210, 585 P.2d 301 (1978); *People v. Dowdell*, 197 Colo. 76, 589 P.2d 948 (1979); *People v. Trout*, 198 Colo. 98, 596 P.2d 762 (1979); *Kreiser v. People*, 199 Colo. 20, 604 P.2d 27 (1979); *People v. Johnson*, 644 P.2d 34 (Colo. App. 1980); *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. Sanchez*, 644 P.2d 95 (Colo. App. 1982); *People v. Dement*, 661 P.2d 675 (Colo. 1983); *People v. Gouker*, 665 P.2d 113 (Colo. 1983); *People v. Reedy*, 705 P.2d 1032 (Colo. App. 1985).

18-3-205. Vehicular assault. (1) (a) If a person operates or drives a motor vehicle in a reckless manner, and this conduct is the proximate cause of serious bodily injury to another, such person commits vehicular assault.

(b) (I) If a person operates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and this conduct is the proximate cause of a serious bodily injury to another, such person commits vehicular assault. This is a strict liability crime.

(II) For the purposes of this subsection (1), one or more drugs shall mean all substances defined as a drug in section 27-80-203 (13), C.R.S., and all controlled substances defined in section 18-18-102 (5), and glue-sniffing, aerosol inhalation, or the inhalation of any other toxic vapor or vapors as defined in section 18-18-412.

(III) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state shall not constitute a defense against any charge of violating this subsection (1).

(IV) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(c) Vehicular assault, in violation of paragraph (a) of this subsection (1), is a class 5 felony. Vehicular assault, in violation of paragraph (b) of this subsection (1), is a class 4 felony.

(2) In any prosecution for a violation of subsection (1) of this section, the amount of alcohol in the defendant's blood or breath at the time of the commission of the alleged

offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, shall give rise to the following presumptions:

(a) If there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was not under the influence of alcohol.

(b) If there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath, it shall be presumed that the defendant was under the influence of alcohol.

(3) The limitations of subsection (2) of this section shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol.

(4) (a) If a law enforcement officer has probable cause to believe that any person was driving a motor vehicle in violation of paragraph (b) of subsection (1) of this section, the person, upon the request of the law enforcement officer, shall take, and complete, and cooperate in the completing of any test or tests of the person's blood, breath, saliva, or urine for the purpose of determining the alcoholic or drug content within his or her system. The type of test or tests shall be determined by the law enforcement officer requiring the test or tests. If the person refuses to take, or to complete, or to cooperate in the completing of any test or tests, the test or tests may be performed at the direction of a law enforcement officer having probable cause, without the person's authorization or consent. If any person refuses to take, or to complete, or to cooperate in the taking or completing of any test or tests required by this paragraph (a), the person shall be subject to license revocation pursuant to the provisions of section 42-2-126 (3), C.R.S. When the test or tests show that the amount of alcohol in a person's blood was in violation of the limits provided for in section 42-2-126 (3) (a), (3) (b), (3) (d), or (3) (e), C.R.S., the person shall be subject to license revocation pursuant to the provisions of section 42-2-126, C.R.S.

(b) Any person who is required to submit to testing shall cooperate with the person authorized to obtain specimens of his blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing.

(c) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person committed a violation of subparagraph (I) of paragraph (b) of subsection (1) of this section and in accordance with rules and regulations prescribed by the state board of health concerning the health of the person being tested and the accuracy of such testing. Strict compliance with such rules and regulations shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results. It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(d) No person except a physician, a registered nurse, a paramedic as certified in part 2 of article 3.5 of title 25, C.R.S., an emergency medical service provider as defined in part 1 of article 3.5 of title 25, C.R.S., or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse is entitled to withdraw blood to determine the alcoholic or drug content of the blood for purposes of this section. In a trial for a violation of paragraph (b) of subsection (1) of this section, testimony of a law enforcement officer that the officer witnessed the taking of a blood specimen by a person who the officer reasonably believed was authorized to withdraw blood specimens is sufficient evidence that the person was authorized, and testimony from the person who obtained the blood specimens concerning the person's authorization to obtain blood specimens is not a prerequisite to the admissibility of test results concerning the blood specimens obtained. No civil liability shall attach to a person authorized to obtain blood, breath, saliva, or urine specimens or to a hospital, clinic, or association in or for which the specimens are obtained in accordance with this subsection (4) as a result of the act of obtaining the specimens from any person if the specimens were obtained according to the rules prescribed by the state board of health; except that the provision does not relieve the person from liability for negligence in obtaining the specimen sample.

(e) Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of his blood or any drug content of his system as provided in this subsection (4). If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency shall be allowed to test any blood, urine, or saliva which was obtained and not utilized by a health care provider and shall have access to that portion of the analysis and results of any tests administered by such provider which shows the alcohol or drug content of the person's blood or any drug content within his system. Such test results shall not be considered privileged communications, and the provisions of section 13-90-107, C.R.S., relating to the physician-patient privilege shall not apply. Any person who is dead, in addition to the tests prescribed, shall also have his blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Such information obtained shall be made a part of the accident report.

(f) If a person refuses to take, or to complete, or to cooperate in the completing of any test or tests as provided in this subsection (4) and such person subsequently stands trial for a violation of subsection (1) (b) of this section, the refusal to take, or to complete, or to cooperate with the completing of any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to the admission of his refusal to take, or to complete, or to cooperate with the completing of any test or tests.

(g) Notwithstanding any provision in section 42-4-1301.1, C.R.S., concerning requirements which relate to the manner in which tests are administered, the test or tests taken pursuant to the provisions of this section may be used for the purposes of driver's license revocation proceedings under section 42-2-126, C.R.S., and for the purposes of prosecutions for violations of section 42-4-1301 (1) or (2), C.R.S.

(5) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine his alcohol or drug level. This subsection (5) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this subsection (5) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

Source: L. 71: R&RE, p. 421, § 1. C.R.S. 1963: § 40-3-205. L. 75: Entire section amended, p. 625, § 2, effective June 26. L. 77: (1) R&RE, p. 961, § 11, effective July 1. L. 81: (1)(b) amended, p. 1992, § 5, effective June 19. L. 83: (4) added, p. 1648, § 18, effective July 1. L. 88: IP(2) amended, p. 1365, § 6, effective July 1. L. 89: (1)(b), (2),

and (3) amended, (4) R&RE, and (5) added, pp.896, 898, §§ 3, 4, effective July 1. **L. 93:** (1) amended, p. 1987, § 15, effective July 1; (1)(b)(II) amended, p. 1731, § 14, effective July 1. **L. 94:** (4)(c), (4)(e), and (5) amended, p. 2734, § 357, effective July 1; (4)(a) and (4)(g) amended, p. 2552, § 41, effective January 1, 1995. **L. 97:** (4)(a) amended, p. 1471, § 19, effective July 1. **L. 2002:** (4)(g) amended, p. 1915, § 5, effective July 1. **L. 2004:** (2)(b) and (2)(c) amended, p. 781, § 4, effective July 1. **L. 2008:** (4)(a) amended, p. 244, § 4, effective July 1; (4)(g) amended, p. 1890, § 57, effective August 5. **L. 2012:** (1)(b)(II) amended, (HB 12-1311), ch. 281, p.1618, § 39, effective July 1; (4)(d) amended, (HB 12-1059), ch. 271, p. 1435, § 14, effective July 1.

Editor's note: (1) Amendments to subsection (1) in House Bill 93-1302 and House Bill 93-1088 were harmonized.

(2) Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (4)(d) applies to acts committed on or after July 1, 2012.

Cross references: (1) For penalties for driving under the influence of alcohol, see § 42-4-1301.

(2) For the legislative declaration contained in the 1994 act amending subsections (4)(c), (4)(e), and (5), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Law reviews. For article, "Drinking and Driving: An Update on the 1989 Legislation", see 18 Colo. Law. 1943 (1989).

Annotator's note. Since § 18-3-205 is similar to former § 40-2-11, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Constitutionality. This section is not unconstitutional on the grounds that it denies the accused the opportunity to rebut the presumption raised by his or her blood alcohol content. *People v. Rostad*, 669 P.2d 126 (Colo. 1983); *People v. Ray*, 678 P.2d 1019 (Colo. 1984); *People v. Sutherland*, 683 P.2d 1192 (Colo. 1984).

Legislative concern is for result of reckless driving. This statute is not concerned with drunk driving or reckless driving, as such. Rather, this statute evidences a legislative concern for the result which flows from the reckless operation of a motor vehicle by one who is under the influence of intoxicating liquor, the result being the injury of a human being. *People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973).

Reckless driving is not a lesser included offense of vehicular homicide or vehicular assault. *People v. Clary*, 950 P.2d 654 (Colo. App. 1997).

Driving under the influence is a lesser included offense of vehicular assault. If a person is guilty of vehicular assault by virtue of driving under the influence, driving under the influence is a lesser included offense prohibited by the double jeopardy clause. *People v. Cruthers*, 124 P.3d 887 (Colo. App. 2005).

The gravamen of both vehicular homicide, § 18-3-106, and this section is the "reckless" operation or driving of a motor vehicle, which results in the death of or serious bodily injury to another. *People v. Sexton*, 192 Colo. 81, 555 P.2d 1151 (1976).

Vehicular assault is distinguishable from second degree assault described in § 18-3-203 (1)(d), and therefore these sections do not violate equal protection. The statutes differ in three primary ways. Second degree assault applies to a range of unspecified conduct, while vehicular assault applies narrowly to driving or operating a motor vehicle. Second degree assault can apply to acts of omission, while vehicular assault requires acts of commission. Second degree assault applies to any deadly weapon, which may include a motor vehicle, while vehicular assault requires the defendant's reckless driving or operation of a motor vehicle to have proximately caused the serious bodily injury. *People v. Stewart*, 55 P.3d 107 (Colo. 2002).

Elements of offense. This statute requires proof of two elements for conviction in addition to that of driving while under the influence: First, driving in a reckless manner; and second, the infliction of bodily injury while so doing. *People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973).

Finding of knowing or wilful conduct is sufficient to establish recklessness. *People v. Yanaga*, 635 P.2d 925 (Colo. 1981).

Offense requires injury. Neither offenses of driving under the influence of alcohol, nor reckless driving, nor causing an accident while under the influence of alcohol or by reckless driving, constitute felonious acts. Only when these events caused a death or injury to another person does the statute specifically provide that an offense has been committed. *Penn Mut. Life Ins. Co. v. Gibson*, 160 Colo. 462, 418 P.2d 50 (1966).

Vehicular assault while driving under the influence is a strict liability crime, and jury was properly instructed on obligation to prove proximate cause beyond a reasonable doubt. *People v. Hall*, 722 P.2d 447 (Colo. App. 1986).

“Person”, as used in this section to describe a victim of vehicular assault, includes a fetus that is injured while in the womb, is subsequently born and lived outside the womb, and then dies from the injuries sustained. While Colorado has no provisions criminalizing the injuring or killing of a fetus, the state common law “born alive” doctrine permits a criminal prosecution of the perpetrator when a child is born alive and then dies of the prenatal injuries, and civil law in the state has held that such a victim is a person within Colorado’s wrongful death statute. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009).

Subsections (1)(a) and (1)(b) set forth two alternative ways of committing the singular crime of vehicular assault; they do not create two separate crimes. *People v. Acosta*, 860 P.2d 1376 (Colo. App. 1993); *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999).

Defendant must be operating or driving the motor vehicle. *Britto v. People*, 178 Colo. 216, 497 P.2d 325 (1972).

There was substantial evidence that defendant’s actions caused defendant’s injuries, so there was no err in failing to instruct the jury that acts of omission cannot constitute vehicular assault. *People v. Smith*, 121 P.3d 243 (Colo. App. 2005).

Misdemeanor offenses under § 42-4-1202 are not the same as felony offenses under this section. *People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973).

Driving under the influence of intoxicating liquor and driving while ability is impaired are not lesser included offenses of the felony charge of inflicting bodily injury while under the influence of intoxicating liquor by driving an automobile in a reckless manner. *People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973); *People v. Lucero*, 985 P.2d 87 (Colo. App. 1999).

Prosecution not barred under this section. The court’s dismissal of a misdemeanor count under § 42-4-1202, which placed the defendant in jeopardy as to that count, did not bar prosecution on felony count under this section. *People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973).

Right to refuse to submit to blood alcohol test does not apply. The right of refusal to submit to a blood alcohol test under the Colorado implied consent law applied only to the misdemeanor offense of driving under the influence of intoxicating liquor and not to the felony offense of causing an injury while driving under the influence of intoxicating liquor. *People v. Blandon*, 194 Colo. 102, 568 P.2d 1171 (1977).

The general assembly need not extend the legislative grace of a right to refuse a blood test, a test which is constitutionally permissible, to those charged with vehicular homicide or vehic-

ular assault. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

Equal protection is not violated by the failure of § 18-3-106 and this section to afford an accused the right to refuse a blood test afforded by § 42-4-1202. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

The general assembly’s decision to permit one charged with the less grievous offense of driving under the influence to refuse a blood test while not likewise permitting one charged with felonious vehicular homicide or felonious vehicular assault to refuse the test is not arbitrary or unreasonable. *People v. Myers*, 198 Colo. 295, 599 P.2d 891 (1979).

In order for an officer to require a test under this section, the motorist must first be given the opportunity to refuse consent to the test. *People v. Maclaren*, 251 P.3d 578 (Colo. App. 2010).

Failure of an officer to obtain consent prior to subjecting a motorist to a test under this section does not require suppression of the test result or dismissal of the case. Court has broad discretion to suppress evidence or dismiss the case as a sanction for improper police conduct. *People v. Maclaren*, 251 P.3d 578 (Colo. App. 2010).

Where officer made no attempt to comply with the requirements of the statute and there were no circumstances that would have prevented compliance, trial court did not abuse its discretion by suppressing results of blood test. *People v. Maclaren*, 251 P.3d 578 (Colo. App. 2010).

Regulations promulgated pursuant to implied consent statute apply to offenses charged under it and not to felonies charged under this section. *People v. Acosta*, 620 P.2d 55 (Colo. App. 1980).

Failure of police to obtain test from unconscious victim pursuant to subsection (4)(e) does not entitle defendant to a dismissal of the charges under this section when the defendant cannot show that the failure was in bad faith. *People v. Kearns*, 988 P.2d 189 (Colo. App. 1999).

Sentence of three years plus two years probation for class 4 felony conviction under subsection (1)(b) was not disproportionate. *People v. Kearns*, 988 P.2d 189 (Colo. App. 1999).

Performance and consent to breathalyzer test. *People v. Sanchez*, 173 Colo. 188, 476 P.2d 980 (1970).

Evidence sufficient to sustain conviction. *People v. Rodriguez*, 645 P.2d 857 (Colo. App. 1982).

As to former element of intent, see *Britto v. People*, 178 Colo. 216, 497 P.2d 325 (1972).

Violation of reckless vehicular assault statute is a predicate crime of violence for purposes of the United States sentencing guide-

lines. Subsection (1)(a) creates a categorical crime of violence because it reaches only conduct involving the use of force as required under the sentencing guidelines. *United States v. Grajeda-Ramirez*, 348 F.3d 1123 (9th Cir. 2003).

Applied in *People v. Beltran*, 634 P.2d 1003 (Colo. App. 1981); *People v. Roybal*, 655 P.2d 410 (Colo. 1982).

18-3-206. Menacing. (1) A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a class 3 misdemeanor, but, it is a class 5 felony if committed:

(a) By the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or

(b) By the person representing verbally or otherwise that he or she is armed with a deadly weapon.

Source: **L. 71:** R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-206. **L. 77:** Entire section amended, p. 961, § 12, effective July 1. **L. 2000:** Entire section amended, p. 694, § 5, effective July 1.

ANNOTATION

Law reviews. For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986).

Statute did not unconstitutionally violate the defendant's equal protection rights, despite the defendant's claim that the conduct proscribed by this section, a class 5 felony, was indistinguishable from the conduct proscribed in § 18-9-106 (1)(f) (disorderly conduct with a deadly weapon), a class 2 misdemeanor, in which the actus reus is less specific than the actus reus in this section. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

It is only when the same conduct is proscribed in two statutes and different criminal sanctions apply, that problems arise under equal protection. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

Felony menacing is a specific intent crime. *People v. Lundborg*, 39 Colo. App. 498, 570 P.2d 1303 (1977).

Felony menacing is not a lesser included offense of second-degree assault. The offense of second-degree assault does not establish every essential element of felony menacing and, therefore, the merger doctrine does not apply. *People v. Truesdale*, 804 P.2d 287 (Colo. App. 1990).

Menacing is not a lesser included offense of attempted extreme indifference murder. *People v. Portillo*, 251 P.3d 483 (Colo. App. 2010).

The actus reus of felony menacing is "placing another person in fear of imminent serious bodily injury by the use of a deadly weapon", an act more specific than the actus reus of disorderly conduct with a deadly weapon, which is displaying a deadly weapon in an alarming manner in a public place. Therefore, it does not violate the equal protection clause of article II, section 25, of the Colorado constitution to subject defendants to potential criminal liability

under both statutes. *People v. Torres*, 848 P.2d 911 (Colo. 1993).

Court did not err in denying motion for acquittal when defendant charged with felony menacing and evidence showed the victims believed themselves to be in danger of imminent serious bodily harm. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

Failure to instruct jury on "imminent" element was harmless error where prosecutor argued fear was imminent and defense did not challenge whether fear was imminent. Evidence clearly showed fear was imminent. *People v. Geisendorfer*, 991 P.2d 308 (Colo. App. 1999).

The phrase "use of a deadly weapon" is broad enough to include the act of holding a weapon in the presence of another in a manner that causes the other person to fear for his safety, even if the weapon is not pointed at the other person. *People v. Hines*, 780 P.2d 556 (Colo. 1989); *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Felony menacing requires use of deadly weapon. The elements of misdemeanor menacing and felony menacing are identical but for the added requirement of the use of a deadly weapon. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Under the felony provision of this section unloaded firearm is a deadly weapon. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980).

An unloaded firearm is a deadly weapon. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Defendant "used" his or her purported HIV status in a manner that could cause the victim to fear for his or her safety where the evidence showed that the defendant stated he or she was HIV positive, pinched and scratched the

victim, and attempted to bite him or her. *People v. Shawn*, 107 P.3d 1033 (Colo. App. 2004).

Felony menacing distinguished from first degree burglary. It is possible to commit a first degree burglary without also perpetrating felony menacing. The merger doctrine does not apply because there is no requirement in the first degree burglary statute that a victim be placed in fear of imminent serious bodily injury by a deadly weapon as there is in the felony menacing statute. *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

Voluntary intoxication is not a defense to felony menacing, which is a general intent crime. *People v. Breland*, 728 P.2d 763 (Colo. App. 1986); *People v. Esparza*, 757 P.2d 1164 (Colo. App. 1988).

And from aggravated robbery. The offense of aggravated robbery may be committed without also committing felony menacing. No merger occurs because the requirement in the felony menacing statute that the actor knowingly places a victim in fear of "serious bodily injury" is distinguishable from the requirement that the robber knowingly places a victim in fear of "bodily injury". *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

An essential element of the offense is a specific intent to cause fear. *People v. Stout*, 193 Colo. 466, 568 P.2d 52 (1977).

The specific intent of the defendant to cause fear is the gravamen of the offense of felony menacing. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980).

No reversible error committed when court refused to instruct the jury that if it found the affirmative defense of self-defense applied to any one defendant it applied to them all. Court not persuaded of real possibility that jury could convict the defendant, finding that he acted reasonably toward one victim but not another. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

Court erroneously submitted instruction to jury which included "specific intent" element for "general intent" crime of felony menacing. *People v. Crump*, 769 P.2d 496 (Colo. 1989).

Menacing is a general intent crime requiring only that the defendant be aware that the defendant's conduct is practically certain to cause the result. *People v. Zieg*, 841 P.2d 342 (Colo. App. 1992); *People v. Segura*, 923 P.2d 266 (Colo. App. 1995); *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996); *People v. Saltray*, 969 P.2d 729 (Colo. App. 1998); *People v. Shawn*, 107 P.3d 1033 (Colo. App. 2004).

It is unnecessary for the victim actually to hear or to be cognizant of any threat from defendant; instead, if there is evidence from which the jury could reasonably find that the defendant knew his actions, if discovered, would place the victim in fear of imminent serious bodily injury by use of a deadly weapon,

then the intent element of the offense may be established. *People v. Saltray*, 969 P.2d 729 (Colo. App. 1998).

The jury instruction which did not specify a particular victim, coupled with the comments of the prosecutor, invited the jury to convict without regard to the identity of the victim, making it impossible to determine whether the jury unanimously convicted defendant on the basis of menacing the same victim. *People v. Simmons*, 973 P.2d 627 (Colo. App. 1998).

Where the evidence of defendant's guilt was overwhelming and the issue of whether the defendant acted knowingly was not contested at trial, the trial court's error in instructing the jury on the meaning of "knowingly" is not plain error in defendant's conviction for menacing. *Espinoza v. People*, 712 P.2d 476 (Colo. 1985).

The trial court's omission of the definition of "serious bodily injury" from the jury instructions, although erroneous, did not rise to the level of plain error because the issue of the degree of bodily injury the victim feared from the defendant was not contested at trial. *People v. Fichtner*, 869 P.2d 539 (Colo. 1994).

Intent to inflict injury not gist of crime. Whether the defendant had the intent of actually to inflict injury is not the gist of felony menacing. *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980).

Conditional or contingent threat satisfies the "threat" element of felony menacing. *People v. Hines*, 780 P.2d 556 (Colo. 1989); *People v. Segura*, 923 P.2d 266 (Colo. App. 1995).

The term "use" is broad enough to include the act of holding a weapon in the presence of another in a manner that causes the other person to fear for his safety. *People v. Hines*, 780 P.2d 556 (Colo. 1989).

The term "use" necessarily includes the physical possession of a deadly weapon at the time of the crime. *People v. Adams*, 867 P.2d 54 (Colo. App. 1993).

The term "use" is broad enough to allow the jury to convict the defendant of felony menacing for defendant's act of returning to the victim at the location where the defendant previously sexually assaulted the victim while holding a gun to the victim's head, even though the victim did not see the gun upon the defendant's return. The jury and victim could reasonably believe the defendant still had the gun after the sexual assault and could use it to cause fear in the victim. *People v. Frye*, 872 P.2d 1316 (Colo. App. 1993).

Jury verdict convicting defendant of felony menacing is not inconsistent with the jury's verdict acquitting defendant of first degree sexual assault. *People v. Frye*, 872 P.2d 1316 (Colo. App. 1993).

Actual subjective fear on the part of the victim is not a necessary element of this crime. *People v. Stout*, 193 Colo. 466, 568 P.2d 52

(1977); *People v. Williams*, 827 P.2d 612 (Colo. App. 1992); *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

Nonetheless, what the victim saw or heard, and his reactions thereto, are relevant considerations in determining whether the defendant had the requisite intent to place him in fear. *People v. Gagnon*, 703 P.2d 661 (Colo. App. 1985).

Rather, it is only necessary that the defendant be aware that his conduct is practically certain to cause fear. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996); *United States v. Blackwell*, 323 F.3d 1256 (10th Cir. 2003).

When there is one count of felony menacing it is not necessary to prove each of the named victims was placed in fear of imminent serious bodily injury. It is sufficient to prove that the defendant committed the offense against the same listed persons. *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996).

The crime of menacing does not require proof of the intent to rob. *People v. Marlott*, 191 Colo. 304, 552 P.2d 491 (1976).

Intoxication as defense. If at the time of the incident in question, felony menacing was a specific intent crime, intoxication is available as a defense to negate the requisite specific intent. *People v. Sandoval*, 42 Colo. App. 503, 596 P.2d 1225 (1979).

Evidence held sufficient to bind police officer over for trial. *Johns v. District Court*, 192 Colo. 462, 561 P.2d 1 (1977).

Evidence sufficient to indicate that felony prosecution under this section was proper. *Biddle v. District Court*, 183 Colo. 281, 516 P.2d 645 (1973); *People v. Stout*, 193 Colo. 466, 568 P.2d 52 (1977); *People v. Gonzales*, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

Where evidence supports felony conviction, improper misdemeanor instruction does not affect misdemeanor conviction. Where the evidence supported a conviction for felony menacing, the fact that the trial court improperly submitted an instruction on misdemeanor menacing to the jury did not affect the defendant's conviction for the lesser included offense, misdemeanor menacing. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

Felony menacing is not a lesser included offense of attempted second degree murder. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

The offense of second degree murder does not establish every element of felony menacing. Attempted second degree murder requires a defendant to knowingly engage in conduct that is a substantial step toward causing the death of a person. There is no requirement that the victim be in fear of imminent serious bodily injury. Thus, an attempted second degree murder conviction does not necessarily establish all the

elements of menacing. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009).

Misdemeanor menacing is not a lesser included offense of use of a stun gun. *People v. Wheeler*, 170 P.3d 817 (Colo. App. 2007).

Constitution proscribes retrial when conviction impliedly acquits defendant. The double jeopardy clause proscribes retrial when a felony menacing conviction impliedly acquits the defendant of a second-degree assault charge. *Ortiz v. District Court*, 626 P.2d 642 (Colo. 1981).

Trial court abused discretion in refusing to grant a continuance to allow stabbing victim's prior felony drug convictions to become final so that defendant could cross-examine victim concerning the convictions for impeachment purposes. *People v. Gagnon*, 703 P.2d 661 (Colo. App. 1985).

No error where court excluded evidence of actions of victim after menacing occurred, since, in determining the issue of reasonable belief of imminent injury, it is the actions and demeanor of the believed assailant which first occurred that are relevant. *People v. Beckett*, 782 P.2d 812 (Colo. App. 1989), aff'd, 800 P.2d 74 (Colo. 1990).

Defendant's act of touching a knife to the officer's person was not sufficient to establish the elements of assault-during-escape. To hold, under the present criminal code, that a threat with a deadly weapon constitutes an assault with intent to commit bodily injury would eliminate any distinction between the crimes of menacing and assault with intent to commit bodily injury. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Viewed in the light most favorable to the prosecution, the evidence was sufficient to induce a person of ordinary prudence to entertain a reasonable belief that defendant committed the crime of felony menacing where evidence indicated that defendant, while holding the knife that mortally wounded victim, threatened to kill other person if that person did not leave his residence. *People v. District Ct.*, 17th Jud. Dist., 926 P.2d 567 (Colo. 1996).

A violation of this section qualifies as a violent felony under the federal Armed Career Criminals Act, 18 U.S.C. § 924(e). *United States v. Herron*, 432 F.3d 1127 (10th Cir. 2005), cert. denied, 547 U.S. 1104, 126 S. Ct. 1895, 164 L. Ed. 2d 579 (2006).

Felony menacing is a crime of violence for purposes of the United States sentencing guidelines. *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011).

A conviction for violation of this section is a conviction of a crime of violence as defined by 18 U.S.C. § 16, and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), making alien removable under 8 U.S.C.

§ 1227(a)(2)(A)(iii). *Damaso-Mendoza v. Holder*, 653 F.3d 1245 (10th Cir. 2011).

Applied in *Miller v. District Court*, 1931 Colo. 404, 566 P.2d 1063 (1977); *Jones v. District Court*, 196 Colo. 1, 584 P.2d 81 (1978); *People v. Chavez*, 629 P.2d 1040 (Colo. 1981); *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People v. Jones*, 631 P.2d 1132 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo.

1981); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People v. Brassfield*, 652 P.2d 588 (Colo. 1982); *People v. Ferguson*, 653 P.2d 725 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Dillon*, 655 P.2d 841 (Colo. 1982); *People v. Shearer*, 650 P.2d 1293 (Colo. App. 1982); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. Jones*, 140 P.3d 325 (Colo. App. 2006).

18-3-207. Criminal extortion - aggravated extortion. (1) A person commits criminal extortion if:

(a) The person, without legal authority and with the intent to induce another person against that other person's will to perform an act or to refrain from performing a lawful act, makes a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person; and

(b) The person threatens to cause the results described in paragraph (a) of this subsection (1) by:

(I) Performing or causing an unlawful act to be performed; or

(II) Invoking action by a third party, including but not limited to, the state or any of its political subdivisions, whose interests are not substantially related to the interests pursued by the person making the threat.

(1.5) A person commits criminal extortion if the person, with the intent to induce another person against that other person's will to give the person money or another item of value, threatens to report to law enforcement officials the immigration status of the threatened person or another person.

(2) A person commits aggravated criminal extortion if, in addition to the acts described in subsection (1) of this section, the person threatens to cause the results described in paragraph (a) of subsection (1) of this section by means of chemical, biological, or harmful radioactive agents, weapons, or poison.

(3) For the purposes of this section, "substantial threat" means a threat that is reasonably likely to induce a belief that the threat will be carried out and is one that threatens that significant confinement, restraint, injury, or damage will occur.

(4) Criminal extortion, as described in subsections (1) and (1.5) of this section, is a class 4 felony. Aggravated criminal extortion, as described in subsection (2) of this section, is a class 3 felony.

Source: **L. 71:** R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-207. **L. 75:** Entire section amended, p. 618, § 8, effective July 21. **L. 81:** Entire section amended, p. 981, § 4, effective May 13; entire section amended, p. 974, § 8, effective July 1. **L. 82:** (2) amended, p. 623, § 17, effective April 2. **L. 94:** Entire section R&RE, p. 1619, § 1, effective May 31. **L. 2006, 1st Ex. Sess.:** (1.5) added and (4) amended, p. 11, § 1, effective July 31.

Editor's note: Amendments to this section by House Bill 81-1167 and Senate Bill 81-183 were harmonized.

ANNOTATION

Law reviews. For article, "Criminal Law", which discusses a Tenth Circuit decision dealing with extortion, see 62 Den. U. L. Rev. 153 (1985). For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (October 2006).

This section is applicable to efforts to collect a legally enforceable debt. *People v.*

Rosenberg, 194 Colo. 423, 572 P.2d 1211 (1978).

This section and § 18-9-111, which classifies harassment as a misdemeanor, address separate and distinct crimes and the classification of such offenses have a rational basis in fact and are reasonably related to legitimate government interests. *People v. Czemerynski*,

786 P.2d 1100 (Colo. 1990).

Statute is facially overbroad because it sweeps within its reach both protected and unprotected speech. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

Statute is facially overbroad because it also covers constitutionally protected threats of collective action in support of group demands. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

A specific intent requirement does not eliminate overbreadth concerns when the effect associated with the intent provision, here, to induce another to act against his or her will, encompasses a substantial amount of protected activity. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

The trial court must vacate defendant's conviction and sentence for criminal extortion where the statute requires extensive revision to comply with constitutional requirements and rewriting the statute is more appropriately left to the general assembly rather than to the court. *Whimbush v. People*, 869 P.2d 1245 (Colo. 1994) (decided prior to 1994 repeal and reenactment).

Subsection (1) does not include within its reach protected speech, and therefore, it is not unconstitutionally overbroad. The legisla-

ture repealed and reenacted this section in 1994 with substantial modifications. Thus, the types of protected speech found to be criminalized under the prior statute are no longer included within the definition of extortion. *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

This section gives sufficient notice of the proscribed conduct and is not unconstitutionally vague. A person of reasonable intelligence could conclude that phone calls made with the intent to threaten the victim is prohibited. *People v. Czemyrnski*, 786 P.2d 1100 (Colo. 1990).

Indictment did not adequately allege a violation of the threat to confine or restrain element of the criminal extortion charge where it did not allege that sheriff made a substantial threat to confine or restrain an inmate who was already confined as an inmate. The indictment and the bill of particulars alleged only that sheriff threatened to transfer the inmate to another jail if inmate did not agree to work on sheriff's home. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Even if evidence of threatened loss of good time would otherwise have been sufficient to establish a violation of the extortion statute, it cannot cure the absence of such a factual allegation in the indictment or bill of particulars. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Applied in *People v. Hearty*, 644 P.2d 302 (Colo. 1982).

18-3-208. Reckless endangerment. A person who recklessly engages in conduct which creates a substantial risk of serious bodily injury to another person commits reckless endangerment, which is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 421, § 1. C.R.S. 1963: § 40-3-208.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "The Legal Risks of AIDS: Moving Beyond Discrimination", see 18 Colo. Law. 606 (1989).

Offense not lesser included offense of third degree assault. The establishment of every element of third degree assault would not necessarily include proving conduct which creates a substantial risk of serious bodily injury, an element of reckless endangerment. Third degree assault requires proof of bodily injury but not proof of a substantial risk of serious bodily injury. Therefore reckless endangerment is not a lesser included offense of third degree assault. *People v. Berner*, 42 Colo. App. 520, 600 P.2d 112 (1979).

Trial court did not err by refusing to instruct the jury on the lesser nonincluded of-

fense of reckless endangerment, because there was no rational basis upon which the jury could have convicted defendant of that offense and acquitted him of child abuse resulting in death. *People v. Cauley*, 32 P.3d 602 (Colo. App. 2001).

There is no right to a jury instruction on a lesser included offense if the element that distinguishes the greater from the lesser is uncontested. Where it is undisputed that death occurred as a result of defendant's conduct, there is no right to an instruction on reckless endangerment in a reckless manslaughter case. *People v. Hall*, 59 P.3d 298 (Colo. App. 2002).

Applied in *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (1978); *Perea v. District Court*, 199 Colo. 27, 604 P.2d 25 (1979); *People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980).

18-3-209. Assault on the elderly or persons with disabilities - legislative declaration. (Repealed)

Source: L. 84: Entire section added, p. 542, § 2, effective April 12. L. 86: (2) amended, p. 777, § 4, effective July 1. L. 93: Entire section amended, p. 1634, § 18, effective July 1. L. 95: Entire section repealed, p. 1251, § 8, effective July 1.

PART 3

KIDNAPPING

18-3-301. First degree kidnapping. (1) Any person who does any of the following acts with the intent thereby to force the victim or any other person to make any concession or give up anything of value in order to secure a release of a person under the offender's actual or apparent control commits first degree kidnapping:

- (a) Forcibly seizes and carries any person from one place to another; or
- (b) Entices or persuades any person to go from one place to another; or
- (c) Imprisons or forcibly secretes any person.

(2) Whoever commits first degree kidnapping is guilty of a class 1 felony if the person kidnapped shall have suffered bodily injury; but no person convicted of first degree kidnapping shall suffer the death penalty if the person kidnapped was liberated alive prior to the conviction of the kidnapper.

(3) Whoever commits first degree kidnapping commits a class 2 felony if, prior to his conviction, the person kidnapped was liberated unharmed.

Source: L. 71: R&RE, p. 421, § 1. C.R.S. 1963: § 40-3-301.

ANNOTATION

Annotator's note. Since § 18-3-301 is similar to former § 40-2-44, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

For a discussion of the legislative history of first-degree kidnapping, see *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Section not vague. The kidnapping statutes, by using words such as "seize" and "imprison" to define the offenses, are not so vague that men of common intelligence and understanding are required to guess as to their application. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Essential elements of the crime of kidnapping are: (1) Wilfulness or intent to do the act; (2) the act must be done without lawful authority; (3) there must be a seizing, or imprisoning; and (4) the act must be done against the victim's will, by means of force or otherwise. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

All elements of crime of kidnapping must be present or the crime is not committed. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Prosecution must prove movement and intent to force victim to make concession. For first degree kidnapping, the prosecution must prove, in addition to movement, that the intent of the defendant is to force the victim to make a

concession or give up a thing of value in order to secure release. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980); *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

Movement which is more than incidental to the commission of an underlying crime is circumstantial evidence of specific intent to kidnap, and a jury could be so instructed. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Evidence of intent to sustain conviction derived from examining movement surrounding underlying crime. Circumstantial evidence of intent sufficient to sustain a conviction for first degree kidnapping may be derived from an examination of the amount and character of the movement surrounding an underlying crime, taking into account, for example, the time of detention, the distance, any changed environmental factors, whether the commission of the underlying crime and the movement were simultaneous, and the consistency of the defendant's actions with an independent intent to kidnap. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (Colo. 1980); *People v. Swanson*, 638 P.2d 45 (Colo. 1981).

Section imposes only a single intent requirement: Namely an intent "to force the victim or any other person to make any concession or give up anything of value in order to secure a release". First degree kidnapping does not require proof that the kidnapper intended to re-

lease the victim upon obtaining the concession sought. *People v. Weare*, 155 P.3d 527 (Colo. App. 2006).

"Any concession" includes sexual assault. The phrase "any concession" is sufficiently broad to encompass submission to a sexual assault as a basis for a verdict of guilty. *People v. Molina*, 41 Colo. App. 128, 584 P.2d 634 (1978).

Submission to sexual assault not sufficient per se. Proof of the victim's submission to a sexual assault is not sufficient per se to establish the concession required for first degree kidnapping. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Assault is not a necessary element of the crime of kidnapping. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Multiple punishment is not permitted where one act of forcible abduction results in kidnapping of two victims. *People v. Duran*, 183 Colo. 180, 515 P.2d 1117 (1973).

Venue in a kidnapping case may be either in the county in which the offense was committed or in any county through which the person kidnapped was taken or kept while under confinement or restraint. *Claxton v. People*, 164 Colo. 283, 434 P.2d 407 (1967).

Information charging kidnapping held sufficient. *Mayer v. People*, 116 Colo. 284, 180 P.2d 1017 (1947).

Evidence sufficient to support conviction. *Tomsak v. People*, 166 Colo. 226, 442 P.2d 825 (1968); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *Chatfield v. Ricketts*, 673 F.2d 330 (10th Cir.), cert. denied, 459 U.S. 843, 103 S. Ct. 96, 74 L. Ed.2d 88 (1982).

Where an individual was pursued, her car rammed, and the road blocked by defendant who got into her car, shoved her to the passenger side, and then drove away until the victim was able to break from defendant's grasp and jump from the moving car, the crime of kidnapping was clearly established. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

Where the assault by the defendant was a crime of physical force or violence, the victim had no choice in the matter, and the assault ended when the police arrived, the evidence was insufficient to support a first degree kidnapping charge but was sufficient to sustain a conviction for second degree kidnapping. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

The evidence is insufficient to sustain a conviction on a first degree kidnapping charge where the victim of a first degree sexual assault is forced to submit without having any choice in the matter, there existing no "concession" or intent to obtain a concession within the meaning of the first degree kidnapping statute. *People v. Nunez*, 673 P.2d 53 (Colo. App. 1983).

Evidence did not require instruction on false imprisonment. When both the victim and

the defendant's accomplice testify that the defendant committed acts which constitute kidnapping, the only theory of defense is alibi, and the defendant denies the commission of any act which could lead to the conviction of either false imprisonment or kidnapping and no evidence is presented from which the jury might find that the defendant is only guilty of false imprisonment, the defendant is either guilty of kidnapping or nothing at all and is not entitled to an instruction on false imprisonment even though it is a lesser included offense of kidnapping. *Ortega v. People*, 178 Colo. 419, 498 P.2d 1121 (1972).

This section is sufficiently definite to give reasonable notice of the proscribed conduct to one who would avoid its penalties, to guide the trial judge in its application, and to guide counsel in defending one charged with its violation. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

Because this section does not proscribe the same criminal conduct as § 18-3-302, it does not violate the requirements of equal protection. This section requires the kidnapper to force the victim or any other person to make any concession or give up anything of value in order to secure a release, an element not required for second degree kidnapping. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

Inclusion of the terms "entices" and "decoys" in § 18-3-302 (2) does not mean that the word "takes" necessarily prohibits only forcible seizures therefore prohibiting the same conduct defined in subsection (1)(a) of this section. A taking could occur without force, with the intent to keep or conceal the child from his or her parent or guardian or with intent to sell, trade, or barter the child for consideration, but without the child's being enticed or decoyed away. The terms "entices" and "decoys", therefore, are not rendered meaningless by an interpretation of "takes" that encompasses nonforcible seizures. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

The obvious distinction between subsection (1)(a) of this section and § 18-3-302 (2) is that § 18-3-302 (2) applies only to children. Subsection (1)(a) of this section and § 18-3-302 (2) do not prohibit exactly the same criminal conduct while imposing disparate penalties. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

The different penalties provided for in subsections (2) and (3) of this section do not violate the equal protection clause because subsection (2) requires a finding of bodily injury, an additional element of proof which justifies the imposition of different penalties. *People v. Hines*, 194 Colo. 284, 572 P.2d 467 (1977).

It is not unconstitutional to try the felony murder and first degree kidnapping charges together under the current statutory scheme.

People v. Cunningham, 194 Colo. 198, 570 P.2d 1086 (1977).

Prohibition against double punishment for same criminal act is not violated where a defendant is found guilty of first degree kidnapping and first degree sexual assault for same criminal episode. People v. Molina, 41 Colo. App. 128, 584 P.2d 634 (1978).

To convict an individual of first degree kidnapping, the movement of the victim must be more than incidental to the commission of some other underlying offense. Although the defendant forced the victim into the manager's office at knife point and ordered the manager to retrieve cash from the safe to secure the victim's release, the movement of the victim had no purpose or effect beyond robbery. People v. Owens, 97 P.3d 227 (Colo. App. 2004).

Forcible sexual acts which cause extreme physical pain and a subsequent kidney infection clearly satisfy the statutory definition of bodily injury under this section. People v. Hines, 194 Colo. 284, 572 P.2d 467 (1977).

Case remanded to correct excessive sentence. Abeyta v. People, 112 Colo. 49, 145 P.2d 884 (1944); People v. Bridges, 199 Colo. 520, 612 P.2d 1110 (1980).

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under this section and §§ 18-3-402 and 18-4-301 (1). People v. Bridges, 199 Colo. 520, 612 P.2d 110 (1980).

If victim is injured, section applies even though victim is later liberated. Miller v. District Court, 197 Colo. 485, 593 P.2d 1379 (1979).

18-3-302. Second degree kidnapping. (1) Any person who knowingly seizes and carries any person from one place to another, without his consent and without lawful justification, commits second degree kidnapping.

(2) Any person who takes, entices, or decoys away any child not his own under the age of eighteen years with intent to keep or conceal the child from his parent or guardian or with intent to sell, trade, or barter such child for consideration commits second degree kidnapping.

(3) Second degree kidnapping is a class 2 felony if any of the following circumstances exist:

(a) The person kidnapped is a victim of a sexual offense pursuant to part 4 of this article; or

(b) The person kidnapped is a victim of a robbery.

(4) (a) Unless it is a class 2 felony under subsection (3) of this section, second degree kidnapping is a class 3 felony if any of the following circumstances exist:

(I) The kidnapping is accomplished with intent to sell, trade, or barter the victim for consideration; or

(II) The kidnapping is accomplished by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or

(III) The kidnapping is accomplished by the perpetrator representing verbally or otherwise that he or she is armed with a deadly weapon.

(b) A defendant convicted of second degree kidnapping committed under any of the

If the victim is forced to submit to sexual assault without having a choice in the matter, there generally is no concession within the meaning of this section. People v. San Emerterio, 819 P.2d 516 (Colo. App. 1991), rev'd on other grounds, 839 P.2d 1161 (Colo. 1992).

The term "concession" as used in this section need not apply only to things with objective value but is broad enough to include a promise that has sufficient subjective value to a kidnapper to be exchanged for release. People v. San Emerterio, 839 P.2d 1161 (Colo. 1992).

The term "concession" is not so restrictive as to impose a control requirement to make a promise sufficiently valuable. People v. San Emerterio, 839 P.2d 1161 (Colo. 1992).

All of the elements of first degree kidnapping are present if a defendant forcibly seizes a victim and carries her away with the intent to force her to make a promise to complete a future act in order to secure her release. Such circumstances are sufficient to constitute a "concession" within the meaning of this section. People v. San Emerterio, 839 P.2d 1161 (Colo. 1992).

Applied in Raullerson v. People, 157 Colo. 462, 404 P.2d 149 (1965); People v. McGill, 190 Colo. 443, 548 P.2d 600 (1976); People v. Glenn, 200 Colo. 416, 615 P.2d 700 (Colo. 1980); People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Martinez, 634 P.2d 26 (Colo. 1981); People v. Reynolds, 638 P.2d 43 (Colo. 1981); People v. Gonzales, 631 P.2d 1170 (Colo. App. 1981); People v. Bridges, 662 P.2d 161 (Colo. 1983); People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983).

circumstances set forth in this subsection (4) shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

(5) Second degree kidnapping is a class 4 felony, except as provided in subsections (3) and (4) of this section.

Source: L. 71: R&RE, p. 421, § 1. C.R.S. 1963: § 40-3-302. L. 77: Entire section R&RE, p. 961, § 13, effective July 1. L. 81: Entire section R&RE, p. 983, § 1, effective July 1. L. 86: (4) amended, p. 777, § 5, effective July 1. L. 87: (1) amended, p. 615, § 4, effective July 1. L. 89: (2) and (4) amended, p. 902, §§ 1, 2, effective July 1. L. 2000: (4) amended, p. 694, § 6, effective July 1. L. 2001: (3), (4), and (5) amended, p. 857, § 2, effective July 1. L. 2002: (4)(b) amended, p. 1512, § 188, effective October 1. L. 2003: (3)(a) amended, p. 1432, § 20, effective April 29. L. 2007: (4) amended, p. 1687, § 5, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Recovering the Parentally Kidnapped Child", see 12 Colo. Law. 1798 (1983). For article, "Missing Children", see 13 Colo. Law. 1005 (1984).

Annotator's note. Since § 18-3-302 is similar to former § 40-2-44, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Second degree kidnapping statute criminalizing "knowingly, forcibly, or otherwise" seizing and carrying any person from one place to another is unconstitutionally vague. However, the phrase "forcibly or otherwise" is severable from the constitutional sections of the statute, leaving the remainder complete and in accord with legislative intent. *People v. Powell*, 716 P.2d 1096 (Colo. 1986) (decided prior to 1987 amendment).

No equal protection violation where general assembly chose to punish with the same severity all cases where kidnapping was accompanied by sexual assault, making no distinction between misdemeanor and felony sexual assault. *People v. Williams*, 89 P.3d 492 (Colo. App. 2003).

Because this section does not proscribe the same criminal conduct as § 18-3-301, it does not violate the requirements of equal protection. Inclusion of the terms "entices" and "decoys" in subsection (2) of this section does not mean that the word "takes" necessarily prohibits only forcible seizures therefore prohibiting the same conduct defined in § 18-3-301 (1)(a). A taking could occur without force, with the intent to keep or conceal the child from his or her parent or guardian or with intent to sell, trade, or barter the child for consideration, but without the child's being enticed or decoyed away. The terms "entices" and "decoys", therefore, are not rendered meaningless by an inter-

pretation of "takes" that encompasses nonforcible seizures. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

The obvious distinction between § 18-3-301 (1)(a) and subsection (2) of this section is that subsection (2) of this section applies only to children. Section 18-3-301 (1)(a) and subsection (2) of this section do not prohibit exactly the same criminal conduct while imposing disparate penalties. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

Term "seize" does not imply the use of force. Where defendant conceded that evidence was sufficient to show he "took" his daughter from her custodial parent, conviction under subsection (1) was proper although taking was not by force. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Taking a person through the use of deceit falls within the term "seize" because it is a taking without the consent of the victim. Consent obtained through deceit is invalid. *People v. Maass*, 981 P.2d 177 (Colo. App. 1988).

Forcing customer of movie theater to accompany defendant at gunpoint to theater manager's office with threats of retribution if he called the police satisfies "seize and carry" requirement for purposes of second degree kidnapping. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

The court did not commit plain error in instructing the jury that "seized and carried" means any movement, however short in distance. The court's instruction accurately states the law. Further, it was appropriate for the court to instruct the jury on the phrase "seized and carried" since it has special meaning in the context of kidnapping and is a statutory term of art. *People v. Rogers*, 220 P.3d 931 (Colo. App. 2008).

Phrase "without lawful justification" is not a term of art, nor does it connote some addi-

tional legal purpose ulterior to the act of seizing and transporting a nonconsenting victim. Instructing jury to give phrase “the common meaning that the words imply” was not plain error. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Conviction for second degree kidnapping that involves sexual assault requires proof of sexual assault beyond reasonable doubt. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

A defendant convicted of sexual assault and second degree kidnapping under subsection (3) is not subjected to unconstitutional “double punishment” in the sense of being convicted of two substantive offenses for the same conduct. The sexual assault factor under subsection (3) is a sentence enhancement factor, and, where, as here, the intent of the legislature clearly authorizes a conviction of second degree kidnapping as a class 2 felony on the basis of a related conviction for sexual assault, the kidnapping conviction must be upheld. *People v. Powell*, 716 P.2d 1096 (Colo. 1986); *People v. Turner*, 730 P.2d 333 (Colo. App. 1986).

Analysis is identical for purposes of double jeopardy and merger doctrines. Sexual assault is not a lesser included offense of second degree kidnapping where the fact that sexual assault occurred in conjunction with kidnapping is used to raise the kidnapping from a class 4 to a class 2 felony. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Aguilar-Ramos*, 224 P.3d 402 (Colo. App. 2009); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Distinction between sentence-enhancement factor and element of separate offense. Subsection (3)(a) of this section does not create a separate and definable offense from that created in subsection (1) or (2); it simply relates to what felony level the offense entails. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Sexual assault is not a lesser included offense of, and therefore not merged into, second degree kidnapping involving sexual assault. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. McKnight*, 813 P.2d 331 (Colo. 1991); *People v. Johnson*, 815 P.2d 427 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001); *People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005); *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007); *Lewis v. People*, 261 P.3d 480 (Colo. 2011).

Section not vague. The kidnapping statutes, by using words such as “seize” and “imprison” to define the offenses, are not so vague that men of common intelligence and understanding are required to guess as to their application. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Essential elements of the crime of kidnapping are: (1) Willfulness or intent to do the act; (2) the act must be done without lawful authority; (3) there must be a seizing, or imprisoning; and (4) the act must be done against the victim’s will, by means of force or otherwise. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

A material element of the crime of kidnapping is that a person must be held against his or her will. *People v. Johnson*, 183 Colo. 219, 516 P.2d 116 (1973).

Person is guilty of attempted second degree kidnapping if he knowingly engaged in conduct which is strongly corroborative of the firmness of his purpose to knowingly seize or carry another person from one place to another without his consent and without lawful justification. *People v. Lahr*, 200 Colo. 425, 615 P.2d 707 (1980).

To sustain a conviction, prosecution must prove victim was seized and transported without consent, but it is not necessary to show that the involuntariness exists from the beginning of the transaction if subsequently the victim is forcibly detained. *People v. Brown*, 622 P.2d 109 (Colo. App. 1980).

Robbery is not a lesser included offense to second degree kidnapping even though a robbery in conjunction with the second degree kidnapping may lead to an enhanced penalty for that crime. *People v. Huggins*, 825 P.2d 1024 (Colo. App. 1991).

Movement for a “substantial” distance is not required as an element of second degree kidnapping. *People v. Apodaca*, 668 P.2d 941 (Colo. App. 1982), *aff’d in part and rev’d in part* on other grounds, 712 P.2d 467 (Colo. 1985).

Insubstantial movement of the victim is sufficient to satisfy the element of second degree kidnapping that the victim be carried from one place to another if the insubstantial movement causes increased risk of harm to the victim. *People v. Huggins*, 825 P.2d 1024 (Colo. App. 1991).

The evidence, viewed in a light most favorable to the prosecution, satisfied the asportation element of second degree kidnapping. Even though moving the victim from the living room to the bedroom and then hallway was an insubstantial seizure and carrying, the movement did increase the risk of harm to the victim, thus satisfying the asportation element. Defendant increased the risk of harm to the victim by moving the victim to an area of the residence where an escape was less likely, and to an area where he was less likely to be detected since there were no windows. *People v. Rogers*, 220 P.3d 931 (Colo. App. 2008).

Where it is unclear whether movement was substantial, jury should be instructed on relevance of increased risk of harm. *People v. Owens*, 97 P.3d 227 (Colo. App. 2004).

The element of this offense which requires that a person be moved “from one place to another” is not met where the victim is forced to move from his living room to his bedroom at gunpoint. *People v. Bell*, 809 P.2d 1026 (Colo. App. 1990).

“Significant movement” of the victim is not required as an element of kidnapping, but merely some movement which substantially increases the risk of harm to the victim. *People v. Unrein*, 677 P.2d 951 (Colo. App. 1983); *People v. Fuller*, 791 P.2d 702 (Colo. 1990).

The asportation element of second degree kidnapping is the movement by the defendant of the victim from one place to another. Evidence that the defendant's actions substantially increased a risk of harm to the victim may be relevant to whether asportation was proved in some cases, but creating such a risk is not an essential element of the offense. *People v. Harlan*, 8 P.3d 448 (Colo. 2000).

The term “without lawful justification” in subsection (1) means acting in a manner not authorized or permitted by law and does not connote some additional illegal purpose ulterior to the act of seizing and transporting a nonconsenting victim from one place to another. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Trial court did not commit plain error by failing to provide the jury with a clarifying definition of “without lawful justification”. *People v. Schuett*, 833 P.2d 44 (Colo. 1992).

Although the jury was instructed as to first degree kidnapping and not second degree kidnapping, where the jury found all of the elements necessary to prove second degree kidnapping beyond a reasonable doubt, the judgment of conviction for second degree kidnapping should be entered upon remand to the trial court. *People v. San Emerterio*, 819 P.2d 516 (Colo. App. 1991), rev'd on other grounds, 839 P.2d 1161 (Colo. 1992).

All elements of crime of kidnapping must be present or the crime is not committed. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

The element contained in second degree kidnapping and not contained in false imprisonment, a lesser included offense, is that of transportation of the victim. *People v. Arispe*, 191 Colo. 555, 555 P.2d 525 (1976).

False imprisonment is not a lesser included offense of attempted second degree kidnapping. Thus, a prosecutor can prove attempted second degree kidnapping without showing that the victim was actually seized or falsely imprisoned. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Prosecution must prove every material element of kidnapping including consent. *People v. Rutt*, 179 Colo. 180, 500 P.2d 362 (1972).

Specific intent need not be proved by direct evidence but may be inferred from the circum-

stances surrounding the commission of the offense. *People v. McGill*, 190 Colo. 443, 548 P.2d 600 (1976).

Assault is not necessary element of the crime of kidnapping. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Subsection (2) prohibits unauthorized interference with parents' custodial right to their children. *People v. Woodward*, 631 P.2d 1188 (Colo. App. 1981).

Conduct constituting child kidnapping. Keeping a child in physical seclusion or keeping accurate information regarding the child's location from her parents, making it more difficult for the child's parents to discover her location, constitutes child kidnapping. *People v. Woodward*, 631 P.2d 1188 (Colo. App. 1981).

Subsection (2) does not require proof that a child be taken for any particular duration to show the actor's intent. Evidence proving that defendant violently took the child from the victim without telling her where he was going is sufficient to sustain the jury's guilty verdict. *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

The offense of second degree kidnapping of a child in violation of subsection (2) does not impliedly require proof that the perpetrator took the child without the consent of a parent. Nothing in the language of this section suggests that the parent or guardian must be aware of the defendant's intent at the time the child is taken. *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

False imprisonment is a lesser nonincluded offense of second degree kidnapping committed in violation of subsection (2). Nothing in the language of subsection (2) suggests that the parent or guardian must be aware of the defendant's intent at the time the child is taken. Therefore, the absence of consent is not an implied element of second degree kidnapping committed in violation of subsection (2). *People v. Ortiz*, 155 P.3d 532 (Colo. App. 2006).

Both parents share an equal right to the custody of a child in the absence of a court order granting legal or physical custody to one parent or the other for purpose of application of this section. *Armendariz v. People*, 711 P.2d 1268 (Colo. 1986); *People v. Haynie*, 826 P.2d 371 (Colo. App. 1991).

Therefore, even though the defendant father took his child from the mother, the prosecution was unable to prove the essential element of consent in the absence of a court order granting legal or physical custody of the child to the mother. *Armendariz v. People*, 711 P.2d 1268 (Colo. 1986).

The “taking” of a child under subsection (2) could occur without force with the intent to keep or conceal the child from his or her parent or guardian. The terms “entices” or “decoys” are not rendered meaningless by an interpretation of “takes” that encompasses nonforcible

seizures. *People v. Kendall*, 174 P.3d 791 (Colo. App. 2007).

Failure to include element of “knowingly” in instruction is error. The trial court’s failure to include the element of “knowingly” in a second degree kidnapping instruction is plain error. *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982).

Justification is not affirmative defense, but rather the state must prove unlawful justification as an essential element of the offense of second degree kidnapping. *People v. Rex*, 636 P.2d 1282 (Colo. App. 1981).

Voluntary intoxication not defense. The mental culpability requirement of both second degree kidnapping and first degree sexual assault is “knowingly”; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

Evidence sufficient to sustain conviction. *Yescas v. People*, 197 Colo. 379, 593 P.2d 358 (1979); *People v. Nunez*, 673 P.2d 53 (Colo.

App. 1983); *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Where the assault by the defendant was a crime of physical force or violence, the victim had no choice in the matter, and the assault ended when the police arrived, the evidence was insufficient to support a first degree kidnapping charge but was sufficient to sustain a conviction for second degree kidnapping. *People v. Naranjo*, 612 P.2d 1099 (Colo. 1980).

Jury instruction held proper. *People v. Johnson*, 183 Colo. 219, 516 P.2d 116 (1973).

Applied in *People v. Wilkerson*, 192 Colo. 386, 559 P.2d 1107 (1977); *Goodwin v. District Court*, 197 Colo. 6, 588 P.2d 874 (1979); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People v. Goodwin*, 197 Colo. 47, 593 P.2d 326 (1979); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People v. Sharpless*, 635 P.2d 896 (Colo. App. 1981); *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People v. Gouker*, 665 P.2d 113 (Colo. 1983).

18-3-303. False imprisonment. (1) Any person who knowingly confines or detains another without the other’s consent and without proper legal authority commits false imprisonment. This section shall not apply to a peace officer acting in good faith within the scope of his or her duties.

(2) False imprisonment is a class 2 misdemeanor; except that false imprisonment is a class 5 felony if:

- (a) The person uses force or threat of force to confine or detain the other person; and
- (b) The person confines or detains the other person for twelve hours or longer.

Source: **L. 71:** R&RE, p. 422, § 1. **C.R.S. 1963:** § 40-3-303. **L. 77:** Entire section amended, p. 961, § 14, effective July 1. **L. 2002:** Entire section amended, p. 1579, § 3, effective July 1.

ANNOTATION

Law reviews. For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981).

The element contained in second degree kidnapping and not contained in false imprisonment, a lesser included offense, is that of transportation of the victim. *People v. Arispe*, 191 Colo. 555, 555 P.2d 525 (1976).

False imprisonment is not a lesser included offense of attempted second degree kidnapping. *People v. Joyce*, 68 P.3d 521 (Colo. App. 2002).

Probable cause for arrest prevents liability for false imprisonment. Where police officer had both probable cause to believe that an offense had been committed and that the plaintiff was the person who had committed it, he was

not civilly liable for false arrest and false imprisonment. *Beyer v. Young*, 32 Colo. App. 273, 513 P.2d 1086 (1973).

Acquittal not determinative of lawfulness of arrest. Acquittal of the plaintiff of the charge for which he was arrested and imprisoned is not determinative of the lawfulness of the arrest, as the officer’s right to make an arrest is dependent upon the facts and circumstances in existence at the time of the arrest and not dependent upon the outcome of a subsequent trial. *Beyer v. Young*, 32 Colo. App. 273, 513 P.2d 1086 (1973).

Applied in *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

18-3-304. Violation of custody order or order relating to parental responsibilities.

(1) Except as otherwise provided in subsection (2.5) of this section, any person, including a natural or foster parent, who, knowing that he or she has no privilege to do so or heedless in that regard, takes or entices any child under the age of eighteen years from the custody or care of the child's parents, guardian, or other lawful custodian or person with parental responsibilities with respect to the child commits a class 5 felony.

(2) Except as otherwise provided in subsection (2.5) of this section, any parent or other person who violates an order of any district or juvenile court of this state, granting the custody of a child or parental responsibilities with respect to a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian or person with parental responsibilities of the custody or care of a child under the age of eighteen years, commits a class 5 felony.

(2.5) Any person who, in the course of committing the offenses described in subsections (1) and (2) of this section, removes a child under the age of eighteen years from this country commits a class 4 felony.

(3) It shall be an affirmative defense either that the offender reasonably believed that his conduct was necessary to preserve the child from danger to his welfare, or that the child, being at the time more than fourteen years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child.

(4) Any criminal action charged pursuant to this section may be tried in either the county where the act is committed or in which the court issuing the orders granting custody or allocating parental responsibilities is located, if such court is within this state.

(5) Repealed.

Source: L. 71: R&RE, p. 422, § 1. C.R.S. 1963: § 40-3-304. L. 85: (4) amended, p. 618, § 11, effective July 1. L. 86: (5) added, p. 779, § 1, effective April 3. L. 98: (1) and (2) amended and (2.5) added, p. 1442, § 27, effective July 1; (1), (2), and (4) amended, p. 1403, § 56, effective February 1, 1999.

Editor's note: (1) Subsection (5)(c) provided for the repeal of subsection (5), effective December 2, 1986. (See L. 86, p. 779.)

(2) Amendments made to subsections (1) and (2) by House Bill 98-1160 and House Bill 98-1183 were harmonized, effective February 1, 1999.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Recovering the Parentally Kidnapped Child", see 12 Colo. Law. 1798 (1983).

Defendant failed to carry his burden of proving this section unconstitutional by being so vague and overbroad that it failed to give fair notice of the criminal activity proscribed and therefore denied due process. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

This section is not unconstitutionally overbroad because a statute preventing the taking of a child in violation of a court order regarding custody is a legitimate exercise of police power. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

Use of the word "custody" in subsection (2) is not unconstitutionally vague. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

Use of the words "an order . . . granting custody . . ." in subsection (2), is not limited or

qualified by type and court will not read into statute an exception, limitation, or qualifier that its plain language does not suggest, warrant, or mandate; subsection (2) penalizes violations of temporary and permanent custody orders alike and the rule of lenity does not apply. *People v. Sorrendino*, 37 P.3d 501 (Colo. App. 2001).

Temporary "care and control" provisions of restraining orders issued pursuant to §§ 14-4-102 and 14-10-108 qualify as an order granting custody within the meaning of subsection (2). *People v. Sorrendino*, 37 P.3d 501 (Colo. App. 2001).

A person awarded permanent custody becomes for all practical purposes "a parent". The legal custodian has a duty to care for a child, providing the basic necessities of life. The legal custodian has such rights to the exclusion of the natural parent. In addition, the general assembly has strengthened the position of a custodian through criminal sanctions for viola-

tion of a custody order. A natural parent may be charged criminally for violating a custody order if there is intent to deprive the custodian of custody of a child. *U.S. v. Al-Ahmad*, 996 F. Supp. 1055 (D. Colo. 1998) (decided prior to the 1998 amendment).

Violation of custody is a separate and distinct offense from second degree kidnapping. *People v. Tippet*, 733 P.2d 1183 (Colo. 1987); *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Culpable mental state required by subsection (2) is the intent to deprive the lawful custodian of custody. No "knowing" mental state with respect to the custodial order itself is implied or needs be proven. *People v. Metcalf*, 926 P.2d 133 (Colo. App. 1996).

Jury instructions adequately encompassed defendant's theory of affirmative defense based on subsection (3). *People v. Tippet*, 733 P.2d 1183 (Colo. 1987).

Effect of habeas corpus on custody decree. Where the original custody award of a child and a subsequent habeas corpus proceeding are in the same state, but in different courts, although the habeas corpus court would not have juris-

diction to test the wisdom of or to modify the custody decree, it can and should make the writ permanent to enforce the decree and should order the child returned to the one lawfully entitled to custody. *Wood v. District Court*, 181 Colo. 95, 508 P.2d 134 (1973).

Evidence in support of affirmative defense to violation of custody may be limited to defendant's state of mind at or shortly before the time he took his daughter. *People v. Mossman*, 17 P.3d 165 (Colo. App. 2000).

The determination of temporal limitations upon the admission of affirmative defense evidence is within the sound discretion of the trial court. *People v. Beilke*, 232 P.3d 146 (Colo. App. 2009).

Exclusion of evidence of defendant's state of mind led to the incorrect denial of defendant's request for an affirmative defense instruction. *People v. Mossman*, 17 P.3d 165 (Colo. App. 2000).

Evidence held sufficient. *People v. Moore*, 193 Colo. 81, 562 P.2d 749 (1977).

Applied in *People v. Coyle*, 654 P.2d 815 (Colo. 1982).

18-3-305. Enticement of a child. (1) A person commits the crime of enticement of a child if he or she invites or persuades, or attempts to invite or persuade, a child under the age of fifteen years to enter any vehicle, building, room, or secluded place with the intent to commit sexual assault or unlawful sexual contact upon said child. It is not necessary to a prosecution for attempt under this subsection (1) that the child have perceived the defendant's act of enticement.

(2) Enticement of a child is a class 4 felony. It is a class 3 felony if the defendant has a previous conviction for enticement of a child or sexual assault on a child or for conspiracy to commit or the attempted commission of either offense, or if the enticement of a child results in bodily injury to that child.

(3) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this section and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: L. 85: Entire section added, p. 715, § 2, June 7. **L. 87:** (2) amended, p. 606, § 12, effective July 1. **L. 90:** (3) added, p. 1025, § 5, effective July 1. **L. 2000:** (1) amended, p. 711, § 48, effective July 1; (3) amended, p. 1846, § 30, effective August 2.

ANNOTATION

Attempted sexual assault of any degree sufficient. This statute requires proof only that the defendant acted with the intent to cause the result of a sexual assault of some degree upon a victim younger than fifteen years of age. Failure to complete sexual assault of particular degree is irrelevant. *People v. Black*, 759 P.2d 746 (Colo. App. 1988).

This section does not preclude a presentence remedy such as a deferred sentence under § 18-1.3-102. Until defendant is sentenced, the Lifetime Supervision Act does not apply. *People v. Loveall*, 203 P.3d 540 (Colo. App. 2008), *aff'd*, 231 P.3d 408 (Colo. 2010).

18-3-306. Internet luring of a child. (1) An actor commits internet luring of a child if the actor knowingly communicates over a computer or computer network, telephone

network, or data network or by a text message or instant message to a person who the actor knows or believes to be under fifteen years of age and, in that communication or in any subsequent communication by computer, computer network, telephone network, data network, text message, or instant message, describes explicit sexual conduct as defined in section 18-6-403 (2) (e), and, in connection with that description, makes a statement persuading or inviting the person to meet the actor for any purpose, and the actor is more than four years older than the person or than the age the actor believes the person to be.

(2) It shall not be a defense to this section that a meeting did not occur.

(a) and (b) (Deleted by amendment, L. 2007, p. 1688, § 8, effective July 1, 2007.)

(3) Internet luring of a child is a class 5 felony; except that luring of a child is a class 4 felony if committed with the intent to meet for the purpose of engaging in sexual exploitation as defined in section 18-6-403 or sexual contact as defined in section 18-3-401.

(4) For purposes of this section, “in connection with” means communications that further, advance, promote, or have a continuity of purpose and may occur before, during, or after the invitation to meet.

Source: L. 2006: Entire section added, p. 2055, § 4, effective July 1. L. 2007: (1) and (2) amended, p. 1688, § 8, effective July 1. L. 2009: (1) amended, (HB 09-1132), ch. 341, p. 1792, § 2, effective July 1.

ANNOTATION

The statute is not unconstitutionally overbroad. The statute does not suppress a large amount of speech subject to constitutional protection. *People v. Boles*, __ P.3d __ (Colo. App. 2011).

The statute is not unconstitutionally vague. A person of common intelligence can determine what is prohibited by the statute. *People v. Boles*, __ P.3d __ (Colo. App. 2011).

The statute does not violate the dormant commerce clause. Since the statute regulates

conduct by adults who send sexually explicit messages that endanger the welfare of minors, there is no legitimate commerce that would be limited by the statute. *People v. Boles*, __ P.3d __ (Colo. App. 2011).

The statute as applied to defendant was not unconstitutional. The record contains numerous sexually explicit messages from the defendant that were obscene in nature. *People v. Boles*, __ P.3d __ (Colo. App. 2011).

PART 4

UNLAWFUL SEXUAL BEHAVIOR

Editor’s note: This title was repealed and reenacted in 1971, and this part 4 was subsequently repealed and reenacted in 1975, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 4 prior to 1975, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor’s note following the title heading. Former C.R.S. section numbers prior to 1975 are shown in editor’s notes following those sections that were relocated.

Cross references: For introduction of evidence of similar acts or transactions by a defendant prosecuted pursuant to this part 4, see § 16-10-301.

18-3-401. Definitions. As used in this part 4, unless the context otherwise requires:

(1) “Actor” means the person accused of a sexual offense pursuant to this part 4.

(1.5) “Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4.

(1.7) “Diagnostic test” means a human immunodeficiency virus (HIV) screening test

followed by a supplemental HIV test for confirmation in those instances when the HIV screening test is repeatedly reactive.

(2) "Intimate parts" means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.

(2.5) "Pattern of sexual abuse" means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.

(3) "Physically helpless" means unconscious, asleep, or otherwise unable to indicate willingness to act.

(3.5) One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

(4) "Sexual contact" means the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse.

(5) "Sexual intrusion" means any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

(6) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime.

(7) "Victim" means the person alleging to have been subjected to a criminal sexual assault.

Source: **L. 75:** Entire part R&RE, p. 627, § 1, effective July 1. **L. 83:** (4) amended, p. 697, § 1, effective March 3; (3.5) added, p. 693, § 1, effective June 15. **L. 86:** (3.5) amended, p. 770, § 6 effective July 1. **L. 88:** (2) amended, p. 712, § 17, effective July 1. **L. 89:** (2.5) added, p. 903, § 1, effective June 1. **L. 90:** (3.5) amended, p. 1028, § 15, effective July 1. **L. 92:** (1.5) added, p. 322, § 3, effective July 1. **L. 93:** (2) and (4) amended, p. 1731, § 15, effective July 1. **L. 2000:** (1.7) added, p. 452, § 5, effective April 24. **L. 2003:** (1) amended, p. 1432, § 22, effective April 29.

Editor's note: This section is similar to former § 18-3-409 as it existed prior to 1975.

ANNOTATION

Law reviews. For note discussing changes in terminology and classification of offenses of part 4 of this article, and constitutional issues raised thereunder, see 53 Den. L.J. 349 (1976).

Statute not void for vagueness due to definition of "position of trust", since a person of ordinary intelligence could readily understand its meaning and application. *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

Defendant charged under former section where conduct occurred prior to effective time of amendatory section. Where the criminal conduct charged in a prosecution for rape occurred prior to 3:50 p.m., July 1, 1975, the time the governor signed the bill amending this section and therefore the effective time of the

amendment, the defendant was properly charged with rape under former § 18-3-401. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Where assault established by evidence, intent to commit rape no defense. Where all the elements of the crime charged (attempt to commit third degree sexual assault) were established by the evidence, the fact that the defendant's actions might also be construed as evincing an intent to commit rape did not constitute a defense to the charge. *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980).

Scientific evidence to support the victim's testimony is not a legal prerequisite to a jury's finding that the defendant is guilty of unlawful sexual behavior. *People v. Graham*, 678 P.2d

1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed.2d 366 (1984).

Definition of "sexual contact" construed. People v. Myers, 714 P.2d 513 (Colo. App. 1985); People v. West, 724 P.2d 623 (Colo. 1986); People in Interest of J.A., 733 P.2d 1197 (Colo. 1987).

Definition of the term "sexual contact" is not unconstitutionally vague. People v. West, 724 P.2d 623 (Colo. 1986); People in the Interest of J.A., 733 P.2d 1197 (Colo. 1987); People v. Jensen, 747 P.2d 1247 (Colo. 1987).

The court interpreted "any sexual contact" as an unlimited, nonrestrictive phrase that generally encompasses a multitude of types of sexual contacts. People v. Woellhaf, 105 P.3d 209 (Colo. 2005).

The distinction of numerous "intimate parts" merely demarcates different intimate parts of the human anatomy and has no effect on the scope of conduct the general assembly sought to criminalize. People v. Woellhaf, 105 P.3d 209 (Colo. 2005).

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing "sexual contact". People v. Vinson, 42 P.3d 86 (Colo. App. 2002).

"Consent" and the affirmative defense of consent discussed in People v. Williams, 899 P.2d 306 (Colo. App. 1995).

Jury instruction on "consent" properly provided to jury. The instruction substantially tracked the language of this section. The slight variance from the statute was only to clarify properly that the definition was applicable to first degree sexual assault. The definition was important to explain to the jury the specialized meaning of "consent" in the context of sexual assault. People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003).

The term "pattern of sexual abuse" is clearly and unambiguously defined in this section and, therefore, the sentencing enhancement provision of § 18-3-405 (2)(c) which incorporates that term is not unconstitutionally vague. People v. Longoria, 862 P.2d 266 (Colo. 1993).

The phrase "two or more incidents of sexual contact" in the definition of "pattern of sexual abuse" means that the sexual contacts must occur during distinct episodes of sexual assault and be separated by time or an intervening event. People v. Woellhaf, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

The term "victim" means "intended victim" in the context of a conviction for attempted sexual assault. People v. Buerge, 240 P.3d 363 (Colo. App. 2009).

A defendant can be charged with one pattern count for each underlying substantive count. People v. Bobrik, 87 P.3d 865 (Colo. App. 2003).

Evidence sufficient to establish victim was "physically helpless". Record demonstrated that there was sufficient evidence from which the jury could find that the victim was unable to indicate a willingness to act and therefore "physically helpless" within the statutory definition of that term. There was testimony that the victim was virtually unable to converse and required total care; that she needed assistance in everything she did; that while she could at times respond to a simple yes-or-no question, her answers could be nonsensical or inaccurate; that she was physically incapable of protecting herself against any attack; that she was in a locked facility for her own protection, because she would otherwise wander away; and that the Alzheimer's disease affected her both mentally and physically. People v. Klausner, 74 P.3d 421 (Colo. App. 2003).

Trial court committed reversible error by refusing defendants' request to instruct the jury on the affirmative defense of consent where the evidence bearing on the possible existence of consent, while not strong, at least satisfied the "scintilla" standard required for an instruction on an affirmative defense. People v. Cruz, 903 P.2d 1198 (Colo. App. 1995).

Because the alleged victim's alleged consent would have "negative[d] an element of the [sexual assault] offense", the trial court was required to instruct the jury on the affirmative defense of consent. People v. Cruz, 903 P.2d 1198 (Colo. App. 1995).

A stepparent is in a position of trust for purposes of this section. People v. Brown, 749 P.2d 436 (Colo. App. 1987); People v. Brown, 761 P.2d 261 (Colo. App. 1988).

Jury could conclude that defendant was "in a position of trust" relative to the victim within the meaning of the applicable statute, where defendant lived in the same residence with the victim and her family and contributed to the household income, the victim spent hours alone with the defendant in his room, the victim was the only child the defendant allowed in his room, and neither the victim's mother nor any other individual intervened during the time that the victim was alone in the defendant's room. People v. Luman, 994 P.2d 432 (Colo. App. 1999) (decided prior to 1990 amendment).

Upon taking the victim to defendant's home where the two of them were to be alone, defendant assumed responsibility for the welfare and supervision of the child both en route and in the home. People v. Duncan, 33 P.3d 1180 (Colo. App. 2001).

Defendant in "position of trust" even though he was not performing a specific supervisory duty at the time of the unlawful act. Where victim was pastor's daughter and defendant previously taught victim in Sunday school, defendant and his wife babysat for victim and her sister on several occasions, defendant joined

victim's family often for dinner, defendant helped victim and her sisters with their school work, defendant chaperoned church trip for victim, and victim's parents allowed victim to go to defendant's house by herself to ride horses, defendant assumed a position of trust through an ongoing and continuous supervisory relationship with victim. *Pellman v. People*, 252 P.3d 1122 (Colo. 2011).

A "position of trust" for purposes of § 18-3-405.3 and subsection (3.5) of this section may be a supervisory position that exists for a "brief" period—a matter of hours or days—or it may extend over a long relationship. Defendant's discrete acts of supervision were the product of the general position of trust that defendant assumed in relation to victim. *Pellman v. People*, 252 P.3d 1122 (Colo. 2011).

Any deficiency in instructions with respect to definition of sexual contact was harmless error when evidence concerning defendant's touching of victim could not reasonably be con-

strued as being for any purpose other than sexual arousal, gratification, or abuse. *People in Interest of B.D.S.*, 739 P.2d 902 (Colo. App. 1987).

Trial court properly refused to instruct jury concerning consent as an affirmative defense in sexual assault case. Affirmative defense not warranted where one victim testified that she did not resist or cry out when defendant assaulted her and another testified that her failure to resist or cry out was motivated by fear and that her submission was induced by fear. *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

Applied in *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979); *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980); *People v. Opson*, 632 P.2d 602 (Colo. App. 1980); *People v. Reynolds*, 638 P.2d 43 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Salazar*, 648 P.2d 157 (Colo. App. 1981).

18-3-402. Sexual assault. (1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or

(d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or

(e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search; or

(g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or

(h) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.

(2) Sexual assault is a class 4 felony, except as provided in subsections (3), (3.5), (4), and (5) of this section.

(3) If committed under the circumstances of paragraph (e) of subsection (1) of this section, sexual assault is a class 1 misdemeanor and is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(3.5) Sexual assault is a class 3 felony if committed under the circumstances described in paragraph (h) of subsection (1) of this section.

(4) Sexual assault is a class 3 felony if it is attended by any one or more of the following circumstances:

(a) The actor causes submission of the victim through the actual application of physical force or physical violence; or

(b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or

(c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes that the actor will execute this threat. As used in this paragraph (c), “to retaliate” includes threats of kidnapping, death, serious bodily injury, or extreme pain; or

(d) The actor has substantially impaired the victim’s power to appraise or control the victim’s conduct by employing, without the victim’s consent, any drug, intoxicant, or other means for the purpose of causing submission.

(e) (Deleted by amendment, L. 2002, p. 1578, § 2, effective July 1, 2002.)

(5) (a) Sexual assault is a class 2 felony if any one or more of the following circumstances exist:

(I) In the commission of the sexual assault, the actor is physically aided or abetted by one or more other persons; or

(II) The victim suffers serious bodily injury; or

(III) The actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim.

(b) (I) If a defendant is convicted of sexual assault pursuant to this subsection (5), the court shall sentence the defendant in accordance with section 18-1.3-401 (8) (e). A person convicted solely of sexual assault pursuant to this subsection (5) shall not be sentenced under the crime of violence provisions of section 18-1.3-406 (2). Any sentence for a conviction under this subsection (5) shall be consecutive to any sentence for a conviction for a crime of violence under section 18-1.3-406.

(II) The provisions of this paragraph (b) shall apply to offenses committed prior to November 1, 1998.

(6) Any person convicted of felony sexual assault committed on or after November 1, 1998, under any of the circumstances described in this section shall be sentenced in accordance with the provisions of part 10 of article 1.3 of this title.

Source: **L. 75:** Entire part R&RE, p. 628, § 1, effective July 1. **L. 77:** (1) amended, p. 962, § 15, effective July 1. **L. 83:** IP(1) amended, p. 698, § 1, effective July 1. **L. 85:** (2) R&RE and (3) and (4) amended, pp. 666, 667, §§ 1, 2, effective July 1. **L. 95:** (4) amended, p. 1252, § 9, effective July 1. **L. 98:** (4) amended, p. 1293, § 13, effective November 1. **L. 2000:** Entire section R&RE, p. 698, § 18, effective July 1. **L. 2002:** (1)(g), (2), and (4)(e) amended and (1)(h) and (3.5) added, p. 1578, §§ 1, 2, effective July 1; (5)(b)(I) and (6) amended, p. 1512, § 189, effective October 1. **L. 2004:** (3) and (6) amended, p. 635, § 5, effective August 4.

Editor’s note: This section is similar to former § 18-3-401 as it existed prior to 1975.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (5)(b)(I) and (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- III. Trial and Prosecution.
 - A. In General.
 - B. Indictment or Information.
 - C. Evidence.
 - D. Jury.
 - E. Instructions.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, “Criminality of Voluntary Sexual Acts in Colorado”, see 40 U.

Colo. L. Rev. 268 (1968). For article, “Reform Rape Legislation: A New Standard of Sexual Responsibility”, see 49 U. Colo. L. Rev. 185 (1978). For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981). For comment, “Warning Bell: The Inherent Difficulties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools”, see 76 U. Colo. L. Rev. 813 (2005).

Annotator’s note. Since § 18-3-402 is similar to § 18-3-402 as it existed prior to its 2000 repeal and reenactment, and former § 18-3-402 is similar to former § 18-3-401, as it existed

prior to the 1975 revision of this part, and § 40-2-25, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not unconstitutionally vague where it sets out the act, the requisite mental state, and the content of the threat used to force the victim's submission, and each of these elements is defined. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

This section does not violate equal protection. Putting a victim of sexual assault in fear — and in danger — of losing life and limb is a graver and more morally reprehensible act than subjecting the victim to lesser threats. The two kinds of threats are constitutionally distinguishable. Statutes proscribing acts based on this distinction do not violate equal protection. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

Prohibition against double punishment for same criminal act is not violated where a defendant is found guilty of first degree kidnapping and first degree sexual assault for the same criminal episode. *People v. Molina*, 41 Colo. App. 128, 584 P.2d 634 (1978).

Application of 2008 Colorado sex offender management board handbook not ex post facto violation in regard to pre-2008 misdemeanor sexual assault because sexually violent predator statute, not the handbook, applied to defendant's case. Said statute clearly covered defendant's misdemeanor sexual assault for the time the crime was committed. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

It is clear that the general assembly intended to impose a more severe punishment in situations in which more than one person commits the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

Rape and incest were separate and distinct crimes with certain different elements essential to their proof; either or both of these crimes may be charged in an appropriate factual situation. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Before July 1, 1977, "knowingly" was not statutory element of first degree sexual assault, and it was not necessary, therefore, to include that factor in the definition of the crime, so long as the general intent factor was covered elsewhere in the instruction. *People v. Mattas*, 44 Colo. App. 139, 618 P.2d 675 (1980), *aff'd*, 645 P.2d 254 (Colo. 1982).

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under § 18-3-301 (1)(a), this section, and § 18-4-301 (1). *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

For lesser included offense of crime of rape, see *People v. Futamata*, 140 Colo. 233,

343 P.2d 1058 (1959); *People v. Barger*, 191 Colo. 152, 550 P.2d 1281 (1976); *People v. Hansen*, 191 Colo. 175, 551 P.2d 710 (1976).

Section 18-3-409 and this section are severable so that even if the former were invalidated, the latter would still be capable of enforcement. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

Individuals convicted of misdemeanor sexual assaults in violation of subsection (1)(e) should not be excluded from designation as sexually violent predators. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

Because sexually violent predator statute, § 18-3-414.5, plainly covers misdemeanor sexual assault, court need not consider any agency publications. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

Even if the defendant's 18-year-old wife could not be prosecuted for having sex with a 15-year-old girl, the defendant could still be prosecuted for photographing his wife with the girl pursuant to § 18-6-403. *People v. Campbell*, 94 P.3d 1186 (Colo. App. 2004).

Victim's submission to assault insufficient concession for first degree kidnapping. Proof of the victim's submission to a sexual assault is not sufficient per se to establish the concession required for first degree kidnapping. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Voluntary intoxication not defense. The mental culpability requirement of both second degree kidnapping and first degree sexual assault is "knowingly"; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

For constitutionality of former statute relating to deviate sexual intercourse by force or its equivalent, see *People v. Beaver*, 190 Colo. 554, 549 P.2d 1315 (1976).

For lesser included offense of former crime of deviate sexual intercourse by force or its equivalent, see *People v. Barger*, 191 Colo. 152, 550 P.2d 1281 (1976).

For cases construing former statute relating to deviate sexual intercourse by force or its equivalent, see *Martin v. People*, 114 Colo. 120, 162 P.2d 597 (1945); *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969); *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

The offenses of first and second degree sexual assault are mutually exclusive. Second degree sexual assault is not a lesser included offense of the crime of first degree sexual assault. *People v. Shields*, 822 P.2d 15 (Colo. 1991) (reversing *People v. Silburn*, 807 P.2d 1167 (Colo. App. 1990)).

There is no merger between what was formerly first degree sexual assault and second degree assault even if both involved the proof of serious bodily injury. Although the infliction

of serious bodily injury for purposes of the sexual assault statute raised the class of felony for which one could be convicted, it was not an element of the offense itself. *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

The aggravators found in subsection (4) apply to attempted sexual assaults in addition to completed sexual assaults. *People v. King*, 151 P.3d 594 (Colo. App. 2006).

Applied in *People ex rel. VanMeveren v. District Court*, 195 Colo. 1, 575 P.2d 405 (1978); *People v. Reynolds*, 195 Colo. 386, 578 P.2d 647 (1978); *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People v. Jacobs*, 198 Colo. 75, 596 P.2d 1187 (1979); *People v. Mikkleson*, 42 Colo. App. 77, 593 P.2d 975 (1979); *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979); *People v. DeLeon*, 44 Colo. App. 126, 613 P.2d 639 (1980); *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Evans*, 630 P.2d 94 (Colo. App. 1981); *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Sharpless*, 635 P.2d 896 (Colo. App. 1981); *People v. Flowers*, 644 P.2d 916 (Colo. 1982); *People v. Constant*, 645 P.2d 843 (Colo. 1982); *People v. Phillips*, 652 P.2d 575 (Colo. 1982); *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. District Court*, 663 P.2d 616 (Colo. 1983); *People v. Brandt*, 664 P.2d 712 (Colo. 1983); *People v. Vigil*, 718 P.2d 496 (Colo. 1986).

II. ELEMENTS OF OFFENSE.

Victim must show resistance or that resistance was overcome by fear. To constitute the crime of rape there must be the utmost reluctance and resistance on the part of the female complainant, or her will must be overcome by fear and terror so extreme as to preclude resistance. *Bigcraft v. People*, 30 Colo. 298, 70 P. 417 (1902).

This section recognizes the offense even though there is no actual resistance where the female person is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Acts and circumstances may obviate the necessity of proof of physical resistance, as where they show fear making it impossible, or condi-

tions making it useless. *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Proof of sexual intrusion is sufficient to support a conviction for first degree sexual assault. *People v. Lankford*, 819 P.2d 520 (Colo. App. 1991).

Sexual intercourse for the purposes of sexual assault does not include simulated intercourse. *People v. Jurado*, 30 P.3d 769 (Colo. App. 2001).

Where the jury is properly instructed as to the elements of the offense and the term "knowingly," the jury should properly focus on whether the defendant knowingly caused submission of the victim through the application of physical force or violence. The defendant's awareness of the victim's nonconsent is neither an element of the offense nor a topic for argument to the jury. *People v. Dunton*, 881 P.2d 390 (Colo. App. 1994).

Nothing in the plain language of subsection (1)(b) suggests that the section is limited to cases involving victims who suffer from a mental infirmity. *People v. Platt*, 170 P.3d 802 (Colo. App. 2007), *aff'd*, 201 P.3d 545 (Colo. 2009).

The coexistence of subsections (1)(b) and (1)(h) represents a reasoned legislative determination that, depending on the facts of a particular case, a victim who is partially asleep and incapable of appraising the nature of his or her own conduct may not necessarily be physically "unable to indicate willingness to act." *People v. Platt*, 170 P.3d 802 (Colo. App. 2007), *aff'd*, 201 P.3d 545 (Colo. 2009).

Proof of defendant's awareness of nonconsent is not necessary under this section, except under the circumstances described in subsection (1)(e). In all other circumstances, the prohibited conduct by its very nature negates the existence of the victim's consent. *Dunton v. People*, 898 P.2d 571 (Colo. 1995); *Platt v. People*, 201 P.3d 545 (Colo. 2009).

And it is not error for trial court to refuse jury instruction on the affirmative defense of consent where the statute equates the victim's nonconsent with proof that defendant had caused the victim's submission by means "of sufficient consequence reasonably calculated to cause submission against the victim's will". In such case, the jury can only convict a defendant after concluding that the prosecution has proved the victim's lack of consent beyond a reasonable doubt. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Submission induced by fear of great bodily harm does not constitute consent, especially where the threats are accompanied by a demonstration of actual force. *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Principles of complicity apply to sexual assault in the first degree such that, if the actor or an accomplice is armed with and uses a deadly weapon, then both may be found to have

committed a class 2 felony. *People v. Walford*, 716 P.2d 137 (Colo. App. 1985).

Sexual assault is not a lesser included offense of, and therefore not merged into, second-degree kidnapping involving sexual assault. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. McKnight*, 813 P.2d 331 (Colo. 1991); *People v. Johnson*, 815 P.2d 427 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

For first degree assault to be elevated from a class 3 felony to a class 2 felony, there must be more than one person involved in the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

Evidence insufficient to support jury's determination that defendant physically aided or abetted in the commission of the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

The term "extreme pain" is one of ordinary and not technical usage. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Extreme pain measure of criminal conduct. The term "extreme pain" as used in subsection (1)(b) of this section is a measure of criminal conduct and a gauge for determining whether the threat was the cause for the victim's submission; it is not so vague or overbroad as to render the section unconstitutional. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Evidence that defendant's body weight caused victim to submit against his or her will is sufficient to establish probable cause to believe that defendant applied the physical force required under subsection (4)(a). Physical force means force applied to the body and physical violence means unjust or unwarranted exercise of physical force. These definitions do not require an extra application of force other than any force applied to the body, but the physical force or physical violence must cause the victim to submit to sexual intrusion or sexual penetration. *People v. Keene*, 226 P.3d 1140 (Colo. App. 2009).

Element of submission through actual application of physical force or physical violence is applied in *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

Term "attended" in subsection (3) is applied in *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

Threats of future retaliation not made until after the assault were insufficient to establish the class 3 felony aggravator under subsection (4)(c). *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007).

Unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. Proof of sexual intrusion requires proof of sexual contact with a person's intimate parts satisfying the strict elements test, and unlawful sexual contact involves less serious injury than

sexual intrusion and lesser culpability than sexual assault. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010).

III. TRIAL AND PROSECUTION.

A. In General.

Where acts were continuous people may be compelled to rely on certain act. Where in a prosecution under this section of a male for having carnal knowledge of an unmarried female, it appearing that the illicit intercourse was continuous, the people may on motion be compelled to select the occasion upon which they will demand a conviction, and this selection must be made before the accused is required to proceed to his defense. The prosecutor is not required to select any specific date, but must individualize a certain act upon which he will rely. *Laycock v. People*, 66 Colo. 441, 182 P. 880 (1919).

Where there was evidence of several different acts committed at different times, it was error to refuse to require the prosecuting attorney to elect upon which offense he would rely for a conviction. *Schuetz v. People*, 33 Colo. 325, 80 P. 890 (1905).

On the trial of a statutory rape case, election of the district attorney to rely upon a particular offense committed on or about a certain date, at the conclusion of the state's case and before the beginning of the case for the defense, held not to violate the rule in *Laycock v. People* (66 Colo. 441, 182 P. 880 (1919)). *Wills v. People*, 100 Colo. 127, 66 P.2d 329 (1937).

Leading questions addressed to prosecuting witness 14 years of age on direct examination may be permitted in the discretion of the trial court, and the supreme court will not reverse an action on such ground unless it clearly appears that defendant was denied a fair trial. *Ewing v. People*, 87 Colo. 6, 284 P. 341 (1930).

Discretionary power of court to permit district attorney to reopen case. Permission to the district attorney in a prosecution for rape to reopen his case for the purpose of showing the age of defendant is properly granted by the court as within its discretionary powers. *Monchego v. People*, 105 Colo. 486, 99 P.2d 193 (1940).

B. Indictment or Information.

Information need not follow exact language of section. It is sufficient that the offense be charged in language from which the nature of it may be readily understood by the accused and the jury. *Tracy v. People*, 65 Colo. 226, 176 P. 280 (1918); *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924).

One count may contain different ways crime committed. It is proper in one count of an information to charge in all ways in which a

crime may be committed by the use of the word "and" even where the statute uses "or". *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Information which contained substantially same language as this section not defective as description of charges permitted defendant to adequately defend himself and ensured defendant would not be prosecuted again for same offense. *People v. Mogul*, 812 P.2d 705 (Colo. App. 1991).

C. Evidence.

Law reviews. For comment, "Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions", see 61 U. Colo. L. Rev. 833 (1990).

Evidence necessary to prove act. Though it is true that the law does not require the female's statement of actual penetration, nevertheless, some evidence other than an inference is essential to prove the act. Generally, it is held that uncorroborated evidence by the prosecution must be clear and convincing or that it should be scrutinized carefully. *Martinez v. People*, 160 Colo. 534, 422 P.2d 44 (1966).

When the evidence of defendant's guilt was overwhelming and the issue of whether the defendant acted knowingly was not contested at trial, the trial court's error in instructing the jury on the meaning of "knowingly" is not plain error in defendant's conviction for sexual assault in the first degree. *Espinoza v. People*, 712 P.2d 476 (Colo. 1985).

Circumstances tending to discredit prosecutrix. The failure of the prosecutrix to avail herself of assistance when at hand, to report the assault at the earliest possible moment, and to call immediate attention to the injuries received and afterwards complained of, are circumstances tending to discredit the testimony of the party alleged to have been outraged. *Bueno v. People*, 1 Colo. App. 232, 28 P. 248 (1891).

For complaint of prosecutrix as evidence, see *Donaldson v. People*, 33 Colo. 333, 80 P. 906 (1905).

Corroborative testimony of prompt complaint by an alleged victim is properly admitted in a rape case, but even that exception is restricted to the mere fact of complaint, and the details of the occurrence as related to an investigating officer by a prosecutrix and his opinions as to the seriousness of the charge and the difficulties of prosecution as told to the prosecutrix are never admissible in evidence. *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973).

A complaint about a sexual assault, made soon after its occurrence, can constitute corroboration of the victim's testimony. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

In sexual assault cases, testimony tending to prove the promptness of the victim's complaint

to the police is admissible corroboration evidence. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

An eleven-year-old victim's complaint to her nine-year-old sister on the day immediately following a sexual assault by their father was sufficient to corroborate the victim's testimony to the effect that sexual penetration had occurred during the assault. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

Evidence that the victim of a sexual assault failed to make a complaint soon after the crime is admissible as a circumstance which tends to discredit that person's testimony. *People v. Oliver*, 665 P.2d 152 (Colo. App. 1983).

Testimony of officer as to victim's credibility improper. When a police officer who investigates a rape complaint made by a prosecutrix, is permitted to testify as to statements he made to her about his opinions on the seriousness and difficulties experienced by a prosecutrix in rape prosecutions, there is error because the testimony improperly lends credibility to the testimony of the prosecuting witness. *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973).

Permissible police testimony is restricted to the mere fact of the victim's complaint and may not encompass the details related to the investigating officer. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

Testimony of prosecutrix' physical handicap is admissible on issue of her ability to resist forcible attack, notwithstanding contention that such testimony is offered solely to invoke sympathy. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Evidence as to day of offense. Under an information charging the crime of rape to have been committed on a certain day, evidence is admissible of any rape committed by defendant on the prosecuting witness prior to the filing of the information and within the statute of limitations. *Schuetz v. People*, 33 Colo. 325, 80 P. 890 (1905).

Approximate date sufficient where there is evidence of several offenses. In a prosecution for rape, there being evidence of the commission of several offenses, the district attorney is not required to fix a definite date of the occurrence upon which he relies for a conviction, the time being alleged as "on or about" a certain date. The approximate date is sufficient, the specific occasion being definitely identified. *Wills v. People*, 100 Colo. 127, 66 P.2d 329 (1937).

Birth of child is sufficient to establish sexual intercourse. In a prosecution for rape, the fact that prosecutrix gave birth to a child was sufficient evidence to establish sexual intercourse. *Monchego v. People*, 105 Colo. 486, 99 P.2d 193 (1940).

Evidence of abortion not error. Where defendant convicted of statutory rape contends admission of doctor's testimony to prosecutrix'

therapeutic abortion is error, court will not consider such for first time on appeal. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Evidence of intercourse insufficient. It cannot be inferred in law that because defendant intended to rape his victim or that her clothes were torn that an act of sexual intercourse took place or that there was any penetration. The latter is mere conjecture and does not rise to the dignity of legal proof. *Martinez v. People*, 160 Colo. 534, 422 P.2d 44 (1966).

Evidence sufficient to support jury's conclusion that defendant used deadly weapon to force victim to submit to first-degree sexual assault. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Other crimes related to force and were properly admitted. Where evidence of kidnapping, assault, and the forced commission of another sexual act tended to prove the *res gestae* and the force element of rape, it was not error to admit such evidence of other crimes because they were not wholly independent of the offense charged. *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

Aiding or abetting does not require physical assistance during the actual act of penetration. *People v. Beigel*, 646 P.2d 948 (Colo. App. 1982).

Evidence sufficient to support a general verdict based upon the alternative methods of committing sexual assault in the first degree, including the third alternative of causing the victim's submission with threats of future retaliation. *James v. People*, 727 P.2d 850 (Colo. 1986).

Evidence sufficient to sustain conviction. *Harlan v. People*, 32 Colo. 397, 76 P. 792 (1904); *Boegel v. People*, 95 Colo. 319, 35 P. 2d 855 (1934); *Davis v. People*, 112 Colo. 452, 150 P.2d 67 (1944); *Armstead v. People*, 168 Colo. 485, 452 P.2d 8 (1969); *People v. Duran, Jr.*, 179 Colo. 129, 498 P.2d 937 (1972); *Yescas v. People*, 197 Colo. 379, 593, P.2d 358 (1979); *People v. Powell*, 716 P.2d 1096 (Colo. 1986); *People v. Mogul*, 812 P.2d 705 (Colo. App. 1991).

Evidence to support multiple convictions. Evidence of three separate and distinct incidents of sexual assault which occurred in three different ways, each in a separate time period, is sufficient to support a finding of guilty on three separate counts under this section. *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978).

Evidence insufficient to support conviction. A conviction for rape based solely upon the evidence of the prosecuting witness, who had passed the age of consent at the time of the alleged crime, where there was no evidence as to what force was used or what resistance was made, and no evidence that the consent of the prosecuting witness was obtained or her resistance prevented by any threat of defendant or fear of violence at his hands, the only threat

testified to being a threat to kill her and the rest of the family if she told of the acts, evidence was insufficient to support conviction. *Bigcraft v. People*, 30 Colo. 298, 70 P. 417 (1902).

Evidence insufficient to support conviction as a matter of law under the "physically aided and abetted" standard of subsection (3)(a). *People v. Higa*, 735 P.2d 203 (Colo. App. 1987).

There was sufficient evidence of the required element of penetration beyond a reasonable doubt where the victim testified to the occurrence of penetration and the codefendant pleaded guilty to a crime involving penetration, admitted intrusion with his fingers, and admitted he and the defendant "raped" the victim. *People v. Lankford*, 819 P.2d 520 (Colo. App. 1991).

The victim's testimony describing soreness, the counselor's testimony that both defendant and the victim were naked from the waist down, and the defendant's statement that "it was consensual" were sufficient circumstantial evidence to prove penetration occurred. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

Trial court did not err in providing a dictionary definition of the term "submission" which did not include physical force or violence in response to a jury inquiry, where the jury was explicitly instructed that one of the elements of first degree sexual assault was that the defendant caused the victim's submission through the actual application of physical force or physical violence. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996).

D. Jury.

Evidence determines if lesser offense is submitted to jury. It does not follow from the conclusion that the aggravated assault need not be specifically pleaded that a court is invariably required to submit the lesser included crime to the jury. There remains the question whether the evidence justifies this action. Oftentimes the evidence precludes submission even when the offense is charged in a separate count, and in some cases the evidence is such that the jury must determine the case on the greater offense and that alone. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Where there was uncontroverted evidence that the sexual penetration was obtained by means of physical force, it was not error for the trial court to refuse to instruct the jury on the lesser offense of second degree sexual assault. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

Where the evidence is sufficient to support a charge of assault with intent to commit rape, and such as to justify a simultaneous acquittal of the charge of rape, refusal of a trial court to submit a verdict and instruction on assault with intent to

commit rape is error. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Failure of the court to construct an assault with intent to commit rape as a lesser included offense of forcible rape does not affect substantial rights of defendant, and is therefore not cognizable as plain error where defendant was convicted of statutory rape and at trial had denied both assault and commission of act itself. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Jury to evaluate threat. It is for the jury to decide the magnitude of the threat and to evaluate the victim's belief of the defendant's ability at the time the threats were made to carry them out. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

E. Instructions.

"Force" requires no further definition. The trial court does not commit reversible error by failing to define "force" in its instructions. An instruction which contains the word "force", with no further definition, is written in plain understandable English. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983); *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

The court properly defined "physical force" and "physical violence" in its instructions. *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006).

Instructions as to corroboration. Instruction to the effect that testimony of prosecutrix must be corroborated by other evidence, such as evidence of a struggle, or by making proof of complaint by prosecutrix at her earliest opportunity, or by other evidence tending to prove the commission of the offense charged was held not subject to the criticism that it authorized conviction of forcible rape without any corroboration of testimony of prosecutrix with respect to the question of whether or not the act of intercourse was accompanied by force. *Davis v. People*, 112 Colo. 452, 150 P.2d 67 (1944).

Complicity instruction not error simply because possibility of inconsistent verdict. The trial court did not err by instructing on complicity and on sexual assault when the defendant was aided or abetted by others simply because the instructions, when given together, could lead to an inconsistent verdict. *People v. Naranjo*, 200 Colo. 11, 612 P.2d 1106 (1980).

Aiding or abetting must be established beyond a reasonable doubt. Jury instructions which did not inform the jury that being "physically aided or abetted" had to be established beyond a reasonable doubt, coupled with conflicting evidence presented at trial on the issue of aiding or abetting, requires reversal of defendant's conviction for first degree sexual assault as a class two felony. *Beigel v. People*, 683 P.2d 1188 (Colo. 1984).

For deadly weapon sexual assault, it is sufficient to instruct the jury that it needs to consider whether a deadly weapon was used to cause submission. The jury does not need to determine whether submission was obtained by actual physical force or by sufficient consequences reasonably calculated to cause submission. *People v. Lehmkuhl*, 117 P.3d 98 (Colo. App. 2004).

Instruction on fear as substitute for force required. In a prosecution for rape following a vicious assault on a victim, the people are entitled to an instruction which adequately and clearly defines fear and apprehension of bodily injury as a substitute for the ingredient of force. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Failure of trial court to include the sentencing enhancement factor in the elemental instruction to the substantive charge was not plain error. *People v. Torres*, 701 P.2d 78 (Colo. App. 1984).

Sentence enhancers in subsection (4) are not additional substantive elements of the crime and do not require proof of a mens rea. Instruction on enhancer did not need to include "knowingly". *People v. Santana-Medrano*, 165 P.3d 784 (Colo. App. 2006).

The courts failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. In order to convict the defendant of first degree sexual assault or incest the jurors had to accept the victim's testimony because the victim testified unequivocally to actual sexual intercourse while the defendant denied any improper touching at all. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

The trial court erred by failing to respond adequately to the jury's question regarding the difference between first and second degree sexual assault. A jury should be referred back to the instructions only when it is apparent that it has overlooked some portion of the instructions or when the instructions clearly answer its inquiry. *People v. Shields*, 805 P.2d 1140 (Colo. App. 1990).

The court must take adequate measures to insure that the jury understands the difference between the principal charged offense and the lesser included offense if a lesser included offense instruction is given. COLJI-Crim. No. 12:05 is insufficient to apprise the jury of the differences between first and second degree sexual assault, and, accordingly, the conviction for first degree sexual assault should be reversed. *People v. Shields*, 805 P.2d 1140 (Colo. App. 1990).

Sexual assault in the second degree is a lesser included offense of sexual assault in the first degree. *People v. Silburn*, 807 P.2d 1167 (Colo. App. 1990).

Trial court did not err in refusing to give the consent defense jury instruction tendered by the defendant in a first degree sexual assault case where the crime itself requires that the prosecution prove a lack of consent. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996).

The jury was not instructed on both elements of alternative (c) and could not have assessed whether the prosecution had proven each element of that alternative beyond a reasonable doubt. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

IV. VERDICT AND SENTENCE.

A sentence imposed beyond the presumptive range for a defendant convicted of both first degree sexual assault with a deadly weapon and a crime of violence does not deny equal protection of law since it cannot be said that the sentencing statutes permit different degrees of punishment for persons in the defendant's situation. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

A rational distinction exists in the sentencing scheme for people convicted of first degree sexual assault with a deadly weapon in contrast to convictions of the same crime without a deadly weapon since the legislature could rationally perceive that use of a deadly weapon during the course of such an assault is more reprehensible and dangerous than commission of such a crime without a deadly weapon. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986), disapproving *People v. Montoya*, 709 P.2d 58 (Colo. App. 1985), rev'd, 736 P.2d 1208 (Colo. 1987).

Evidence controls whether lesser included offense of assault with intent to rape can stand alone or fall on acquittal of forcible rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Section not inconsistent with § 18-3-405. Charges under each section are distinguishable by the nature of the prohibited sexual activity. *People v. Hawkins*, 728 P.2d 385 (Colo. App. 1986).

18-3-403. Sexual assault in the second degree. (Repealed)

Source: **L. 75:** Entire part R&RE, p. 628, § 1, effective July 1. **L. 77:** IP(1) amended, p. 962, § 16, effective July 1. **L. 83:** (1)(b) and (2) amended, p. 698, § 2, effective July 1. **L. 88:** (1)(e) amended, p. 725, § 1, effective July 1. **L. 90:** (1)(f) repealed, p. 1033, § 25, effective July 1. **L. 99:** (1)(e.5) added and (2) amended, p. 347, §§ 1, 2, effective July 1. **L. 2000:** Entire section repealed, p. 700, § 19, effective July 1.

18-3-404. Unlawful sexual contact. (1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:

- (a) The actor knows that the victim does not consent; or
- (b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

Conviction of sexual assault under this section meets conviction of sexual offense criterion within the meaning of § 18-1.3-1001 et seq. The defendant is subject to indeterminate sentencing accordingly. *People v. Klausner*, 74 P.3d 421 (Colo. App. 2003).

Trial court's omission of the word "physically" from its interrogatory distinguishing class 2 from class 4 felony sexual assault did not amount to plain error under the circumstances, and there was no indication that the trial court failed to exercise its discretion with regard to the full range of penalties available for class 2 felonies. Sentencing court's choice of 16 years for the lower component of its indeterminate sentence was well within the permissible range, according to any of the arguably applicable statutes, and the sentencing court supported its exercise of discretion with reference to the nature of the particular offense, the character of the offender, and the public interest. *Tumentsereg v. People*, 247 P.3d 1015 (Colo. 2011).

Sentence found not excessive. A sentence of 27 to 50 years for sexual assault in the first degree was not excessive. *People v. Hall*, 619 P.2d 492 (Colo. 1980).

Sentence of six years was not inappropriate. The prosecutor recommended a minimum sentence of four years, but it is not improper for the sentencing court, on its own volition, to sentence contrary to the district attorney's recommendation. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Sentence found excessive. Defendant's sentence of a minimum of 32 years exceeded what is authorized by § 18-1.3-401 (6), since the minimum sentence is greater than twice the 12-year presumptive maximum for a class 3 felony. *People v. Clark*, 214 P.3d 531 (Colo. App. 2009), aff'd on other grounds, 232 P.3d 1287 (Colo. 2010).

Jury verdict convicting defendant of felony menacing is not inconsistent with the jury's verdict acquitting defendant of first degree sexual assault. *People v. Frye*, 872 P.2d 1316 (Colo. App. 1993).

(c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission; or

(e) Repealed.

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit; or

(g) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

(1.5) Any person who knowingly, with or without sexual contact, induces or coerces a child by any of the means set forth in section 18-3-402 to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person, for the purpose of the actor's own sexual gratification, commits unlawful sexual contact. For the purposes of this subsection (1.5), the term "child" means any person under the age of eighteen years.

(1.7) Repealed.

(2) (a) Unlawful sexual contact is a class 1 misdemeanor and is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(b) Notwithstanding the provisions of paragraph (a) of this subsection (2), unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402 (4) (a), (4) (b), or (4) (c) or if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section or subsection (1.5) of this section.

(3) If a defendant is convicted of the class 4 felony of unlawful sexual contact pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406; except that this subsection (3) shall not apply if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section.

Source: **L. 75:** Entire part R&RE, p. 629, § 1, effective July 1. **L. 77:** IP(1) amended, p. 962, § 17, effective July 1. **L. 86:** (3) added, p. 777, § 6, effective July 1. **L. 89:** (1.5) added and (2) and (3) amended, p. 830, § 41, effective July 1. **L. 90:** (1)(e) repealed, p. 1033, § 25, effective July 1. **L. 91:** (3) amended, p. 1912, § 21, effective June 1. **L. 92:** (1.5) amended and (1.7) added, p. 404, § 15, effective June 3. **L. 94:** (1.5) and (1.7) amended, p. 1717, § 9, effective July 1. **L. 95:** (3) amended, p. 1252, § 10, effective July 1. **L. 96:** (1.7) amended, p. 1581, § 4, effective July 1. **L. 2000:** IP(1), (1.5), (1.7), (2), and (3) amended, p. 700, § 20, effective July 1. **L. 2002:** (3) amended, p. 1513, § 190, effective October 1. **L. 2004:** (2) and (3) amended, p. 635, § 6, effective August 4. **L. 2010:** (1.7)(b) added by revision, (SB 10-128), ch. 415, pp. 2045, 2049, §§ 1, 12.

Editor's note: (1) This section is similar to former §§ 18-3-403, 18-3-404, and 18-3-410 as they existed prior to 1975.

(2) Subsection (1.7)(b) provided for the repeal of subsection (1.7), effective July 1, 2012. (See L. 2010, pp. 2045, 2049.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For comment, "Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions", see 61 U. Colo. L. Rev. 833 (1990). For comment, "Warning Bell: The Inherent Diffi-

culties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools", see 76 U. Colo. L. Rev. 813 (2005).

Where assault established by evidence, intent to commit rape no defense. Where all the elements of the crime charged (attempt to com-

mit third degree sexual assault) were established by the evidence, the fact that the defendant's actions might also be construed as evincing an intent to commit rape did not constitute a defense to the charge. *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980).

No violation of equal protection of the laws under the Colorado Constitution is created even though subsection (1)(e) and the offense described in § 18-3-405 (2)(b) contain some similar elements. The offenses also contain elements which make them distinguishable. The fact that a single act may give rise to more than one criminal violation does not, by itself, create an equal protection problem. *People v. Madril*, 746 P.2d 1329 (Colo. 1987).

The general assembly determined that persons who commit unlawful sexual contact with force must be sentenced to at least the midpoint of the sentencing range. *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006).

It was proper for the court to include the definition of "consent" from § 18-1-505 (3)(d) in its instruction for unlawful sexual contact. *People v. Holwuttel*, 155 P.3d 447 (Colo. App. 2006).

Defendant's prior conviction of assault did not bar his subsequent conviction of sexual assault, as offenses had distinct elements that were not subsumed by each other. *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986).

Attempted third degree sexual assault is a lesser included offense of attempted first degree sexual assault. *People v. Staggs*, 740 P.2d 21 (Colo. App. 1987).

The court's failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. Because third degree sexual assault may be committed without proof of sexual penetration, defendant's conviction of that crime could not have been affected by the lack of response to the jurors' inquiry. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

A difference in the description of third degree sexual assault between the charging document and the jury instructions was not unconstitutional. The defendant received adequate notice that he could potentially have to defend against allegations that he subjected the victim to sexual contact in the course of attempting to induce her to expose intimate parts. *People v. Madden*, 111 P.3d 452 (Colo. 2005).

To be used as a ground for discipline in an attorney disciplinary proceeding sexual assault in the third degree need only be proved by clear and convincing evidence. *In re Egbune*, 971 P.2d 1065 (Colo. 1999).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client and with a current client without either woman's consent. *People v. Bertagnolli*, 922 P.2d 935 (Colo. 1996).

Unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. Proof of sexual intrusion requires proof of sexual contact with a person's intimate parts satisfying the strict elements test, and unlawful sexual contact involves less serious injury than sexual intrusion and lesser culpability than sexual assault. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010).

Evidence of coercion sufficient to sustain conviction. Using bribes and other manipulation to get juveniles to engage in sexual conduct satisfied the coercion element. *People v. Walker*, ___ P.3d ___ (Colo. App. 2011).

Evidence of sexual gratification sufficient to sustain conviction. Testimony regarding defendant's demeanor during photo sessions, defendant's verbal directions during photo sessions, and defendant's possession of photos and videos all support the sexual gratification element. *People v. Walker*, ___ P.3d ___ (Colo. App. 2011).

A conviction under subsection (1) of this section constitutes a forcible sex offense and therefore is a crime of violence under § 2L1.2 of the United States sentencing guidelines. *United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007), cert. denied, 553 U.S. 1066, 128 S. Ct. 2500, 171 L. Ed. 2d 790 (2008); *United States v. Reyes-Alfonso*, 653 F.3d 1137 (10th Cir. 2011), cert. denied, ___ U.S. ___, 132 S. Ct. 828, ___ L. Ed. 2d ___, 80 U.S.L.W. 3334 (U.S. Dec. 5, 2011) (No. 11-7115).

A sex offense may be committed by means that do not involve physical force, yet the offense may still be forcible. When an offense involves sexual contact with another person, it is necessarily forcible when that person does not consent. The use of disparities in situational power, influence, or control meet the definition of force. *United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007), cert. denied, 553 U.S. 1066, 128 S. Ct. 2500, 171 L. Ed. 2d 790 (2008).

Applied in *People in Interest of M.M.*, 43 Colo. App. 65, 599 P.2d 968 (1979); *People v. Opson*, 632 P.2d 602 (Colo. App. 1980); *People v. Johnson*, 653 P.2d 737 (Colo. 1982).

18-3-405. Sexual assault on a child. (1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

(2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:

(a) The actor applies force against the victim in order to accomplish or facilitate sexual contact; or

(b) The actor, in order to accomplish or facilitate sexual contact, threatens imminent death, serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor has the present ability to execute the threat; or

(c) The actor, in order to accomplish or facilitate sexual contact, threatens retaliation by causing in the future the death or serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor will execute the threat; or

(d) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time must be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse, whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401 (1) (a), C.R.S., concerning sex offenses against children. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).

(3) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraphs (a) to (d) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

Source: **L. 75:** Entire part R&RE, p. 630, § 1, effective July 1. **L. 77:** (1) amended, p. 962, § 18, effective July 1. **L. 83:** (5) amended, p. 693, § 2, effective June 15. **L. 86:** (3) added, p. 777, § 7, effective July 1. **L. 89:** (2)(b) and (3) amended and (2)(c) added, p. 903, §§ 2, 3, effective June 1. **L. 90:** (2)(b) repealed, p. 1033, § 25, effective July 1. **L. 95:** (2) and (3) amended, p. 1252, § 11, effective July 1. **L. 2002:** (2)(d) amended, p. 1582, § 8, effective July 1; (3) amended, p. 1513, § 191, effective October 1. **L. 2006:** (2)(d) amended, p. 413, § 2, effective July 1.

Editor's note: This section is similar to former § 18-3-408 as it existed prior to 1975.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For note, "One Year Review of Constitutional Law", see 41 Den. L. Ctr. J. 77 (1964). For article, "The Adolescent Sex Offender: An Overview", see 16 Colo. Law. 1844 (1987). For comment, "Warning Bell: The Inherent Difficulties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools", see 76 U. Colo. L. Rev. 813 (2005).

Annotator's note. Since § 18-3-405 is similar to former § 18-3-408, as it existed prior to the 1975 revision of this part, and § 40-2-32, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Enhanced crime of violence sentence on conviction for pattern of sexual assault on a child does not violate defendant's due process and equal protection guarantees. Prosecution not required to charge and prove a separate crime of violence count pursuant to § 16-11-

309 (4) and (5) for per se crimes of violence even though the elements of the pattern sentence enhancer do not overlap with the elements of a crime of violence. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

Neither § 18-3-403 (1) nor subsection (1) is lesser included offense of the other, as each contains elements not found in the other. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

Convictions under both not double jeopardy. Convictions for violations of § 18-3-403 (1) and subsection (1) arising from the same act do not constitute double jeopardy. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

But sexual assault on a child, as described in subsection (1), is a lesser included offense of second degree sexual assault, as described in § 18-3-403 (1)(e). Accordingly, defendant could not be convicted of both offenses, and the court was required to vacate the conviction that

would effectuate as fully as possible the jury's verdict. As such, the court was required to consider the general assembly's felony classification of the various crimes committed by the defendant, together with the length of sentences, and maximize the jury's verdict, which gives effect to the most serious offense. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The "pattern" provision of subsection (2)(d) does not violate the double jeopardy protection against multiple punishments. Separate convictions and punishments authorized by the legislature never violate double jeopardy. The general assembly intended to authorize separate convictions for each incident of sexual assault on a child and authorized enhanced punishment of each assault that is committed as part of a "pattern of sexual abuse". *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

No double jeopardy violation for imposing sentences under §§ 18-3-405 and 18-3-405.3. Each section required a different element, a pattern of abuse for the first and being in a position of trust for the second, thus, there was no double jeopardy violation. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), *aff'd sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011).

No double jeopardy violation for conviction of sexual assault on a child and conviction of sexual assault on a child-pattern. Each count was based on a separate volitional incident that was separated by time and intervening events. *People v. Greer*, 262 P.3d 920 (Colo. App. 2011).

Conviction under this section is not violative of equal protection on grounds that § 18-3-404 prohibits the same conduct with a lesser penalty. Statutory classifications are valid, even if difference in prohibited conduct is only a matter of degree. *People v. Oliver*, 745 P.2d 222 (Colo. 1987).

This section does not violate equal protection of the laws under the Colorado Constitution because, although the felony offense of sexual assault on a child by one in a position of trust and the misdemeanor offense of sexual assault in the third degree under § 18-3-404 (1)(e) contain some of the same elements, the two offenses contain elements which make them distinguishable. The fact that a single act may give rise to more than one criminal violation does not, by itself, create an equal protection problem. *People v. Madril*, 746 P.2d 1329 (Colo. 1987).

Subsection (2)(c) does not violate due process by allowing the prosecution to use evidence of alleged uncharged crimes since evidence of multiple instances of sexual abuse is not similar transaction evidence but rather evidence that forms integral part of the offense. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Conduct proscribed by this section is different than conduct proscribed by § 18-6-

403, sexual exploitation of a child, and imposing different penalties for the two sections does not offend equal protection. *People v. Slusher*, 844 P.2d 1222 (Colo. App. 1992).

Subsection (2)(c) does not violate equal protection of the law since the classification of those charged with pattern sexual offense involving children has a rational basis in fact and is reasonably related to the legitimate governmental interest of protecting young children. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Subsection (2)(c) is not unconstitutionally vague. *People v. Longoria*, 862 P.2d 266 (Colo. 1993); *People v. Graham*, 876 P.2d 68 (Colo. App. 1994); *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

Subsection (2)(c) was possibly applied ex post facto, therefore, enhancement portion of conviction is reversed where several assaults occurred before this law was enacted, the verdict could have been based on an act that preceded the law's enactment, and the jury was not instructed that the conviction had to be based on an act that occurred after the law's passage. *People v. Graham*, 876 P.2d 68 (Colo. App. 1994).

If the acts preceding the date of the enactment of the statute are included in the charges, the jury must be instructed not to consider them in determining defendant's guilt or innocence with respect to sexual abuse as a part of a pattern of sexual abuse. If the jury is permitted to consider them, the statute, as applied to the defendant, is retrospective and violates the ex post facto prohibition. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

Subsection (2)(c) did not violate the prohibition against ex post facto laws since the defendant had the requisite fair warning of the consequences of committing the offense with which he was charged. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Subsection (2)(c) did not violate the prohibition against ex post facto laws since the conduct that triggered the pattern sexual abuse statute occurred after the statute's effective date. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Although defendant's criminal acts were committed prior to the effective date of subsection (2)(d), application of this subsection to him did not violate the ex post facto clauses of the federal and state constitutions, because the general assembly had passed legislation increasing the penalty for sexual assault as a pattern of sexual abuse as early as 1989, before defendant committed the acts for which he was convicted. Because the acts were therefore not innocent when committed and the changes to subsection (2)(d) did not change the punishment or deprive defendant of a defense, subsection

(2)(d) was not an ex post facto law. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The 1982 amendment extending the statute of limitations from a three-year period to a seven-year period for the offense of sexual assault on a child applies to all offenses which are not time-barred as of the effective date of the amendatory legislation. *People v. Whitesell*, 729 P.2d 985 (Colo. 1986).

Section not inconsistent with § 18-3-402. Charges under each section are distinguishable by the nature of the prohibited sexual activity. *People v. Hawkins*, 728 P.2d 385 (Colo. App. 1986).

Convictions on four separate counts of sexual assault on a child, based upon different types of sexual contact, but not clearly separate incidents, violates constitutional prohibition against double jeopardy. Defendant, therefore, received more than one sentence for each single contact, and the charges were multiplicative. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

But, if evidence supports a conclusion that the offenses were separated in time or location, and comprised separate volitional departures, defendant may be charged and convicted on separate offenses for identically worded counts of sexual assault on a child without violating constitutional prohibitions on double jeopardy. *Quintano v. People*, 105 P.3d 585 (Colo. 2005).

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing the "sexual contact" element of sexual assault on a child. *People v. Vinson*, 42 P.3d 86 (Colo. App. 2002).

The term "pattern of sexual abuse" is clearly and unambiguously defined in § 18-3-401 (2.5) and, therefore, the sentencing enhancement provision of subsection (2)(c) which incorporates that term is not unconstitutionally vague. *People v. Longoria*, 862 P.2d 266 (Colo. 1993).

Defining sexual assault on a child as part of a "pattern of sexual abuse" is a sentencing enhancer of sexual assault on a child because it increases the punishment for that offense from a class 4 felony to a class 3 felony. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

The "pattern" provision of subsection (2)(d) is not a separate offense, rather it allows each incident to be elevated to a class 3 felony. The definition of "pattern of sexual abuse" does not establish a separate offense; the unit of prosecution remains the substantive crime. The plain language of the statute authorizes greater punishment for the substantive crime, which is sexual assault on a child. *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

A pattern count citing both the statute on sexual assault on a child and the pattern sentence enhancer is sufficient to charge both

charges. *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Although a conviction for sexual assault on a child as part of a pattern of abuse requires violent crime sentencing, that fact does not make it a violent crime as defined in § 18-1.3-406. *People ex rel. A.B.-B.*, 215 P.3d 1205 (Colo. App. 2009).

Trial court did not err in denying the request for a jury trial. Since defendant's charge of sexual assault on a child did not include charges of bodily injury, intimidation, threats, or force, defendant was not charged with a crime of violence as defined in § 18-1.3-406 and, subsequently, was not entitled to a jury trial. *People ex rel. A.B.-B.*, 215 P.3d 1205 (Colo. App. 2009).

In order to impose the pattern of sexual abuse sentence enhancer, defendant must be convicted of at least two completed acts of sexual contact against a child. The jury found defendant guilty of only attempted, not completed offenses, and there was no other conduct that the jury could have relied upon to come to the conclusion there was a pattern of sexual abuse. *People v. Day*, 230 P.3d 1194 (Colo. 2010).

Defendant's position of trust in relation to victim could not be used as aggravating factor under § 18-1-105 where it was also element of substantive crime. *People v. Garciadealba*, 733 P.2d 1240 (Colo. App. 1986).

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

Dismissal of specific counts alleging a violation of subsection (1) does not preclude conviction on subsection (2)(d). *People v. Melillo*, 976 P.2d 353 (Colo. App. 1998), *aff'd*, 25 P.3d 769 (Colo. 2001).

Verdicts for sexual assault on a child as part of a pattern of sexual abuse and sexual assault on a child by one in a position of trust were not inconsistent and were based upon separate statutory provisions requiring proof of different elements. *People v. Hoefer*, 961 P.2d 563 (Colo. App. 1998).

Where the jury instructions invited the jury to find defendant guilty of a pattern of sexual abuse count based on any two sexual acts, regardless of when they occurred, the conviction required reversal. Since the pattern of sexual abuse under subsection (2)(d) is a sentence enhancer to a crime charged under subsection (1), only a count charged under subsection (1) can serve as the predicate offense,

and the jury must find the defendant guilty both of the predicate offense and of another act of sexual abuse occurring within 10 years prior to the period in which the predicate offense occurred. Reversal of the conviction was required where the jury instruction did not specify the 10-year requirement. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

Jury verdict form for sexual assault on a child should not have included the word "pattern" because pattern is a sentence enhancement and not a separate offense. However, use of such instruction was not plain error because there was no reasonable possibility that it contributed to defendant's convictions. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

The people adequately elected the specific acts underlying each count that constituted the pattern of sexual abuse. *People v. Greer*, 262 P.3d 920 (Colo. App. 2011).

Both the predicate act and the earlier pattern act or acts may occur within the period alleged in the pattern of sexual assault count in the information. The period in the information was less than ten years, therefore it would have been impossible to find the defendant guilty of the enhancer unless the jury found the defendant committed two separate acts within the period in the information. *People v. Honeysette*, 53 P.3d 714 (Colo. App. 2002).

Enhanced penalty under subsection (2)(d) improper when, based on jury instruction and argument of prosecutor, jury could have found a pattern of abuse from multiple sexual contacts during a single sexual assault episode. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

Former section held constitutional. *Gallegos v. People*, 176 Colo. 191, 489 P.2d 1301 (1971).

Purpose of former statute was to protect morals of children. The evident purpose of former statute was to protect children under a certain age from those acts which would tend to corrupt their morals, so that the question of the consent or nonconsent of those included within the law was not material, because its prime object was to protect the morals of such youth. *Dekelt v. People*, 44 Colo. 525, 99 P. 330 (1908); *Martinez v. People*, 111 Colo. 52, 137 P.2d 690 (1943); *Cross v. People*, 122 Colo. 469, 223 P.2d 202 (1950).

Former statute was designed to protect children from depravity and licentiousness. *Kidder v. People*, 115 Colo. 72, 169 P.2d 181 (1946).

Former statute was neither obscure nor indefinite. It was designed to protect the morals of children in any place, and arbitrary rules of construction were not to be invoked to restrict its meaning. *Martinez v. People*, 111 Colo. 52, 137 P.2d 690 (1943).

Evidence on age of juvenile-defendant required. Where the petition in delinquency states

the respondent's age, although § 19-3-106 and C.R.J.P. 8 specify that "jurisdictional matters of the age and residence of the child shall be deemed admitted . . . unless specifically denied", the juvenile-defendant's age is not thereby admitted, and it is necessary to present evidence specifically on that element of an offense when it is critical under this section. *People in Interest of M. M.*, 41 Colo. App. 44, 582 P.2d 692 (1978).

Effect of lack of evidence on four-year age differential. Since the four-year age differential is an essential element of the offense, a conviction cannot be sustained where no evidence was adduced as to that element. *People in Interest of M. M.*, 41 Colo. App. 44, 582 P.2d 692 (1978).

Evidence of age differential admitted. An eleven-year-old child's estimate of her father's age as within a range greater than her own by only four years is not so inherently speculative as to be without probative value. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

Where evidence of many acts, prosecution compelled to select specific transaction for conviction. Where there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction, and although it is not required to identify the exact date of the offense, it must individualize and select a specific act. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980); *People v. Quintano*, 105 P.3d 585 (Colo. 2005).

The appropriate "unit of prosecution" for the crime of sexual assault on a child is "any sexual contact" not each separate offense of touching within a single incident that encompasses a multitude of types of sexual contacts. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

Mental state required is "knowingly". The general assembly intended that the mental state requirement for this crime be "knowingly", and that this supersedes any indication of mens rea suggested by the term "intentional" in § 18-3-401. *People v. Salazar*, 648 P.2d 157 (Colo. App. 1981).

Evidence of similar offenses committed by accused against same child is admissible in prosecutions for taking indecent liberties with the child. *Godfrey v. People*, 168 Colo. 299, 451 P.2d 291 (1969).

The exception to the general rule excluding evidence of other offenses allows such evidence to show design, motive, or intent. The exception is broadened in cases of sexual offenses. *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969).

Evidence of prior sexual episodes with the victim which goes to prove a common plan, scheme, or design, is admissible under § 16-10-301 (1). *People v. Whitesel*, 200 Colo. 362, 615 P.2d 678 (1980).

Evidence of uncharged sexual contact properly admitted as evidence of pattern of

sexual assault against same victim. Since the incident occurred within 10 years of the predicate offenses charged under this section, it was evidence that could be used to prove the pattern under this section. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), *aff'd* on other grounds *sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011).

Similar acts as to other persons cannot be shown in evidence. *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969).

Other offenses inadmissible where guilty knowledge is necessary conclusion. Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible, and violates the rule that the evidence must be confined to the issue. *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969).

Testimony of prior offenses not prejudicial. Each of the witnesses testified that defendant had perpetrated indecent liberties on occasions prior to the ones with which he was charged. The witnesses gave no dates or in any other manner identified or testified about any particular occurrence. In this circumstance no election is required because the evidence only tends to show one particular transaction, which in each instance was the transaction charged in the information. Examination of the record fails to disclose that the jury could have somehow convicted defendant for some act other than the very ones with which he was charged. *Nowels v. People*, 166 Colo. 140, 442 P.2d 410 (1968).

Attempt to commit sexual assault on child is offense under Colorado law. *People v. Martinez*, 42 Colo. App. 257, 592 P.2d 1358 (1979).

Evidence sufficient to support conviction. *Rapue v. People*, 171 Colo. 324, 466 P.2d 925 (1970); *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983).

Evidence sufficient to support a charge of sexual assault on a child beyond a reasonable doubt. *People v. Carmichael*, 179 P.3d 47 (Colo. App. 2007), *rev'd* on other grounds, 206 P.3d 800 (Colo. 2009).

Evidence sufficient for conviction. Victim's testimony, if believed by the jury, was enough to convict defendant, and the credibility of witness is almost solely within the province of the jury. *People v. McNeely*, 222 P.3d 370 (Colo. App. 2009).

Conviction on one count may not be set aside simply because it is factually inconsistent with acquittals on other counts. *People v. McNeely*, 222 P.3d 370 (Colo. App. 2009).

Evidence insufficient for class 3 conviction sufficient for class 4 conviction. Evidence which was insufficient to support a conviction for a class 3 felony charge was sufficient to convict for a lesser included class 4 felony. *People v. Whitesel*, 200 Colo. 362, 615 P.2d 678 (1980).

Verdicts of guilty under this section and of contributing to juvenile delinquency. Verdicts of guilty under this section and also as to a count of contributing to juvenile delinquency were not inconsistent. *Warren v. People*, 121 Colo. 118, 213 P.2d 381 (1949).

In a trial for commission of a crime under subsection (2)(c), no limiting instructions were required, as evidence of multiple sexual abuse incidents is not similar transaction evidence but is evidence of an integral part of the offense. *People v. Graham*, 876 P.2d 68 (Colo. App. 1994).

Trial court's failure to instruct the jury that voluntary intoxication may apply to sexual assault on a child does not constitute plain error for there is doubt whether the issue is yet settled. *People v. O'Connell*, 134 P.3d 460 (Colo. App. 2005).

Sentence enhancement under subsection (2)(c) is not precluded by fact that prior conduct contributing to the establishment of pattern sexual abuse occurred in another state. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Conviction for attempted sexual assault on a child constitutes sexual abuse of a minor and therefore is a crime of violence under the United States sentencing guidelines. *United States v. De La Cruz-Garcia*, 590 F.3d 1157 (10th Cir. 2010).

When a defendant is convicted of sexual assault on a child by one in a position of trust, the offense of sexual assault on a child is not a lesser included offense. *People v. Leske*, 957 P.2d 1030 (Colo. 1998); *People v. Duncan*, 33 P.3d 1180 (Colo. App. 2001).

A victim's belief that defendant would continue to hold her against her will unless she complied with his sexual demands could constitute a continuing threat of imminent kidnap sufficient to support defendant's conviction for violating subsection (2)(b). *People v. Zamora*, 940 P.2d 939 (Colo. App. 1996).

Because sexual assault on a child is based not on a sexually exploitative image but on evidence of a sexual contact, it was appropriate for the trial court to impose the felony sexual exploitation sentences consecutive to defendant's other sentences. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

Applied in *Continental Liquor Co. v. Kalbin*, 43 Colo. App. 438, 608 P.2d 353 (1977); *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978); *People v. Cavalier*, 41 Colo. App. 119, 584 P.2d 92 (1978); *People v. Boyette*, 635 P.2d 552 (Colo. 1981); *People in Interest of W.C.L.*, 650 P.2d 1302 (Colo. App. 1982); *People v. Green*, 658 P.2d 281 (Colo. App. 1982); *People v. Corbett*, 656 P.2d 687 (Colo. 1983); *People v. Lindsey*, 660 P.2d 502 (Colo. 1983); *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

18-3-405.3. Sexual assault on a child by one in a position of trust. (1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child by one in a position of trust if the victim is a child less than eighteen years of age and the actor committing the offense is one in a position of trust with respect to the victim.

(2) Sexual assault on a child by one in a position of trust is a class 3 felony if:

(a) The victim is less than fifteen years of age; or

(b) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time need be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401 (1) (a), C.R.S., concerning sex offenses against children. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).

(3) Sexual assault on a child by one in a position of trust is a class 4 felony if the victim is fifteen years of age or older but less than eighteen years of age and the offense is not committed as part of a pattern of sexual abuse, as described in paragraph (b) of subsection (2) of this section.

(4) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

Source: **L. 90:** Entire section added, p. 1028, § 16, effective July 1. **L. 98:** Entire section amended, p. 1444, § 33, effective July 1. **L. 2002:** (2)(b) amended, p. 1582, § 9, effective July 1; (4) amended, p. 1513, § 192, effective October 1. **L. 2006:** (2)(b) amended, p. 413, § 3, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Application of this section to the defendant violated the ex post facto clauses of the federal and state constitutions because, while defendant's conviction was based on incidents occurring between June 1, 1990, and June 1, 1991, jurors were not clearly instructed that defendant's conviction had to be based on an act that occurred after July 1, 1990, the effective date of the statute. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The "pattern" provision of subsection (2)(b) does not violate the double jeopardy protection against multiple punishments. Separate convictions and punishments authorized by the legislature never violate double jeopardy. The general assembly intended to authorize separate convictions for each incident of sexual assault on a child by one in a position of trust and authorized enhanced punishment of each assault that is committed as part of a "pattern of sexual abuse". *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

No double jeopardy violation for imposing sentences under §§ 18-3-405 and 18-3-405.3. Each section required a different element, a

pattern of abuse for the first and being in a position of trust for the second, thus, there was no double jeopardy violation. *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009), *aff'd sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011).

Convictions on four separate counts of sexual assault on a child, based upon different types of sexual contact, but not clearly separate incidents, violates constitutional prohibition against double jeopardy. Defendant, therefore, received more than one sentence for each single contact, and the charges were multiplicative. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

The appropriate "unit of prosecution" for the crime of sexual assault on a child is "any sexual contact" not each separate offense of touching within a single incident that encompasses a multitude of types of sexual contacts. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005); *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

The "unit of prosecution" for the crime of aggravated incest is the same as for the crime of sexual assault on a child because there is no discernible difference between the language

used in § 18-6-302 (1)(a) and the phrase “any sexual contact” used in this section. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

To determine if defendant’s actions satisfy more than one unit of prosecution, the court looks at all evidence introduced at trial to determine whether evidence relied upon by the jury for conviction supports distinct and separate offenses. Factors to determine distinct offenses include contacts occurring at different locations or times or whether they were the product of new volitional departures. If the acts are not distinct offenses, they merge into a single conviction. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

The “pattern” provision of subsection (2)(b) is not a separate offense, rather it allows each incident to be elevated to a class 3 felony. The definition of “pattern of sexual abuse” does not establish a separate offense; the unit of prosecution remains the substantive crime. The plain language of the statute authorizes greater punishment for the substantive crime, which is sexual assault on a child by one in a position of trust. *People v. Simon*, 266 P.3d 1099 (Colo. 2011).

The crime of sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of trust under analysis of either § 18-1-408 (5)(a) or 18-1-408 (5)(c). *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Violent crime sentencing for patterned enhanced counts of sexual assault on a child by one in a position of trust only apply to offenses committed on or after July 1, 1998. *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

Because this section requires a “knowingly” culpable mental state, the requisite intent by the assailant could be demonstrated in a juvenile proceeding. *Swentkowski v. Dawson*, 881 P.2d 437 (Colo. App. 1994).

Jury could conclude that defendant was “in a position of trust” relative to the victim within the meaning of the applicable statute, where defendant lived in the same residence with the victim and her family and contributed to the household income, the victim spent hours alone with the defendant in his room, the victim was the only child the defendant allowed in his room, and neither the victim’s mother nor any

other individual intervened during the time that the victim was alone in the defendant’s room. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999) (decided under law in effect prior to 1990 amendment to § 18-3-401 (3.5)).

Defendant in “position of trust” even though he was not performing a specific supervisory duty at the time of the unlawful act. Where victim was pastor’s daughter and defendant previously taught victim in Sunday school, defendant and his wife babysat for victim and her sister on several occasions, defendant joined victim’s family often for dinner, defendant helped victim and her sisters with their school work, defendant chaperoned church trip for victim, and victim’s parents allowed victim to go to defendant’s house by herself to ride horses, defendant assumed a position of trust through an ongoing and continuous supervisory relationship with victim. *Pellman v. People*, 252 P.3d 1122 (Colo. 2011).

A “position of trust” for purposes of this section and § 18-3-401 (3.5) may be a supervisory position that exists for a “brief” period — a matter of hours or days — or it may extend over a long relationship. Defendant’s discrete acts of supervision were the product of the general position of trust that defendant assumed in relation to victim. *Pellman v. People*, 252 P.3d 1122 (Colo. 2011).

Defendant must be in position of trust at time of unlawful act. Court properly dismissed charges against defendant who met victim while in a position of trust but who was no longer in a position of trust at the time of the unlawful act. *People v. Johnson*, 167 P.3d 207 (Colo. App. 2007).

Ejaculation of semen onto clothing covering another person’s intimate parts may constitute “touching” for purposes of establishing the “sexual contact” element of sexual assault on a child by one in a position of trust. *People v. Vinson*, 42 P.3d 86 (Colo. App. 2002).

Enhanced penalty under subsection (2)(b) improper when, based on jury instruction and argument of prosecutor, jury could have found a pattern of abuse from multiple sexual contacts during a single sexual assault episode. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev’d on other grounds, 105 P.3d 209 (Colo. 2005).

Evidence sufficient to support a charge of sexual assault by one in a position of trust beyond a reasonable doubt. *People v. Carmichael*, 179 P.3d 47 (Colo. App. 2007), rev’d on other grounds, 206 P.3d 800 (Colo. 2009).

Because sexual assault on a child is based not on a sexually exploitative image but on evidence of a sexual contact, it was appropriate for the trial court to impose the felony sexual exploitation sentences consecutive to defendant’s other sentences. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

18-3-405.4. Internet sexual exploitation of a child. (1) An actor commits internet sexual exploitation of a child if the actor knowingly importunes, invites, or entices through communication via a computer network or system, telephone network, or data network or by a text message or instant message, a person whom the actor knows or believes to be under fifteen years of age and at least four years younger than the actor, to:

(a) Expose or touch the person's own or another person's intimate parts while communicating with the actor via a computer network or system, telephone network, or data network or by a text message or instant message; or

(b) Observe the actor's intimate parts via a computer network or system, telephone network, or data network or by a text message or instant message.

(2) (Deleted by amendment, L. 2009, (HB 09-1163), ch. 343, p. 1797, § 1, effective July 1, 2009.)

(3) Internet sexual exploitation of a child is a class 4 felony.

Source: L. 2006: Entire section added, p. 2056, § 5, effective July 1. L. 2009: Entire section amended, (HB 09-1163), ch. 343, p. 1797, § 1, effective July 1; (1) amended, (HB 09-1132), ch. 341, p. 1793, § 3, effective July 1.

Editor's note: Amendments to subsection (1) by House Bill 09-1163 and House Bill 09-1132 were harmonized.

18-3-405.5. Sexual assault on a client by a psychotherapist. (1) (a) Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits aggravated sexual assault on a client if:

(I) The actor is a psychotherapist and the victim is a client of the psychotherapist; or

(II) The actor is a psychotherapist and the victim is a client and the sexual penetration or intrusion occurred by means of therapeutic deception.

(b) Aggravated sexual assault on a client is a class 4 felony.

(2) (a) Any actor who knowingly subjects a victim to any sexual contact commits sexual assault on a client if:

(I) The actor is a psychotherapist and the victim is a client of the psychotherapist; or

(II) The actor is a psychotherapist and the victim is a client and the sexual contact occurred by means of therapeutic deception.

(b) Sexual assault on a client is a class 1 misdemeanor.

(3) Consent by the client to the sexual penetration, intrusion, or contact shall not constitute a defense to such offense.

(4) As used in this section, unless the context otherwise requires:

(a) "Client" means a person who seeks or receives psychotherapy from a psychotherapist.

(b) "Psychotherapist" means any person who performs or purports to perform psychotherapy, whether the person is licensed or registered by the state pursuant to title 12, C.R.S., or certified by the state pursuant to part 5 of article 1 of title 25, C.R.S.

(c) "Psychotherapy" means the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate mental disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors which interfere with effective emotional, social, or intellectual functioning.

(d) "Therapeutic deception" means a representation by a psychotherapist that sexual contact, penetration, or intrusion by the psychotherapist is consistent with or part of the client's treatment.

Source: L. 88: Entire section added, p. 726, § 1, effective July 1. L. 89: (3) amended, p. 831, § 42, effective July 1. L. 2011: IP(4) and (4)(b) amended, (SB 11-187), ch. 285, p. 1327, § 69, effective July 1.

Cross references: For the licensing of mental health professionals, see article 43 of title 12.

ANNOTATION

Section is not unconstitutionally overbroad. Neither the treating psychotherapist nor the psychotherapy client has a fundamental constitutional right to engage in sexual intercourse with each other during the existence of the psychotherapist-client relationship. *Ferguson v. People*, 824 P.2d 803 (Colo. 1992).

Although consent is eliminated as a defense, prosecution must still prove mental culpability of the crime. Crime is not a strict liability offense. *Ferguson v. People*, 824 P.2d 803 (Colo. 1992).

18-3-405.6. Invasion of privacy for sexual gratification. (1) A person who knowingly observes or takes a photograph of another person's intimate parts without that person's consent, in a situation where the person observed or photographed has a reasonable expectation of privacy, for the purpose of the observer's own sexual gratification, commits unlawful invasion of privacy for sexual gratification.

(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2), invasion of privacy for sexual gratification is a class 1 misdemeanor and is an extraordinary risk crime subject to the modified sentencing range specified in section 18-1.3-501 (3).

(b) Invasion of privacy for sexual gratification is a class 6 felony and is an extraordinary risk crime subject to the modified sentencing range specified in section 18-1.3-401 (10) if either of the following circumstances exist:

(I) The offense is committed subsequent to a prior conviction, as defined in section 16-22-102 (3), C.R.S., for unlawful sexual behavior as defined in section 16-22-102 (9), C.R.S.; or

(II) The person observes or takes a photograph of the intimate parts of a person under fifteen years of age. This subparagraph (II) shall not apply if the defendant is less than four years older than the person observed or photographed.

(3) For purposes of this section, "photograph" includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, or chemically produced or reproduced visual material.

Source: L. 2010: Entire section added, (SB 10-128), ch. 415, p. 2045, § 2, effective July 1, 2012.

18-3-406. Criminality of conduct. (Repealed)

Source: L. 75: Entire part R&RE, p. 630, § 1, effective July 1. **L. 2001:** Entire section repealed, p. 859, § 5, effective July 1.

Editor's note: Current provisions relating to criminality of conduct are contained in § 18-1-503.5.

18-3-407. Victim's and witness's prior history - evidentiary hearing - victim's identity - protective order. (1) Evidence of specific instances of the victim's or a witness's prior or subsequent sexual conduct, opinion evidence of the victim's or a witness's sexual conduct, and reputation evidence of the victim's or a witness's sexual conduct may be admissible only at trial and shall not be admitted in any other proceeding except at a proceeding pursuant to paragraph (c) of subsection (2) of this section. At trial, such evidence shall be presumed to be irrelevant except:

(a) Evidence of the victim's or witness' prior or subsequent sexual conduct with the actor;

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.

(2) In any criminal prosecution for class 4 felony internet luring of a child, as described in section 18-3-306 (3) or under sections 18-3-402 to 18-3-405.5, 18-6-301, 18-6-302, 18-6-403, and 18-6-404, or for attempt or conspiracy to commit any of said crimes, if

evidence, that is not excepted under subsection (1) of this section, of specific instances of the victim's or a witness's prior or subsequent sexual conduct, or opinion evidence of the victim's or a witness's sexual conduct, or reputation evidence of the victim's or a witness's sexual conduct, or evidence that the victim or a witness has a history of false reporting of sexual assaults is to be offered at trial, the following procedure shall be followed:

(a) A written motion shall be made at least thirty-five days prior to trial, unless later for good cause shown, to the court and to the opposing parties stating that the moving party has an offer of proof of the relevancy and materiality of evidence of specific instances of the victim's or witness's prior or subsequent sexual conduct, or opinion evidence of the victim's or witness's sexual conduct, or reputation evidence of the victim's or witness's sexual conduct, or evidence that the victim or witness has a history of false reporting of sexual assaults that is proposed to be presented.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall notify the other party of such. If the prosecution stipulates to the facts contained in the offer of proof, the court shall rule on the motion based upon the offer of proof without an evidentiary hearing. Otherwise, the court shall set a hearing to be held in camera prior to trial. In such hearing, to the extent the facts are in dispute, the court may allow the questioning of the victim or witness regarding the offer of proof made by the moving party or otherwise allow a presentation of the offer of proof, including but not limited to the presentation of witnesses.

(d) An in camera hearing may be held during trial if evidence first becomes available at the time of the trial or for good cause shown.

(e) At the conclusion of the hearing, or by written order if no hearing is held, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness is relevant to a material issue to the case, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.

(f) All motions and supporting documents filed pursuant to this section shall be filed under seal and may be unsealed only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence contained in the motion is admissible, only that portion of the motion and supporting documents pertaining to the admissible portion may be unsealed.

(g) The court shall seal all court transcripts, tape recordings, and records of proceedings, other than minute orders, of a hearing held pursuant to this section. The court may unseal the transcripts, tape recordings, and records only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence is admissible, only the portion of the hearing pertaining to the admissible evidence may be unsealed.

(3) (a) In a criminal prosecution including an offense described in subsection (2) of this section, the court may, at any time upon motion of the prosecution or on the court's own motion, issue a protective order pursuant to the Colorado rules of criminal procedure concerning disclosure of information relating to the victim or a witness. The court may punish a violation of a protective order by contempt of court.

(b) The victim who would be the subject of the protective order may object to the motion for a protective order.

Source: **L. 75:** Entire part R&RE, p. 630, § 1, effective July 1. **L. 91:** IP(2) amended, p. 405, § 10, effective June 6. **L. 98:** Entire section amended and IP(2) amended, pp. 399, 400, §§ 7, 8, effective April 21. **L. 2004:** (3) added, p. 375, § 1, effective April 8. **L. 2005:** IP(1), (2)(c), and (2)(e) amended and (2)(f) and (2)(g) added, p. 426, § 5, effective April 29. **L. 2006:** IP(2) amended, p. 2056, § 6, effective July 1. **L. 2012:** (2)(a) amended, (SB 12-175), ch. 208, p. 871, § 127, effective July 1.

Editor's note: (1) Amendments to the introductory portion to subsection (2) by sections 7 and 8 of House Bill 98-1177 were harmonized.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending (2)(a) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, “Hearsay in Criminal Cases Under The Colorado Rules of Evidence: An Overview”, see 50 U. Colo. L. Rev. 277 (1979).

Basic purpose of section is one of public policy: to provide rape and sexual assault victims greater protection from humiliating and embarrassing public “fishing expeditions” into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People v. Braley*, 879 P.2d 410 (Colo. App. 1993); *People v. Murphy*, 919 P.2d 191 (Colo. 1996); *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999); *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004); *People v. Golden*, 140 P.3d 1 (Colo. App. 2005).

This section reflects the general assembly’s intent to prevent victims of sexual assaults from being subjected to psychological or emotional abuse as the price of their cooperation in prosecuting sex offenders. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

Section held not to apply where victim was not a rape victim, the defendant was not accused of sexual assault, the defense asserted was not consent, nor was the evidence offered to impeach the victim’s credibility. *People v. Miller*, 981 P.2d 654 (Colo. App. 1998); *People v. Carlson*, 72 P.3d 411 (Colo. App. 2003).

Homosexual orientation is within the purview of this section. *People v. Koon*, 713 P.2d 410 (Colo. App. 1985); *People v. Murphy*, 919 P.2d 191 (Colo. 1996).

Prosecution may “open the door” to inadmissible evidence of a rape victim’s sexual orientation and past sexual conduct, allowing the defendant to inquire into the previously barred matter. *People v. Murphy*, 919 P.2d 191 (Colo. 1996).

But the concept of “opening the door” is subject to the considerations of relevance and prejudice required under C.R.E. 401 and C.R.E. 403. *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

But “opening the door” to evidence on an issue does not mean that any evidence on that issue is automatically admissible. Where prosecution opened the door to evidence of victim’s homosexuality, defendant was still required to present such evidence via reputation or opinion evidence, not via a specific instance of conduct. *People v. Miller*, 981 P.2d 654 (Colo. App. 1998).

Victim’s statements that he was “not into whatever it is”, that he believed the defen-

dant was a “sick bastard”, and that he was “not that kind” did not necessarily suggest that the victim was heterosexual, opening the door to evidence of the victim’s sexual orientation or past sexual contact. *People v. Murphy*, 919 P.2d 191 (Colo. 1996).

No denial of right to confront accuser. This section strikes a balance by conditioning admission of evidence of the victim’s sexual history on the defendant’s preliminary showing that it is relevant, and involves no denial of the defendant’s right to confront his accuser for there is no constitutional right to introduce irrelevant and highly inflammatory evidence. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978).

This section does not deny a defendant’s right to confront his accuser. Certain exceptions are made therein to preserve such rights of the defendant. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983).

This section does not violate defendant’s confrontation rights. Defendant’s inability to confront the victim at trial resulted not from the provisions of this section, but from his failure to follow the procedure set forth in this section or to show good cause why he should have been excused from following that procedure. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

Section neither wholly substantive nor procedural. This section cannot be characterized as either purely substantive and thus entirely within the general assembly’s power, or purely procedural and thus subject solely to this court’s rulemaking power, but rather it is “mixed” in nature. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Section does not unconstitutionally intrude into matters exclusively judicial nor does it violate § 21 of art. III or art. VI, Colo. Const. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978).

Evidence of prior sex act of prosecutrix. It is essential that an accused lay a proper foundation for the introduction of the evidence of the prosecutrix’s prior sex act. *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Prentiss*, 172 P.3d 917 (Colo. App. 2006).

Evidence of a specific instance of sexual activity, offered to show the source or origin of semen, is not precluded by the statutory presumption of irrelevance or the procedural safeguards which are given to other evidence of a prosecutrix’s past sexual activity. *People v. Martinez*, 634 P.2d 26 (Colo. 1981).

Evidence of a prior sexual act with another man, which could explain the presence of semen

in the prosecutrix's vaginal tract, is relevant in that it tends to render more probable the inference that defendant did not have sexual intercourse with the prosecutrix. *People v. Martinez*, 634 P.2d 26 (Colo. 1981).

Victim's testimony about lack of prior sex. This section does not specifically prohibit the victim from testifying as to the lack of prior sexual activity. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983).

Evidence of victim's virginity should not have been admitted because it was so over-inclusive that its prejudicial nature outweighed its probative value. Even evidence falling within an exception to the rape shield statute is not automatically admissible. *Fletcher v. People*, 179 P.3d 969 (Colo. 2007).

Deletion of reference to prior sexual conduct in sexual assault victim's personal diary that was admitted into evidence after she relied on it to pinpoint the date of offense was proper under rape shield law. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1984).

Under subsection (1), evidence of prior or subsequent sexual conduct is presumptively irrelevant unless such contact is with the defendant or unless there are specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or similar evidence that would show that the act charged was not committed by the defendant. *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

The term "similar evidence" in subsection (1)(b) refers to evidence having characteristics in common with, or very much like, evidence showing the source or origin of semen, pregnancy, or disease, all of which are examples of physical evidence or condition. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

If the evidence does not fall within one of the statutory exceptions contained in subsection (1), the presumption of irrelevance may nevertheless be rebutted when the defendant offers proof that the evidence is relevant to a material issue in the case. If the trial court determines the offer of proof to be sufficient, it must conduct an in-camera hearing regarding the evidence. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

This section applies to evidence of a sexual assault witness's sexual history. There is no exception to the statute if the proffered evidence is not being offered for the truth of the matter asserted. The proponent of such evidence must comply with the offer of proof procedure and in camera hearing requirement to ensure that the evidence is relevant and material before it can be introduced at trial. *People v. MacLeod*, 176 P.3d 75 (Colo. 2008).

Evidence within the ambit of subsection (2) is not automatically admissible, as it remains subject to the usual rules of evidence. Specifically, a trial court must apply C.R.E. 403 to

balance the probative value of the proffered evidence against any possible unfair prejudice. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

Exception for "similar evidence of sexual intercourse" does not include evidence of a victim's prior sexual conduct because that would defeat the purpose of the rape shield statute. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

Subsection (2) only requires defense counsel to file a motion and an affidavit in which the offer of proof is stated, and it does not indicate any limitations upon, nor does it identify, who may be an affiant. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Evidence does not become inadmissible under this section or under C.R.E. 404 simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct. *People v. Cobb*, 962 P.2d 944 (Colo. 1998); *People v. Williamson*, 249 P.3d 801 (Colo. 2011).

Prior sexual conduct evidence not presumptively irrelevant is also not automatically admissible; trial court must apply C.R.E. 403 to balance the probative value of the proffered evidence against any possible unfair prejudice. *People v. Harris*, 43 P.3d 221 (Colo. 2002).

Evidence of victim's rape fantasy and victim's statements regarding fantasy admissible under rape shield statute. The evidence and supporting statements should be admitted since the evidence and statements were material and relevant to the issue of consent. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

Evidence of defendant's prior sexual relationship with victim subject to "prior sexual contact with actor" exception to rape shield statute. The evidence should be admitted since it is material and relevant to the issue of consent and supported defendant's theory of the case. *People v. Garcia*, 179 P.3d 250 (Colo. App. 2007).

Statements acknowledging the existence of a committed romantic relationship are evidence of neither sexual conduct nor sexual orientation. As such, if evidence of such a committed romantic relationship is otherwise relevant to the case, it is admissible and not barred by the rape shield statute. *People v. Golden*, 140 P.3d 1 (Colo. App. 2005).

If initial questions into the existence of such a relationship are ruled in order, a court cannot foreclose cross-examination through use of prior inconsistent statements in that regard. *People v. Golden*, 140 P.3d 1 (Colo. App. 2005).

Evidence of victim's prior sexual encounter was not logically relevant to the question of whether the defendant committed sexual assault or whether victim consented to intercourse and trial court properly excluded it under the rape

shield statute's presumption of irrelevance. *People v. Harris*, 43 P.3d 221 (Colo. 2002).

Trial court did not commit error in denying defendant's motion to admit witness testimony in sexual assault prosecution without a hearing where defendant sought to admit testimony that one of the victims had stated that she was having a sexual relationship with defendant and that she had sex for money. Such evidence was presumptively irrelevant and court properly concluded that offer of proof was insufficient to require evidentiary hearing. *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

Proffered testimony that victim owned condoms and had a male visitor was only marginally probative as to whether the victim was sexually active prior to the incidents involving the defendant. *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

In addition, the proffered testimony was not the type that if believed would have, by necessity, exculpated the defendant. *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

Moreover, in the context of the entire record, the appellate court was not persuaded that the proffered testimony, even if admitted, would have created a reasonable doubt that did not exist without the evidence. *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

Trial court properly excluded evidence under the rape shield statute. The rape shield statute is designed to keep out evidence offered to show the victim was predisposed to homosexual, pedophilic experiences. *People v. Dembry*, 91 P.3d 431 (Colo. App. 2003).

Credibility of a victim in a sexual assault case may be attacked by showing that she has a history of making false accusations. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1983), cert. denied, 469 U.S. 843, 105 S. Ct. 148, 83 L. Ed.2d 87 (1984).

Trial court erred in precluding defendant from inquiring into, and if necessary, presenting evidence of, a romantic relationship between alleged victim and a friend. Evidence of alleged victim's romantic and sexual relationship with friend was relevant to a material issue in the case, namely, victim's motive to lie. Trial court's exclusion of the motive evidence infringed upon defendant's constitutional right to confront witnesses. *People v. Owens*, 183 P.3d 568 (Colo. App. 2007).

Allegation that charges were not brought as a result of other sexual assault allegations is insufficient to warrant the court convening an evidentiary hearing under subsection (2)(c). To invoke such a hearing, the statute requires that the affidavit accompanying the defendant's offer of proof must articulate facts that, if demonstrated at the evidentiary hearing by a preponderance of the evidence, would show that the alleged victim made multiple prior or subsequent reports of sexual assault that were in

fact false. *People v. Weiss*, 133 P.3d 1180 (Colo. 2006).

Evidence that a third person claimed that the victim had been previously raped while the victim denied the alleged prior rape properly excluded because it was not evidence of false reporting of a rape incident. *People v. Schmidt*, 885 P.2d 312 (Colo. App. 1994).

Evidence of victim's reputation for sexual conduct was not relevant, in order to show defendant's state of mind at time he committed alleged sexual assault, where there was no indication that defendant knew anything about victim's reputation at time of assault; accordingly, evidence was properly excluded. *People v. Moreno*, 739 P.2d 866 (Colo. App. 1987).

Where the material issue at trial is whether the complainant consented to the sexual contact, the understanding or state of mind of the accused regarding the complainant's sexual history is neither material nor relevant to the issue of whether the complainant consented, and a trial court may only allow the admission of such evidence that is relevant to a material issue to the case. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Defendant cannot justify his behavior or mitigate his culpability through his knowledge of the victim's sexual history; accordingly, evidence of the victim's sexual history contained in defendant's offer of proof was held irrelevant and immaterial because it only served to foster an impermissible inference, namely, that the victim's prior sexual activity demonstrated that she did not refuse the defendant's sexual advances. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Propounding questions with no reasonable basis in fact for the interrogation. Under C.R.E. 403 and this section, the defendant held not to have established entitlement to elicit the name of the male whom the child sexual assault victim allegedly had intercourse with days before the date of the sexual assault. *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990).

Evidence of victim's sexual history inadmissible to attack her credibility as a witness after victim stated to a treating nurse that the defendant had taken her virginity, because victim's statement related to a collateral issue, and extrinsic evidence is generally inadmissible to contradict a witness's testimony on a collateral matter. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

Evidence of past acts of solicitation of prostitution, even when no sexual contact or intercourse occurred, is "sexual conduct" and protected under this statute. The general assembly intended the term "sexual conduct" to encompass a broader range of behaviors than those that it defined in § 18-3-401. *People v. Williamson*, 249 P.3d 801 (Colo. 2011).

The term “prior sexual conduct” includes prior sexual assaults. *People v. Aldrich*, 849 P.2d 821 (Colo. App. 1992); *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

The term “prior or subsequent sexual conduct” includes sexual assaults perpetrated by the victim. Because perpetrators may also be the victims of sexual assault, the court concluded that, under the plain language of this section, such perpetrators are within the statute’s protection. Because the defendant failed to comply with the procedural requirements of this

section for the introduction of testimony regarding the victim’s sexual conduct, such testimony was appropriately barred. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

Applied in *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People in Interest of M.M.*, 43 Colo. App. 65, 599 P.2d 968 (1979); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. Rice*, 709 P.2d 67 (Colo. App. 1985); *People v. Meis*, 837 P.2d 258 (Colo. App. 1992); *People v. Wallen*, 996 P.2d 182 (Colo. App. 1999).

18-3-407.5. Victim evidence - forensic evidence - electronic lie detector exam without victim’s consent prohibited. (1) Any direct cost associated with the collection of forensic evidence from the victim shall be paid by the referring or requesting law enforcement agency.

(2) A law enforcement agency, prosecuting officer, or other government official may not ask or require a victim of a sexual offense to submit to a polygraph examination or any form of a mechanical or electrical lie detector examination as a condition for proceeding with any criminal investigation or prosecution of an offense. A law enforcement agency shall conduct the examination only with the victim’s written informed consent. Consent shall not be considered informed unless the law enforcement agency informs the victim in writing of the victim’s right to refuse to submit to the examination. In addition, the law enforcement agency shall orally provide to the victim information about the potential uses of the results of the examination.

(3) (a) A law enforcement agency, prosecuting officer, or other government official may not ask or require a victim of a sexual offense to participate in the criminal justice system process or cooperate with the law enforcement agency, prosecuting officer, or other government official as a condition of receiving a forensic medical examination that includes the collection of evidence.

(b) A victim of a sexual offense shall not bear the cost of a forensic medical examination that includes the collection of evidence that is used for the purpose of evidence collection even if the victim does not want to participate in the criminal justice system or otherwise cooperate with the law enforcement agency, prosecuting officer, or other government official. The division of criminal justice in the department of public safety shall pay the cost of the examination.

(c) When personnel at a medical facility perform a forensic medical examination that includes the collection of evidence based on the request of a victim of a sexual offense, not in connection with a referring or requesting law enforcement agency, and the medical facility performing the examination knows where the crime occurred, the facility shall contact the law enforcement agency in whose jurisdiction the crime occurred regarding preservation of the evidence. If the medical facility does not know where the crime occurred, the facility shall contact its local law enforcement agency regarding preservation of the evidence. Notwithstanding any other statutory requirements regarding storage of biological evidence, the law enforcement agency contacted by the medical facility shall retrieve the evidence from the facility and store it for at least two years.

Source: L. 95: Entire section added, p. 948, § 3, effective July 1. L. 2008: (2) amended and (3) added, p. 263, § 1, effective March 31.

18-3-408. Jury instruction prohibited. In any criminal prosecution under sections 18-3-402 to 18-3-405, or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405, the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given. However, the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury.

Source: L. 75: Entire part R&RE, p. 631, § 1, effective July 1. **L. 90:** Entire section amended, p. 925, § 8, effective March 27.

ANNOTATION

Section not unconstitutional. This section does not operate to deprive a defendant of due process of law by prohibiting the exercise of trial court discretion with respect to giving this instruction, nor does it violate the constitutional requirement of separation of powers by interfering with the rule-making power of the Colorado supreme court. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

This section does not violate the constitutional requirement of separation of powers (art. III, Colo. Const.) by interfering with the rule-making power of the court established in § 21 of art. VI, Colo. Const. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980).

Failure to instruct the jury on gender bias was not a "structural defect" or plain error requiring reversal of third degree sexual assault conviction where gender bias was not raised

during the trial and the jury was instructed sympathy or prejudice should not influence its decision. *People v. Johnson*, 870 P.2d 571 (Colo. App. 1993).

Where the case involved a homosexual act and the defendant's theory of the case was consent, omission of a gender bias instruction did not rise to the level of plain error. Defendant erroneously equated gender bias with bias against homosexuals, and the record provided no reason to believe the jury would confuse the two concepts. In addition, the trial court instructed the jury not to allow prejudice to influence its decision. Further, omission of the instruction was not a structural error and did not require reversal because it was harmless beyond a reasonable doubt. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

18-3-408.5. Jury instruction on consent - when required. (1) In any criminal prosecution for a crime listed in subsection (2) of this section or for attempt or conspiracy to commit a crime listed in subsection (2) of this section, upon request of any party to the proceedings, the jury shall be instructed on the definition of consent as set forth in section 18-3-401 (1.5). Notwithstanding the provisions of section 18-1-505 (4), an instruction on the definition of consent given pursuant to this section shall not constitute an affirmative defense, but shall only act as a defense to the elements of the offense.

- (2) The provisions of subsection (1) of this section shall apply to the following crimes:
- (a) Sexual assault as described in section 18-3-402 (1) (a);
 - (b) Sexual assault as described in section 18-3-402 (1) (b), (1) (c), or (1) (e), as they existed prior to July 1, 2000, for offenses committed prior to July 1, 2000;
 - (c) Sexual assault in the second degree as described in section 18-3-403 (1) (a) or (1) (b), as they existed prior to July 1, 2000, for offenses committed prior to July 1, 2000;
 - (d) Unlawful sexual contact as described in section 18-3-404 (1) (a), (1) (c), or (1) (d);
 - (e) Unlawful sexual contact as described in section 18-3-404 (1.7), as it existed prior to July 1, 2010, for offenses committed prior to July 1, 2010;
 - (f) Invasion of privacy for sexual gratification as described in section 18-3-405.6; or
 - (g) Criminal invasion of privacy in violation of section 18-7-801.

Source: L. 92: Entire section added, p. 322, § 4, effective July 1. **L. 2002:** Entire section amended, p. 757, § 1, effective July 1. **L. 2010:** Entire section amended, (SB 10-128), ch. 415, p. 2047, § 7, effective July 1, 2012.

18-3-409. Marital defense. Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense under this part 4 unless such defense is specifically set forth in the applicable statutory section by having the elements of the offense specifically exclude a spouse.

Source: L. 75: Entire part R&RE, p. 631, § 1, effective July 1. **L. 88:** Entire section R&RE, p. 725, § 2, effective July 1.

ANNOTATION

Law reviews. For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981).

Annotator’s note. The cases annotated below were all decided prior to the 1988 amendment to this section.

Marital exception of this section is neither arbitrary nor irrational as it may remove an obstacle to the resumption of normal marital relations and also avoids the difficult emotional issues and problems of proof inherent in this sensitive area. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

Section 18-3-402 and this section are severable, so that even if the former were invalidated the latter would still be capable of enforcement. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

Former law. For cases construing requirement of former rape statute that the victim could not be the wife of the actor, see *Waelchi v. People*, 77 Colo. 147, 234 P. 1113 (1925); *Schreiner v. People*, 95 Colo. 392, 36 P.2d 764 (1934); *Efsiever v. People*, 105 Colo. 88, 96 P.2d 8 (1939); *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

18-3-410. Medical exception. The provisions of this part 4 shall not apply to any act performed for bona fide medical purposes if such act is performed in a manner which is not inconsistent with reasonable medical practices.

Source: L. 75: Entire part R&RE, p. 631, § 1, effective July 1.

18-3-411. Sex offenses against children - “unlawful sexual offense” defined - limitation for commencing proceedings - evidence - statutory privilege. (1) As used in this section, “unlawful sexual offense” means enticement of a child, as described in section 18-3-305, sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age, sexual assault in the first degree, as described in section 18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403 (1) (a), (1) (b), (1) (c), (1) (d), (1) (g), or (1) (h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403 (1) (e), as it existed prior to July 1, 2000, when the victim is less than fifteen years of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; trafficking in children, as described in section 18-3-502; sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; indecent exposure, as described in section 18-7-302, soliciting for child prostitution, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of child prostitution, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of child prostitution, as described in section 18-7-405.5; patronizing a prostituted child, as described in section 18-7-406; class 4 felony internet luring of a child, as described in section 18-3-306 (3); internet sexual exploitation of a child, as described in section 18-3-405.4; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) No person shall be prosecuted, tried, or punished for a misdemeanor offense specified in section 18-3-402 or 18-3-404, unless the indictment, information, complaint, or action for the same is found or instituted within five years after the commission of the offense. The limitation for commencing criminal proceedings and juvenile delinquency proceedings concerning unlawful sexual offenses that are felonies shall be governed by section 16-5-401 (1) (a), C.R.S.

(3) Out-of-court statements made by a child describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, performed with, by, or on the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, may be admissible in any proceeding in which the child is a victim of an unlawful sexual offense pursuant to the provisions of section 13-25-129, C.R.S.

(4) All cases involving the commission of an unlawful sexual offense shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed.

(5) The statutory privilege between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an unlawful sexual offense.

Source: **L. 82:** Entire section added, p. 313, § 1, effective July 1. **L. 83:** (3) added, p. 630, § 2, effective May 25; (4) and (5) added, p. 694, § 3, effective June 15. **L. 85:** (1) and (2) amended, p. 618, § 12, effective July 1. **L. 88:** (5) amended, p. 713, § 19, effective July 1. **L. 91:** (1) amended, p. 406, § 11, effective June 6. **L. 94:** (1) amended, p. 1717, § 10, effective July 1. **L. 2000:** (1) and (2) amended, p. 704, § 29, effective July 1. **L. 2002:** (2) amended, p. 1128, § 2, effective June 3. **L. 2006:** (1) amended, p. 2056, § 8, effective July 1; (2) amended, p. 413, § 4, effective July 1. **L. 2010:** (1) amended, (SB 10-140), ch. 156, p. 538, § 9, effective April 21.

Cross references: For provisions concerning child abuse that are similar to the provisions of this section, see § 18-6-401.1; for the husband-wife privilege, see § 13-90-107.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982). For article, "The Child Sex Abuse Case in the Courtroom", see 15 Colo. Law. 807 (1986).

Specific expression of legislative intent to apply ten-year statute of limitations to offenses occurring on or after July 1, 1979, overcomes presumption of prospective operation. *People v. Midgley*, 714 P.2d 902 (Colo. 1986).

Flat 10-year statute of limitations applies to offenses allegedly committed before June 3, 2002, due to an ambiguity created in the act enacting the 2002 amendments to this section. The general statutory construction rule of lenity requires that ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant. Thus, effective date section of the 2002 enacting legislation stating that the act applies to offenses committed on or after passage of the act (June 3, 2002) is controlling despite July 1, 1992 date set forth in the substantive provisions of the statute. *People v. Sum-*

mers, 208 P.3d 251 (Colo. 2009) (decided based upon statute as it existed at the time the alleged crimes were committed prior to 2006 amendments).

In prosecution for sexual assault, the prosecutor had obligation to provide defense counsel with a victim's prior, allegedly false, rape report because the rape report was highly probative of the victim's credibility as a witness. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1983), cert. denied, 469 U.S. 843, 105 S. Ct. 148, 83 L. Ed.2d 87 (1984).

No error in instructing jury that exact dates of two offenses charged need not be proved, where evidence clearly showed two different incidents, defendant was charged in connection with both, and neither could have occurred outside the applicable limitation period. *People v. Bolton*, 859 P.2d 303 (Colo. App. 1993).

Applied in *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. District Court*, 743 P.2d 432 (Colo. 1987).

18-3-412. Habitual sex offenders against children - indictment or information - verdict of the jury. (1) For the purpose of this section, "unlawful sexual offense" means sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age, sexual assault in the first degree, as described in section 18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403 (1) (a), (1) (b), (1) (c), (1) (d), (1) (g), or (1) (h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403 (1) (e), as it existed prior to July 1, 2000, when the victim is less than fifteen years

of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; trafficking in children, as described in section 18-3-502; sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; soliciting for child prostitution, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of child prostitution, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of child prostitution, as described in section 18-7-405.5; patronizing a prostituted child, as described in section 18-7-406; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) Every person convicted in this state of an unlawful sexual offense who has been previously convicted upon charges prior to the commission of the present act, which were separately brought, either in this state or elsewhere, of an unlawful sexual offense or who has been previously convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an unlawful act that, if committed within this state, would be an unlawful sexual offense shall be adjudged an habitual sex offender against children. If the second or subsequent unlawful sexual offense for which a defendant is convicted constitutes a felony, the court shall impose a sentence to the department of corrections of not less than three times the upper limit of the presumptive range for that class felony as set out in section 18-1.3-401. If the second or subsequent unlawful sexual offense for which a defendant is convicted constitutes a misdemeanor, the court shall impose a sentence to the county jail of not less than three times the maximum sentence for that class misdemeanor as set out in section 18-1.3-501.

(3) Any previous conviction of an unlawful sexual offense shall be set forth in apt words in the complaint, indictment, or information. For purposes of trial, a duly authenticated copy of the record of previous convictions and judgments of any court of record for any of said crimes of the party indicted, charged, or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. A duly authenticated copy of the records of institutions of treatment or incarceration, including, but not limited to, records pertaining to identification of the party indicted, charged, or informed against, shall be prima facie evidence of the facts contained therein and may be used in evidence against such party.

(4) Any person who is subject to the provisions of this section shall not be eligible for suspension of sentence.

(5) The procedures specified in section 18-1.3-803 shall govern in a trial to which the provisions of this section are alleged to apply based on a previous conviction or convictions for an unlawful sexual offense as set out in the complaint, indictment, or information.

Source: L. 82: Entire section added, p. 316, § 1, effective July 1. L. 85: (1) amended, p. 619, § 13, effective July 1. L. 96: (5) amended, p. 1846, § 18, effective July 1. L. 99: (1) amended, p. 1154, § 18, effective July 1. L. 2000: (1) amended, p. 711, § 49, effective July 1; (2) amended, p. 249, § 1, effective August 2. L. 2002: (2) and (5) amended, p. 1513, § 193, effective October 1. L. 2003: (2) and (4) amended, p. 1427, § 7, effective April 29. L. 2010: (1) amended, (SB 10-140), ch. 156, p. 539, § 10, effective April 21.

Cross references: (1) For provisions concerning habitual child abusers that are similar to the provisions of this section, see § 18-6-401.2; for limitations on collateral attacks on prior convictions, see § 16-5-402.

(2) For the legislative declaration contained in the 2002 act amending subsections (2) and (5), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

The fact that this section allows a judge, not a jury, to find facts that increase a defendant's sentence beyond that authorized by the jury's verdict is not unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.

Ct. 24228, 153 L. Ed. 2d 556 (2002); *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

There was no abuse of discretion by the court in the use of a prior conviction for sentencing purposes. *People v. Quintano*, 81 P.3d 1093 (Colo. App. 2003), *aff'd* on other grounds, 105 P.3d 585 (Colo. 2005).

18-3-412.5. Failure to register as a sex offender. (1) A person who is required to register pursuant to article 22 of title 16, C.R.S., and who fails to comply with any of the requirements placed on registrants by said article, including but not limited to committing any of the acts specified in this subsection (1), commits the offense of failure to register as a sex offender:

- (a) Failure to register pursuant to article 22 of title 16, C.R.S.;
 - (b) Submission of a registration form containing false information or submission of an incomplete registration form;
 - (c) Failure to provide information or knowingly providing false information to a probation department employee, to a community corrections administrator or his or her designee, or to a judge or magistrate when receiving notice pursuant to section 16-22-106 (1), (2), or (3), C.R.S., of the duty to register;
 - (d) If the person has been sentenced to a county jail, otherwise incarcerated, or committed, due to conviction of or disposition or adjudication for an offense specified in section 16-22-103, C.R.S., failure to provide notice of the address where the person intends to reside upon release as required in sections 16-22-106 and 16-22-107, C.R.S.;
 - (e) Knowingly providing false information to a sheriff or his or her designee, department of corrections personnel, or department of human services personnel concerning the address where the person intends to reside upon release from the county jail, the department of corrections, or the department of human services. Providing false information shall include, but is not limited to, providing false information as described in section 16-22-107 (4) (b), C.R.S.
 - (f) Failure when registering to provide the person's current name and any former names;
 - (g) Failure to register with the local law enforcement agency in each jurisdiction in which the person resides upon changing an address, establishing an additional residence, or legally changing names;
 - (h) Failure to provide the person's correct date of birth, to sit for or otherwise provide a current photograph or image, to provide a current set of fingerprints, or to provide the person's correct address;
 - (i) Failure to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which the person will no longer reside;
 - (j) When the person's place of residence is a trailer or motor home, failure to register an address at which the trailer or motor home is lawfully located pursuant to section 16-22-109 (1) (a.3), C.R.S.;
 - (k) Failure to register an e-mail address, instant-messaging identity, or chat room identity prior to using the address or identity if the person is required to register that information pursuant to section 16-22-108 (2.5), C.R.S.
- (1.5) (a) In a prosecution for a violation of this section, it is an affirmative defense that:
- (I) Uncontrollable circumstances prevented the person from complying;
 - (II) The person did not contribute to the creation of the circumstances in reckless disregard of the requirement to comply; and
 - (III) The person complied as soon as the circumstances ceased to exist.
- (b) In order to assert the affirmative defense pursuant to this subsection (1.5), the defendant shall provide notice to the prosecuting attorney as soon as practicable, but not later than thirty-five days prior to trial, of his or her notice of intent to rely upon the

affirmative defense. The notice shall include a description of the uncontrollable circumstance or circumstances and the dates the uncontrollable circumstances began and ceased to exist in addition to the names and addresses of any witnesses the defendant plans to call to support the affirmative defense. The prosecuting attorney shall advise the defendant of the names and addresses of any additional witnesses who may be called to refute such affirmative defense as soon as practicable after their names become known. Upon the request of the prosecution, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute sufficient evidence to support submission to the jury.

(2) (a) Failure to register as a sex offender is a class 6 felony if the person was convicted of felony unlawful sexual behavior, or of another offense, the underlying factual basis of which includes felony unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute felony unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves felony unlawful sexual behavior; except that any second or subsequent offense of failure to register as a sex offender by such person is a class 5 felony.

(b) Any person convicted of felony failure to register as a sex offender shall be sentenced pursuant to the provisions of section 18-1.3-401. If such person is sentenced to probation, the court may require, as a condition of probation, that the person participate until further order of the court in an intensive supervision probation program established pursuant to section 18-1.3-1007. If such person is sentenced to incarceration and subsequently released on parole, the parole board may require, as a condition of parole, that the person participate in an intensive supervision parole program established pursuant to section 18-1.3-1005.

(c) A person who is convicted of a felony sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits felony failure to register as a sex offender as specified in paragraph (a) of this subsection (2) and shall be sentenced as provided in paragraph (b) of this subsection (2).

(3) (a) Failure to register as a sex offender is a class 1 misdemeanor if the person was convicted of misdemeanor unlawful sexual behavior, or of another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute misdemeanor unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior. A class 1 misdemeanor conviction pursuant to this subsection (3) is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(b) A person who is convicted of a misdemeanor sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits misdemeanor failure to register as a sex offender as specified in paragraph (a) of this subsection (3).

(4) (a) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be placed or committed out of the home for not less than one year.

(b) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a thirty-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence.

(5) For purposes of this section, unless the context otherwise requires, "unlawful sexual behavior" has the same meaning as set forth in section 16-22-102 (9), C.R.S.

(6) (a) When a peace officer determines that there is probable cause to believe that a crime of failure to register as a sex offender has been committed by a person required to register as a sexually violent predator in this state pursuant to article 22 of title 16, C.R.S., or in any other state, the officer shall arrest the person suspected of the crime. It shall be a condition of any bond posted by such person that the person shall register pursuant to the provisions of section 16-22-108, C.R.S., within seven days after release from incarceration.

(b) When a peace officer makes a warrantless arrest pursuant to this subsection (6), the peace officer shall immediately notify the Colorado bureau of investigation of the arrest. Upon receiving the notification, the Colorado bureau of investigation shall notify the jurisdiction where the sexually violent predator last registered. The jurisdiction where the sexually violent predator last registered, if it is not the jurisdiction where the probable cause arrest is made, shall coordinate with the arresting jurisdiction immediately to determine the appropriate jurisdiction that will file the charge. If the sexually violent predator is being held in custody after the arrest, the appropriate jurisdiction shall have no less than seven days after the date of the arrest to charge the sexually violent predator.

Source: **L. 91:** Entire section added, p. 393, § 1, effective April 17. **L. 94:** Entire section R&RE, p. 1736, § 1, effective July 1. **L. 95:** (6) amended and (6.5) and (9) added, p. 1309, § 1, effective June 5; (3) and (4) amended, p. 468, § 16, effective July 1. **L. 96:** (1), (2), (4), and (6) amended and (6.7) added, p. 1581, § 5, effective July 1; (8) amended, p. 1691, § 25, effective January 1, 1997. **L. 97:** IP(6.7) amended, p. 173, § 1, effective March 31; (1)(f) amended, p. 1547, § 19, effective July 1; (2) and (6.7)(c) amended and (6.7)(e) added, pp. 1553, 1554, §§ 6, 7, effective July 1; (3.5) added and IP(7) and (8) amended, p. 1563, § 9, effective July 1. **L. 98:** Entire section amended, p. 389, § 1, effective April 21. **L. 99:** (1)(a)(II), IP(1)(b), (1)(b)(XXI) to (1)(b)(XXIII), (1)(c), (2)(a), (2)(c), (3)(d), (6)(b), (6.5)(b), (6.5)(c), (7)(a)(II), and (7)(a)(III) amended and (1)(d), (4)(a)(III.5), and (6)(b.5) added, pp. 1144, 1146, 1150, 1156, 1155, 1151, §§ 2, 6, 13, 20, 19, 14, 21, effective July 1; IP(4)(a) amended, p. 799, § 19, effective July 1. **L. 2000:** (2)(a)(I) and (6)(b) amended and (3)(e), (3.5)(e), (3.5)(f), and (4)(a)(VI) added, pp. 718, 719, §§ 2, 5, 3, 1, 4, effective May 23; IP(1)(b), (1)(d), (2)(a)(I), (3)(a), (3)(d), (3.5)(a), (6)(c), (6.5)(d), and IP(7)(a) amended and (1)(b)(XXIV), (3.7), (4)(a)(VII), (5)(c), (6)(e), (6.5)(e), and (7)(c) added, pp. 915, 919, 920, 918, §§ 1, 5, 6, 8, 2, 3, 4, effective July 1; (1)(b)(I), (1)(b)(II), (1)(b)(III), (7)(a)(II), and (7)(a)(III) amended, p. 705, § 30, effective July 1; (8.5) added, p. 432, § 2, effective July 1; (6.5)(b) amended, p. 250, § 3, effective August 2. **L. 2001:** (4)(b) and (4)(c) amended, p. 567, § 2, effective May 29; (3)(a)(I.5) and (3.9) added and (7)(c) amended, pp. 656, 658, §§ 1, 8, 2, effective May 30; (2)(a)(I), (2)(a)(II), (3)(e), (3.5)(e), (3.5)(f), (6)(b), (6.5)(c), (6.5)(d), IP(7)(a), (7)(a)(I), (7)(a)(II), and (7)(a)(III) amended and (3.6) and (7)(a)(VI) added, pp. 962, 960, 961, §§ 3, 1, 2, effective June 5. **L. 2002:** Entire section R&RE, p. 1178, § 2, effective July 1; (2)(b) amended, p. 1567, § 393, effective October 1. **L. 2004:** (2)(c) and (5) added and (3) amended, p. 1119, §§ 17, 18, effective May 27; (3) amended, p. 635, § 7, effective August 4. **L. 2006:** (6) added, p. 1313, § 7, effective May 30. **L. 2007:** IP(1) amended and (1)(j) added, p. 211, § 4, effective March 26; (1)(k) added, p. 1682, § 4, effective July 1. **L. 2011:** (1.5) added and (2)(b) amended, (HB 11-1278), ch. 224, p. 965, § 10, effective May 27. **L. 2012:** (1.5)(b) and (6) amended, (SB 12-175), ch. 208, p. 872, § 128, effective July 1.

Editor's note: (1) Amendments to subsection (2)(a)(I) by House Bill 00-1232 and House Bill 00-1317 were harmonized. Amendments to subsection (3) by House Bill 04-1388 and Senate Bill 04-154 were harmonized.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsections (1.5)(b) and (6) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: (1) For provisions relating to sex offender registration requirements, see article 22 of title 16.

(2) For the legislative declaration contained in the 2000 act enacting subsection (8.5), see section 1 of chapter 125, Session Laws of Colorado 2000. For the legislative declaration contained in the 2001

act amending subsections (4)(b) and (4)(c), see section 1 of chapter 176, Session Laws of Colorado 2001. For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Failure to register as a sex offender is a continuing offense. Since the general assembly determined that sex offenders pose a continuous threat to society and registration is necessary to continually monitor sex offenders, it follows that the failure to register offense is a continuing offense. *People v. Lopez*, 140 P.3d 106 (Colo. App. 2005).

When the prosecution relies on the continuing offense doctrine to prosecute a failure to register offense, the prosecution must provide the court and defense the dates that the prosecution intends to rely on to prosecute the failure to register offense. The jury instructions should also reflect the dates provided by the prosecution. *People v. Lopez*, 140 P.3d 106 (Colo. App. 2005).

Failure to register as a sex offender is not a strict liability offense but includes the mental state of knowingly. *People v. Lopez*, 140 P.3d 106 (Colo. App. 2005).

A person who fails to comply with any of the requirements placed on registrants in subsections (1)(a) through (1)(k) commits the offense of failure to register as a sex offender. Subsections (1)(a) through (1)(k) are not merely examples of failure to register. *People v. Poage*, ___ P.3d ___ (Colo. App. 2011).

Subsection (1)(i) requires that prosecution prove defendant moved away from the county of his or her last registration. The prosecution presented no evidence that defendant, who was homeless, had moved out of the county. Therefore, the conviction must be vacated. *People v. Poage*, ___ P.3d ___ (Colo. App. 2011).

Failure to register as a sex offender is not a crime involving moral turpitude under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011).

18-3-412.6. Failure to verify location as a sex offender. (1) A person who is required to register pursuant to article 22 of title 16, C.R.S., and who lacks a fixed residence, as defined in that article, and who fails to comply with the provisions of section 16-22-109 (3.5) (c) (I) or 16-22-109 (3.5) (c) (II), C.R.S., commits the offense of failure to verify location as a sex offender.

(2) (a) In a prosecution for a violation of this section, it is an affirmative defense that:

(I) Uncontrollable circumstances prevented the person from complying; and

(II) The person did not contribute to the creation of the circumstances in reckless disregard of the requirement to comply; and

(III) The person complied as soon as the circumstances ceased to exist.

(b) In order to assert the affirmative defense pursuant to this subsection (2), the defendant shall provide notice to the prosecuting attorney as soon as practicable, but not later than thirty days prior to trial, of his or her notice of intent to rely upon the affirmative defense. The notice shall include a description of the uncontrollable circumstance or circumstances and the dates that the uncontrollable circumstances began and ceased to exist in addition to the names and addresses of any witnesses the defendant plans to call to support the affirmative defense. The prosecuting attorney shall advise the defendant of the names and addresses of any additional witnesses who may be called to refute the affirmative defense as soon as practicable after their names become known. Upon the request of the prosecution, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute sufficient evidence to support submission to the jury.

(3) Failure to verify location as a sex offender is an unclassified misdemeanor punishable by a sentence of up to thirty days in the county jail; except that a third or subsequent violation of this section is an unclassified misdemeanor punishable by up to one year in the county jail.

(4) Failure to verify location as a sex offender is not a sexual offense subject to the provisions of sections 16-11.7-104 and 16-11.7-105, C.R.S., and, notwithstanding any other provision of law to the contrary, offenders convicted of a violation of this section are not eligible for probation pursuant to part 2 of article 1.3 of this title.

Source: **L. 2012:** Entire section added, (HB 12-1346), ch. 220, p. 945, § 6, effective July 1.

18-3-413. Video tape depositions - children - victims of sexual offenses. (1) When a defendant has been charged with an unlawful sexual offense, as defined in section 18-3-411 (1), or incest, as defined in section 18-6-301, and when the victim at the time of the commission of the act is a child less than fifteen years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

(4) If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b) (1) of the Colorado rules of evidence.

(5) Nothing in this section shall prevent the admission into evidence of any videotaped statements of children which would qualify for admission pursuant to section 13-25-129, C.R.S., or any other statute or rule of evidence.

Source: **L. 83:** Entire section added, p. 694, § 4, effective June 15. **L. 91:** (5) added, p. 406, § 12, effective June 6. **L. 2003:** (1) amended, p. 974, § 6, effective April 17.

Cross references: For provisions concerning video tape depositions of victims of child abuse that are similar to the provisions of this section, see § 18-6-401.3.

ANNOTATION

Law reviews. For article, "The Child Sex Abuse Case in the Courtroom", see 15 Colo. Law. 807 (1986). For comment, "Confrontation of Child Victim-Witnesses: Trauma, Unavailability, and Colorado's Hearsay Exceptions for Statements Describing Sexual Abuse", see 60 Colo. L. Rev. 659 (1989). For article, "Children as Witnesses", see 31 Colo. Law. 15 (October 2002).

Constitutionality. Implementation of this statute in a manner which preserves other aspects of the right to confrontation is not violative of the defendant's constitutional rights even though witness does not look directly upon the defendant or testify in the defendant's direct physical presence. *People v. Thomas*, 770 P.2d 1324 (Colo. App. 1988), rev'd on other grounds, 803 P.2d 144 (Colo. 1990).

As subsection (5), enacted in 1991, did not apply to offenses committed before June 6, 1991, this subsection was not applicable to of-

fenses committed between June 1, 1989, and April 10, 1990. *People v. Carter*, 919 P.2d 862 (Colo. App. 1996).

Medical unavailability includes a situation in which testifying in front of the defendant would cause the child substantial and long term emotional or psychological harm. *Thomas v. People*, 803 P.2d 144 (Colo. 1990); *People v. Newbrough*, 803 P.2d 155 (Colo. 1990).

Specific findings required. Testimony about the likely impact of the child's age and emotional inability to testify must be related to the particular child witness. The mere unwillingness, nervousness, excitement, or reluctance to testify are not sufficient to render the child medically unavailable. *People v. Thomas*, 770 P.2d 1324 (Colo. App. 1988).

Children's videotaped depositions were admitted at sexual abuse trial where evidence established that both victims were medically unavailable and would be severely traumatized

by the defendant's presence during their testimony. *Thomas v. Guenther*, 754 F. Supp. 833 (D. Colo. 1990), *aff'd*, 962 F.2d 1477 (10th Cir. 1992).

This section governs all videotaped statements obtained from child sexual abuse victims. *People v. Newbrough*, 803 P.2d 155 (Colo. 1990).

18-3-413.5. Use of closed circuit television - child victims of sexual offenses. (Repealed)

Source: **L. 96:** Entire section added, p. 677, § 1, effective May 2. **L. 2003:** IP(1)(a) amended, p. 974, § 7, effective April 17. **L. 2004:** (2)(a)(V) amended, p. 1380, § 7, effective July 1. **L. 2005:** Entire section repealed, p. 427, § 8, effective April 29.

18-3-414. Payment of treatment costs for the victim or victims of a sexual offense against a child. (1) In addition to any other penalty provided by law, the court may order any person who is convicted of an unlawful sexual offense, as defined in section 18-3-411 (1), or of incest, as defined in section 18-6-301, when the victim was under the age of fifteen at the time of the commission of the offense, to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of his or her offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims.

Source: **L. 83:** Entire section added, p. 694, § 5, effective June 15. **L. 2003:** Entire section amended, p. 974, § 8, effective April 17.

Cross references: For provisions concerning payment of treatment costs for child abuse victims that are similar to the provisions of this section, see § 18-6-401.4.

18-3-414.5. Sexually violent predators - assessment - annual report. (1) As used in this section, unless the context otherwise requires:

(a) "Sexually violent predator" means an offender:

(I) Who is eighteen years of age or older as of the date the offense is committed or who is less than eighteen years of age as of the date the offense is committed but is tried as an adult pursuant to section 19-2-517 or 19-2-518, C.R.S.;

(II) Who has been convicted on or after July 1, 1999, of one of the following offenses, or of an attempt, solicitation, or conspiracy to commit one of the following offenses, committed on or after July 1, 1997:

(A) Sexual assault, in violation of section 18-3-402 or sexual assault in the first degree, in violation of section 18-3-402, as it existed prior to July 1, 2000;

(B) Sexual assault in the second degree, in violation of section 18-3-403, as it existed prior to July 1, 2000;

(C) Unlawful sexual contact, in violation of section 18-3-404 (1.5) or (2) or sexual assault in the third degree, in violation of section 18-3-404 (1.5) or (2), as it existed prior to July 1, 2000;

(D) Sexual assault on a child, in violation of section 18-3-405; or

(E) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3;

(III) Whose victim was a stranger to the offender or a person with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization; and

(IV) Who, based upon the results of a risk assessment screening instrument developed by the division of criminal justice in consultation with and approved by the sex offender management board established pursuant to section 16-11.7-103 (1), C.R.S., is likely to subsequently commit one or more of the offenses specified in subparagraph (II) of this paragraph (a) under the circumstances described in subparagraph (III) of this paragraph (a).

(b) "Convicted" includes having received a verdict of guilty by a judge or jury, having pleaded guilty or *nolo contendere*, or having received a deferred judgment and sentence.

(2) When a defendant is convicted of one of the offenses specified in subparagraph (II) of paragraph (a) of subsection (1) of this section, the probation department shall, in coordination with the evaluator completing the mental health sex offense specific evaluation, complete the sexually violent predator risk assessment, unless the evaluation and assessment have been completed within the six months prior to the conviction or the defendant has been previously designated a sexually violent predator. Based on the results of the assessment, the court shall make specific findings of fact and enter an order concerning whether the defendant is a sexually violent predator. If the defendant is found to be a sexually violent predator, the defendant shall be required to register pursuant to the provisions of section 16-22-108, C.R.S., and shall be subject to community notification pursuant to part 9 of article 13 of title 16, C.R.S. If the department of corrections receives a mittimus that indicates that the court did not make a specific finding of fact or enter an order regarding whether the defendant is a sexually violent predator, the department shall immediately notify the court and, if necessary, return the defendant to the custody of the sheriff for delivery to the court, and the court shall make a finding or enter an order regarding whether the defendant is a sexually violent predator; except that this provision shall not apply if the court was not required to enter the order when imposing the original sentence in the case.

(3) When considering release on parole or discharge for an offender who was convicted of one of the offenses specified in subparagraph (II) of paragraph (a) of subsection (1) of this section, if there has been no previous court order, the parole board shall make specific findings concerning whether the offender is a sexually violent predator, based on the results of a sexually violent predator assessment. If no previous assessment has been completed, the parole board shall order the department of corrections to complete a sexually violent predator assessment. If the parole board finds that the offender is a sexually violent predator, the offender shall be required to register pursuant to the provisions of section 16-22-108, C.R.S., and shall be subject to community notification pursuant to part 9 of article 13 of title 16, C.R.S.

(4) On or before January 15, 2008, and on or before January 15 each year thereafter, the judicial department and the department of corrections shall jointly submit to the judiciary committees of the senate and the house of representatives, or any successor committees, to the division of criminal justice in the department of public safety, and to the governor a report specifying the following information:

(a) The number of offenders evaluated pursuant to this section in the preceding twelve months;

(b) The number of sexually violent predators identified pursuant to this section in the preceding twelve months;

(c) The total number of sexually violent predators in the custody of the department of corrections at the time of the report, specifying those incarcerated, those housed in community corrections, and those on parole, including the level of supervision for each sexually violent predator on parole;

(d) The length of the sentence imposed on each sexually violent predator in the custody of the department of corrections at the time of the report;

(e) The number of sexually violent predators discharged from parole during the preceding twelve months;

(f) The total number of sexually violent predators on probation at the time of the report and the level of supervision of each sexually violent predator on probation; and

(g) The number of sexually violent predators discharged from probation during the preceding twelve months.

Source: **L. 97:** Entire section added, p. 1564, § 10, effective July 1. **L. 98:** Entire section amended, p. 397, § 2, effective April 21. **L. 99:** Entire section amended, p. 1148, § 9, effective July 1. **L. 2000:** (1)(a)(II)(A), (1)(a)(II)(B), and (1)(a)(II)(C) amended, p. 706, § 31, effective July 1. **L. 2001:** (2) amended, p. 657, § 4, effective May 30. **L. 2002:** (2) and (3) amended, p. 1186, § 22, effective July 1. **L. 2006:** IP(1)(a)(II), (1)(b), (2), and (3) amended, p. 1314, § 8, effective May 30. **L. 2007:** (4) added, p. 254, § 1, effective March 26. **L. 2008:** (2) amended, p. 214, § 1, effective March 26.

ANNOTATION

Law reviews. For article, “Constitutional Challenges to Sex Offender Registration and Community Notification Laws”, see 30 Colo. Law. 51 (February 2001).

Trial court’s adjudication of defendant as a sexually violent predator under this section did not violate defendant’s right to trial under Apprendi v. New Jersey. Lifetime duty to register as a sex offender and posting of defendant’s personal information on internet were not additional punishments giving rise to right to trial by jury. *People v. Stead*, 66 P.3d 117 (Colo. App. 2002).

Trial court’s adjudication of defendant as a sexually violent predator subjecting him to community notification did not violate defendant’s right to trial under Apprendi v. New Jersey. Community notification is not additional punishment giving rise to right to trial by jury. *People v. Rowland*, 207 P.3d 890 (Colo. App. 2009).

Sexually violent predator statute does not violate equal protection based on a slight difference between the arrest rate of a sexually violent predator versus a non-sexually violent predator for a sexual offense. *People v. Mendoza*, __ P.3d __ (Colo. App. 2011).

Sexually violent predator statute does not violate procedural due process because some of the evaluation scoring is subjective. Sufficient safeguards are present to ensure that, when an evaluator makes a judgment, it is based on an equal application of the criteria. In addition, defendant had a hearing before the district court that ultimately made the decision. *People v. Mendoza*, __ P.3d __ (Colo. App. 2011).

There is no ex post facto violation when a current qualifying sexually violent predator offense was not a qualifying offense at the time it was committed. Since sexually violent predator status is not punishment, there is no constitutional violation. *People v. Mendoza*, __ P.3d __ (Colo. App. 2011).

Defendant’s due process rights violated when the court determined his sexually violent predator status based upon a sexually violent predator risk assessment test without making specific findings of fact. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

This section covers offense of misdemeanor sexual assault by including among its enumerated crimes “[s]exual assault, in violation of section 18-3-402”. Misdemeanor sexual assault is set forth in § 18-3-402 (1)(e). *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

Individuals convicted of misdemeanor sexual assaults should not be excluded from designation as sexually violent predators. Because this section plainly covers misdemeanor sexual assault, court need not consider any agency

publications. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009).

The term “victim” means “intended victim” in the context of a conviction for attempted sexual assault. *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009).

A fictional 14-year-old girl created by police officers conducting an Internet sting operation, therefore, can be a victim within the meaning of this section. *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009).

The victim of an attempted sexual assault need not have actually been victimized and need not be an actual person. *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009).

When perpetrator has been convicted of an attempted sexual assault, the definition of “victim” does not preclude a finding that defendant is a sexually violent predator. *People v. Buerge*, 240 P.3d 363 (Colo. App. 2009).

A court may find that a defendant is a sexually violent predator when the screening instrument and evaluator make a contrary recommendation as long as the court states specific reasons for doing so in the record. The screening instrument and evaluator’s opinion are intended to assist the court in making a decision, but the court is not bound by the recommendation. *People v. Allen*, __ P.3d __ (Colo. App. 2010).

The sex offender risk scale meets the statutory requirements for a “risk assessment screening instrument”. The sex offender management board satisfied the objectives and criteria set forth in § 16-11.7-103 for developing the screening instrument. *People v. Brosh*, 251 P.3d 456 (Colo. App. 2010).

Court improperly found defendant to be a sexually violent predator under this section when there was no evidence in the record to establish that the victim was a stranger or that the defendant established or promoted a relationship for the purpose of sexual victimization. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev’d on other grounds, 105 P.3d 209 (Colo. 2005).

Court improperly found defendant to be sexually violent predator. When the defendant is a neighbor of the victims, helped one of the victim’s carry in groceries, had dinner with both of the victims in his trailer, and had a nickname for one of the victims, the defendant is not a stranger for purposes of satisfying the third element of sexually violent predator status. *People v. Hunter*, 240 P.3d 424 (Colo. App. 2009).

Trial court erred in concluding defendant satisfied the third element of the sexually violent predator requirement and, thus, in designating him a sexually violent predator, since there was no evidence that he had previously promoted a relationship with the victim to facil-

itate that assault. *People v. Valencia*, 257 P.3d 1203 (Colo. App. 2011).

In case of stepfather who sexually assaulted adolescent stepdaughter, court properly interpreted phrase “promoted a relationship” to include failed attempts to establish a relationship with a stranger or known victim, as well as efforts to encourage a victim with whom the offender has a limited relationship, such as stepfather, to enter into a broader relationship primarily for the purpose of sexual victimization. *People v. Tixier*, 207 P.3d 844 (Colo. App. 2008).

In case of offender who sexually abused the daughter of his girlfriend, the court erred in its interpretation of “establishing a relationship”. That statutory criterion of “establishing a relationship” applies only when an offender, from the outset, seeks out a victim with whom he or she has no definable relationship for the primary purpose of sexual victimization. Where the offender already has a relationship with the victim independent of the sexual victimization, the offender cannot be considered to have established the relationship for that purpose. *People v. Gallegos*, 240 P.3d 882 (Colo. App. 2009).

Evidence supports court’s designation of defendant as a sexually violent predator. The fact that defendant used alcohol to drug the victim during the sexual assaults supports the fact that defendant promoted the relationship with the victim for the purpose of sexual victimization. Next, the court determined that the public is at-risk for defendant to repeat the crimes and that defendant is unable to abstain from alcohol. Those findings supported the court’s conclusion that defendant was likely to reoffend. *People v. Brosh*, 251 P.3d 456 (Colo. App. 2010).

Court did not err in designating defendant a sexually violent predator. The court found that defendant fostered the relationship to sexually victimize the child. *People v. Mendoza*, ___ P.3d ___ (Colo. App. 2011).

This section does not mandate an evidentiary hearing on whether an offender is a sexually violent predator. *People v. Rowland*, 207 P.3d 890 (Colo. App. 2009).

The court’s findings were sufficient to conclude that defendant was a sexually violent predator. *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010).

18-3-415. Acquired immune deficiency syndrome testing for persons charged with any sexual offense. Any adult or juvenile who is bound over for trial for any sexual offense involving sexual penetration as defined in section 18-3-401 (6), subsequent to a preliminary hearing or after having waived the right to a preliminary hearing, or any person who is indicted for or is convicted of any such offense, shall be ordered by the court to submit to a diagnostic test for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, said diagnostic test to be ordered in conjunction with the diagnostic test ordered pursuant to section 18-3-415.5. The results of such diagnostic test shall be reported to the court or the court’s designee, who shall then disclose the results to any victim of the sexual offense who requests such disclosure. Review and disclosure of diagnostic test results by the courts shall be closed and confidential, and any transaction records relating thereto shall also be closed and confidential. If the person who is bound over for trial or who is indicted for or convicted of any such offense voluntarily submits to a diagnostic test for the human immunodeficiency virus (HIV), the fact of such person’s voluntary submission shall be admissible in mitigation of sentence if the person is convicted of the charged offense.

Source: **L. 88:** Entire section added, p. 728, § 1, effective July 1. **L. 93:** Entire section amended, p. 1731, § 16, effective July 1. **L. 99:** Entire section amended, p. 1003, § 10, effective May 29. **L. 2000:** Entire section amended, p. 451, § 1, effective April 24.

Cross references: (1) For the provision allowing the test to be done without the knowledge and consent of the person, see § 25-4-1405 (8)(a)(V).

(2) For the legislative declaration contained in the 1999 act amending this section, see section 1 of chapter 254, Session Laws of Colorado 1999.

18-3-415.5. Acquired immune deficiency syndrome testing for persons charged with certain sexual offenses - mandatory sentencing. (1) For purposes of this section, “sexual offense” is limited to a sexual offense that consists of sexual penetration, as defined in section 18-3-401 (6), involving sexual intercourse or anal intercourse.

(2) Any adult or juvenile who is bound over for trial subsequent to a preliminary hearing or after having waived the right to a preliminary hearing on a charge of committing

a sexual offense shall be ordered by the court to submit to a diagnostic test for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, said diagnostic test to be ordered in conjunction with the diagnostic test ordered pursuant to section 18-3-415. The results of said diagnostic test shall be reported to the district attorney. The district attorney shall keep the results of such diagnostic test strictly confidential, except for purposes of pleading and proving the mandatory sentencing provisions specified in subsection (5) of this section.

(3) (a) If the person tested pursuant to subsection (2) of this section tests positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, the district attorney may contact the state department of public health and environment or any county, district, or municipal public health agency to determine whether said person had been notified prior to the date of the offense for which the person has been bound over for trial that he or she tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome.

(b) If the district attorney determines that the person tested pursuant to subsection (2) of this section had notice of his or her HIV infection prior to the date the offense was committed, the district attorney may file an indictment or information alleging such knowledge and seeking the mandatory sentencing provisions authorized in subsection (5) of this section. Any such allegation shall be kept confidential from the jury and under seal of court.

(c) The state department of public health and environment or any county, district, or municipal public health agency shall provide documentary evidence limited to whether the person tested pursuant to subsection (2) of this section had notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. The parties may stipulate that the person identified in said documents as having notice or discussion of his or her HIV infection is the person tested pursuant to subsection (2) of this section. Such stipulation shall constitute conclusive proof that said person had notice of his or her HIV infection prior to committing the substantive offense, and the court shall sentence said person in accordance with subsection (5) of this section.

(d) If the parties do not stipulate as provided in paragraph (c) of this subsection (3), an officer or employee of the state department of public health and environment or of the county, district, or municipal public health agency who has had contact with the person tested pursuant to subsection (2) of this section regarding his or her HIV infection and can identify said person shall provide, for purposes of pretrial preparation and in court proceedings, oral and documentary evidence limited to whether said person had notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. If the state department or the county, district, or municipal public health agency no longer employs an officer or employee who has had contact with the person tested pursuant to subsection (2) of this section regarding the person's HIV infection, the state department or the county, district, or municipal public health agency shall provide:

(I) The names of and current addresses, if available, for each former officer or employee who had contact with the person tested pursuant to subsection (2) of this section regarding the person's HIV infection;

(II) Documentary evidence concerning whether the person tested pursuant to subsection (2) of this section was provided notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion; and

(III) If none of said former officers or employees are available, any officer or employee who has knowledge regarding whether the person tested pursuant to subsection (2) of this section was provided notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. Said officer or employee shall provide such evidence for purposes of pretrial preparation and in court proceedings.

(4) Nothing in this section shall be interpreted as abridging the confidentiality requirements imposed on the state department of public health and environment and the county, district, and municipal public health agencies pursuant to part 14 of article 4 of title 25, C.R.S., with regard to any person or entity other than as specified in this section.

(5) (a) If a verdict of guilty is returned on the substantive offense with which the person tested pursuant to subsection (2) of this section is charged, the court shall conduct

a separate sentencing hearing as soon as practicable to determine whether said person had notice of his or her HIV infection prior to the date the offense was committed, as alleged. The sentencing hearing shall be conducted by the judge who presided at trial or before whom the guilty plea was entered or a replacement for said judge in the event he or she dies, resigns, is incapacitated, or is otherwise disqualified as provided in section 16-6-201, C.R.S. At the sentencing hearing, the district attorney shall have the burden of proving beyond a reasonable doubt that said person had notice of his or her HIV infection prior to the date the offense was committed, as alleged.

(b) If the court determines that the person tested pursuant to subsection (2) of this section had notice of his or her HIV infection prior to the date the offense was committed, the judge shall sentence said person to a mandatory term of incarceration of at least three times the upper limit of the presumptive range for the level of offense committed, up to the remainder of the person's natural life, as provided in section 18-1.3-1004.

Source: **L. 99:** Entire section added, p. 1000, § 5, effective May 29. **L. 2000:** (2) amended, p. 451, § 2, effective April 24. **L. 2002:** (5)(b) amended, p. 1514, § 195, effective October 1. **L. 2010:** (3)(a), (3)(c), IP(3)(d), and (4) amended, (HB 10-1422), ch. 419, p. 2073, § 33, effective August 11.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (5)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-3-416. Reports of convictions to department of education. When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this part 4 when the victim is a child and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: **L. 90:** Entire section added, p. 1025, § 6, effective July 1. **L. 2000:** Entire section amended, p. 1847, § 31, effective August 2.

18-3-417. Reports of sexual assault by applicants, registrants, or licensed professionals. When the director of the division of professions and occupations or a board or commission within the division of professions and occupations in the department of regulatory agencies refers a case to the office of expedited settlement or the office of the attorney general for disciplinary action related to an alleged offense described in this part 4, the office of expedited settlement or the office of the attorney general shall forward the victim's contact information to a victim's advocate in the office of the attorney general. The victim's advocate shall make reasonable efforts to advise the victim of the right to pursue criminal action, the right to pursue civil action, the applicable statutes of limitations, and contact information for the police, sheriff, and community-based resources in the jurisdiction where the alleged offense occurred. This provision shall not prohibit additional reporting of criminal offenses by the attorney general.

Source: **L. 2007:** Entire section added, p. 1109, § 1, effective May 23.

PART 5

HUMAN TRAFFICKING AND SLAVERY

Editor's note: This part 5 was added with relocations in 2010. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

18-3-501. Trafficking in adults. (1) A person commits trafficking in adults if he or she:

(a) Sells, exchanges, barter, or leases an adult and receives any money or other consideration or thing of value for the adult as a result of such transaction; or

(b) Receives an adult as a result of a transaction described in paragraph (a) of this subsection (1).

(2) As used in this section, “adult” means a person eighteen years of age or older.

(3) Trafficking in adults is a class 3 felony unless the adult or adults who have been trafficked are illegally present in the United States, in which case trafficking in adults is a class 2 felony.

Source: L. 2010: Entire part added with relocations, (SB 10-140), ch. 156, p. 535, § 1, effective April 21.

Editor’s note: This section is similar to former § 18-13-127 as it existed prior to 2010.

ANNOTATION

Law reviews. For article, “2006 Immigration Legislation in Colorado”, see 35 Colo. Law. 79 (October 2006).

18-3-502. Trafficking in children. (1) A person commits trafficking in children if he or she:

(a) Sells, exchanges, barter, or leases a child and receives any money or other consideration or thing of value for the child as a result of such transaction; or

(b) Receives a child as a result of a transaction described in paragraph (a) of this subsection (1).

(2) As used in this section, “child” means a person under eighteen years of age.

(3) Trafficking in children is a class 2 felony.

Source: L. 2010: Entire part added with relocations, (SB 10-140), ch. 156, p. 535, § 1, effective April 21.

Editor’s note: This section is similar to former § 18-6-402 as it existed prior to 2010.

18-3-503. Coercion of involuntary servitude. (1) A person commits coercion of involuntary servitude if he or she coerces another person to perform labor or services by:

(a) Withholding or threatening to destroy documents relating to a person’s immigration status;

(b) Threatening to notify law enforcement officials that a person is present in the United States in violation of federal immigration laws;

(c) Threatening serious harm or physical restraint against that person or another person;

(d) Means of a scheme, plan, or pattern intended to cause the person to believe that, if the person does not perform the labor or services, he or she or another person would suffer serious harm or physical restraint; or

(e) Abusing or threatening abuse of law or the legal process.

(2) A person may commit coercion of involuntary servitude regardless of whether the person provides compensation to the person who is coerced.

(3) Coercion of involuntary servitude is a class 6 felony.

Source: L. 2010: Entire part added with relocations, (SB 10-140), ch. 156, p. 536, § 1, effective April 21.

Editor’s note: This section is similar to former § 18-13-129 as it existed prior to 2010.

ANNOTATION

Law reviews. For article, “2006 Immigration Legislation in Colorado”, see 35 Colo. Law. 79 (October 2006).

PART 6

STALKING

Editor’s note: This part 6 was added with relocations in 2010. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated.

18-3-601. Legislative declaration. (1) The general assembly hereby finds and declares that:

- (a) Stalking is a serious problem in this state and nationwide;
- (b) Although stalking often involves persons who have had an intimate relationship with one another, it can also involve persons who have little or no past relationship;
- (c) A stalker will often maintain strong, unshakable, and irrational emotional feelings for his or her victim and may likewise believe that the victim either returns these feelings of affection or will do so if the stalker is persistent enough. Further, the stalker often maintains this belief, despite a trivial or nonexistent basis for it and despite rejection, lack of reciprocation, efforts to restrict or avoid the stalker, and other facts that conflict with this belief.

(d) A stalker may also develop jealousy and animosity for persons who are in relationships with the victim, including family members, employers and co-workers, and friends, perceiving them as obstacles or as threats to the stalker’s own “relationship” with the victim;

(e) Because stalking involves highly inappropriate intensity, persistence, and possessiveness, it entails great unpredictability and creates great stress and fear for the victim;

(f) Stalking involves severe intrusions on the victim’s personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim, even in the absence of express threats of physical harm.

(2) The general assembly hereby recognizes the seriousness posed by stalking and adopts the provisions of this part 6 with the goal of encouraging and authorizing effective intervention before stalking can escalate into behavior that has even more serious consequences.

Source: L. 2010: Entire part added with relocations, (HB 10-1233), ch. 88, p. 293, § 1, effective August 11.

Editor’s note: This section is similar to former § 18-9-111 (4)(a) as it existed prior to 2010.

18-3-602. Stalking - penalty - definitions - Vonnies law. (1) A person commits stalking if directly, or indirectly through another person, the person knowingly:

(a) Makes a credible threat to another person and, in connection with the threat, repeatedly follows, approaches, contacts, or places under surveillance that person, a member of that person’s immediate family, or someone with whom that person has or has had a continuing relationship; or

(b) Makes a credible threat to another person and, in connection with the threat, repeatedly makes any form of communication with that person, a member of that person’s immediate family, or someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensues; or

(c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person’s immediate family, or someone with whom that person has or has had a continuing relationship in a manner that

would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress. For purposes of this paragraph (c), a victim need not show that he or she received professional treatment or counseling to show that he or she suffered serious emotional distress.

(2) For the purposes of this part 6:

(a) Conduct "in connection with" a credible threat means acts that further, advance, promote, or have a continuity of purpose, and may occur before, during, or after the credible threat.

(b) "Credible threat" means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.

(c) "Immediate family" includes the person's spouse and the person's parent, grandparent, sibling, or child.

(d) "Repeated" or "repeatedly" means on more than one occasion.

(3) A person who commits stalking:

(a) Commits a class 5 felony for a first offense except as otherwise provided in subsection (5) of this section; or

(b) Commits a class 4 felony for a second or subsequent offense, if the offense occurs within seven years after the date of a prior offense for which the person was convicted.

(4) Stalking is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10).

(5) If, at the time of the offense, there was a temporary or permanent protection order, injunction, or condition of bond, probation, or parole or any other court order in effect against the person, prohibiting the behavior described in this section, the person commits a class 4 felony.

(6) Nothing in this section shall be construed to alter or diminish the inherent authority of the court to enforce its orders through civil or criminal contempt proceedings; however, before a criminal contempt proceeding is heard before the court, notice of the proceedings shall be provided to the district attorney for the judicial district of the court where the proceedings are to be heard and the district attorney for the judicial district in which the alleged act of criminal contempt occurred. The district attorney for either district shall be allowed to appear and argue for the imposition of contempt sanctions.

(7) A peace officer shall have a duty to respond as soon as reasonably possible to a report of stalking and to cooperate with the alleged victim in investigating the report.

(8) (a) When a person is arrested for an alleged violation of this section, the fixing of bail for the crime of stalking shall be done in accordance with section 16-4-103 (2) (d), C.R.S., and a protection order shall issue in accordance with section 18-1-1001(5).

(b) This subsection (8) shall be known and may be cited as "Vonnie's law".

(9) When a violation under this section is committed in connection with a violation of a court order, including but not limited to any protection order or any order that sets forth the conditions of a bond, any sentences imposed pursuant to this section and pursuant to section 18-6-803.5 or any sentence imposed in a contempt proceeding for violation of the court order shall be served consecutively and not concurrently.

Source: L. 2010: Entire part added with relocations, (HB 10-1233), ch. 88, p. 294, § 1, effective August 11. L. 2012: (5) amended and (8) and (9) added, (HB 12-1114), ch. 176, pp. 632, 631, § 4, 1, effective May 11.

Editor's note: This section is similar to former § 18-9-111 (4)(b), (4)(c), (5), and (6), as they existed prior to 2010.

ANNOTATION

Annotator's note. Since § 18-3-602 is similar to § 18-9-111 as it existed prior to the 2010 amendments to this part, relevant cases construing that provision have been included in the annotations to this section.

Subsection (4)(a)(II) held constitutional. By burdening only those communications furthering, promoting, or advancing an expressed credible threat, subsection (4)(a)(II) does not reach protected conduct. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Nor is the provision void for vagueness since a person of ordinary intelligence can know what conduct is proscribed. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Requiring a jury to determine "reasonableness" does not make subsection (4)(b)(III) unconstitutionally vague. The statute prohibits contact that inflicts "serious emotional distress" and provides an objective "reasonable person" standard to measure whether the emotional distress inflicted upon the victim was "serious". Thus, it provides notice that conduct that would cause a reasonable person serious emotional distress is prohibited. The only uncertainty raised by the statute is whether the conduct would cause a reasonable person serious emotional distress, and the determination of "reasonableness" is a question for the jury. *People v. Yascavage*, 80 P.3d 899 (Colo. App. 2003), *aff'd* on other grounds, 101 P.3d 1090 (Colo. 2004).

Subsections (4)(b)(I) and (4)(b)(III) are not unconstitutionally vague or overbroad. The definition of "credible threat" does not substantially burden speech and is specifically sufficient to provide guidance to the public. The term "serious emotional distress" sets forth an identifiable objective standard for measuring the proscribed conduct and therefore is not unconstitutionally vague. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), *rev'd* on other grounds, 127 P.3d 71 (Colo. 2006); *People v. Richardson*, 181 P.3d 340 (Colo. App. 2007).

Right to access to courts does not include right to file lawsuits in abusive manner; therefore, the stalking convictions that were based, in part, on defendant filing 13 frivolous lawsuits against the victim did not violate the defendant's right to access the courts. *People v. Richardson*, 181 P.3d 340 (Colo. App. 2007).

A defendant does not need to know that his or her conduct would cause a reasonable person serious emotional distress. This reading of subsection (4)(b)(III) would impart a nonexistent requirement that the defendant must intend to cause serious emotional distress. The defendant must only be aware of his or her conduct, and the result of that conduct is evaluated under

an objective standard to which his or her specific intent is irrelevant. *People v. Yascavage*, 80 P.3d 899 (Colo. App. 2003), *aff'd*, 101 P.3d 1090 (Colo. 2004).

The mens rea of knowingly in the crime of emotional distress harassment by stalking does not apply to the element that the stalker be aware that his or her conduct would cause serious emotional distress to a reasonable person. Generally, the mental state applies to all elements of an offense unless the legislative intent is to limit its application. The general assembly recognized the stalker may be oblivious to reality of the emotional distress he or she is causing, and, therefore, it would be absurd to allow a defendant so out-of-touch with reality to avoid criminal prosecution. *People v. Cross*, 127 P.3d 71 (Colo. 2006).

An electronic surveillance device installed on the victim's car "repeatedly" stored information about her movements thereby allowing the defendant to gain information about her on repeated occasions, and therefore satisfying the requirements of this section. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

The phrase "in connection with" indicates an intention by the general assembly that a continued relationship between the credible threat and the repeated communications is contemplated. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

A person must directly, or indirectly through another person, knowingly make a credible threat to another person and repeatedly make any form of communication with the recipient of the threat. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

The repeated communications may occur before, during, or after the credible threat but they must be connected to the threat. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Whether the repeated communications are "in connection with" the threat is a matter of fact just as the existence of a credible threat itself. *People v. Baer*, 973 P.2d 1225 (Colo. 1999) (decided prior to 1999 amendment to subsection (4)).

Trial court erred in not instructing the jury that defendant must knowingly engage in conduct taken in connection with the threat. *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003).

The defendant could not have been charged with a violation of subsection (4) until all of the elements of the crime are completed. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

The defendant may be charged with increased penalties because of amendments to subsection

(4) that became effective in July of 1995 when the defendant did not consummate following the victim until August, but had committed elements of the offense prior to July. *People v. Bastian*, 981 P.2d 203 (Colo. App. 1998).

The phrase “under surveillance” includes electronic surveillance that records a person’s whereabouts as that person moves from one location to another and allows the stalker to access that information either simultaneously or shortly thereafter. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

Defendant’s statement that he was going to kill the victim if she did not see him was sufficient evidence to support a finding that he had made a credible threat. *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003).

Evidence sufficient to support a finding that contact was made in connection with a credible threat. Defendant called the victim repeatedly on one day and threatened that he would kill her if she did not see him. Following this threat, defendant contacted the victim numerous times in person and by telephone and repeatedly asked to see her. This evidence is sufficient to support a finding that the contact was made in connection with a credible threat. *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003).

Serious emotional distress was supported by the evidence where the victim testified that she suspected the defendant was stalking her for over a month, that she was concerned about constantly being watched, that she took alternate routes to her destinations, that she was uncomfortable and had stomach aches, that she had trouble sleeping and was anxious, and that she took a leave of absence from work to enter a safe house for her safety. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

Evidence sufficient to support a finding beyond a reasonable doubt of serious emotional distress where the victim testified that defendant’s behavior caused her to change her work schedule, take days off from work, and feel unsafe; she was nervous and had trouble sleeping; and she felt she was constantly being watched by defendant. The statute is clear that serious emotional distress need not be such as would compel professional treatment or a breakdown. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev’d on other grounds, 127 P.3d 71 (Colo. 2006).

Evidence sufficient to establish a “credible threat”. The credible threat does not need to be separate from the harassing behavior or verbal. Therefore, evidence that the defendant was only at the victim’s place of employment when the victim was there, the defendant would approach and make eye contact with the victim, and the

defendant found out where the victim went to church and attended that church was sufficient to establish a “credible threat”. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev’d on other grounds, 127 P.3d 71 (Colo. 2006).

Court’s instruction for harassment by stalking was appropriate. The court instructed the jury that “knowingly” applied to both the credible threat and to the conduct in connection with the threat. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev’d on other grounds, 127 P.3d 71 (Colo. 2006).

The mens rea of knowingly in the crime of emotional distress harassment by stalking does not apply to the element that the stalker be aware that his or her conduct would cause serious emotional distress to a reasonable person. Generally, the mental state applies to all elements of an offense unless the legislative intent is to limit its application. The general assembly recognized the stalker may be oblivious to reality of the emotional distress he or she is causing, and, therefore, it would be absurd to allow a defendant so out-of-touch with reality to avoid criminal prosecution. *People v. Cross*, 127 P.3d 71 (Colo. 2006).

The penalty provision in subsection (5)(a.5) establishes a sentencing enhancer. Since the statute does not prescribe a burden of proof, the prosecution is required to prove the prior conviction by only a preponderance of the evidence, and the court may properly determine the issue without the jury. Therefore, the court erred in admitting the prior conviction into evidence as an element of the harassment by stalking offense. The error required reversal since the evidence was highly prejudicial and had no or little probative value. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev’d on other grounds, 127 P.3d 71 (Colo. 2006).

Because the elements of violation of a mandatory restraining order and the elements of harassment by stalking are not the same, the subsequent prosecution of defendant did not violate double jeopardy protections. *People v. Carey*, 198 P.3d 1223 (Colo. App. 2008).

Defendant’s course of conduct amounted to a single crime for which the general assembly has not authorized multiple punishments. The plain words of the statute define the unit of prosecution for the crime of stalking as a continuous course of conduct by which one repeatedly follows, approaches, contacts, or places another under surveillance. Furthermore, the statute requires that the acts constituting stalking must be performed “repeatedly”. Consequently, per victim, stalking can occur only when there is conduct comprising two or more occurrences of the specified acts. *People v. Herron*, 251 P.3d 1190 (Colo. App. 2010).

ARTICLE 3.5

Unlawful Termination
of Pregnancy

Cross references: For the legislative declaration contained in the 2003 act enacting this article, see section 1 of chapter 340, Session Laws of Colorado 2003.

18-3.5-101.	Unlawful termination of pregnancy.	18-3.5-102.	Exclusions.
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18-3.5-101. Unlawful termination of pregnancy. (1) A person commits the offense of unlawful termination of a pregnancy if, with intent to terminate unlawfully the pregnancy of another person, the person unlawfully terminates the other person's pregnancy.
(2) Unlawful termination of a pregnancy is a class 4 felony.

Source: L. 2003: Entire article added, p. 2162, § 2, effective July 1.

18-3.5-102. Exclusions. Nothing in this article shall permit the prosecution of a person for providing medical treatment, including but not limited to an abortion, in utero treatment, or treatment resulting in live birth, to a pregnant woman for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which consent is implied by law.

Source: L. 2003: Entire article added, p. 2163, § 2, effective July 1.

ARTICLE 4

Offenses Against Property

Editor's note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor's note following the title heading.

PART 1		18-4-302.	Aggravated robbery.
ARSON		18-4-303.	Aggravated robbery of controlled substances.
18-4-101.	Definitions.	18-4-304.	Robbery of the elderly or disabled - legislative declaration. (Repealed)
18-4-102.	First degree arson.	18-4-305.	Use of photographs, video tapes, or films of property.
18-4-103.	Second degree arson.	PART 4	
18-4-104.	Third degree arson.	THEFT	
18-4-105.	Fourth degree arson.		
PART 2			
BURGLARY AND RELATED OFFENSES			
18-4-201.	Definitions.	18-4-401.	Theft.
18-4-202.	First degree burglary.	18-4-402.	Theft of rental property.
18-4-202.1.	Habitual burglary offenders - punishment - legislative declaration. (Repealed)	18-4-403.	Statutory intent.
18-4-203.	Second degree burglary.	18-4-404.	Obtaining control over any stolen thing of value - conviction.
18-4-204.	Third degree burglary.	18-4-405.	Rights in stolen property.
18-4-205.	Possession of burglary tools.	18-4-406.	Concealment of goods.
PART 3		18-4-407.	Questioning of person suspected of theft without liability.
ROBBERY		18-4-408.	Theft of trade secrets - penalty.
18-4-301.	Robbery.	18-4-409.	Aggravated motor vehicle theft.

- 18-4-410. Theft by receiving.
- 18-4-411. Transactions for profit in stolen goods.
- 18-4-411.5. Interagency task force on organized retail theft - legislative declaration - repeal. (Repealed)
- 18-4-412. Theft of medical records or medical information - penalty.
- 18-4-413. Mandatory sentencing for repeated felony theft from a store - store defined.
- 18-4-414. Evidence of value.
- 18-4-415. Use of photographs, video tapes, or films of property.
- 18-4-416. Theft by resale of a lift ticket or coupon.
- 18-4-417. Unlawful acts - theft detection devices.
- 18-4-418. Fuel piracy.
- 18-4-419. Newspaper theft.

PART 5

TRESPASS, TAMPERING,
AND CRIMINAL MISCHIEF

- 18-4-501. Criminal mischief.
- 18-4-502. First degree criminal trespass.
- 18-4-503. Second degree criminal trespass.
- 18-4-504. Third degree criminal trespass.
- 18-4-504.5. Definition of premises.
- 18-4-505. First degree criminal tampering.
- 18-4-506. Second degree criminal tampering.
- 18-4-506.3. Tampering with equipment associated with oil or gas gathering operations - penalty.
- 18-4-506.5. Tampering with a utility meter - penalty.
- 18-4-507. Defacing or destruction of written instruments.
- 18-4-508. Defacing, destroying, or removing landmarks, monuments, or accessories.

- 18-4-509. Defacing property - definitions.
- 18-4-510. Defacing posted notice.
- 18-4-511. Littering of public or private property.
- 18-4-512. Abandonment of a motor vehicle.
- 18-4-513. Criminal use of a noxious substance.
- 18-4-514. Use of photographs, video tapes, or films of property.
- 18-4-515. Entry to survey property - exception to criminal trespass.
- 18-4-516. Criminal operation of a device in motion picture theater.

PART 6

THEFT OF SOUND RECORDINGS

- 18-4-601. Definitions.
- 18-4-602. Unlawful transfer for sale.
- 18-4-603. Unlawful trafficking in unlawfully transferred articles.
- 18-4-604. Dealing in unlawfully packaged recorded articles.
- 18-4-604.3. Unlawful recording of a live performance.
- 18-4-604.7. Trafficking in unlawfully recorded live performance.
- 18-4-605. Applicability.
- 18-4-606. Confiscation and disposition of items.
- 18-4-607. Restitution.

PART 7

THEFT OF CABLE TELEVISION SERVICE

- 18-4-701. Theft of cable service - definitions.
- 18-4-702. Civil action - damages.
- 18-4-703. Severability.

PART 8

THEFT OF PUBLIC
TRANSPORTATION SERVICES

- 18-4-801 and
- 18-4-802. (Repealed.)

PART 1

ARSON

Cross references: For the “Fraudulent Claims and Arson Information Reporting Act”, see part 10 of article 4 of title 10.

18-4-101. Definitions. As used in this article, unless the context otherwise requires:

(1) “Building” means a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, and includes a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein, whether or not a person or animal is actually present.

(2) “Occupied structure” means any area, place, facility, or enclosure which, for

particular purposes, may be used by persons or animals upon occasion, whether or not included within the definition of "building" in subsection (1) of this section, and which is in fact occupied by a person or animal, and known by the defendant to be thus occupied at the time he acts in violation of one or more of sections 18-4-102 to 18-4-105.

(3) Property is that of "another" if anyone other than the defendant has a possessory or proprietary interest therein.

(4) If a building is divided into units for separate occupancy, any unit not occupied by the defendant is a "building of another".

Source: L. 71: R&RE, p. 425, § 1. C.R.S. 1963: § 40-4-101.

ANNOTATION

The words used in subsection (1) of § 18-4-105 are without technical meaning except for "building", "property of another", and "occupied structure", which are all adequately defined by statute in this section. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Scope of generic term "building". In adopting the generic term "building" in amending the burglary statute, the general assembly intended to encompass not only the structures previously listed, but also to cover all types of structures known but not then included. *Sanchez v. People*, 142 Colo. 58, 349 P.2d 561 (1960) (decided under former § 40-3-6, CRS 53).

Rather than limiting the definition of a building to a structure with walls and a roof, which would include a telephone booth, it was the legislative intent that a building is a structure which has the capacity to contain and is designed for the habitation of man or animals or for the sheltering of property. *Sanchez v. People*, 142 Colo. 58, 349 P.2d 561 (1960) (decided under former § 40-3-6, CRS 53).

A trailer pulled by a truck tractor, with the capacity to contain, and the design for the sheltering of, property, which is hauled to a construction site and left there for the purpose of storing materials to be used on the project, is clearly a "building" within the statutory definition. *People v. Simien*, 671 P.2d 1021 (Colo. App. 1983).

When fenced enclosure not "building". A fenced enclosure surrounding a concrete building which serves as a dog pound is not within the statutory meaning of "building" in subsection (1) so as to support a second degree burglary charge for the unlawful entry of the enclosure, where the fenced enclosure's design is directed to containment or exclusion and affords little protection against inclement weather and extreme temperatures. *People v. Moyer*, 635 P.2d 553 (Colo. 1981).

But within definition of "occupied structure". A fenced enclosure surrounding a concrete building which serves as a dog pound is within the definition of "occupied structure" in subsection (2), so as to support a second degree burglary charge for the unlawful entry of the enclosure. *People v. Moyer*, 635 P.2d 553 (Colo. 1981).

Unfinished structure. Under former section, a structure was held to be a building, although it was yet incomplete and unfurnished. *El Jebel Shrine Ass'n v. McGlone*, 93 Colo. 334, 26 P.2d 108 (1933).

"Dwelling" includes attached garage. A garage attached to a residence is part of a "dwelling" within the meaning of § 18-4-203(2), burglary of a dwelling. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

"Proprietary interest" is a protean concept, the meaning of which emerges from contextual use and application. *People ex rel. VanMeveren v. District Court*, 619 P.2d 494 (Colo. 1980).

Term "proprietary interest" is sufficiently broad to include a legally recognized security interest, such as that of a credit union, which the defendant has neither the right nor the authority to defeat or impair, even though he also had an interest in the secured property. *People ex rel. VanMeveren v. District Court*, 619 P.2d 494 (Colo. 1980).

The fact that wife's clothing may have been acquired during the course of her marriage to the defendant and may constitute "marital property" under § 14-10-113 does not create an ownership interest in that property in the defendant for purposes of § 18-4-103. The evidence presented at the trial concerning wife's ownership is sufficient to support a finding of "property of another" and therefore defendant's arson conviction. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

18-4-102. First degree arson. (1) A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent commits first degree arson.

(2) First degree arson is a class 3 felony.

(3) A defendant convicted of committing first degree arson by the use of any explosive shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-102. L. 77: (1) amended, p. 962, § 19, effective July 1. L. 86: (3) added, p. 777, § 8, effective July 1. L. 2002: (3) amended, p. 1515, § 196, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-4-102 is similar to former § 40-3-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

At the common law, arson was a crime against the habitation, rather than against property rights. *Lipschitz v. People*, 25 Colo. 261, 53 P. 1111 (1898).

At common law arson was crime against possession or occupancy, rather than ownership. *People ex rel. VanMeveren v. District Court*, 619 P.2d 494 (Colo. 1980).

Conviction of this offense not equal protection violation. Prosecution, conviction, and sentencing for a class 3 felony under this section, rather than for a class 4 felony under the third degree arson statute, § 18-4-104(1), did not violate defendant's right to equal protection under the fourteenth amendment to the United States Constitution. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Distinguished from third degree arson. The more serious first degree arson statute contains an element not contained in the less serious third degree arson statute: The requirement that the property damaged or destroyed be a "building or occupied structure of another". *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Distinction not unreasonable. The general assembly's decision to provide a more serious penalty for intentionally burning a "building or occupied structure" than for intentionally burning "any property" is not arbitrary or unreasonable. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Person may be guilty of arson although he is in possession of property. The legal title of property conveyed by deed of trust to secure a debt is in the trustee, and an indictment for conspiracy to commit arson properly alleges the ownership of such property in the trustee. The grantor in a deed of trust may be guilty of arson of the property although he is in possession and occupancy of the property, and has a right to redeem from the trust deed. *Lipschitz v. People*, 25 Colo. 261, 53 P. 111 (1898).

Jury may infer lack of consent where defendant owed a large sum of money to the previous owner and defendant was still making payments to him; it is not necessary for the prosecution to show that the previous owner affirmatively did not consent. *People v. Espinoza*, 989 P.2d 178 (Colo. App. 1999).

Tenant may commit arson upon building owned by other. Where a tenant sets fire to a unit which he occupies, he also damages the property interests of the owner in that building; thus, he may be deemed to have committed first degree arson upon the building of another. *People v. Brown*, 44 Colo. App. 397, 622 P.2d 573 (1980).

The terms "burn" or "set fire to" require more than a mere scorching or discoloration. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

However, it is not necessary that the entire "building" or "structure" be totally destroyed or materially injured as long as any part of the "building" or "structure", regardless of its size, is burned or set afire. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Sheetrock ceiling and wooden joists were a part of "building" or "structure" for purposes of arson statute. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Where evidence indicated that it was possible for sheetrock to "burn", defendant's claim of impossibility under this section must fail. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Proof of corpus delicti and intent. In prosecutions for arson, the rule as to proof of corpus delicti and intent is the same as in prosecutions for other crimes where direct evidence is relied on. Exclusion of every possible theory other than guilt is not required. Exclusion of every other rational hypothesis, which means reasonable hypothesis, is the test, and this jury was so instructed. *Militello v. People*, 95 Colo. 519, 37 P.2d 527 (1934).

Variance in proof that dwelling was burned fatal. The property answering the description contained in the information was never burned, and the defendant cannot stand convicted of burning it. The defendant was never notified or

informed of the fact that he was accused of burning a building other than the dwelling named in the information, and yet the trial court submitted the question to the jury, which found him guilty of an offense with which he was never charged, the nature of which was never disclosed to him. *Skidmore v. People*, 154 Colo. 363, 390 P.2d 944 (1964).

Testimony showing motive admissible. Introduction of evidence that defendant's father was the major creditor and general manager of the club allegedly arsoned, that the club had been financially unsuccessful and had lost its lease, and that the club premises were insured, offered to show defendant's motive for setting the fire, was admissible when offered in combination with testimony concerning the close business association between the defendant and his father and defendant's desire to ensure the financial success of his father's investment in the club. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Evidence that defendant raised his insurance coverage six months before the fire is properly admitted as tending to prove a motive on the part of the defendant to burn his store. *People v. Elkhatab*, 632 P.2d 275 (Colo. 1981).

18-4-103. Second degree arson. (1) A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any property of another without his consent, other than a building or occupied structure, commits second degree arson.

(2) Second degree arson is a class 4 felony, if the damage is one hundred dollars or more.

(3) Second degree arson is a class 2 misdemeanor, if the damage is less than one hundred dollars.

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-103. L. 77: (1) amended, p. 962, § 20, effective July 1.

ANNOTATION

Arson of nondwelling cannot be substituted for charge as to dwelling. Where a count of an information identifies with particularity the exact section of the statute upon which prosecution is based, namely burning a certain dwelling, no other statute can be substituted for the one actually selected as forming the subject matter of the prosecution, namely the burning of a nondwelling, in a different location, and belonging to a different person. *Skidmore v. People*, 154 Colo. 363, 390 P.2d 944 (1964) (decided under former § 40-3-1, CRS 53).

The fact that wife's clothing may have been acquired during the course of her marriage to

Evidence of the underlying reasons for an insurance company's denial of coverage is not relevant in that it has no logical relation to any motive defendant may have had prior to the fire, nor is it probative of any elements of the crime charged. *People v. Carlson*, 677 P.2d 390 (Colo. App. 1983), aff'd, 712 P.2d 1018 (Colo. 1986).

Denial of fire loss claim. Testimony of insurer that defendant's claim for fire loss to her business had been denied because insurer believed it had a provable arson defense to claim failed to meet logical relevancy requirement of rule of evidence and therefore was not admissible as probative of mens rea element of arson charge since such testimony was directed toward insurer's opinion or belief and not toward defendant's motive. *People v. Carlson*, 712 P.2d 1018 (Colo. 1986).

Question of guilt for jury. It is the sole province of the jury, upon all of the testimony, to determine the precise question of guilt. *Goldberger v. People*, 45 Colo. 327, 101 P. 407 (1909).

Applied in *People v. Hinchman*, 196 Colo. 526, 589 P.2d 917 (1978); *People in Interest of M.R.J.*, 633 P.2d 474 (Colo. 1981); *People v. Moyer*, 635 P.2d 553 (Colo. 1981); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981).

the defendant and may constitute "marital property" under § 14-10-113 does not create an ownership interest in that property in the defendant for purposes of this section. The evidence presented at the trial concerning wife's ownership is sufficient to support a finding of "property of another" and therefore defendant's arson conviction. *People v. Sullivan*, 53 P.3d 1181 (Colo. App. 2002).

Applied in *People v. Ray*, 640 P.2d 262 (Colo. App. 1981).

18-4-104. Third degree arson. (1) A person who, by means of fire or explosives, intentionally damages any property with intent to defraud commits third degree arson.

(2) Third degree arson is a class 4 felony.

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-104.

ANNOTATION

Distinguished from first degree arson. The more serious first degree arson statute, § 18-4-102, contains an element not contained in this section: The requirement that the property damaged or destroyed be a “building or occupied structure of another”. *People v. Calvaresi*, 198 Colo. 321, 600 P.2d 57 (1979).

Distinction not unreasonable. The general assembly’s decision to provide a more serious penalty for intentionally burning a “building or occupied structure” than for intentionally burning “any property” is not arbitrary or unreasonable.

People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979).

Construed in accordance with 18-1-502, this section would be inapplicable to those situations in which there was no voluntary act or omission to perform an act within the physical capabilities of the person. Thus, the statute would not apply to a fire started by events beyond the actor’s control. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Applied in *People v. Elkhatib*, 632 P.2d 275 (Colo. 1981).

18-4-105. Fourth degree arson. (1) A person who knowingly or recklessly starts or maintains a fire or causes an explosion, on his own property or that of another, and by so doing places another in danger of death or serious bodily injury or places any building or occupied structure of another in danger of damage commits fourth degree arson.

(2) Fourth degree arson is a class 4 felony if a person is thus endangered.

(3) Fourth degree arson is a class 2 misdemeanor if only property is thus endangered and the value of the property is one hundred dollars or more.

(4) Fourth degree arson is a class 3 misdemeanor if only property is thus endangered and the value of the property is less than one hundred dollars.

(5) It shall not be an arson offense pursuant to this section if:

(a) A person starts and maintains a fire as a controlled agricultural burn in a reasonably cautious manner; and

(b) No person suffers any of the following as a result of the fire:

(I) Bodily injury;

(II) Serious bodily injury; or

(III) Death.

(6) For purposes of this section, “controlled agricultural burn” means a technique used in farming to clear the land of any existing crop residue, kill weeds and weed seeds, or reduce fuel buildup and decrease the likelihood of a future fire.

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-105. L. 77: (1) amended, p. 962, § 21, effective July 1. L. 2010: (5) and (6) added, (HB 10-1123), ch. 121, p. 404, § 1, effective August 11.

ANNOTATION

Law reviews. For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981).

Control of fire is a matter of great public concern. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Thus the general assembly may make the commission of a prohibited act a crime, irrespective of scienter, when public policy dictates it for the protection of the public health, safety,

and welfare. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

The general assembly is not constitutionally restricted to punishing conduct that only “imminently” puts a structure in danger of damage. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Not facially vague. Absent indications that this section is being applied to conduct which a citizen could not reasonably have known was

forbidden, the statute should not be ruled unconstitutional on grounds of facial vagueness. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

This is not a statute that employs technical terms with inadequate definitions but uses words of common understanding. This section is drafted in words that are not susceptible to difficulties of interpretation by a person of common understanding and intelligence. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Subsection (1) contains ordinary language with an obvious purpose and a clear meaning. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

The phrase "starts or maintains a fire" conveys a plain meaning as to the general conduct proscribed by the statute. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

However, the phrase "starts or maintains a fire" in this section must be read in accordance with §§ 18-1-501(9) and 18-1-502. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

The statutory requirement that a structure be placed "in danger of damage" gives both the defendant and the jury a practical guideline to acceptable behavior. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

"Building", "property of another", and "occupied structure". The words used in subsection (1) are without technical meaning except for "building", "property of another", and "occupied structure", which are all adequately defined by statute in § 18-4-101. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Section 18-1-502 expressly removes any ambiguity as to the culpability requirement of this section. That section states that if an offense does not require a culpable mental state on the part of the actor, the offense is one of strict liability. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Prosecution need not prove intent to endanger the person or building. *People v. Owens*, 670 P.2d 1233 (Colo. 1983); *People v. Copeland*, 976 P.2d 334 (Colo. App. 1998), *aff'd*, 2 P.3d 1283 (Colo. 2000).

The knowingly or recklessly mens rea requirement only applies to starting or maintaining a fire, not to the endangerment provisions. *Copeland v. People*, 2 P.3d 1283 (Colo. 2000).

This section would not apply to a fire started by events beyond the actor's control; the actor must purposefully start a fire, though he may not intend or foresee the consequences. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Construed in accordance with § 18-1-502, this section would be inapplicable to those situations in which there was no voluntary act or omission to perform an act within the physical capabilities of the person. Thus, the statute would not apply to a fire started by events beyond the actor's control. *People v. Garcia*, 189 Colo. 347, 541 P.2d 687 (1975).

Applied in *People v. Johnson*, 757 P.2d 1098 (Colo. App. 1988).

PART 2

BURGLARY AND RELATED OFFENSES

18-4-201. Definitions. As used in this article, unless the context otherwise requires:

- (1) "Premises" means any real estate and all improvements erected thereon.
- (2) "Separate building" means each unit of a building consisting of two or more units separately secured or occupied.
- (3) A person "enters unlawfully" or "remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of his or her intent, enters or remains in or upon premises that are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to him or her by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public. Except as is otherwise provided in section 33-6-116 (1), C.R.S., a person who enters or remains upon unimproved and apparently unused land that is neither fenced nor otherwise enclosed in a manner designed to exclude intruders does so with license and privilege unless notice against trespass is personally communicated to the person by the owner of the land or some other authorized person or unless notice forbidding entry is given by posting with signs at intervals of not more than four hundred forty yards or, if there is a readily identifiable entrance to the land, by posting

with signs at such entrance to the private land or the forbidden part of the land. In the case of a designated access road not otherwise posted, said notice shall be posted at the entrance to private land and shall be substantially as follows:

**“ENTERING PRIVATE PROPERTY
REMAIN ON ROADS”.**

Source: L. 71: R&RE, p. 426, § 1. C.R.S. 1963: § 40-4-201. L. 75: (3) amended, p. 634, § 1, effective July 1. L. 84: (3) amended, p. 922, § 9, effective January 1, 1985. L. 99: (3) amended, p. 326, § 1, effective July 1.

Cross references: For the definition of the word “premises” as used in criminal trespass, see § 18-4-504.5.

ANNOTATION

Burglary of hotel room. Under this section, one who enters a room of a hotel with intent to commit larceny therein is guilty of burglary, and the argument that the offense should have been alleged against the hotel rather than against the guest occupying such room is without merit. *Gallegos v. People*, 150 Colo. 37, 370 P.2d 755 (1962) (decided under former § 40-3-6, CRS 53).

“Open to the public” defined. “Open to the public” means premises which by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances at the time would cause a reasonable person to believe no

permission to enter or remain is required. *People v. Bozeman*, 624 P.2d 916 (Colo. App. 1980).

Theater manager’s office in a completely enclosed space within theater not “open to public” for purposes of subsection (3) of this section. Defendant’s use of a pretense to gain entrance to manager’s office indicates that he was aware that the office was not open to public and was therefore “unlawfully entering” premises. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

Applied in *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978); *Bollier v. People*, 635 P.2d 543 (Colo. 1981).

18-4-202. First degree burglary. (1) A person commits first degree burglary if the person knowingly enters unlawfully, or remains unlawfully after a lawful or unlawful entry, in a building or occupied structure with intent to commit therein a crime, other than trespass as defined in this article, against another person or property, and if in effecting entry or while in the building or occupied structure or in immediate flight therefrom, the person or another participant in the crime assaults or menaces any person, or the person or another participant is armed with explosives or a deadly weapon.

(2) First degree burglary is a class 3 felony.

(3) If under the circumstances stated in subsection (1) of this section the property involved is a controlled substance, as defined in section 18-18-102 (5), within a pharmacy or other place having lawful possession thereof, such person commits first degree burglary of controlled substances, which is a class 2 felony.

Source: L. 71: R&RE, p. 427, § 1. C.R.S. 1963: § 40-4-202. L. 73: p. 572, § 10. L. 81: (3) amended, p. 737, § 20, effective July 1. L. 99: (1) amended, p. 327, § 2, effective July 1. L. 2012: (3) amended, (HB 12-1311), ch. 281, p. 1618, § 40, effective July 1.

ANNOTATION

Law reviews. For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981).

Annotator’s note. Since § 18-4-202 is similar to former § 40-3-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing

those provisions have been included in the annotations to this section.

For conspiracy to commit burglary, see *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Conviction for both assault and burglary constitutional. A conviction for both first de-

gree assault and first degree burglary does not violate the constitutional guarantee against double jeopardy. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

Assault is clearly a lesser included offense of first degree burglary when assault is the predicate offense. Under the terms of subsection (1), assault is one of four predicate offenses for first degree burglary in Colorado. Where assault is the predicate offense, the elements of first degree burglary necessarily include all of the elements of assault. *Litwinsky v. Zavaras*, 132 F. Supp.2d 1316 (D. Colo. 2001).

Assault, a predicate offense for first degree burglary, is a lesser included offense of first degree burglary. Therefore, the two counts merge. In a case where the lesser included offense carries a higher penalty, the court must vacate the conviction carrying the lower penalty and impose the higher penalty in order maximize the jury's verdict. *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004).

Burglary is an offense against property, and the general assembly intended the additional element of assault in this section to modify and aggravate the offense of burglary and not to change the gravamen of the crime. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

A single entry can support only one conviction of first degree burglary, even if multiple assaults occur. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

The element of intent has remained unchanged in burglary cases. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Specific intent to commit a specific crime is an essential element of the offense of burglary. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

Although the jury must agree on the underlying felony defendant intended to commit, the jury is not required to agree on the intended victim of the underlying crime. To commit an actual crime, there must be a victim, however, a person can have the mental state of intent to commit a crime without having an identified specific victim. *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003).

Violation of a restraining order is a sufficient predicate offense for conviction under this section. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

Burglary is complete when burglar enters with requisite intent, even though object of entry may be impossible. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

Subsection (1) contains no "surreptitious" requirement concerning remaining unlawfully. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Formal defects in information could not be raised after verdict where the information un-

der this section for burglary, charged the use of explosives "with the purpose, etc.", instead of "for the purpose, etc.". The information also failed to aver expressly the incorporation of the owner of the building. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Criminal trespass is not a lesser included offense of burglary since the crime of criminal trespass contains essential elements which are not elements of the offense of burglary. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

First degree criminal trespass is not a lesser included offense of first degree burglary. However, it is a lesser non-included offense, and the trial court may instruct a jury on such offense over the objection of the defendant if the charging document provides notice that defendant might have to defend against that charge. *People v. Satre*, 950 P.2d 667 (Colo. App. 1997).

The crime of criminal mischief is not a lesser-included burglary offense because the elements are far different. While criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Attempted first degree burglary is a lesser-included offense of first degree burglary. *People v. Simien*, 656 P.2d 698 (Colo. 1983).

Distinguished from felony menacing. It is possible to commit a first degree burglary without also perpetrating felony menacing. The merger doctrine does not apply because there is no requirement in this section that a victim be placed in fear of imminent serious bodily injury by a deadly weapon as there is in the felony menacing statute. *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

There is no requirement that victim be placed in fear of imminent serious bodily injury by a deadly weapon under the first degree burglary statute. *People v. Montanez*, 944 P.2d 529 (Colo. App. 1996).

Specific intent may be inferred from the circumstances surrounding the accused's entry into an apartment, together with what occurred after the entry was gained. *People v. McCormick*, 181 Colo. 162, 508 P.2d 1270 (1973).

Sufficient evidence of specific intent. Where defendant was caught by the police inside a pharmacy while armed and while taking drugs off the shelves, and a crowbar and suitcases were found inside the pharmacy, and during his arrest, he told the police that "he did it for the drugs", and even admitted during cross-examination that he "broke into the pharmacy" to get drugs, this evidence amply supports a jury finding that defendant had the requisite specific intent to commit first degree burglary. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The immediate flight standard of this section requires that the entry, the assault, and the flight be close in time and that the assault

occur while fleeing from the building or occupied structure. Therefore, a person commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

Evidence relevant to show plan, scheme, or design. Where evidence relating to the burglary of another apartment was of a transaction similar in nature and closely related to the transaction upon which the defendant was being tried in point of time, in the areas where the burglaries were committed, and in the methods used in obtaining entrance, this evidence was relevant to show plan, scheme, or design, and the trial court committed no error in admitting it into evidence. *People v. Moen*, 186 Colo. 196, 526 P.2d 654 (1974).

Possession of stolen goods after burglary is sufficient to warrant conviction, unless the attending circumstances or other evidence is such as to overcome the presumption raised by such possession, sufficient to create a reasonable doubt of the defendant's guilt. *People v. Moen*, 186 Colo. 196, 526 P.2d 654 (1974).

Use of explosive with intent to commit crime sufficient. The breaking and entering must have been with the intent to commit the crime of larceny and the explosive must have been used for the purpose of committing such a crime. It was sufficient if the forcible entry and the use of an explosive were with the intent to and for the purpose of committing the crime. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Evidence insufficient to support conviction. Where the facts adduced at the trial are just as consistent with a theory of innocence of burglary as of guilt, the conviction cannot stand. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Where the only evidence that defendant entered a room with intent to commit theft is the strong circumstantial evidence that he took a billfold, the evidence is insufficient to establish intent. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Refusal to instruct on criminal trespass not error. In a prosecution for burglary, the contention that the trial court erred in refusing to instruct the jury on a misdemeanor of criminal trespass, as a lesser included offense of the crime of burglary, is without merit. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

Circumstantial evidence as foundation for instructions. Circumstantial evidence, when tied together, can support and provide a foundation for instructions on each of the crimes of first degree murder, first degree burglary, and theft arising out of the same transaction. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Intent must coincide with the moment of trespass. If burglary is based upon remaining in a structure unlawfully, intent must be present at that time. Pattern jury instruction sufficiently described elements of crime. *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000).

Jury instruction is sufficient if it conveys that the intent to commit a crime must be contemporaneous with the moment of trespass. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Instructions for crimes of theft and burglary which were phrased in language of statutes were sufficient. *People v. Bowen*, 182 Colo. 294, 512 P.2d 1157 (1973).

The court did not commit plain error when it failed to instruct the jury that it must unanimously agree on the underlying felony for the first degree burglary conviction. Because the jury unanimously found defendant guilty of attempted aggravated robbery, the finding satisfied the intent requirement of first degree burglary as well as any requirement that the jury agree unanimously to the underlying offense. Therefore, the court's failure to give a unanimity instruction was not plain error because there was no reasonable possibility that any error contributed to defendant's conviction. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Verdicts of guilt as to theft, but not as to burglary, are consistent. Where evidence linking the defendant with the burglary was conflicting or was rebutted, but the evidence clearly established that the defendant was in possession of property recently taken in a burglary, there was evidence to sustain a conviction of larceny and the verdicts of not guilty of burglary but guilty of larceny were not inconsistent as being irreconcilable with the evidence of each case. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Guilty verdicts for first degree burglary and attempted second degree murder are consistent where reasonable jury could find that defendant entered or remained in home with intent to menace and while there took a substantial step toward causing occupant's death. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Sentence, on separate counts, for first degree burglary-assault/menace and for first degree burglary-deadly weapon was erroneous because, while the general assembly may proscribe alternative means of committing the same offense, a court may not impose multiple punishments for each prohibited method a defendant uses if he or she uses more than one of the proscribed methods to accomplish the offense. *People v. Moore*, __ P.3d __ (Colo. App. 2010).

Sentence concurrent with life sentence proper. Where the defendant was sentenced for life imprisonment for first degree murder and lesser sentences for first degree burglary and

theft which the jury found he had committed, and all sentences were imposed concurrently with the life sentence which the jury ordered, there was no error. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Sentence of 10 to 20 years did not constitute an abuse of discretion. *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

Where the only evidence concerning the presence of deadly weapons at the time of the robbery was that defendant was carrying stolen items, including weapons, in a canvas sack during commission of the burglary, such evidence was insufficient to prove that defendant was armed with a deadly weapon, a requisite element of burglary. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Second degree burglary is a lesser included offense of first degree burglary. *Armintrout v. People*, 864 P.2d 576 (Colo. 1993).

Second degree burglary becomes first degree burglary when the perpetrator increases the risk of deadly or bodily harm to an occupant or other person present by possessing a deadly weapon such that he knowingly places or at-

tempts to place such person in fear of serious bodily injury or intends to and does cause serious bodily injury to any person. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

If the defendant steals a deadly weapon and thereby becomes armed with a deadly weapon, the burglary is elevated to first degree, and there is no requirement that the prosecution show that the defendant assaulted or menaced anyone with the deadly weapon. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992).

The defendant is considered "armed" with a deadly weapon if the weapon is easily accessible and readily available for use by the defendant. The court need not consider the defendant's willingness or present ability to use the deadly weapon. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992).

Applied in *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *Pigford v. People*, 197 Colo. 358, 593 P.2d 354 (1979); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. District Court*, 663 P.2d 616 (Colo. 1983).

18-4-202.1. Habitual burglary offenders - punishment - legislative declaration. (Repealed)

Source: **L. 81:** Entire section added, p. 985, § 1, effective July 1. **L. 82:** (1) and (2) amended, p. 253, § 10, effective May 3. **L. 2002:** Entire section repealed, p. 1463, § 3, effective October 1.

Editor's note: This section was relocated to § 18-1.3-804 in 2002.

Cross references: For the legislative declaration contained in the 2002 act repealing this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

18-4-203. Second degree burglary. (1) A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.

(2) Second degree burglary is a class 4 felony, but it is a class 3 felony if:

(a) It is a burglary of a dwelling; or

(b) It is a burglary, the objective of which is the theft of a controlled substance, as defined in section 18-18-102 (5), lawfully kept within any building or occupied structure.

Source: **L. 71:** R&RE, p. 427, § 1. **C.R.S. 1963:** § 40-4-203. **L. 81:** (2) amended, p. 974, § 9, effective July 1; (2)(b) amended, p. 2031, § 44, effective July 14. **L. 99:** (1) amended, p. 327, § 3, effective July 1. **L. 2012:** (2)(b) amended, (HB 12-1311), ch. 281, p. 1618, § 41, effective July 1.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

III. Trial and Prosecution.

A. In General.

B. Indictment or Information.

C. Evidence.

1. In General.

2. Possession of Stolen Property.

3. Sufficiency.

D. Jury.

E. Instructions.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-4-203 is similar to former § 40-3-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Second degree burglary and second degree sexual assault are not the same offense for purposes of the prohibition against double jeopardy because the elements of the two offenses are different. *Childs v. Zavaras*, 90 F. Supp.2d 1141 (D. Colo. 1999).

Common-law burglary consisted of breaking and entering a dwelling at night with felonious intent. *Sanchez v. People*, 142 Colo. 58, 349 P.2d 561 (1960).

By statute in Colorado the common law definition of burglary has been modified and broadened to include in some instances, and under some circumstances, a legal entry into the building of another with felonious intent. *Macias v. People*, 161 Colo. 233, 421 P.2d 116 (1966).

In determining whether the crime of burglary has been committed, the focus is upon the possessory rights of the parties, and not their ownership rights. The law of burglary was designed to protect the dweller, and hence, the controlling question is occupancy rather than ownership. *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996); *People v. Mondragon*, 217 P.3d 936 (Colo. App. 2009).

A person can be convicted of a burglary if previously granted permission to enter the premises is withdrawn and the person enters or remains on the premises with the intent to commit a crime therein. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996).

"Open to the public" defined. "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances at the time would cause a reasonable person to believe no permission to enter or remain is required. *People v. Bozeman*, 624 P.2d 916 (Colo. App. 1980).

"Dwelling" includes attached garage. A garage attached to a residence is part of a "dwelling" within the meaning of this section. *People v. Jiminez*, 651 P.2d 395 (Colo. 1982).

"Dwelling" includes homes under renovation that are intended to be used for habitation in the future. The definition of "dwelling" in § 18-1-901 (3)(g) specifically includes buildings intended to be used for habitation. Because a home undergoing renovation cannot be presently used for habitation does not exclude it from the statute. *People v. Morales*, 2012 COA 2, __ P.3d __.

Burglary of fenced enclosure. A fenced enclosure surrounding a concrete building which serves as a dog pound is within the definition of "occupied structure" in § 18-4-101(2) so as to support a second degree burglary charge for the unlawful entry of the enclosure. *People v. Moyer*, 635 P.2d 553 (Colo. 1981).

A fenced enclosure surrounding a concrete building which serves as a dog pound is not within the statutory meaning of "building" in § 18-4-101(1) so as to support a second degree burglary charge for the unlawful entry of the enclosure, where the fenced enclosure's design is directed to containment of exclusion and affords little protection against inclement weather and extreme temperatures. *People v. Moyer*, 635 P.2d 553 (Colo. 1981).

Police officer may be guilty of burglary. A contention that a defendant, being a police officer, had a right to enter the building being burglarized by his confederates, and therefore could not be held guilty of burglary, is hostile to the status of implied licensee, since one entitled to such status must be performing a duty. *Clews v. People*, 151 Colo. 219, 377 P.2d 125 (1962).

Violation of a restraining order is a sufficient predicate offense for conviction under this section. *People v. Rhorer*, 967 P.2d 147 (Colo. 1998).

Even in the absence of a restraining order, an estranged spouse is not privileged or licensed to enter the separate residence of the other spouse so as to create a defense to a charge of second degree burglary. *People v. Johnson*, 906 P.2d 122 (Colo. 1995).

Crime of criminal trespass is not a lesser included offense in the crime of burglary; it requires an element not essential to the crime of burglary. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

The crime of criminal mischief is not a lesser included burglary offense because the elements are far different. While criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Offenses of burglary and assault with intent to rob are separate and independent since burglary is a crime of entering a dwelling place with intent to commit a felony, while assault with intent to rob is a crime requiring unlawful attempt coupled with a present ability to commit a violent injury on a person, with the specific intent to commit robbery. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967); *Trujillo v. People*, 178 Colo. 136, 496 P.2d 1026 (1972).

Second degree burglary is a lesser included offense of first degree burglary. *Armintrout v. People*, 864 P.2d 576 (Colo. 1993).

First degree criminal trespass is not a lesser included offense of second degree burglary. *People v. Garcia*, 920 P.2d 878 (Colo.

App. 1996), rev'd on other grounds, 940 P.2d 357 (Colo. 1997).

Second degree criminal trespass (§ 18-4-503) is a lesser included offense of second degree burglary. Second degree criminal trespass requires the defendant to unlawfully enter or remain on the premises of another that are enclosed in a manner designed to exclude intruders. By definition, if a building or structure exists, entry of which is required for second degree burglary, the building or structure is designed to exclude intruders. Thus, all of the elements of second degree criminal trespass are included in the offense of second degree burglary. *People v. MacBlane*, 952 P.2d 824 (Colo. App. 1997).

Jail cell qualifies as a "dwelling" within the meaning of this section. *People v. Nichols*, 920 P.2d 901 (Colo. App. 1996).

Applied in *Vigil v. People*, 150 Colo. 582, 375 P.2d 103 (1962); *People v. Mangum*, 189 Colo. 246, 539 P.2d 120 (1975); *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *People v. Davis*, 194 Colo. 138, 568 P.2d 1175 (1977); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People v. Bielecki*, 41 Colo. App. 256, 588 P.2d 377 (1978); *People v. Jacquez*, 196 Colo. 569, 588 P.2d 871 (1979); *People v. Hillyard*, 197 Colo. 83, 589 P.2d 939 (1979); *People v. Griffith*, 197 Colo. 544, 595 P.2d 231 (1979); *People v. Jacobs*, 198 Colo. 75, 596 P.2d 1187 (1979); *Germany v. People*, 198 Colo. 337, 599 P.2d 904 (1979); *People v. Weber*, 199 Colo. 25, 604 P.2d 30 (1979); *People v. Soper*, 628 P.2d 604 (Colo. 1981); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People v. Savage*, 630 P.2d 1070 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Chavez*, 632 P.2d 574 (Colo. 1981); *People v. Hotopp*, 632 P.2d 600 (Colo. 1981); *People v. District Court*, 632 P.2d 1022 (Colo. 1981); *People v. Brown*, 632 P.2d 1025 (Colo. 1981); *People in Interest of M.R.J.*, 633 P.2d 474 (Colo. 1981); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Quintana*, 634 P.2d 413 (Colo. 1981); *People v. Cohen*, 640 P.2d 1138 (Colo. 1982); *People ex rel. VanMeveren v. District Court*, 643 P.2d 37 (Colo. 1982); *People v. Leonard*, 644 P.2d 85 (Colo. App. 1982); *People v. Constant*, 645 P.2d 843 (Colo. 1982); *Chavez v. District Court*, 648 P.2d 658 (Colo. 1982); *People v. Holloway*, 649 P.2d 318 (Colo. 1982); *People v. Conwell*, 649 P.2d 1099 (Colo. 1982); *People v. Elmore*, 652 P.2d 571 (Colo. 1982); *People v. Johnson*, 653 P.2d 737 (Colo. 1982); *People v. Fisher*, 657 P.2d 922 (Colo. 1983); *People v. Quintero*, 657 P.2d 948 (Colo. 1983); *Flower v. People*, 658 P.2d 266 (Colo. 1983); *People v. District Court*, 664 P.2d 247 (Colo. 1983); *People v. Jones*, 140 P.3d 325 (Colo. App. 2006).

II. ELEMENTS OF OFFENSE.

This section may be violated in either of the ways mentioned; however, the final result is burglary. *People v. Holmes*, 129 Colo. 180, 268 P.2d 406 (1954).

Former Colorado burglary statute contained different situations under which the crime of burglary might be committed: A direct trespass to the property, with or without force, but without the consent, express or implied, of the owner or person in possession, and an initial lawful entry into the property or premises with the express or implied invitation or consent of the owner, with a subsequent trespass by an unauthorized entry into any room, apartment, or compartment of the same building. *Macias v. People*, 161 Colo. 233, 421 P.2d 116 (1966).

The element of intent has remained unchanged in burglary cases. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

In order to sustain a conviction for second degree burglary, there must be evidence that the accused entered the building with intent to commit a crime. *People v. Barnhart*, 638 P.2d 814 (Colo. App. 1981).

Specific intent at time of entry essential. An essential element in a charge of burglary is that the accused have the intent to commit a specific crime at the very time and place of breaking and entering. *Gomez v. People*, 162 Colo. 77, 424 P.2d 387 (1967); *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967); *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972).

To be convicted under this section, the jury must find that the defendant had made up his mind to commit some other offense at the point at which he or she becomes a trespasser. A person cannot be convicted under this section if the jury finds that the defendant formed the necessary intent at any time while unlawfully remaining on the premises. *Cooper v. People*, 973 P.2d 1234 (Colo. 1999).

Jury must find that the defendant either (1) broke and entered or unlawfully entered with the intent to commit a crime therein or (2) entered lawfully but subsequently remained unlawfully with the intent to commit a crime therein. *Cooper v. People*, 973 P.2d 1234 (Colo. 1999).

But intent at the time of entry is not the sole element of burglary under the statute. *People v. Carstensen*, 161 Colo. 249, 420 P.2d 820 (1966).

A person can be found guilty of second degree burglary if the intent to commit a crime is formed after the unlawful entry. *People v. Angell*, 917 P.2d 312 (Colo. App. 1995), overruled in *Cooper v. People*, 973 P.2d 1234 (Colo. 1999).

When the general assembly amended second degree burglary to add the language, "after a lawful or unlawful entry", the general assembly removed the requirement that the in-

tent to commit a crime exist at the time of entry. *People v. Larkins*, 109 P.3d 1003 (Colo. App. 2004).

Where defendant was given permission to enter the crawlspace and such permission to enter was not limited to any discrete portion of the crawlspace, the entry was not "unlawful" even though defendant entered the crawlspace with an intent to commit a sexual offense. *People v. Waddell*, 24 P.3d 3 (Colo. App. 2000).

Burglary includes an element of actual or constructive trespass on the property of another with intent to commit some other crime once the intruder has effected an entry into the building of another. *Macias v. People*, 161 Colo. 233, 421 P.2d 116 (1966).

If the owner had not unlocked the apartment, and if the defendant had not been given permission to enter, then the theft of which he was convicted would have been the result of an unlawful breaking or entering, which in turn would support a conviction of burglary. *People v. Carstensen*, 161 Colo. 249, 420 P.2d 820 (1966).

While not explicitly requiring an unauthorized entry, burglary statutes have always been interpreted as requiring an unauthorized entry as well as the intent to commit a felony or misdemeanor. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

One element of the crime of burglary under this statute is that the defendant be a trespasser. *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973).

Proof of no lawful right to be in building required. In addition to unlawful intent at the time of entry, this burglary statute requires the people to prove that the defendant had no lawful right to be in the building. *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973).

Unlawful entry of a railroad box car without force, under this section, constitutes the crime of burglary. *Panion v. People*, 138 Colo. 236, 331 P.2d 501 (1958).

Where evidence that the defendant was unlawfully in the victim's home was overwhelming, the court's failure to provide further clarification on the unlawful entry into the dwelling element of the crime did not constitute plain error. *People v. Angell*, 917 P.2d 312 (Colo. App. 1995).

Character of structure as a "dwelling" is a sentence enhancer, not an element of the offense. Therefore, first degree criminal trespass, which has as an essential element entry into a "dwelling," is not a lesser included offense of second degree burglary. *People v. Garcia*, 920 P.2d 878 (Colo. App. 1996).

Ownership means any rightful possession. The object is to describe the place where the offense was committed, not to determine the ownership of the property. Ownership as against

the burglar means any possession which is rightful. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Such possession may be actual or constructive. Possession which is equivalent to ownership for the purpose of proving the offense in this class of cases need not be a possession coupled with actual occupancy, as a dwelling or otherwise, of the burglarized premises. Proof that one was in actual or constructive possession of the burglarized premises is sufficient to establish his alleged ownership. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Agent may be the owner. Under this section breaking into an unoccupied house is burglary. The ownership is properly laid in an agent having general charge and control of the premises. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Or corporation having possession of the building. A banking corporation having possession of the building burglariously entered, occupying it for the conduct of its business, is the owner for the purposes of a prosecution under this section. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Unlawful entry is an element of the offense of second degree burglary. *People v. Esquibel*, 794 P.2d 1065 (Colo. App. 1990).

A perpetrator is guilty of second degree burglary when, unarmed, he breaks into a building and removes items even though those items may, in other circumstances, be used as deadly weapons. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Second degree burglary becomes first degree burglary when the perpetrator increases the risk of deadly or bodily harm to an occupant or other person present by possessing a deadly weapon such that he knowingly places or attempts to place such person in fear of serious bodily injury or intends to and does cause serious bodily injury to any person. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Actual taking of property, or the value of property taken, need not be proven. This section requires only that the defendant intended to take property. *People v. Gillis*, 883 P.2d 554 (Colo. App. 1994).

Violation of a no-contact order constitutes a predicate crime for purposes of second degree burglary. Violation of a municipal no-contact order constitutes a crime under § 18-6-803.5. Therefore, intent to violate a no-contact order by breaking into a home constitutes an "intent to commit therein a crime against person or property" and fulfills the element of the crime of second degree burglary. *People v. Rhorer*, 967 P.2d 147 (Colo. 1998).

Intrusion of any body part into the prohibited premises is sufficient to constitute entry as element of crime. Jury instruction clarifying

term was a correct statement of the law in this case. *People v. Gonyea*, 195 P.3d 1171 (Colo. App. 2008).

III. TRIAL AND PROSECUTION.

A. In General.

Proof of the breaking with intent to steal is all that is required under this section. In the trial of a burglary case under this section, when the people establish the breaking with intent to steal, nothing more is required. *Windolph v. People*, 96 Colo. 285, 42 P.2d 197 (1935).

Burglary is committed whenever a person willfully breaks and enters, either with or without force, any building with the intent to commit a larceny. No other act is necessary for the commission of the crime of burglary to be complete. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

Second degree burglary requires that the prosecution prove that defendant knowingly broke into and entered the liquor store with the intent to commit the crime of theft. *People v. Gomez*, 189 Colo. 91, 537 P.2d 297 (1975).

Crime intended does not have to be actually committed. It is not essential to a conviction under this section that the crime intended in the burglarious entry should have been actually committed. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Under this section one can commit the crime of burglary by entering a building with the unlawful intent prescribed, and where the intent is to commit larceny, the offense is complete regardless of whether the theft is consummated. *Ex parte Hill*, 101 Colo. 243, 72 P.2d 471 (1937).

The contemplated theft may be forcibly prevented by an inmate of the building, or the purpose to steal abandoned, and still the perpetrator would be guilty of the crime of burglary. If accomplished, evidence of the larceny would be admissible on the burglary count as the highest proof of the larcenous intent with which entry was made, yet not make the actual larceny one of the essential ingredients of the crime of burglary. *Ex parte Hill*, 101 Colo. 243, 72 P.2d 471 (1937).

To commit a burglary, the defendant need only have unlawfully entered the structure with the intent to commit the proscribed crime. There is no requirement that the crime intended to be committed be in fact completed. *People v. Archuleta*, 191 Colo. 482, 554 P.2d 307 (1976).

B. Indictment or Information.

Charge of breaking and entering the store building with the intent to commit larceny therein constitutes the charge of burglary and

not of larceny. *Gallegos v. People*, 166 Colo. 409, 444 P.2d 267 (1968).

Information charging burglary must specify by name the ulterior crime which it is alleged the accused intended to commit upon entry into the building. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

The element of intent to commit a specific crime is a matter of substance, not form, and must be set forth in the information; otherwise, the charge is fatally defective. *Gomez v. People*, 162 Colo. 77, 424 P.2d 387 (1967).

An information charging breaking and entering "with the intent then and there to commit a crime" clearly is insufficient, since a specific crime must be alleged. *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968).

In a burglary charge, the allegation "with the intent then and there to commit the crime of theft" meets the requirements of sufficiency to adequately apprise a defendant of the offense charged. *People v. Cordova*, 172 Colo. 522, 474 P.2d 615 (1970).

It is necessary that the specific conduct which constitutes the ulterior crime be clearly defined in order to determine if the defendant's intent was that prescribed by the burglary statute. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972); *People v. Barnhart*, 638 P.2d 814 (Colo. App. 1981).

Information reciting elements of attempt, and referring to provision defining ulterior crime, adequate. Where the information recited the elements of the inchoate crime of attempt in the language § 18-2-101 and included a reference to the section defining the burglary allegedly attempted, and where the defendant claimed no surprise or prejudice resulting from the absence of an allegation specifying the ulterior crime to be relied upon by the prosecution in its proof of the elements of burglary, the information adequately described the offense of attempt. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

Insufficient to charge mere larceny in separate count. The mere fact that larceny, as a part of the same transaction, was charged in another count is insufficient to fulfill the requirement that all the basic elements of a burglary charge, including the intent of the accused to commit the specific crime at the time and place of breaking and entering, must be alleged. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

Allegations as to ownership in burglary cases under this section might be placed on the same footing as such averments in charges of larceny. In an information charging larceny the ownership of the goods stolen may be laid in the person in whose possession the property was at the time of the theft, although such person is merely an agent and not the real owner. *Sloan v. People*, 65 Colo. 456, 176 P. 481 (1918).

Objection that incorporation was not proven too late in supreme court. With respect to an information for the burglary of the banking house of a named state bank, a corporation, the suggestion that the incorporation of the bank was not proven will not be heard, if first presented in the supreme court. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Related acts charged in one count not duplicitous. This section by the use of the word "or" provides disjunctively the ways of its violation; however, acts may be so closely related that they may be charged conjunctively in a single count without being duplicitous. *People v. Holmes*, 129 Colo. 180, 268 P.2d 406 (1954).

Any error in the form of the information was harmless where the defendant had sufficient notice of the elements and the factual basis for the charges prior to trial. *People v. Richardson*, 58 P.3d 1039 (Colo. App. 2002).

Variance in description of building not prejudicial. Where ample evidence established that the lumber company structure involved was a building, and an "office, shop, and warehouse" describes a building, no prejudice arose from this discrepancy in wording of the information. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

C. Evidence.

1. In General.

Crime may be proven by circumstantial or direct evidence. The essential elements of the crime of burglary may be established by circumstantial evidence as well as direct. A case of circumstantial evidence by its very nature implies the weaving of a fabric of known facts, which, often infinitesimal, immaterial, or even prejudicial when considered alone, become important only as they are tied to others, and when so tied lead to inevitable conclusions as to facts in issue. *Pena v. People*, 147 Colo. 253, 363 P.2d 672 (1961).

Circumstantial evidence, consisting of the possession of goods recently stolen in a burglary, is sufficient to sustain a conviction. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958).

Frequently burglary must be established by circumstantial evidence, it seldom being provable by direct evidence of actual breaking and entry by the person charged. *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed.2d 652 (1964).

Want of consent by the owner to enter into his premises may be proved by circumstantial evidence. *White v. People*, 172 Colo. 271, 472 P.2d 674 (1970).

Circumstantial evidence may be, and frequently is, most convincing and satisfactory.

Southard v. People, 174 Colo. 324, 483 P.2d 962 (1971).

Quantum of proof is the same. The quantum of proof where guilt is based upon circumstantial evidence is the same as where it is based on direct evidence; that is, it must be sufficient to establish guilt beyond a reasonable doubt. *Southard v. People*, 174 Colo. 324, 483 P.2d 962 (1971).

Intent inferred from actions. An accused is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

In the absence of a restraining order or an order granting one party exclusive possession of the marital residence, the question whether one spouse has the sole possessory interest in it depends on whether the evidence shows that both parties had decided to live separately. *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996).

Sufficient evidence was presented to establish that defendant had relinquished his possessory interests in the home where defendant and his wife separated two and one-half months before the burglary, defendant's wife told him she wanted a divorce, defendant left and took his belongings, and defendant's wife changed the locks on the home. *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996).

Specific intent may be inferred from commission of crime after entry. In the case of burglary, the fact that a felony was committed after breaking and entering is admissible as evidence from which the jury can infer that the intent to commit the felony existed at the time of the breaking and entering. *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963).

Where one breaks and enters into the property of another in the night time, an inference may be drawn that he did so with the intent to commit larceny. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

Acts subsequent to entry are admissible to allow the jury to infer the requisite intent for the crime charged, and therefore testimony that certain items on a burglarized premises are moved from their previous locations to a centralized location on the day of the burglary is admissible. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

The specific intent to commit the crime of theft does not have to be proved by direct, substantive evidence, but can be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. *People v. Germany*, 643 P.2d 776 (Colo. App. 1980).

Evidence showing a forcible unauthorized entry and an attempt to conceal the entry imposes a duty on the court to draw an inference of an

intent to commit theft. *People ex rel. Russel v. Hall*, 620 P.2d 34 (Colo. 1980).

Trespass alone is immaterial as to specific intent. The fact that the defendant may have committed a trespass at the time he entered the office where the alleged burglary took place is immaterial as to intent to commit theft. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Trespass to be proved beyond reasonable doubt. The people must prove the element of trespass in prosecution for crime of burglary, like other material elements of the crime charged, beyond a reasonable doubt. *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973).

Evidence establishing motive admissible. Evidence which has a direct tendency to establish motive is admissible against the accused, even though it may show him guilty of crimes other than that for which he is on trial. *Wilkinson v. People*, 170 Colo. 336, 460 P.2d 774 (1969).

As are acts at time of arrest. The circumstance of the finding of part of the items stolen from the drugstore had already led to a suspicion that the accused was involved in the burglary. The acts surrounding his conduct when he was arrested, indicating drug use, could be found to support the inference that he had a motive for the burglary. This made evidence of defendant's acts at the time of the arrest material and relevant to the offense with which he was charged. *Wilkinson v. People*, 170 Colo. 336, 460 P.2d 774 (1969).

Where a defendant is arrested inside a store under circumstances which conclusively establish that his entry was unlawful, articles which are then found on the premises in the possession of defendant, or reasonably attributed to him, and which are foreign to the store, are admissible. *Baca v. People*, 139 Colo. 111, 336 P.2d 712 (1959).

Burglars tools admissible. Exhibits of a tire iron, jack hammer, and punch, although not intrinsically and exclusively burglary tools, but capable of use for that purpose, were admissible under the burglary charge and in support of the charge of possession. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947).

Articles such as a stocking mask, hammer, and flashlight belonging to a defendant and found in his possession shortly after a burglary are admissible as part of the history of arrest, and when coupled with other pertinent evidence, tends to establish the charge. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958).

A weapon or other instrument found in the possession of an accused when arrested is admissible as part of the history of the arrest. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958).

The acquisition or possession of instruments, tools, or other means of committing burglary is admissible as a significant circumstance; the

possession signifies a probable design to use and the instruments need not be such as are entirely appropriate, nor such as were actually put to use. *Baca v. People*, 139 Colo. 111, 336 P.2d 712 (1959).

In a prosecution for burglary, evidence of possession of burglary tools and of property allegedly taken from burglarized premises, is properly admitted. *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed.2d 652 (1964).

It is not error to admit into evidence in a burglary case pry bars not belonging to the store which are found near the back doors of the store in which the defendant is found hiding. *People v. Marques*, 180 Colo. 154, 503 P.2d 339 (1972).

But only after burglary shown to have been committed. The possession of burglary tools as evidence in connection with the charge of burglary can only be considered when a burglary is first shown to have been committed. *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed.2d 652 (1964).

2. Possession of Stolen Property.

Possession of stolen property admissible. Defendant was shown to have had possession of the stolen tools soon after the burglary, and this is sufficient to justify the reception of such evidence. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Evidence of theft and recent possession of goods stolen were important as establishing the identity, and the intent which accompanied the breaking and entering. *Windolph v. People*, 96 Colo. 285, 42 P.2d 197 (1935); *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed.2d 652 (1964).

It requires explanation from defendant. Although the burden of proof cannot be validly shifted to the defendant in a criminal case, the onus of explanation can be placed upon him. An inference from possession of stolen property recently after the theft is an aid in proof which calls for rebutting or explanatory evidence. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Jury may infer guilt from recent unexplained possession. In a prosecution for larceny or burglary, the jury may infer that the accused committed the theft from the circumstances of his recent, unexplained, exclusive possession of the stolen articles involved. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970); *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971).

Such possession and proof of burglary support conviction. Proof that a burglary was committed, and that goods were then and there stolen, and shortly thereafter found in the possession of the accused, will sustain a conviction.

tion. *Davis v. People*, 137 Colo. 113, 321 P.2d 1103 (1958); *Wilcox v. People*, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed.2d 652 (1964).

Defendant's explanation need only raise reasonable doubt. Possession of stolen goods after a burglary or theft is sufficient to warrant a conviction, unless the attending circumstances or other evidence is such as to overcome the presumption raised by such possession, sufficient to create a reasonable doubt of the defendant's guilt. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958, cert. denied, 362 U.S. 923, 80 S. Ct. 673, 4 L. Ed.2d 744 (1960).

If the possession of the property by defendant, unexplained, constitutes a criminating circumstance, he need not show, even by a preponderance of testimony, that he came by it honestly. It is not necessary that the explanation should be satisfactory to the jury; if it raises in their minds a reasonable doubt of the defendant's guilt, it is sufficient to require an acquittal. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Unexplained possession instruction may be given where there is evidence that defendant had exclusive possession of the recently stolen goods whether the time of that possession was at the time of defendant's arrest or at an earlier time. *People v. Card*, 42 Colo. App. 259, 596 P.2d 402 (1979).

Rationale of unexplained possession doctrine is that when property is in a defendant's possession recently after a burglary, there is a "high probability" that the defendant has committed the burglary. *People v. Card*, 42 Colo. App. 259, 596 P.2d 402 (1979).

Testimony showing possession of stolen property. Possession of the stolen property for purposes of the unexplained possession doctrine may be established by the testimony of the arresting officer or by the testimony of other witnesses. *People v. Card*, 42 Colo. App. 259, 596 P.2d 402 (1979).

3. Sufficiency.

Evidence insufficient to establish intent. Where the only evidence that defendant entered a room with intent to commit theft is the strong circumstantial evidence that he took a billfold, the evidence is insufficient to establish intent. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Circumstantial evidence sufficient to support conviction of burglary. *Nunn v. People*, 177 Colo. 87, 493 P.2d 6 (1972).

When no one testified to seeing the actual breaking and entering, but witnesses heard a noise which alerted them and caused them to go see what was happening, and they saw the defendant coming out of the liquor store carrying four bottles of vodka, and investigation disclosed that the door had been forcibly opened,

and that the crowbar found in the defendant's car fit exactly the prymarks adjacent to the broken hasp, there is sufficient circumstantial evidence to rebut the defendant's testimony that he purchased the vodka from a youth and was carrying it from the side of the building to his car. *People v. Florez*, 179 Colo. 176, 498 P.2d 1162 (1972).

Evidence held sufficient to support conviction. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947); *People v. Marques*, 180 Colo. 154, 503 P.2d 339 (1972); *People v. Pleasant*, 182 Colo. 144, 511 P.2d 488 (1973); *People v. Bueno*, 183 Colo. 304, 516 P.2d 434 (1973); *People v. Maestas*, 187 Colo. 107, 528 P.2d 916 (1974); *People v. Gomez*, 189 Colo. 91, 537 P.2d 297 (1975); *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

Defendant's admissions of the break-in and larceny to several officers and direction of them to a locker in the bus station where he had placed the loot and where it was found was sufficient to establish his guilt beyond a reasonable doubt. *Hubbard v. People*, 152 Colo. 529, 383 P.2d 317 (1963).

Evidence that a building was burglarized and certain property stolen therefrom, that a defendant was arrested shortly thereafter with the stolen property in his possession, and that heelprints left on papers strewn on the floor of the burglarized building matched the heelprint of a shoe worn by defendant when arrested is sufficient to sustain a conviction. *Brown v. People*, 138 Colo. 354, 332 P.2d 996 (1958).

Evidence, when viewed in the light most favorable to the prosecution, supports defendant's burglary conviction. Facts were sufficient to allow a reasonable fact finder to determine that victim had possessory interest in apartment, defendant entered victim's apartment without permission, and, for purposes of the burglary statutes, defendant entered a building or occupied structure unlawfully. Accordingly, defendant may properly be retried on burglary charges. *People v. Mondragon*, 217 P.3d 936 (Colo. App. 2009).

Where prosecution's chief witness identifies defendant as his accomplice in burglary, evidence is sufficient to support jury's verdict of guilty. *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973).

Verbal warning regarding restraining order given prior to entry was sufficient to establish defendant's knowledge that he was not licensed or privileged to enter. Absent circumstances not present in the case, the court perceives no basis for limiting the dweller's right to occupancy of the structure to those cases in which the intruder is informed in writing that his former possessory rights are no longer in effect. *People v. Smith*, 943 P.2d 31 (Colo. App. 1996).

Evidence sufficient to sustain conviction for conspiracy to commit burglary. *People v. Coca*, 185 Colo. 10, 521 P.2d 781 (1974).

Evidence insufficient to support conviction.

Where defendant offered to buy all stolen television sets the witness could provide, but the record did not disclose that defendant was informed that burglaries would be committed, it was conceivable that the sets could have been obtained by theft without burglary, and the evidence was insufficient to sustain a conviction of burglary. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Where the evidence establishes that the defendant touched the outer surface of the inside door of the milk chute at the residence burglarized, no innocent purpose was suggested which would be consistent with that activity, but there was no evidence as to the time that the fingerprint was left on the door, no evidence placed the defendant inside the plaintiff's residence on the day of the burglary or at any other time and the fingerprint was the only evidence tending to tie the defendant to the crime, this evidence, when viewed as a whole and in the light most favorable to the prosecution, was not substantial nor sufficient enough to support a conclusion by a reasonable mind that the defendant was guilty of the burglary beyond a reasonable doubt. *People v. Ray*, 626 P.2d 167 (Colo. 1981).

Since it was not possible for defendant to have walked eight blocks to the gallery, broken in, picked out items to take, loaded plastic bags with the stolen objects, and then carried them back to his residence, evidence, even aided by the inference that arose from his possession of the stolen goods, was insufficient. *People v. Weems*, 676 P.2d 1222 (Colo. App. 1983).

Evidence insufficient to justify overturning sentence. *Triggs v. People*, 197 Colo. 229, 591 P.2d 1024 (1979).

D. Jury.

Questions for the jury. In a prosecution for burglary the identity of stolen property, the effect of proof of recent possession thereof by a defendant, and whether an explanation offered as to the manner in which it was acquired is satisfactory are questions for a jury to determine. *Brown v. People*, 138 Colo. 354, 332 P.2d 996 (1958).

Issue of specific intent to steal was clearly one for the jury to determine from all the evidence and reasonable inferences that could be drawn therefrom. *People v. Romero*, 182 Colo. 50, 511 P.2d 466 (1973); *People v. Green*, 38 Colo. App. 165, 553 P.2d 839 (1976).

"Recent" possession of stolen goods is determined by the facts in each particular case and it may vary from a few days to two years. In practically all cases whether the period of time is "recent" is a question for the jury, and a period of six weeks has been upheld. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958, cert. de-

nied, 362 U.S. 923, 80 S. Ct. 673, 4 L. Ed.2d 744 (1960).

Sufficient evidence to go to jury. *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973).

The argument that a case should not be submitted to the jury when there is no evidence that defendant did breaking and entering is without merit in Colorado, for one may be convicted under the charge of being a principal by proof that he was an accessory thereto. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972).

Though the evidence relating to the defendant's participation in the burglary of a residence was circumstantial in part, and the credibility of one witness was placed in issue by the defendant who claimed that the testimony of the witness was inherently incredible, the trial court was not in error for submitting the case to the jury. *McClendon v. People*, 174 Colo. 7, 481 P.2d 715 (1971).

E. Instructions.

Specific ulterior crime must be clearly and accurately defined. An essential element of burglary is that at the time and place of entering the structure, the accused must have an intent to commit therein a crime. It is therefore necessary that the specific ulterior crime be clearly and accurately defined in order to determine if the defendant's intent was that proscribed by the burglary statute. *People v. Archuleta*, 191 Colo. 482, 554 P.2d 307 (1976).

Elements of theft explained to jury in attempted burglary case. The elements constituting the crime of theft must be explained to the jury when that is the ulterior crime referred to in a case alleging an attempted burglary offense. *People v. Jiron*, 44 Colo. App. 246, 616 P.2d 166 (1980).

The trial court's failure to include the term "unlawful entry" in the jury instruction on second degree burglary was not plain error where, even if the instructions could have been worded more clearly, the jury was instructed using the exact language of the applicable statutory sections. *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996).

Instruction on unexplained recent possession of stolen property, which indicated to the jury that the burden of proving rightful possession was on the defendant, shifted the burden to the defendant to prove his innocence and was prejudicial error. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

It would be desirable for the trial court to instruct the jury that the exclusive possession of stolen property recently after a theft or burglary serves to create an inference or incriminating circumstance that the defendant stole such property or burglarized the premises of the owner of such property and that such evidence, if established beyond a reasonable doubt, is sufficient in

and of itself to justify a verdict of guilty in the absence of an explanation derived from the evidence in the case or furnished by the defendant raising a reasonable doubt as to his guilt. *Ciccarelli v. People*, 147 Colo. 413, 364 P.2d 368 (1961).

Instruction specifying that permission to enter part of a building does not necessarily include permission to enter other parts of the building was properly applied to a dwelling. Defendant, who lived with his mother and stepfather, was charged with burglary arising from the defendant's alleged theft of money from his mother's bedroom. The instruction was appropriate because defendant was specifically forbidden to enter his mother's bedroom. *People v. Lopez*, 946 P.2d 478 (Colo. App. 1997).

Instruction on burglary with intent to rape. Where the information simply charged burglary with intent to rape, the giving of an instruction that rape could be accomplished by sexual intercourse with the woman's permission if that permission was secured by the perpetrator fraudulently inducing her to believe that he was her husband, was not error. *Thistle v. People*, 199 Colo. 1, 199 P.2d 642 (1948).

Instruction on crime not lesser offense properly refused. In a prosecution for burglary, the contention that the trial court erred in refusing to instruct the jury on the misdemeanor of criminal trespass, as a lesser included offense of the crime of burglary, is without merit. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

Instruction indicating that defendant was not otherwise privileged to enter if he knew about a restraining order at the time he entered the premises is a correct statement of the law. Entry into a dwelling in violation of a restraining order is necessarily an unlawful entry. *People v. Smith*, 943 P.2d 31 (Colo. App. 1996).

Attempted first degree criminal trespass may be a lesser included offense to attempted second degree burglary under this section. *People v. Austin*, 799 P.2d 408 (Colo. App. 1990).

IV. VERDICT AND SENTENCE.

Double jeopardy. Defendant, who had been charged with second degree burglary and acquitted on the ground that he had authority to enter the building in question, could not be retried because of double jeopardy provision in state constitution. *People v. Woods*, 182 Colo. 3, 510 P.2d 435 (1973).

Verdict of guilty on charge of conspiracy to commit burglary and verdict of innocent on substantive charge of burglary held not inconsistent. *People v. Coca*, 185 Colo. 10, 521 P.2d 781 (1974).

Verdicts of guilt as to larceny, but not burglary, are consistent. Where there was no evidence to link the defendant with the burglary except his possession of the stolen items shortly after the burglary occurred, and defendant denied any implication in the burglary, the jury could have well believed that the evidence linking defendant with the burglary was too weak to convict, but that the evidence of theft was ample, and therefore, there was no inconsistency in verdicts of guilty of theft and not guilty of burglary. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Consecutive sentences for burglary and for larceny are improper. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

The burglary and larceny should be viewed as a single transaction, indivisible for purposes of punishment. Reason and justice dictate that for the purpose of punishment under these circumstances, these offenses should be merged by concurrent sentencing. *Maynes v. People*, 169 Colo. 186, 454 P.2d 797 (1969).

But consecutive sentences may be imposed for burglary and assault. Conviction and sentences for the two distinct offenses of burglary and assault with intent to rob did not put appellees twice in jeopardy. The offenses are separate and independent; two consecutive sentences were within the law and such imposition did not constitute a violation of any federally protected right. *Trujillo v. Patterson*, 266 F. Supp. 901 (D. Colo. 1966), *aff'd per curiam*, 389 F.2d 1003 (10th Cir. 1967).

Under circumstances of case, a minimum 20-year term for second degree burglary was excessive. *People v. Cohen*, 617 P.2d 1205 (Colo. 1980).

Sentence of eight years was not an abuse of discretion. Defendant had previous convictions for domestic violence and had not complied with a lenient probationary sentence. The defendant had demonstrated an escalating pattern of perpetrating violence on his family based upon his numerous arrests and repeat offenses after release from incarceration and had refused to take personal responsibility for his violent acts. *People v. Smith*, 943 P.2d 31 (Colo. App. 1996).

Sentence under habitual criminal act valid. *Hackett v. Tinsley*, 143 Colo. 203, 352 P.2d 799, cert. denied, 364 U.S. 874, 81 S. Ct. 118, 5 L. Ed.2d 96 (1960).

Mittimus valid. Entering with or without force with the intent to commit larceny constitutes the crime of burglary; hence a mittimus issued following conviction on a charge of breaking and entering without force which recites conviction of burglary is lawful and valid. *McGrath v. Tinsley*, 138 Colo. 18, 328 P.2d 579 (1958).

18-4-204. Third degree burglary. (1) A person commits third degree burglary if with intent to commit a crime he enters or breaks into any vault, safe, cash register, coin vending machine, product dispenser, money depository, safety deposit box, coin telephone, coin box, or other apparatus or equipment whether or not coin operated.

(2) Third degree burglary is a class 5 felony, but it is a class 4 felony if it is a burglary, the objective of which is the theft of a controlled substance, as defined in section 18-18-102 (5), lawfully kept in or upon the property burglarized.

Source: L. 71: R&RE, p. 427, § 1. C.R.S. 1963: § 40-4-204. L. 81: (2) amended, p. 974, § 10, effective July 1; (2) amended, p. 2031, § 45, effective July 14. L. 2012: (2) amended, (HB 12-1311), ch. 281, p. 1619, § 42, effective July 1.

ANNOTATION

Annotator's note. Since § 18-4-204 is similar to former § 40-3-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Degree of theft is not material to charge of attempted burglary under this section. People v. Flanders, 183 Colo. 268, 516 P.2d 418 (1973).

The crime of criminal mischief is not a lesser included burglary offense because the elements are far different. While criminal mischief requires damage to property, burglary does not. People v. Cisneros, 193 Colo. 380, 566 P.2d 703 (1977).

Entering a telephone booth with felonious intent constituted burglary. Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960).

Information adequate. Information charging defendant with attempted burglary of a coin telephone was not defective even though it did not affirmatively aver that the defendant entered the phone booth. People v. Flanders, 183 Colo. 268, 516 P.2d 418 (1973).

"Other apparatus or equipment" must be interpreted to apply only to those things that share the characteristics of the items listed in the statute. Winter v. People, 126 P.3d 192 (Colo. 2006).

Parking lot money slot box held to fall within statute. People v. Garcia, 784 P.2d 823 (Colo. App. 1989).

A glass display case is covered by the "or other apparatus or equipment" language provided in this section and that language is not unconstitutionally vague. People v. Geyer, 942 P.2d 1297 (Colo. App. 1996).

An unsecured and unlocked locker that does not have the appearance of being employed for the safekeeping of valuables is not within the class of items contemplated by this

section. The issue of whether a locker is sufficiently "vault-like" to fit within the purview of "other apparatus or equipment" must turn on the particulars of a given case. Winter v. People, 126 P.3d 192 (Colo. 2006).

Failure to instruct the jury on the elements of "knowingly" and "unlawful entry" in a third degree burglary case because those elements are present in first and second degree burglary was harmless error because those elements were not contested at trial. People v. Geyer, 942 P.2d 1297 (Colo. App. 1996).

Circumstantial evidence held sufficient to sustain conviction where police officers did not see defendant remove any money from slot box, but observed defendant in front of box and found eleven folded and torn dollar bills in defendant's pocket and a piece of wire suitable for pulling bills from slots in pathway of defendant as he walked away from box. People v. Garcia, 784 P.2d 823 (Colo. App. 1989).

The district attorney could not charge under this section for actions that violated the more specific provisions of § 12-47.1-825 under the Limited Gaming Act of 1991. Since the act invokes the full extent of the state's police powers, creates a comprehensive and thorough regulatory scheme to control limited gaming, and specifically defines criminal acts related to limited gaming, the general assembly must have intended that actions violating the specified criminal acts would be chargeable only under the Limited Gaming Act or under article 20 of this title, where the criminal provisions of the limited gaming act are repeated verbatim. People v. Warner, 930 P.2d 564 (Colo. 1996).

Applied in People v. Talarico, 192 Colo. 445, 560 P.2d 90 (1977); People ex rel. Gallagher v. District Court, 632 P.2d 1009 (Colo. 1981); People v. Tate, 657 P.2d 955 (Colo. 1983).

18-4-205. Possession of burglary tools. (1) A person commits possession of burglary tools if he possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense

involving forcible entry into premises or theft by a physical taking, and intends to use the thing possessed, or knows that some person intends to use the thing possessed, in the commission of such an offense.

(2) Possession of burglary tools is a class 5 felony.

Source: L. 71: R&RE, p. 427, § 1. C.R.S. 1963: § 40-4-205.

ANNOTATION

Annotator's note. Since § 18-4-205 is similar to former § 40-3-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The conduct proscribed by this section is sufficiently distinguishable from that prohibited by § 18-4-104 to withstand defendant's equal protection challenge. *People v. Gurule*, 924 P.2d 1164 (Colo. App. 1996).

Statute is not constitutionally overbroad. "Innocent possession" of tools is not prohibited by the statute, and the statute cannot be read to criminalize such conduct. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987).

"Burglary tools" held not unconstitutionally vague. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987); *People v. Gurule*, 924 P.2d 1164 (Colo. App. 1996).

A "pouch" made of a pair of bib overalls that defendant specifically designed and adapted for purposes of facilitating a theft by a physical taking is a burglary tool pursuant to this section. However, mere possession of an item does not implicate the statute. The possession of a designed, adapted, or commonly used tool or other article must be accompanied by an intent to commit a burglary or theft by a physical taking. *People v. Gurule*, 924 P.2d 1164 (Colo. App. 1996).

Language of this section is explicit. *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973).

Arrangement of this section in prior compilations is not controlling in construing the section, but rather, courts must look to the language of the statute itself. *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973).

Information charging defendant with possession of burglary tools held sufficient. *People v. Gnout*, 183 Colo. 366, 517 P.2d 394 (1973).

Statute does not omit the unlawful act element of the crime. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987).

Statute does not permit conviction solely on the basis of another's intent but requires

intent by the accused or knowledge that another intends to use the tool for a burglarious purpose. *People v. Chastain*, 733 P.2d 1206 (Colo. 1987).

Tools held admissible. Tools not intrinsically and exclusively burglary tools, but capable of use as such, were admissible in evidence in support of a charge of possession of burglary tools, where other evidence was ample to show actual breaking and entering and felonious intent. *Smalley v. People*, 116 Colo. 598, 183 P.2d 558 (1947).

State may appropriate burglar tools. Burglar tools are by definition contraband. The state in the exercise of its police power may appropriate, without compensation, property employed in the commission of a crime in order to prevent the continuance of unlawful activity. It is not reasonable to assume that the general assembly intended by this section to permit convicted burglars to retain the tools of their trade. *People v. Angerstein*, 194 Colo. 376, 572 P.2d 479 (1977).

There is no right to have them returned. If property is legally seized and it is designed or intended for use as a means of committing a criminal offense or the possession of which is illegal, there is no right to have it returned. *People v. Angerstein*, 194 Colo. 376, 572 P.2d 479 (1977).

The district attorney could not charge under this section for actions that violated the more specific provisions of § 12-47.1-825 under the Limited Gaming Act of 1991. Since the act invokes the full extent of the state's police powers, creates a comprehensive and thorough regulatory scheme to control limited gaming, and specifically defines criminal acts related to limited gaming, the general assembly must have intended that actions violating the specified criminal acts would be chargeable only under the Limited Gaming Act or under article 20 of this title, where the criminal provisions of the limited gaming act are repeated verbatim. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

Applied in Wilcox v. People, 152 Colo. 173, 380 P.2d 912 (1963); *People v. Tate*, 657 P.2d 955 (Colo. 1983).

PART 3

ROBBERY

18-4-301. Robbery. (1) A person who knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation commits robbery.

(2) Robbery is a class 4 felony.

Source: L. 71: R&RE, p. 427, § 1. C.R.S. 1963: § 40-4-301. L. 77: (1) amended, p. 963, § 22, effective July 1.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- III. Trial and Prosecution.
 - A. Indictment and Information.
 - B. Defenses.
 - C. Evidence.
 - D. Instructions.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Recent Judicial Modification of Habitual Criminal Act", see 23 Dicta 84 (1946). For comment on People v. Gallegos (130 Colo. 232, 274 P.2d 608 (1954)), see 27 Rocky Mt. L. Rev. 247 (1955). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. (1) Since § 18-4-301 is similar to former § 40-5-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

(2) Annotations appearing below from cases prior to 1979 were decided under the version of this section in effect prior to the 1977 amendment, which inserted "knowingly" preceding "takes anything of value".

This section is not unconstitutional. It does not contain ambiguities that would trap or ensnare the unwary, and it also complies with the equal protection clause of the fourteenth amendment of the U.S. constitution inasmuch as the legislative classification of the crimes of robbery is neither arbitrary nor discriminatory and operates equally on all persons within the classification. People v. Small, 177 Colo. 118, 493 P.2d 15 (1972).

Felony murder based on robbery precludes conviction for robbery. The defendant's conviction of the greater offense of felony murder, predicated as it is upon his killing of the robbery victim, precludes his simultaneous conviction of the lesser included offense of robbery. People v. Bartowsheski, 661 P.2d 235 (Colo. 1983).

Robbery conviction not precluded by conviction for murder of another after deliberation. Although a separate judgment of conviction for robbery may not simultaneously exist with a judgment of conviction for first degree murder predicated upon the killing of the robbery victim, there is no such impediment to the entry of both a judgment of conviction for first degree murder based upon the killing of another after deliberation and a separate judgment of conviction for the robbery of the same victim. People v. Bartowsheski, 661 P.2d 235 (Colo. 1983).

"Robbery" in felony murder provision used in generic sense. The term "robbery", as used in the felony murder statute, is to be construed as meaning this type of felony in its generic sense, including all types of robbery as defined in the statutes. People v. Raymer, 626 P.2d 705 (Colo. App. 1980), aff'd, 662 P.2d 1066 (Colo. 1983).

Where defendant was convicted of reckless manslaughter, robbery, and felony murder, appellate court could choose to give effect to the jury's finding that the defendant acted knowingly in committing a robbery and that a death occurred in the course of the robbery. The court could appropriately vacate the jury's finding of reckless manslaughter conviction. People v. Jones, 990 P.2d 1098 (Colo. App. 1999).

Any resulting death from robbery supports felony murder conviction. Any death that results in the course of any type of robbery may serve as a basis for a felony murder conviction, and all such types of robbery are necessarily merged in a felony murder charge. People v. Raymer, 626 P.2d 705 (Colo. App. 1980), aff'd, 662 P.2d 1066 (Colo. 1983).

"Aggravated" and "simple" robbery are but two degrees of the same offense. The former requires that the perpetrator have the intent, if resisted, to kill, maim, or wound the victim. The latter offense does not require this intent. Atwood v. People, 176 Colo. 183, 489 P.2d 1305 (1971).

Simple robbery is a lesser included offense within the charge of aggravated robbery. Hampton v. People, 171 Colo. 101, 465 P.2d 112

(1970); *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975).

Aggravated robbery distinguished. The essential difference between simple robbery and that form of aggravated robbery requiring the culpability element of "knowingly" is that the latter offense requires the defendant to "knowingly" put the person robbed or any other person in reasonable fear of death or bodily injury by the use of force, threats or intimidation with a deadly weapon. *People v. Aragon*, 653 P.2d 715 (Colo. 1982).

Simple robbery and aggravated robbery both require intent to rob. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under §§ 18-3-301 (1)(a) and 18-3-402 and this section. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Attempted robbery lesser included crime of aggravated robbery. Attempted robbery without the element of the specific intent, if resisted, to kill, maim, or wound is a lesser included offense of aggravated robbery which requires the specific intent, if resisted, to kill, maim, or wound. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Third degree assault not included offense. Third degree assault requires proof of bodily injury, an element not necessary to culpability under robbery, and therefore, the former offense is not included within the latter. *People v. Flores*, 39 Colo. App. 556, 575 P.2d 11 (1977).

Theft is not lesser included offense of robbery. *People v. Moore*, 184 Colo. 110, 518 P.2d 944 (1974).

Theft by threat is not lesser offense included in robbery. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971); *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

Attempted robbery is not a lesser included offense of use of a stun gun. *People v. Bass*, 155 P.3d 547 (Colo. App. 2006).

Applied in *Martinez v. Tinsley*, 142 Colo. 495, 351 P.2d 879 (1960); *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975), overruled in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978); *People v. Lobato*, 192 Colo. 357, 559 P.2d 224 (1977); *People v. Maes*, 43 Colo. App. 426, 607 P.2d 1028 (1979); *People v. Brown*, 622 P.2d 109 (Colo. App. 1980); *Smith v. District Court*, 629 P.2d 1055 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. Thompson*, 655 P.2d 416 (Colo. 1982); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. Derrera*, 667 P.2d 1363 (Colo. 1983); *People v. Ward*, 673 P.2d 47 (Colo. App. 1983); *People v. Marquez*, 692 P.2d 1089 (Colo. 1984).

II. ELEMENTS OF OFFENSE.

A threat is defined as a declaration of purpose or intention to work injury to the person, property, or rights of another by the commission of an unlawful act. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971).

The gravamen of the offense is the manner of the taking. In robbery, the kind and value of the property taken is not material, and the gravamen of the offense being the manner of the taking. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933); *Sterling v. People*, 151 Colo. 127, 376 P.2d 676 (1962), cert. denied, 373 U.S. 944, 83 S. Ct. 1554, 10 L. Ed.2d 699 (1963).

The gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a transaction culminating in the taking of property from the victim's person or presence. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Force or fear being the main elements of the offense. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933); *People v. Thomas*, 181 Colo. 317, 509 P.2d 592 (1973).

The gist of the crime of simple robbery is the putting in fear and taking of property of another by force or intimidation. *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972); *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

The robbery statutes endorse the basic public policy that even rightful owners should not be permitted to use force to regain their property, once it has been taken. *People v. Searce*, 87 P.3d 228 (Colo. App. 2003).

The intent to steal is a substantive element in the commission of the crime of robbery. *People v. Gallegos*, 130 Colo. 232, 274 P.2d 608 (1954) (overruled in *People v. Moseley*, 193 Colo. 256, 566 P.2d 331 (1977)).

And the taking of property under a fair claim of right of possession does not constitute robbery. *People v. Gallegos*, 130 Colo. 232, 274 P.2d 608 (1954).

As when a creditor takes money from his debtor in satisfaction of an obligation, even though in so doing he uses force or intimidation, it cannot be regarded as robbery. *People v. Gallegos*, 130 Colo. 232, 274 P.2d 608 (1954).

Property is taken from the "presence of another" when it is so within the victim's reach, inspection or observation that he or she would be able to retain control over the property but for the force, threats, or intimidation directed by the perpetrator against the victim. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Benton*, 829 P.2d 451 (Colo. App. 1991); *People v. Fox*, 928 P.2d 820 (Colo. App. 1996); *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

It is immaterial that the victim was not in the motel lobby when defendant used force to

take away the victim's control of the cash register. Defendant's conduct in luring the victim to said defendant's apartment and attacking the victim there in order to steal the money from the cash drawer in the lobby was sufficient evidence to prove that defendant took something of value from the presence of the victim by the use of force. *People v. Clemons*, 89 P.3d 479 (Colo. App. 2003).

A motor vehicle can be taken from the "presence" of the owner even if the owner is still in the vehicle, the key element being the forcible seizure, from the owner, of the present ability to control the motor vehicle. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

A security guard, pursuant to his employment in a department store, was the custodian of property taken by the defendant, and had the right to exercise control over the property. *People v. Foster*, 971 P.2d 1082 (Colo. App. 1998).

Robbery includes the snatching of an object attached to the person of another if force is used to tear or break the attachment. *People v. Davis*, 935 P.2d 79 (Colo. App. 1996).

Force need not be contemporaneous with taking. There is no requirement that the application of force or intimidation must be virtually contemporaneous with the taking. *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983); *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

The required "taking" need not be accomplished personally by the robber. If the robber forces another to "take" the property, a robbery has occurred. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

The amount of the property is not an essential element of the offense. There is no provision in this section which makes the amount of property taken an essential element of the offense. Nor is there anything in the nature of robbery as defined by the common law from which it appears that the value of the property has ever been deemed of the essence of the crime. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

In robbery the kind or value of the property taken is immaterial. *Sterling v. People*, 151 Colo. 127, 376 P.2d 676 (1962), cert. denied, 373 U.S. 944, 83 S. Ct. 1554, 10 L. Ed.2d 699 (1963).

Since punishment does not depend on the value of the property. There is no occasion, as there is in theft, for alleging the value, as the punishment is not made to depend on the value of the property taken. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

Robbery requires no specific intent to permanently deprive the owner of the use or benefit of his property. *People v. Moseley*, 193 Colo. 256, 566 P.2d 331 (1977) (overruling *People v. Gallegos*, 130 Colo. 232, 272 P.2d 608 (1954)).

People v. Gallegos, 130 Colo. 232, 272 P.2d 608 (1954)).

Robbery of an at-risk adult is a lesser included offense of aggravated robbery; therefore, the conviction for robbery of an at-risk adult must be vacated because it merges with the aggravated robbery conviction. *People v. Lovato*, 179 P.3d 208 (Colo. App. 2007).

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

Information held sufficient. *Falgout v. People*, 170 Colo. 32, 459 P.2d 572 (1969).

An information which substantially follows the terms of this section, is expressed in plain language, and which is easily understood, is sufficient. *Albert v. People*, 90 Colo. 219, 7 P.2d 822 (1932).

Money referred to in information construed to mean money of the United States. Where the information under this section alleges that money was taken, money will be construed to mean money of the United States, and the court will take judicial notice of its value. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

It is not necessary to allege that person from whom property was taken was the owner thereof, since it is sufficient if it appears from the allegations that accused was not the owner. Regardless of the legal title, ownership may properly be laid in the person from whose physical possession the property was taken. *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961); *People v. Marquez*, 692 P.2d 1089 (Colo. 1984).

B. Defenses.

Defendant has right to use his mental condition at time of robbery as a defense on the merits of whether or not he had the requisite intent to commit the crime. *People v. Scheidt*, 186 Colo. 142, 526 P.2d 300 (1974).

Self-defense is not affirmative defense. Self-defense cannot justify the taking of a thing of value from the person or presence of another, and the lawfulness of the force used to accomplish the taking is immaterial. Therefore, self-defense is not an affirmative defense to the crime of aggravated robbery. *People v. Beebe*, 38 Colo. App. 80, 557 P.2d 840 (1976).

To present an affirmative defense for abandonment to the jury, defendant must present "some credible evidence" on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O'Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

C. Evidence.

Evidence of other crimes committed or attempted by accused is admissible to prove scienter, or guilty or criminal knowledge, with respect to the crime charged, if similar and occurring at or about the same time, or at a time not too remote. For such evidence to be admissible, such knowledge must be in issue or be an element of the offense charged, and the other offenses must be so connected with that charged as to throw light on the question. Proper evidence tending to show guilty knowledge is not to be excluded because disclosing the commission of a different crime by accused. *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961).

Recent and unexplained possession of fruits of robbery is an incriminating circumstance, and such fact, coupled with the other related facts and circumstances in the instant case, is deemed sufficient to support the verdict. *Martinez v. People*, 156 Colo. 380, 399 P.2d 415, cert. denied, 382 U.S. 866, 86 S. Ct. 134, 15 L. Ed.2d 104 (1965).

When a proper foundation has been laid, evidence that the property taken in the robbery in question was found in the possession of the accused shortly thereafter is admissible against him, subject to the rules governing the admissibility of evidence of the possession of the fruits of crime generally. There was no error in instructing the jury on this matter, even though the charge was robbery and not larceny. *Cruz v. People*, 147 Colo. 528, 364 P.2d 561 (1961), cert. denied, 368 U.S. 978, 82 S. Ct. 483, 7 L. Ed.2d 440 (1962).

A prima facie case of robbery is made out where the victim's wrist watch was later located in defendant's coat pocket, and the victim's pants pocket and billfold were later found on the floor in the back seat of the squad car in close proximity to defendant. *Sterling v. People*, 151 Colo. 127, 376 P.2d 676 (1962), cert. denied, 373 U.S. 944, 83 S. Ct. 1554, 10 L. Ed.2d 699 (1963).

One may be convicted upon uncorroborated testimony of accomplices, but to support a conviction it must be clear and convincing, must be received with great caution, and show guilt beyond a reasonable doubt. *Bowland v. People*, 136 Colo. 57, 314 P.2d 685 (1957), cert. denied, 355 U.S. 934, 78 S. Ct. 418, 2 L. Ed.2d 417 (1958).

Evidence that defendant closely resembles one of three men who held up a supermarket and forced an employee to open the safe, and whose codefendants testify that defendant was a participant, is sufficient to justify the jury in rejecting defendant's alibi and giving credence to the testimony of his codefendants. *Bowland v. People*, 136 Colo. 57, 314 P.2d 685 (1957), cert. denied, 355 U.S. 934, 78 S. Ct. 418, 2 L. Ed.2d 417 (1958).

Proof of robbery in felony murder case.

Specific intent is not a necessary element in the proof of the offense of robbery, the question of mental capacity to form intent is of no relevance in a felony murder case where in the commission of a robbery a death occurred. *Jones v. People*, 146 Colo. 40, 360 P.2d 686 (1961).

Where defendant was charged with committing murder while perpetrating a robbery, it was incumbent on the state to prove that a robbery occurred. The admission by the defendant that he committed the robbery does not prevent the state from presenting separate and independent proof of the fact admitted. *Bizup v. People*, 150 Colo. 214, 371 P.2d 786 (1962).

Evidence sufficient to sustain robbery conviction. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971); *People v. Goff*, 187 Colo. 103, 530 P.2d 514 (1974).

Where a defendant is properly charged with the crime of robbery, the robbery is shown to have occurred, and defendant's role as an accessory is proved, a prima facie case is made, and thus defendant may be properly convicted under this section, although he was an accessory. *Fernandez v. People*, 176 Colo. 346, 490 P.2d 690 (1971).

Where defendants' fingerprints were found on the inside of the entry door and on an envelope normally kept in a desk drawer in the victim's bedroom, and where defendants theorize that the prints could have been made at a time other than during the commission of the crime, but did not testify nor present other testimony to buttress the theory, the evidence was sufficient for conviction of robbery and conspiracy to commit robbery. *People v. Hannaman*, 181 Colo. 82, 507 P.2d 466 (1973).

D. Instructions.

Evidence in aggravated robbery case held insufficient to support instruction on simple robbery. *People v. Reed*, 180 Colo. 16, 502 P.2d 952 (1972).

Simple robbery instruction is mandatory when the evidence would justify acquitting a defendant of aggravated robbery while convicting him of simple robbery. *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981).

Where no rational basis for simple robbery conviction, court may refuse to instruct. Where the evidence presented to the jury showed, at a minimum, that the defendant had participated as a complicitor in the commission of an aggravated robbery, as proscribed by § 18-4-302, there was no rational basis on which the jury could have acted to acquit the defendant of aggravated robbery while convicting him of simple robbery, and the trial court did not therefore err in refusing to instruct the jury on the latter offense. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Required instructions by court. Where the defendant is charged with aggravated robbery and declines the court's offer to instruct on simple robbery, the court is obligated to instruct on the lesser nonincluded offense of theft only if there is no evidence of the defendant's guilt of the lesser included offense of simple robbery. *People v. Graham*, 41 Colo. App. 390, 590 P.2d 511 (1978), *aff'd*, 199 Colo. 439, 610 P.2d 494 (1980).

Instruction on theft refused. The trial court did not commit error in refusing to instruct the jury on the crime of larceny where the defendant's theory of the case and his defense were based upon mistaken identity and alibi, and the only evidence presented relating to the incident of the offense was that presented by the people, all of which supported robbery. It is not error for a court to have refused a tendered instruction concerning an issue regarding which no facts were presented. *Leyba v. People*, 174 Colo. 1, 481 P.2d 417 (1971).

An instruction that a charge of robbery carries with it the lesser included offense of petty and grand theft would have been improper, since the kind and value of the property taken in a robbery is immaterial. *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

Lesser offense instruction is properly refused when an element that distinguishes the greater offense from the lesser offense is uncontested. Thus, defendant charged with aggravated robbery and felony murder was not entitled to lesser theft offense instruction because there was no evidence disputing the use of force against, and the killing of, the victim. *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Test applicable to defendant's request for an instruction on the crime of theft is whether there existed a rational basis to acquit him of simple robbery but still convict him of theft; the test is not whether there is a total absence of evidence showing the defendant to be guilty of simple robbery. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Where, at a minimum, defendant committed simple robbery, no theft instruction. Because the uncontested evidence before the jury established, at a minimum, that the defendant had committed simple robbery, he was not entitled to an instruction on the crime of theft. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Trial court properly included in jury instruction language from another case that concerned the definition of "presence". *People v. Benton*, 829 P.2d 451 (Colo. App. 1991).

Money was not taken in "presence" of movie theater ticket taker since money was

not in the physical possession of ticket taker and since ticket taker did not have right to exercise control over the money. *People v. Ridenour*, 878 P.2d 23 (Colo. App. 1994).

IV. VERDICT AND SENTENCE.

Proof of intent sufficient to support conviction. Proof of an intent to force the giving up of a thing of value is sufficient to support a conviction for robbery. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Verdicts on offense and conspiracy must be consistent. If counsel for the people insist upon submitting to the jury a count of conspiracy as well as a count of robbery where the evidence which would convict upon either charge is exactly the same, the jury should be instructed that it cannot convict on one count and acquit on the other. *People v. Way*, 165 Colo. 161, 437 P.2d 535 (1968).

General verdict treated as conviction of lesser offense. Where a proper instruction on simple robbery was given and the evidence was sufficient to sustain a verdict of guilty on the lesser included offense of simple robbery, the supreme court elected to treat the verdict of guilty "as charged" as a verdict of guilty of simple robbery. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Convictions for two counts of robbery arising out of the same criminal episode are not multiplicitous. The issue turns on whether two robberies can arise out of a single taking of property. The inquiry then focuses on whether the crime of robbery is intended to protect people or property. If robbery is intended to protect people, a single taking could support multiple convictions if the one item is taken from multiple people with control over the item. The plain language of the robbery statute is ambiguous as to whether it is intended to protect people or property. The common law history of robbery and case law indicates robbery statutes are intended to protect people. Therefore, a single taking can support multiple convictions for robbery if the taking is made in the presence of multiple victims. *People v. Borghesi*, 66 P.3d 93 (Colo. 2003).

Defendant's acts constitute separate offenses as to each victim and conviction is not multiplicitous where the common property taken from the first victim was taken in the second victim's presence. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

Defendant's sentence of eight to nine years for simple robbery was not excessive. *People v. Nierle*, 624 P.2d 1333 (Colo. 1981).

18-4-302. Aggravated robbery. (1) A person who commits robbery is guilty of aggravated robbery if during the act of robbery or immediate flight therefrom:

(a) He is armed with a deadly weapon with intent, if resisted, to kill, maim, or wound the person robbed or any other person; or

(b) He knowingly wounds or strikes the person robbed or any other person with a deadly weapon or by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person robbed or any other person in reasonable fear of death or bodily injury; or

(c) He has present a confederate, aiding or abetting the perpetration of the robbery, armed with a deadly weapon, with the intent, either on the part of the defendant or confederate, if resistance is offered, to kill, maim, or wound the person robbed or any other person, or by the use of force, threats, or intimidation puts the person robbed or any other person in reasonable fear of death or bodily injury; or

(d) He possesses any article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or represents verbally or otherwise that he is then and there so armed.

(2) Repealed.

(3) Aggravated robbery is a class 3 felony and is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10).

(4) If a defendant is convicted of aggravated robbery pursuant to paragraph (b) of subsection (1) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

Source: **L. 71:** R&RE, p. 427, § 1. **C.R.S. 1963:** § 40-4-302. **L. 77:** (1)(b) amended, p. 963, § 23, effective July 1. **L. 86:** (4) added, p. 777, § 9, effective July 1. **L. 89:** (1)(d) added and (2) repealed, pp. 831, 861, §§ 43, 156, effective July 1. **L. 90:** (1)(c) amended, p. 925, § 9, effective March 27. **L. 2002:** (4) amended, p. 1515, § 197, effective October 1. **L. 2004:** (3) amended, p. 636, § 8, effective August 4.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
- III. Trial and Prosecution.
 - A. Indictment and Information.
 - B. Evidence.
 - C. Jury.
 - D. Instructions.
- IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986).

Annotator's note. Since § 18-4-302 is similar to former § 40-5-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not violative of equal protection. *People v. Aragon*, 653 P.2d 715 (Colo. 1982).

The term "aggravated robbery" means a robbery committed with a dangerous weapon and with the intent, if resisted, to kill, maim, or wound the victim or other person. *Johnson v. People*, 174 Colo. 75, 482 P.2d 105 (1971).

This section provides that the crime of aggravated robbery is established if in the perpetration of such robbery the accused is armed with a dangerous weapon with intent, if resisted, to kill, maim, or wound the person robbed or any other person. *Vigil v. People*, 158 Colo. 268, 406 P.2d 100 (1965).

"Robbery" in felony murder provision used in generic sense. The term "robbery", as used in the felony murder statute, is to be construed as meaning this type of felony in its generic sense, including all types of robbery as defined in the statutes. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Any resulting death from robbery supports felony murder conviction. Any death that results in the course of any type of robbery may serve as a basis for a felony murder conviction, and all such types of robbery are necessarily merged in a felony murder charge. *People v. Raymer*, 626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Aggravated robbery was merged in the offense of felony murder and the constitutional protection against double jeopardy precludes conviction for both offenses. *People v. Raymer*,

626 P.2d 705 (Colo. App. 1980), *aff'd*, 662 P.2d 1066 (Colo. 1983).

Aggravated robbery is robbery committed under circumstances in which the actor's conduct creates an increased risk of injury to the victim or instills in the victim an enhanced fear of death or injury. *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Attempt to commit aggravated robbery requires same culpability plus substantial step. Criminal attempt to commit aggravated robbery requires that the offender act with the kind of culpability otherwise required for aggravated robbery and engage in a substantial step toward the commission of aggravated robbery. *People v. Ledman*, 622 P.2d 534 (Colo. 1981).

Explanation of terms before plea of guilty. Where a defendant attempts to plead guilty to a violation of this section, it is mandatory that the court explain to him the nature and elements of "aggravated" robbery, and determine that the accused understands the nature of the charge. *People v. Riney*, 176 Colo. 221, 489 P.2d 1304 (1971).

A dangerous weapon is an article of offense which in its intended or easily adaptable use is likely to produce death or serious bodily injury. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

"Aggravated" and "simple" robbery are but two degrees of the same offense. The former requires that the perpetrator have the intent, if resisted, to kill, maim, or wound the victim. The latter offense does not require this intent. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Aggravated robbery is distinguished from simple robbery by the fact that the accused or a confederate is armed with a dangerous weapon with the intent, if resisted, to maim, wound, or kill. *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972).

Simple robbery is a lesser included offense within the charge of aggravated robbery. *People v. Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (1975).

Simple robbery distinguished. The essential difference between simple robbery and that form of aggravated robbery requiring the culpability element of "knowingly" is that the latter offense requires the defendant to "knowingly" put the person robbed or any other person in reasonable fear of death or bodily injury by the use of force, threats or intimidation with a deadly weapon. *People v. Aragon*, 653 P.2d 715 (Colo. 1982).

Felony menacing distinguished. The offense of aggravated robbery may be committed without also committing felony menacing; no merger occurs because the requirement in the felony menacing statute that the actor knowingly place a victim in fear of "serious bodily injury" is distinguishable from the requirement that the robber knowingly place a victim in fear

of "bodily injury". *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

Criminal attempt to commit aggravated robbery requires that the offender act with the kind of culpability otherwise required for the commission of aggravated robbery and that he engage in conduct constituting a substantial step towards the commission of that offense. *People v. Aragon*, 653 P.2d 715 (Colo. 1982).

Conviction of attempted aggravated robbery does not require a showing of specific intent to commit the underlying crime. *People v. Krovarz*, 697 P.2d 378 (Colo. 1985).

Convictions of both aggravated robbery and conspiracy to commit robbery do not violate double jeopardy. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Conviction for aggravated robbery and commission of a crime of violence does not violate double jeopardy and equal protection. *People v. Schruder*, 735 P.2d 905 (Colo. App. 1986).

Stipulation by attorney that a guilty verdict to aggravated robbery also established that the defendant was guilty of a crime of violence did not violate defendant's rights since the jury returned a verdict which showed that it found that the defendant placed another in fear by the use of a deadly weapon and since defendant failed to show how a special interrogatory could have produced a different result. *People v. McMullen*, 738 P.2d 23 (Colo. App. 1986).

When the crime of violence statute is superimposed on convictions for both aggravated robbery and simple robbery, there are real differences between the two forms of robbery. These differences provide substantial support for the disparate penalty applicable to a crime of violence finding which is superimposed on a conviction for aggravated robbery, and such does not violate equal protection of the laws. *People v. Young*, 758 P.2d 667 (Colo. 1988).

It is possible to commit an aggravated robbery without contemporaneously perpetrating a second degree assault. *People v. Grant*, 40 Colo. App. 46, 571 P.2d 1111 (1977); *People v. Toomer*, 43 Colo. App. 182, 604 P.2d 1180 (1979).

Assault with intent to rob is lesser included offense of aggravated robbery. Therefore, since assault with intent to rob is a lesser included offense of aggravated robbery, it was error for the court to permit both verdicts to stand. Thus, the conviction on the lesser included offense must be set aside. *People v. Stephens*, 188 Colo. 8, 532 P.2d 728 (1975).

As is attempted robbery. Attempted robbery without the element of the specific intent, if resisted, to kill, maim, or wound is a lesser included offense of aggravated robbery which requires the specific intent, if resisted, to kill,

maim, or wound. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

If a robbery or attempted robbery is established but without additional specific intent, if resisted, to kill, maim, or wound, a person charged with aggravated robbery or attempted aggravated robbery can be found guilty of simple robbery or attempted simple robbery under the lesser included offense in a case where only the greater crime is charged. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Aggravated robbery and assault with intent to murder separate offenses. The offense of assault with intent to murder requires proof of a specific intent to kill, a fact not necessary to sustain a charge of aggravated robbery. On the other hand, aggravated robbery requires proof of a robbery, a fact not necessary for assault. Therefore, punishment for both of these offenses committed during one course of conduct does not violate the constitutional prohibition against double jeopardy for the same offense. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

An argument of the defendants, based on the assumption that to be guilty of aggravated robbery they had to be guilty of assault with intent to murder, is clearly unfounded. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Double jeopardy barred convictions for both aggravated robbery and assault with a deadly weapon. Under the former criminal code, it was impossible to commit aggravated robbery without contemporaneously perpetuating an assault with a deadly weapon. Since assault with a deadly weapon was the lesser included offense, double jeopardy barred a conviction for both crimes. *People v. Hancock*, 186 Colo. 30, 525 P.2d 435 (1974).

Lesser included offense. Attempt to commit robbery is a lesser included offense of attempt to commit aggravated robbery. *People v. Johnson*, 634 P.2d 407 (Colo. 1981).

When aggravated robbery is lesser included offense of felony murder. Where the defendant's conviction for felony murder is based upon the causation of the robbery victim's death during the course of the robbery, a charge of aggravated robbery of the same victim is a lesser included offense of the felony murder charge within the meaning of § 18-1-408(5)(c). *People v. Raymer*, 662 P.2d 1066 (Colo. 1983).

Where defendant was convicted of aggravated robbery and was adjudicated a habitual criminal, a subsequent reversal of the adjudication of habitual criminality negated its sentence enhancing effect and required resentencing for the underlying charge since it was not clear from the record that the robbery sentence was imposed independently from the habitual criminal adjudication. When resentencing the trial court could consider all relevant and material factors, including new evidence incor-

porated in a supplemental presentence report. *People v. Watkins*, 684 P.2d 234 (Colo. 1984).

Applied in *Bernard v. Tinsley*, 144 Colo. 244, 355 P.2d 1098 (1960), cert. denied, 365 U.S. 830, 81 S. Ct. 718, 5 L. Ed.2d 708 (1961); *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965); *Cowman v. People*, 157 Colo. 120, 401 P.2d 831 (1965); *Bustos v. People*, 158 Colo. 451, 408 P.2d 64 (1965); *Neighbors v. People*, 161 Colo. 587, 423 P.2d 838 (1967); *Jaggers v. People*, 174 Colo. 430, 484 P.2d 796 (1971); *People v. Marchese*, 37 Colo. App. 65, 541 P.2d 1264 (1975); *People v. Brionez*, 39 Colo. App. 396, 570 P.2d 1296 (1977); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *Wells v. People*, 197 Colo. 350, 592 P.2d 1321 (1979); *People v. Culbertson*, 198 Colo. 153, 596 P.2d 1200 (1979); *Watson v. District Court*, 199 Colo. 76, 604 P.2d 1165 (1980); *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980); *People v. Cabral*, 629 P.2d 575 (Colo. 1981); *People v. Moody*, 630 P.2d 74 (Colo. 1981); *People v. Bravo*, 630 P.2d 612 (Colo. 1981); *People v. Scott*, 630 P.2d 615 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Swanson*, 638 P.2d 45 (Colo. 1981); *People v. Lowery*, 642 P.2d 515 (Colo. 1982); *People v. Bueno*, 646 P.2d 931 (Colo. 1982); *People v. Hogan*, 649 P.2d 326 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982); *People v. Cooper*, 662 P.2d 478 (Colo. 1983); *People v. Akins*, 662 P.2d 486 (Colo. 1983).

II. ELEMENTS OF OFFENSE.

Culpable mental state implied. A statute will be presumed to conform to constitutional requirements, and a culpable mental state will be implied from a particular statute which does not contain an intent element on its face. *People v. Smith*, 620 P.2d 232 (Colo. 1980).

Intent is a necessary element in the proof of aggravated robbery, and this section, covering the offense, must be given its full force and effect. *Funk v. People*, 90 Colo. 167, 7 P.2d 823 (1932); *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

It is not essential that a bandit must demonstrate an intent to kill, maim, or wound the victim of the holdup. *Vigil v. People*, 158 Colo. 268, 406 P.2d 100 (1965).

Fact that defendant was armed with intent to harm only goes to the grade and punishment of crime. In a prosecution for aggravated robbery under this section, the fact that defendant was armed with a dangerous weapon with intent to kill or wound his victim if resisted, is not the essence of the offense of robbery, and proof of these facts is not necessary for a conviction, but goes only to the grade of the crime

and punishment to be inflicted. *Funk v. People*, 90 Colo. 167, 7 P.2d 823 (1932).

Being dangerously armed and having the intent described are not essential to the perpetration of a robbery, but proof thereof goes to the degree of the crime, and affects only the punishment to be suffered in event of conviction. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

A simulated pistol, not per se dangerous, may become so factually because of its substance, size, and weight as a bludgeon wielded within striking distance of the person to be robbed. *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965).

Section 18-1-901 prescribes test to determine whether certain items constitute deadly weapons. Section 18-1-901 (3)(e) expressly prescribes a test to determine whether items other than firearms, knives, and bludgeons are deadly weapons, based not on the intrinsic nature of the items but upon their use or intended use. *Bowers v. People*, 617 P.2d 560 (Colo. 1980).

Armed with and in possession of a deadly weapon. This element of aggravated robbery may be proven by relying on presumption created by subsection (2). *People v. Castenada*, 765 P.2d 641 (Colo. App. 1988), cert. denied, 782 P.2d 1197 (Colo. 1989).

Quart bottle of whiskey is not a bludgeon but it may satisfy the statutory test defining a deadly weapon as a "device, instrument, material, or substance, ... which in the manner it is used ... is capable of producing death or serious bodily injury". *Bowers v. People*, 617 P.2d 560 (Colo. 1980).

The state of mind or intent is usually manifested by circumstances and proof thereof necessarily is by circumstantial evidence, and, of course, such intent is ordinarily inferable from the facts. The state of mind of the defendant is concealed within the mind and is not usually, perhaps never, susceptible of direct proof. *Ruark v. People*, 157 Colo. 320, 402 P.2d 637 (1965).

Circumstantial evidence is sufficient to at least present a jury question as to whether the defendant possessed the requisite specific intent to maim, wound, or kill, if resisted. *Elliott v. People*, 176 Colo. 373, 490 P.2d 687 (1971).

Constitutionality and intent of subsection (2). Clearly, the intent of the general assembly in passing subsection (2) was to prevent armed robbers from escaping aggravated robbery charges by simply concealing deadly weapons in their pockets or under other wraps or devices. Recognizing this legislative intent, the constitutionality of the statute is upheld. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Subsection (2) does not unconstitutionally

deny defendant equal protection of the laws by removing the only real distinction between simple and aggravated robbery. *People v. Murphy*, 192 Colo. 411, 559 P.2d 708 (1977).

Or due process. Subsection (2) of this section, which makes a robber's representation that he is armed prima facie evidence that he is in fact armed, does not deny a defendant due process by shifting the prosecution's burden of proof. *People v. Hawkins*, 192 Colo. 535, 560 P.2d 833 (1977).

The presumption created by subsection (2) does not violate a defendant's constitutional right against self-incrimination. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

As it permits jury inference as to possession. The presumption created by subsection (2) meets the test described by the United States supreme court in that it permits the jury to infer that the defendant actually possessed a deadly weapon when he has made such a representation to another. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Prosecution must still prove additional element. Subsection (2) merely permits the jury to infer that a defendant told the truth when he asserted that he was armed. The prosecution is still required to prove an additional element over and above what is required to prove simple robbery. *People v. Murphy*, 192 Colo. 411, 559 P.2d 708 (1977).

Shifts only part of burden to defendant. The statutory presumption created by subsection (2) does not shift the entire burden of proof to the defendant, but merely the burden of going forward with respect to certain evidence. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Instruction regarding subsection (2) did not shift the burden of proof; rather, the instruction and statute merely shifted the burden of going forward with respect to certain evidence. *People v. Jones*, 191 Colo. 385, 553 P.2d 770 (1976).

This section and an instruction phrased in the language of this section, with the exception that it does not state that representations of being armed shall be considered "prima facie" evidence that the defendant was armed, do not operate to shift the burden of proof. *People v. Hawkins*, 192 Colo. 535, 560 P.2d 833 (1977).

Attempted robbery without aggravation does not include any element not included in attempted robbery with aggravation. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Inference of possession by victim. In the light of common sense and experience, the victim of a robbery — possessed of reasonable belief — may infer that a defendant possesses a deadly weapon if the defendant makes such a representation. *People v. Lorio*, 190 Colo. 373, 546 P.2d 1254 (1976).

Simple robbery and aggravated robbery both require the intent to rob. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

III. TRIAL AND PROSECUTION.

A. Indictment and Information.

Information held sufficient. Johnson v. Tinsley, 155 Colo. 346, 394 P.2d 842 (1964).

Indictment need not specify which method of committing offense charged. As in the case of principals and complicitors, an indictment under this section need not specify which of the two methods of committing the offense is being charged. People v. Martinez, 42 Colo. App. 307, 600 P.2d 82 (1979).

Variance between indictment and proof not fatal to prosecution. A variance between the indictment, which accused defendant of having an armed confederate present, and the proof, which showed defendant as the person armed, was not fatal to a prosecution under this section. People v. Martinez, 42 Colo. App. 307, 600 P.2d 82 (1979).

B. Evidence.

Evidence of conspiracy to commit aggravated robbery is not inadmissible and is not meaningless and to be ignored merely because plans to commit robbery were frustrated and ended with commission of second degree assault. People v. Shannon, 189 Colo. 287, 539 P.2d 480 (1975).

Admission of weapon proper. Where no weapon was seen by victim of aggravated robbery, and where tire iron found by cash register did not belong to service station and had not been seen in service station prior to robbery, and where wound on victim's head appeared to have been inflicted by tire tool or similar instrument, admission of tire tool was not error. People v. Bedwell, 181 Colo. 20, 506 P.2d 365 (1973).

Evidence of intent sufficient to go to jury. McGraw v. People, 154 Colo. 368, 390 P.2d 819 (1964).

Where it was contended that the evidence was insufficient to prove beyond a reasonable doubt that the gunman had the requisite specific intent, if resisted, to kill, maim, or wound the person robbed or any other person, it was held that the record showed sufficient circumstances from which the jury could reasonably infer that the gunman had the state of mind necessary to sustain the conviction of aggravated robbery. Schott v. People, 174 Colo. 15, 482 P.2d 101 (1971).

The pointing of the gun in a threatening manner is sufficient to support the finding of specific intent. Schermerhorn v. People, 175 Colo. 256, 486 P.2d 428 (1971).

A threat by a defendant to shoot a victim is sufficient to require submission of an aggravated robbery charge to a jury. Candelaria v. People, 177 Colo. 136, 493 P.2d 355 (1972).

Evidence held sufficient to support conviction of aggravated robbery. Atwood v. People,

176 Colo. 183, 489 P.2d 1305 (1971); People v. Bedwell, 181 Colo. 20, 506 P.2d 365 (1973); People v. Renfro, 181 Colo. 159, 508 P.2d 396 (1973); People v. Hawkins, 192 Colo. 535, 560 P.2d 833 (1977); People v. Moseley, 193 Colo. 256, 566 P.2d 331 (1977); People v. Larson, 194 Colo. 338, 572 P.2d 815 (1977); People v. Williams, 40 Colo. App. 30, 569 P.2d 339 (1977); People v. Bowers, 42 Colo. App. 467, 600 P.2d 95 (1979); People v. Gregg, ___ P.3d ___ (Colo. App. 2011).

Where defendant is found hiding near scene of robbery with some of the masks and other items used to perfect the robbers' disguise, evidence against him is substantial and supports his conviction. Velarde v. People, 179 Colo. 207, 500 P.2d 125 (1972).

Evidence sufficient to sustain attempted aggravated robbery conviction. People v. Williams, 40 Colo. App. 30, 569 P.2d 339 (1977).

Evidence sustained defendant's conviction as accessory to aggravated robbery. People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

C. Jury.

Questions for jury. Under an information charging aggravated robbery under this section, the jury must first determine from the evidence whether or not a robbery was committed, and if so, whether defendant was armed with dangerous weapons, and had the intent, if resisted, to kill or wound his victim. Funk v. People, 90 Colo. 167, 7 P.2d 823 (1932).

Character of weapon is jury question. Whether an article used as a weapon is dangerous may be, because of its very character or the circumstances of its use, a matter of doubt, and in such case the question should be left to the jury under an instruction as to what constitutes a dangerous weapon. Hutton v. People, 156 Colo. 334, 398 P.2d 973 (1965).

D. Instructions.

Instructions on culpable mental state. A culpable mental state is a requisite element of aggravated robbery. If jury instructions taken as a whole are confusing, or imply that no mental state is required to convict, these instructions are constitutionally deficient. People v. Ward, 673 P.2d 47 (Colo. App. 1983).

Instructions using term "aggravated". The use of the word "aggravated" in the information is a matter of form only. There was no objection to instructions which used the word "aggravated", and this did not constitute plain error affecting substantial rights. Moore v. People, 164 Colo. 222, 434 P.2d 132 (1967).

Simple robbery instruction is mandatory when the evidence would justify acquitting a defendant of aggravated robbery while convict-

ing him of simple robbery. *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981).

Where no rational basis for simple robbery conviction, court may refuse to instruct. Where the evidence presented to the jury showed, at a minimum, that the defendant had participated as a complicitor in the commission of an aggravated robbery, as proscribed by this section, there was no rational basis on which the jury could have acted to acquit the defendant of aggravated robbery while convicting him of simple robbery, and the trial court did not therefore err in refusing to instruct the jury on the latter offense. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Use of term "simple robbery". Where the trial court failed to instruct the jury as to what the court meant in referring to "simple robbery" as a lesser included offense of aggravated robbery, but where the instruction in question was worded substantially in the language of the statute, and the record shows that the instructions when read as a whole are not complicated nor difficult to understand, and the jury was fully capable of understanding the concept of "simple robbery" as a lesser included offense of aggravated robbery, there was no error. *People v. Dago*, 179 Colo. 1, 497 P.2d 1261 (1972).

Instruction on specific intent must be delivered to the jury in cases of aggravated robbery. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

A defendant charged with aggravated robbery is entitled to an instruction on the element of specific intent to kill, maim, or wound, if resisted, whether requested or not. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Failure to so instruct requires reversal. A verdict of guilty cannot stand where the element of specific intent is material as to one count of the information or indictment which is related to and joined with a count of conspiracy, when the court's instructions on intent covering either count are erroneous. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

Where the supreme court fails to properly instruct the jury on a necessary element of the crime charged, a verdict of guilty as to aggravated robbery cannot stand. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Where intent is uncertain, jury must be instructed as to simple robbery. In a prosecution for aggravated robbery under this section, there being evidence tending to negative the specific intent necessary to constitute the crime, it was reversible error for the trial court to refuse to instruct the jury on the question of simple robbery, and to refuse to submit to it a form of verdict covering that feature of the case. *Funk v. People*, 90 Colo. 167, 7 P.2d 823 (1932).

Where aggravated robbery has been charged, the trial judge must give an instruction on the lesser offense of simple robbery when such in-

struction is requested by the defendant and when it is supported by the evidence. *Hollon v. People*, 170 Colo. 432, 462 P.2d 490 (1969); *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970); *People v. Reed*, 180 Colo. 16, 502 P.2d 952 (1972).

Where the jury can convict defendants of aggravated robbery, it is not prejudicial error to submit instructions and verdicts to the jury on the offense of simple robbery. *Atwood v. People*, 176 Colo. 183, 489 P.2d 1305 (1971).

Refusal may be reversible error. There was testimony from the victim that there was no violence and no threats. The only evidence of intent was the presence of the loaded pistol. The evidence was such that the jury could find that the people had failed to prove the element of specific intent beyond a reasonable doubt, thus, it was reversible error for the trial judge to refuse to instruct, as requested, on simple robbery. *Hollon v. People*, 170 Colo. 432, 462 P.2d 490 (1969).

Required instructions by court. Where the defendant is charged with aggravated robbery and declines the court's offer to instruct on simple robbery, the court is obligated to instruct on the lesser nonincluded offense of theft only if there is no evidence of the defendant's guilt of the lesser included offense of simple robbery. *People v. Graham*, 41 Colo. App. 390, 590 P.2d 511 (1978), *aff'd*, 199 Colo. 439, 610 P.2d 494 (1980).

Lesser theft offense instruction is properly refused when an element that distinguishes the greater offense of aggravated robbery from the lesser offense is uncontested. Defendant charged with aggravated robbery and felony murder was not entitled to lesser theft offense instruction because there was no evidence disputing the use of force against, and the killing of, the victim. *People v. Villalobos*, 159 P.3d 624 (Colo. App. 2006).

Evidence in aggravated robbery case held insufficient to support instruction on simple robbery. *Sisneros v. People*, 174 Colo. 543, 484 P.2d 1207 (1971); *People v. Reed*, 180 Colo. 16, 502 P.2d 952 (1972).

Where the suspect pursued by police fired a shot, the defendant charged with aggravated robbery was not entitled to an instruction on simple robbery; he had manifested the specific intent to maim, wound, or kill, if resisted, and placed himself outside of the ambit of the rule requiring an instruction on the lesser offense. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

Refusal of accessory instruction proper. The court's refusal to instruct the jury that the crime of accessory during the fact is also a lesser included offense when robbery is charged, which was the defendant's principal theory of the case, was not error because accessory during the fact is a separate and distinct offense which

was not charged and which could not properly have been the subject of an instruction. *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

The term “confederate” as used in subsection (1)(c) means more than a bystander. The confederate must be “aiding and abetting the perpetration of the robbery”. *People v. Wilford*, 111 P.3d 512 (Colo. App. 2004).

The term “confederate” is not a highly technical one and is well within the comprehension of the jury. The trial court did not err, therefore, in rejecting defendant’s jury instruction that incorporated a definition of “confederate” from a legal dictionary or in declining to define the term. *People v. Wilford*, 111 P.3d 512 (Colo. App. 2004).

Instruction based on subsection (2) properly refused. There being no question that a deadly weapon had been utilized during the robbery, no issue concerning subsection (2) of this section was raised. Hence, the trial court properly refused a tendered instruction based on that subsection. *People v. Roberts*, 37 Colo. App. 490, 553 P.2d 93 (1976).

Instruction adequate. Where the jury was instructed in plain understandable English that a conviction for aggravated robbery requires that the defendant have the specific intent to kill, maim, or wound, if resisted in his attempt to commit the robbery, that instruction, read together with the other instruction requiring the people to prove every element beyond a reasonable doubt, adequately apprised the jury of the law, and the jury was adequately instructed on the elements of aggravated robbery. *People v. Crawford*, 183 Colo. 166, 515 P.2d 631 (1973).

Because the jury indicated it was confused about the meaning of the phrase “use of force or threat or intimidation” and whether carrying a gun meant the same as using a gun, it was proper for the court to give a supplemental instruction. *People v. Wilford*, 111 P.3d 512 (Colo. App. 2004).

An instruction which permits the jury to draw inferences from the unexplained possession of recently stolen property is proper in cases where robbery is charged. *People v. Grubbs*, 39 Colo. App. 436, 570 P.2d 1299 (1977).

To present an affirmative defense for abandonment to the jury, defendant must present “some credible evidence” on the issue of the claimed defense. It is not necessarily the case, however, that the defense of abandonment is not available once defendant has injured the victim. *O’Shaughnessy v. People*, 2012 CO 9, 269 P.3d 1233.

IV. VERDICT AND SENTENCE.

Verdicts held not inconsistent. Since the statutory elements of aggravated robbery and theft over \$200 (now \$300) are different, jury

verdicts convicting a defendant of aggravated robbery of an employee but acquitting the defendant of theft from the employer are not inconsistent and repugnant. *People v. Williams*, 40 Colo. App. 30, 569 P.2d 339 (1977).

Assault with a deadly weapon is a lesser included offense of aggravated robbery, and since the jury convicted the defendant of aggravated robbery, his conviction for the included offense of assault with a deadly weapon must be set aside. *People v. Bugarin*, 181 Colo. 62, 507 P.2d 875 (1973).

Acquittal of conspiracy charge required. Where the very same evidence which the jury did not believe was sufficient to prove that the defendant participated in the robbery was the only evidence which could prove him guilty of conspiracy, the conspiracy verdict could not stand. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Verdict of aggravated robbery sufficient. A verdict in a prosecution under this section which finds the defendant guilty of “robbery with a deadly weapon, to-wit, a gun”, is not insufficient because it does not include the words, “as charged in the information”, or does not more definitely specify the crime as defined by statute. *Van Diest v. People*, 71 Colo. 121, 204 P. 606 (1922).

Where the charge in count one of the information alleged that defendant committed the robbery with the intent to maim, wound, or kill, if resisted, the trial court instructed specifically in the elements necessary to sustain the charge of “aggravated” robbery, and the jury found defendant guilty of “aggravated” robbery “as charged in the first count of the information”, this was sufficient to warrant the imposition of the more severe penalty authorized by this section when a robbery is committed with intent to maim, wound, or kill, if resisted. *Lucero v. People*, 173 Colo. 94, 476 P.2d 257 (1970).

Where the verdict states that defendant is found guilty of “aggravated robbery as charged in the information herein”, and the information describes in detail the more serious robbery involving the increased punishment, there remains no basis for the argument that the verdict found the defendant guilty of only simple robbery. *Johnson v. People*, 174 Colo. 75, 482 P.2d 105 (1971).

Verdict treated as conviction of simple robbery. Where the defendant is charged with aggravated robbery, but the case is submitted to the jury upon an instruction for simple robbery, and the jury returns a verdict of “guilty as charged”, the court should treat the verdict as a finding of guilty as to simple robbery. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

A charge of aggravated robbery and commission of a violent crime require consistent verdicts when based upon the same facts. *People v. Castenada*, 765 P.2d 641 (Colo. App.

1988), cert. denied, 782 P.2d 1197 (Colo. 1989).

Conviction for conspiracy to commit aggravated robbery, as defined in subsection (1)(b), necessarily requires crime of violence sentencing. *People v. Terry*, 961 P.2d 500 (Colo. App. 1997), aff'd, 977 P.2d 145 (Colo. 1999).

Consecutive sentences for aggravated robbery convictions not mandatory where defendant was not separately charged with a "crime of violence" and was convicted under this section generally, but not subsection (1)(b) specifically. *People v. McCoy*, 944 P.2d 577 (Colo. App. 1996).

Use of a sealed verdict in prosecution for aggravated robbery was not improper. *People v. Herrera*, 182 Colo. 302, 512 P.2d 1160 (1973).

Fifteen to 20-year sentence for aggravated robbery was not excessive. *People v. Colasanti*, 626 P.2d 1136 (Colo. 1981).

It was not improper for trial court to consider during sentencing that violent crimes have a greater public impact in small rural communities than in larger urban ones since a sentencing court should always consider the interests of the public involved and this factor was not decisive of the court's decision. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

18-4-303. Aggravated robbery of controlled substances. (1) A person who takes any controlled substance, as defined in section 18-18-102 (5), from any pharmacy or other place having lawful possession thereof or from any pharmacist or other person having lawful possession thereof under the aggravating circumstances defined in section 18-4-302 is guilty of Aggravated robbery of controlled substances.

(2) Aggravated robbery of controlled substances is a class 2 felony.

Source: **L. 73:** p. 572, § 11. **C.R.S. 1963:** § 40-4-303. **L. 81:** (1) and (2) amended, pp. 737, 974, §§ 21, 11, effective July 1. **L. 2012:** (1) amended, (HB 12-1311), ch. 281, p. 1619, § 43, effective July 1.

ANNOTATION

Culpable mental state is element of crime. Because aggravated robbery of drugs is merely a variant of the common-law crime of aggravated robbery, the culpable mental state of "knowingly" is a requisite element of the crime. *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983).

Necessity of chemical testing. While the better practice is to subject narcotics evidence to chemical analysis, chemical testing is not nec-

Convictions for two counts of aggravated robbery arising out of the same criminal episode are not multiplicitous. The issue turns on whether two robberies can arise out of a single taking of property. The inquiry then focuses on whether the crime of robbery is intended to protect people or property. If robbery is intended to protect people, a single taking could support multiple convictions if the one item is taken from multiple people with control over the item. The plain language of the robbery statute is ambiguous as to whether it is intended to protect people or property. The common law history of robbery and case law indicates robbery statutes are intended to protect people. Therefore, a single taking can support multiple convictions for robbery if the taking is made in the presence of multiple victims. *People v. Borghesi*, 66 P.3d 93 (Colo. 2003); *People v. Clifton*, 74 P.3d 519 (Colo. App. 2003).

Defendant's acts constitute separate offenses as to each victim and conviction is not multiplicitous where the common property taken from the first victim was taken in the second victim's presence. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

essary in all cases to prove that the items taken in a robbery were in fact "narcotic drugs". *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978).

Aggravated robbery of drugs from a pharmacy is a separate offense and not merely a punishment enhancement statute for aggravated robbery. *Ramirez v. People*, 682 P.2d 1181 (Colo. 1984).

18-4-304. Robbery of the elderly or disabled - legislative declaration. (Repealed)

Source: **L. 79:** Entire section added, p. 734, § 2, effective July 1. **L. 80:** (4) amended, p. 794, § 48, May 1. **L. 93:** Entire section repealed, p. 1742, § 42, effective July 1.

18-4-305. Use of photographs, video tapes, or films of property. Pursuant to section 13-25-130, C.R.S., photographs, video tapes, or films of property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully are

competent evidence if the photographs, video tapes, or films are admissible into evidence under the rules of law governing the admissibility of photographs, video tapes, or films into evidence.

Source: L. 85: Entire section added, p. 577, § 2, effective July 1.

Cross references: For similar provisions concerning the use of photographs, video tapes, or films of property with respect to the crimes of theft and trespass, tampering, and criminal mischief, see §§ 18-4-415 and 18-4-514.

PART 4

THEFT

Cross references: For civil damages for loss caused by theft of a mercantile establishment, see § 13-21-107.5.

18-4-401. Theft. (1) A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:

- (a) Intends to deprive the other person permanently of the use or benefit of the thing of value; or
- (b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit; or
- (c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use and benefit; or
- (d) Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person.

(1.5) For the purposes of this section, a thing of value is that of "another" if anyone other than the defendant has a possessory or proprietary interest therein.

(2) Theft is:

- (a) (Deleted by amendment, L. 2007, p. 1690, § 3, effective July 1, 2007.)
- (b) A class 2 misdemeanor if the value of the thing involved is less than five hundred dollars;
- (b.5) A class 1 misdemeanor if the value of the thing involved is five hundred dollars or more but less than one thousand dollars;
- (c) A class 4 felony if the value of the thing involved is one thousand dollars or more but less than twenty thousand dollars;
- (d) A class 3 felony if the value of the thing involved is twenty thousand dollars or more.

(3) and (3.1) Repealed.

(4) (a) When a person commits theft twice or more within a period of six months, two or more of the thefts may be aggregated and charged in a single count, in which event the thefts so aggregated and charged shall constitute a single offense, and, if the aggregate value of the things involved is one thousand dollars or more but less than twenty thousand dollars, it is a class 4 felony; however, if the aggregate value of the things involved is twenty thousand dollars or more, it is a class 3 felony.

(b) When a person commits theft twice or more against the same person pursuant to one scheme or course of conduct, the thefts may be aggregated and charged in a single count, in which event they shall constitute a single offense, and, if the aggregate value of the things involved is one thousand dollars or more but less than twenty thousand dollars, it is a class 4 felony; however, if the aggregate value of the things involved is twenty thousand dollars or more, it is a class 3 felony.

(5) Theft from the person of another by means other than the use of force, threat, or intimidation is a class 5 felony without regard to the value of the thing taken.

(6) In every indictment or information charging a violation of this section, it shall be sufficient to allege that, on or about a day certain, the defendant committed the crime of theft by unlawfully taking a thing or things of value of a person or persons named in the

indictment or information. The prosecuting attorney shall at the request of the defendant provide a bill of particulars.

(7) Repealed.

(8) A municipality shall have concurrent power to prohibit theft, by ordinance, where the value of the thing involved is less than one thousand dollars.

(9) (a) If a person is convicted of or pleads guilty or nolo contendere to theft by deception and the underlying factual basis of the case involves the mortgage lending process, a minimum fine of the amount of pecuniary harm resulting from the theft shall be mandatory, in addition to any other penalty the court may impose.

(b) A court shall not accept a plea of guilty or nolo contendere to another offense from a person charged with a violation of this section that involves the mortgage lending process unless the plea agreement contains an order of restitution in accordance with part 6 of article 1.3 of this title that compensates the victim for any costs to the victim caused by the offense.

(c) The district attorneys and the attorney general have concurrent jurisdiction to investigate and prosecute a violation of this section that involves making false statements or filing or facilitating the use of a document known to contain a false statement or material omission relied upon by another person in the mortgage lending process.

(d) Documents involved in the mortgage lending process include, but are not limited to, uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

(e) For the purposes of this subsection (9):

(I) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

(II) "Residential mortgage loan" means a loan or agreement to extend credit, made to a person and secured by a mortgage or lien on residential real property, including, but not limited to, the refinancing or renewal of a loan secured by residential real property.

(III) "Residential real property" means real property used as a residence and containing no more than four families housed separately.

Source: **L. 71:** R&RE, p. 428, § 1. **C.R.S. 1963:** § 40-4-401. **L. 75:** IP(1), (2), and (3) amended and (3.1) added, pp. 618, 619, §§ 9, 10, effective July 1. **L. 77:** (4) amended, p. 972, § 1, effective May 27; (2) R&RE, (3) and (3.1) repealed, and (4) amended, pp. 973, 976, §§ 1, 2, 9, effective July 1. **L. 81:** (7) added, p. 987, § 1, effective July 1. **L. 83:** (8) added, p. 665, § 7, effective July 1. **L. 84:** (7)(a) and (7)(b) amended, p. 541, § 1, effective April 12; (2)(b), (2)(c), (4), (7)(a), and (8) amended, p. 536, §§5, 6, effective July 1, 1985. **L. 85:** (7)(a) amended, p. 1360, § 13, effective June 28. **L. 87:** (2)(b), (2)(c), and (4) amended, p. 352, § 3, effective March 16; (1.5) added and (7)(a) amended, pp. 615, 606, §§5, 13, effective July 1. **L. 92:** (2), (4), and (7)(a) amended, p. 433, § 1, effective April 10; (8) amended, p. 439, § 1, effective June 1. **L. 93:** (7) repealed, p. 1742, § 42, effective July 1. **L. 97:** (2)(b) and (2)(c) amended, p. 1548, § 23, effective July 1. **L. 98:** (4) and (8) amended, p. 1437, § 10, effective July 1; (4) amended, p. 793, § 1, effective July 1. **L. 2006:** (9) added, p. 1327, § 2, effective July 1. **L. 2007:** (2), (4), and (8) amended, p. 1690, § 3, effective July 1. **L. 2009:** (4) amended, (HB 09-1334), ch. 244, p. 1099, § 2, effective May 11.

Cross references: (1) For theft of sound recordings, see §§ 18-4-601 to 18-4-605; for charges for bad checks received as a restitution payment ordered as a condition of a plea agreement, see § 16-7-304; for charges for bad checks received as a restitution payment ordered as a condition of a deferred prosecution, see § 16-7-404.

(2) For the legislative declaration contained in the 2006 act enacting subsection (9), see section 1 of chapter 290, Session Laws of Colorado 2006. For the legislative declaration contained in the 2007 act amending subsections (2), (4), and (8), see section 1 of chapter 384, Session Laws of Colorado 2007. For the legislative declaration contained in the 2009 act amending subsection (4), see section 1 of chapter 244, Session Laws of Colorado 2009.

ANNOTATION

- I. General Consideration.
- II. Elements of Offense.
 - A. In General.
 - B. Threat or Deception.
- III. Indictment or Information.
- IV. Evidence.
 - A. In General.
 - B. Proof of Value.
 - C. Possession of Stolen Property.
 - D. Sufficiency.
- V. Jury and Instructions.
- VI. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Larceny, Embezzlement and False Pretenses in Colorado — A Need for Consolidation", see 23 Rocky Mt. L. Rev. 446 (1951). For article, "The Meaning of 'Theft' in Automobile Insurance", see 29 Dicta 119 (1952). For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952). For note, "False Pretenses, Confidence Game, and Short Check in Colorado", see 25 Rocky Mt. L. Rev. 325 (1953). For article, "Highlights of the 1955 Legislative Session - Criminal Law and Procedure", see 28 Rocky Mt. L. Rev. 69 (1955). For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "One Year Review of Constitutional Law", see 40 Den. L. Ctr. J. 134 (1963). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For article, "Lending to a Debtor-in-Possession", see 11 Colo. Law. 2382 (1982).

Annotator's note. (1) Since § 18-4-401 is similar to former § 40-5-2, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

(2) Annotations appearing below from cases decided prior to 1978 were decided under the version of this section in effect prior to the 1975 amendment to this section.

Common-law offenses. Embezzlement is common-law larceny extended by statute to cover cases where the stolen property comes originally into the possession of the defendant without a trespass. The word implies a fraudulent or unlawful intent. *Phenneger v. People*, 85 Colo. 442, 276 P. 983 (1929); *Lewis v. People*, 109 Colo. 89, 123 P.2d 398 (1942).

Larceny by bailee was not a common-law offense. *Helser v. People*, 100 Colo. 371, 68 P.2d 543 (1937).

Embezzlement was not recognized at common law and the corollary offense, larceny, em-

braced only those thefts which were accompanied by trespass in the original acquisition and possession. It was first recognized in England when parliament enacted the statute so as to embrace nontrespass thefts. It was enacted in Colorado with the same object. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

Former theft statute held not unconstitutionally vague. *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962); *People v. Lewis*, 180 Colo. 423, 506 P.2d 125 (1973).

This section is constitutional. *People v. Edmonds*, 195 Colo. 358, 578 P.2d 655 (1978).

This section is not unconstitutional despite the fact that it does not require a specific allegation of intent in an information or indictment for its violation. *Edwards v. People*, 176 Colo. 478, 491 P.2d 566 (1971).

This section clearly delineates four acts which, if done with the intent specified, constitute the crime of theft, so that any person of common intelligence can readily comprehend the meaning and application of the unambiguous words used by the general assembly in drafting this section. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Statute gives a fair description of the proscribed conduct, and persons of common intelligence can readily appreciate the statute's meaning and application. *People v. Hucal*, 182 Colo. 334, 513 P.2d 454 (1973).

Control in theft statute does not have vague and ambiguous meaning so as to be unconstitutional. *People v. Hucal*, 182 Colo. 334, 513 P.2d 454 (1973).

Intent is not inconsistent with different methods of deprivation. Where what varies in different crimes is the method used to achieve the deprivation, there is no inconsistency between the words used to describe the methods of deprivation with the intent to permanently deprive a person of a thing of value and the words "unlawfully taking". *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

In enacting § 18-4-410, general assembly intended to reach distinct group of wrongdoers. The class includes those persons who receive, retain, or dispose of property received from another person with the knowledge or reasonable belief that the property has been stolen. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

The purpose of this section is to remove distinctions and technicalities which previously existed in the pleading and proof of acquisition crimes. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

In enacting the theft statute, the general assembly intended to define one crime of theft which would incorporate all crimes involving the taking or obtaining of personal property without physical force and to eliminate distinc-

tions and technicalities which previously existed in the pleading and proof of such crimes. *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972); *People v. Terranova*, 38 Colo. App. 476, 563 P.2d 363 (1976); *People v. Hopkins*, 40 Colo. App. 568, 584 P.2d 84 (1978).

It is consolidation of former separate crimes. Prior to 1967 the various felonies of larceny, embezzlement and the like were separately defined throughout the criminal statutes. The 1967 general assembly consolidated these formerly separately defined crimes under one broad, enumerated crime designated as theft. *White v. People*, 172 Colo. 271, 472 P.2d 674 (1970).

It was the purpose of our general assembly to cover every conceivable unlawful conversion by an agent or servant. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

The intent of this section is to bring together in one statute most of the crimes formerly known by several different names, for each of these former crimes has as a material element the unlawful depriving of a person of his property. *Howe v. People*, 178 Colo. 248, 496 P.2d 1040 (1972).

Theft is not a lesser included offense of robbery. *People v. Moore*, 184 Colo. 110, 518 P.2d 944 (1974).

The enactment of § 12-44-102 does not preclude prosecution for theft pursuant to this section because § 12-44-102 does not present a comprehensive regulatory scheme intended to limit prosecution under the general theft statute. *People v. Sharp*, 104 P.3d 252 (Colo. App. 2004).

This section includes as the objects of theft those means or muniments by which the right and title to property, real and personal, might be ascertained. *Beasley v. People*, 168 Colo. 286, 450 P.2d 658 (1969).

Promissory note, being subject to ownership, is personal property even in the hands of the maker, and so is within the purview of this section. *Knepper v. People*, 63 Colo. 396, 167 P. 779 (1917).

This section includes choses in action, chattels, effects, or any other valuable thing. *Miller v. People*, 72 Colo. 375, 211 P. 380 (1922).

Dogs are by statute the subject of larceny. *Thiele v. City & County of Denver*, 135 Colo. 442, 312 P.2d 786 (1957).

A "thing of value", as used in the former short check felony statute, is a phrase of sufficient generic import to encompass clearly within its meaning an executed lien waiver. *Beasley v. People*, 168 Colo. 286, 450 P.2d 658 (1969).

Mechanics' and materialmen's liens are security for the costs of materials and labor furnished. As security, the lien is clearly a "thing of value" to a materialman and by giving it up in exchange for a worthless check, there is a loss of

a thing of value. *Beasley v. People*, 168 Colo. 286, 450 P.2d 658 (1969).

Stolen checks are a "thing of value" within the meaning of the statutes. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

"Thing of value" is defined to include "real property". *People v. Parga*, 188 Colo. 413, 535 P.2d 1127 (1975).

Real property may be the subject of theft. *People v. Parga*, 188 Colo. 413, 535 P.2d 1127 (1975).

Although funds from a "Ponzi scheme" were obtained by theft, the subsequent transfer of these funds by the debtor represented the transfer of an "interest of the debtor in property" for purposes of a chapter 7 bankruptcy action. In *Re M & L Business Mach. Co., Inc.*, 160 Bankr. 851 (Bankr. D. Colo. 1994), *aff'd*, 167 Bankr. 219 (Bankr. D. Colo. 1994).

Where the information charged defendant with theft of money, rather than theft of a check, negotiation of the check was the necessary "last act" to begin the running of the statute of limitations under §16-5-401. The date the check was issued was immaterial for purposes of determining the statute of limitations. *People v. Chavez*, 952 P.2d 828 (Colo. App. 1997).

Colorado courts have jurisdiction over the offense of theft which originated in the state of New Mexico. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Where defendant exercised control over stolen goods in this state. Where there was evidence presented that defendant exercised control over stolen chain saws in Colorado without authorization, the offense of theft was "committed partly within this state" as contemplated by § 18-1-201 (2), and, therefore, in accordance with § 18-1-201 (1)(a), defendant "is subject to prosecution in this state" for that offense. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

Court retains jurisdiction of defendant extradited under former section. Although defendant was arrested out of state on a warrant charging larceny and returned to Colorado, and the crime of larceny was subsequently redesignated as theft, defendant's contention that the warrant charged a nonexistent crime and therefore the trial court had no jurisdiction, was without merit. *Habbord v. People*, 175 Colo. 417, 488 P.2d 554 (1971).

Scope of municipal jurisdiction over theft offenses. Larceny, the subject of statute and of statewide concern, is distinguished from a local and municipal matter in which municipalities may exercise jurisdiction, and a municipal ordinance purporting to cover such field is invalid. *Gazotti v. City & County of Denver*, 143 Colo. 311, 352 P.2d 963 (1960).

Municipal courts are particularly adaptable to the handling of the crime of shoplifting of articles of relatively small value and this type of

theft should be combated not only by state authorities in state courts but by police departments in municipal courts. *Quintana v. Edgewater Municipal Court*, 179 Colo. 90, 498 P.2d 931 (1972).

When a municipal shoplifting ordinance does not limit shoplifting to goods not exceeding \$100 in value, and thereby goes beyond a municipal or local matter, and contains no severable operative provisions, and when plaintiff allegedly takes articles valued over \$100, the ordinance cannot be constitutionally applied to petty theft. *Quintana v. Edgewater Municipal Court*, 179 Colo. 90, 498 P.2d 931 (1972).

This section is the counterpart to the Longmont municipal code theft ordinance which is comprised of identical elements except for the value of the property. *Bradford v. Longmont Municipal Court*, 830 P.2d 1135 (Colo. App. 1992).

Corporation, rather than stockholder, is victim of theft of value of stock. It is well settled that a shareholder in a corporation, once having obtained his stock, is only entitled to the profits in the corporation, not the divisible assets of the corporation. From this proposition it necessarily follows that a stockholder's loss of the value of his stock, however attributable to defendant, is not a theft of value from the stockholder. If there be a crime committed under these facts, it was a theft from the corporation, not from the shareholder. The money which defendant allegedly stole was the property of the corporation. *People v. Westfall*, 185 Colo. 110, 522 P.2d 100 (1974).

Theft and theft by receiving are two separate and distinct crimes. The penalty for each is the same, but conviction of one would not support a conviction of the other. *People v. Griffie*, 44 Colo. App. 46, 610 P.2d 1079 (1980).

Participant in theft cannot be convicted of both crimes. A person who has actively participated in a theft cannot be convicted of both theft and theft by receiving of the stolen property. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

A partner cannot be charged with theft of partnership property under this section because partnership property is not a thing of value of another. *People v. Clayton*, 728 P.2d 723 (Colo. 1986) (decided prior to 1987 enactment of subsection (1.5)).

Conduct constituting receiving stolen property is the same conduct punishable by this section where defendant stole property in Colorado and took it to another jurisdiction, and prosecution under this section is therefore barred as double jeopardy where defendant was previously tried for receiving the stolen property in the other jurisdiction. *People v. Morgan*, 785 P.2d 1294 (Colo. 1990).

Section 18-4-402 distinguished. Section 18-4-402 clearly applies to an unlawful temporary

deprivation of rental property as distinguished from a permanent deprivation of property generally as required by this section. *People v. Trigg*, 184 Colo. 78, 518 P.2d 841 (1974).

Distinguished from § 26-4-114. There are reasonable distinctions which can be drawn between this section and the penal provisions of the medical assistance act, § 26-4-114, as the latter deals only with property unlawfully received in a special way from a specific source, as distinguished from the deprivation of property generally. *People v. Donahue*, 41 Colo. App. 70, 578 P.2d 671 (1978).

Criminal mischief distinguished. The gravamen of criminal mischief is the knowing causation of damage to another's property with resulting economic loss to the owner or possessor of the property. The crime of theft, in contrast, is a crime of misappropriation or wrongful taking with no added element of damage or destruction to the property taken. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Because the conduct prohibited by this section is distinct from the conduct prohibited by § 8-81-101 (1)(a), prosecution under one such statute as opposed to the other does not violate a defendant's constitutional rights. *People v. Chesnick*, 709 P.2d 66 (Colo. App. 1985).

Aider/abettor tried as principal. Where appellant knew items were stolen and on this basis agreed to cash checks as an integral part of an overall scheme to acquire and sell stolen goods, he could be properly tried and convicted as an aider and abettor to theft-receiving and thus, as a principal. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed.2d 167 (1976).

The stealing of several articles of property at the same time and place, as one continuous act or transaction, may be prosecuted as a single offense, although the several articles belong to several different owners. *People v. District Court*, 192 Colo. 355, 559 P.2d 1106 (1977).

Ongoing, continuous scheme of embezzlement pursuant to a single criminal impulse with the same victim throughout does not have to be severed into separate counts or dismissed. *People v. Stratton*, 677 P.2d 373 (Colo. App. 1983).

The general assembly did not proscribe the same conduct in § 42-5-104 and this section. Section 42-5-104 requires that the thing stolen be a part of, or contained in, an automobile, and there is no such requirement under this section. *People v. Czajkowski*, 193 Colo. 352, 568 P.2d 23 (1977).

Theft statute held not to violate guaranty of equal protection. *People v. Cowden*, 735 P.2d 199 (Colo. 1987).

Prosecutor's election to prosecute under general intent theft statute did not violate due process even though defendant was precluded from using affirmative defense of impaired men-

tal condition. *People v. Quick*, 713 P.2d 1282 (Colo. 1986).

Theft statute which imposes penalties according to the value of the thing taken and which contains alternative culpable mental state elements of "knowingly" and "with intent" represents a legitimate legislative decision regarding the nature of the crime and does not raise an equal protection issue of punishing the same conduct with two different sanctions. *People v. Quick*, 713 P.2d 1282 (Colo. 1986).

Elements of two crimes of theft and motor vehicle theft are clearly different, and therefore it does not violate equal protection to prosecute under the latter rather than the former. *People v. Wastrum*, 624 P.2d 1302 (Colo. 1981).

Second degree aggravated motor vehicle theft is not a lesser included offense of theft. Therefore conviction of the former should not merge into a conviction of the latter. *People v. Meads*, 58 P.3d 1137 (Colo. App. 2002), *aff'd*, 78 P.3d 290 (Colo. 2003).

Attorney's theft requires disbarment. An attorney's misuse of his professional status to accomplish the felonious theft of his clients' funds requires disbarment. *People v. Buckles*, 673 P.2d 1008 (Colo. 1984).

Applied in *In re Pratte*, 19 Colo. 138, 34 P. 680 (1893); *Murray v. People*, 49 Colo. 109, 111 P. 711 (1910); *Wheeler v. People*, 49 Colo. 402, 113 P. 312 (1911); *James v. Phoenix Assurance Co.*, 75 Colo. 209, 225 P. 213 (1924); *Critchfield v. People*, 91 Colo. 127, 13 P.2d 270 (1932); *Sanders v. People*, 109 Colo. 243, 125 P.2d 154 (1942); *Conyers v. People*, 113 Colo. 230, 155 P.2d 988 (1945); *Casados v. People*, 119 Colo. 444, 204 P.2d 557 (1949); *Thurman v. People*, 120 Colo. 77, 208 P.2d 927 (1949); *People v. Austin*, 162 Colo. 10, 424 P.2d 113 (1967); *People v. Mangum*, 189 Colo. 246, 539 P.2d 120 (1975); *People v. Pittam*, 194 Colo. 104, 572 P.2d 135 (1977); *People v. Warren*, 196 Colo. 75, 582 P.2d 663 (1978); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978); *People v. Bielecki*, 41 Colo. App. 256, 588 P.2d 377 (1978); *People v. Hallman*, 41 Colo. App. 427, 591 P.2d 101 (1978); *Eftekhari-Zadeh v. Lusero*, 42 Colo. App. 56, 592 P.2d 1347 (1978); *People v. Jacquez*, 196 Colo. 569, 588 P.2d 871 (1979); *People v. Armijo*, 197 Colo. 91, 589 P.2d 935 (1979); *People v. Hillyard*, 197 Colo. 183, 589 P.2d 939 (1979); *People v. Burns*, 197 Colo. 284, 593 P.2d 351 (1979); *Hughes v. District Court*, 197 Colo. 396, 593 P.2d 702 (1979); *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1979); *People v. Williams*, 197 Colo. 559, 596 P.2d 745 (1979); *People v. Ortega*, 198 Colo. 179, 597 P.2d 1034 (1979); *People ex rel. Leidner v. District Court*, 198 Colo. 204, 597 P.2d 1040 (1979); *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979); *People v. Brand*, 43 Colo. App. 347, 608 P.2d 817

(1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *P.V. v. District Court*, 199 Colo. 357, 609 P.2d 110 (1980); *People v. McMichael*, 199 Colo. 433, 609 P.2d 633 (1980); *Godbold v. Wilson*, 518 F. Supp. 1265 (D. Colo. 1981); *People v. Martinez*, 628 P.2d 608 (Colo. 1981); *People v. Savage*, 630 P.2d 1070 (Colo. 1981); *People v. Tucker*, 631 P.2d 162 (Colo. 1981); *People v. Henry*, 631 P.2d 1122 (Colo. 1981); *People v. Boykin*, 631 P.2d 1149 (Colo. App. 1981); *People v. Elkhatib*, 632 P.2d 275 (Colo. 1981); *People v. Walters*, 632 P.2d 566 (Colo. 1981); *People v. Stinson*, 632 P.2d 631 (Colo. App. 1981); *People ex rel. Gallagher v. District Court*, 632 P.2d 1009 (Colo. 1981); *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People in Interest of M.R.J.*, 633 P.2d 474 (Colo. 1981); *People v. R.V.*, 635 P.2d 892 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Franklin*, 640 P.2d 226 (Colo. 1982); *People v. Boyd*, 642 P.2d 1 (Colo. 1982); *People v. Petrie*, 642 P.2d 519 (Colo. 1982); *People ex rel. VanMeveren v. District Court*, 643 P.2d 37 (Colo. 1982); *People v. Hearty*, 644 P.2d 302 (Colo. 1982); *People v. Turner*, 644 P.2d 951 (Colo. 1982); *People v. Leonard*, 644 P.2d 85 (Colo. App. 1982); *People v. Conwell*, 649 P.2d 1099 (Colo. 1982); *People v. Cushon*, 650 P.2d 527 (Colo. 1982); *People v. Jimenez*, 651 P.2d 395 (Colo. 1982); *J.T. v. O'Rourke ex rel. Tenth Judicial Dist.*, 651 P.2d 407 (Colo. 1982); *People v. Williams*, 651 P.2d 899 (Colo. 1982); *People in Interest of B.R.M.*, 653 P.2d 77 (Colo. App. 1982); *People v. Williams*, 654 P.2d 319 (Colo. App. 1982); *Hunter v. People*, 655 P.2d 374 (Colo. 1982); *People v. Fisher*, 657 P.2d 922 (Colo. 1983); *People v. District Court*, 664 P.2d 247 (Colo. 1983); *People v. Montoya*, 667 P.2d 1377 (Colo. 1983); *Landis v. Farish*, 674 P.2d 957 (Colo. 1984); *People v. Stratton*, 677 P.2d 373 (Colo. App. 1983); *People v. Lancaster*, 683 P.2d 1202 (Colo. 1984); *People v. Jeffers*, 690 P.2d 194 (Colo. 1984); *People v. Eastepp*, 884 P.2d 305 (Colo. 1994); *People v. Collie*, 995 P.2d 765 (Colo. App. 1999).

II. ELEMENTS OF OFFENSE.

A. In General.

For elements of former crime of larceny by bailee, see *McGuire v. People*, 83 Colo. 154, 262 P. 1015 (1928); *Poe v. People*, 163 Colo. 20, 428 P.2d 77 (1967).

For essential elements of former crime of embezzlement, see *Phenneger v. People*, 85 Colo. 442, 276 P. 983 (1929); *Blackett v. People*, 98 Colo. 7, 52 P.2d 389 (1935); *Sparr v. People*, 122 Colo. 35, 219 P.2d 317 (1950); *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

The corpus delicti in theft consists of two elements: (1) That the property is lost by the

owner; and (2) that it is lost by a felonious taking. *Lee v. People*, 138 Colo. 321, 332 P.2d 992 (1958).

Theft occurs when any person obtains control of the property of another and knowingly intends to permanently deprive that person of the use or benefit of a thing of value. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

In order to show a prima facie case of theft, the prosecution must establish the elements of the corpus delicti of theft: That the property was lost by the owner and that it was lost by a felonious taking. *People v. Contreras*, 195 Colo. 80, 575 P.2d 433 (1978).

In 1975 this section was amended to eliminate the receiving element and a new theft by receiving statute was enacted in § 18-4-410. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

For a specific intent to deprive as element prior to 1975 amendment, see *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Intent is a material element of theft. *People in Interest of J. S. C. v. J. S. C.*, 30 Colo. App. 381, 493 P.2d 671 (1972).

The intent to steal is an essential element of proof of the crime of larceny. *Montoya v. People*, 169 Colo. 428, 457 P.2d 397 (1969).

An essential element of the crime of theft is the formation of an intent to permanently deprive the owner of his property. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971); *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979).

The intent to deprive another permanently of the use or benefit of his property and knowingly obtaining or exerting control over anything of value are both essential elements of the crime of theft and both elements must be proven to exist beyond a reasonable doubt. *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1972).

To support a conviction of felony theft, the evidence must show beyond a reasonable doubt that the defendant knowingly or intentionally used the property in such a manner as to deprive the victim permanently of its use. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

Burglary intent need not be shown. In making out the case of larceny the prosecutor need not show any burglary intent or entry, it only being necessary to prove the usual elements of theft as defined by the statute. *Ex parte Hill*, 101 Colo. 243, 72 P.2d 471 (1937); *White v. People*, 172 Colo. 271, 472 P.2d 674 (1970).

Defendant charged with felony theft as a result of violating § 38-22-127 of the general mechanic's lien statute can be held criminally liable as set forth in this section, but only where prosecutor proves each of the elements of the crime of theft, including requisite intent. *People v. Mendro*, 731 P.2d 704 (Colo. 1987).

Defendant did not exercise control over the property "without authorization" where an-

other person who was a rightful possessor of the property authorized the defendant to take the property. *People v. McCormick*, 784 P.2d 808 (Colo. App. 1989).

In the context of theft of construction project trust funds, the "knowingly using" element of mental culpability in subsection (1) (b) does not require a conscious objective to deprive another person of the use or benefit of the construction trust funds, but instead requires the offender to be aware that his manner of using the trust funds is practically certain to result in depriving another person of the use or benefit of the funds. *People v. Anderson*, 773 P.2d 542 (Colo. 1989); *In re Helmke*, 398 B.R. 38 (Bankr. D. Colo. 2008).

Theft requires proof that the accused knowingly obtained possession of or exercised control over the property either without authorization or by threat or deception. *People v. Griffie*, 44 Colo. App. 46, 610 P.2d 1079 (1980).

In the context of theft of real property, actual physical control is not required. The element "to obtain or exercise control" for theft of real property does not require actual physical control of the real property. To obtain or exercise control can mean to retain an interest in the real property without authorization and with intent to permanently deprive another person of the use or benefit of such real property. *People v. Jensen*, 172 P.3d 946 (Colo. App. 2007).

Control need not be unauthorized from the outset. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Subsection (1) makes it clear that theft can occur even though initial control of the property has been authorized; the intent to deprive, or knowing use inconsistent with the owner's benefit, may arise at a later time when control is no longer authorized. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

"Without authorization" defined. Exercising control over property "without authorization", pursuant to subsection (1), means that the owner of the property, or a person in possession of the property with the owner's consent, has not given the actor permission to exercise control over the property. *People v. Edmonds*, 195 Colo. 358, 578 P.2d 655 (1978); *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

Unauthorized taking is not necessary element of offense: Exercising control without authorization, combined with the requisite intent, is sufficient. *People v. Am. Health Care, Inc.*, 42 Colo. App. 209, 591 P.2d 1343 (1979).

Where initial control of property is authorized, the intent to deprive may arise at a later time when control is no longer authorized. *People v. Am. Health Care, Inc.*, 42 Colo. App. 209, 591 P.2d 1343 (1979); *People v. Carr*, 841 P.2d 361 (Colo. App. 1992).

It is not necessary that a person maintain absolute control over the thing of value to

commit theft; it is sufficient that the intended use of such thing be inconsistent with the owner's use or benefit. *Becker & Tenenbaum v. Eagle Restaurant*, 946 P.2d 600 (Colo. App. 1997).

When the defendant is a substantial distance from the item stolen the defendant's actions do not constitute theft from the person of another. *People v. Smith*, 121 P.3d 243 (Colo. App. 2005).

It is sufficient that the intended use of the money be inconsistent with the owner's use or benefit. In other words, it is only required that the defendant knowingly exercise unauthorized control over the property, with requisite intent; it is not necessary that he maintain absolute control for his own personal use. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Property must have belonged to another. An essential element of the crime of embezzlement is that the property alleged to have been converted belongs to another. *Kelley v. People*, 157 Colo. 417, 402 P.2d 934 (1965).

Money may be taken from living or dead body. It makes no difference in determining guilt whether the money in a theft was taken from a living person or a dead body. *People v. Walker*, 44 Colo. App. 249, 615 P.2d 57 (1980).

Taking property under control and possession of victim violates section. The taking of a purse from the cart which the victim was pushing, and which was under her control and in her present possession, constituted taking "from the person of another" in violation of subsection (5). *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980).

Restaurant had sufficient proprietary interest in the cash and checks taken (even though not in its possession when taken) to prove that the defendant stole a thing of value from another. A person need not have obtained actual physical custody or delivery of the thing of value in order to have a proprietary interest in it if he has parted with consideration entitling him to receive the thing of value. *People v. Ferguson*, 701 P.2d 72 (Colo. App. 1984).

The element of theft requiring ownership by "another" does not require proof of the titled ownership by "another". *People v. Schlicht*, 709 P.2d 94 (Colo. App. 1985).

Ownership may be laid either in the real owner or in the person in possession at the time of the theft. *Romero v. People*, 134 Colo. 342, 304 P.2d 639 (1956); *Griffin v. People*, 157 Colo. 72, 400 P.2d 928 (1965).

The actual condition of the legal title is immaterial to the thief and so far as he is concerned, one may be taken as the owner who was in peaceable possession of it, and whose possession was unlawfully disturbed by the taking. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

There can be no theft without wrongful appropriation of another's property. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Critical elements are the defendant's intent to deprive and the location at which his control over the property was no longer authorized. *People v. Carr*, 841 P.2d 361 (Colo. App. 1992).

The elements of the crime of theft need not be proven by direct, substantive evidence, but can be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

Where evidence showed that defendant holding a power of attorney made 32 separate withdrawals from the victim's account, did not issue promissory notes to the victim contemporaneously with each withdrawal, did not attempt to repay the victim in regular installments or to pay interest on the "loans", and concealed the "loans" from the victim's sons, it was for the jury to determine whether the defendant withdrew the money from the victim's account without her authorization and with the intent to permanently deprive her of the use of the money. *People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996).

The place where the defendant comes into possession of thing of value not element of offense. *People v. Tinkle*, 714 P.2d 919 (Colo. App. 1985).

Police decoy operation is not consent to being deprived of possession. A police decoy operation set up so that a person otherwise inclined would have the opportunity to take money, is not consent by the police officer to being permanently deprived of possession of the money. *People v. Gresham*, 647 P.2d 243 (Colo. App. 1981).

It is the intent at the time of taking to permanently deprive that is the essential element of theft. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The deprivation need not be permanent; once the wrongful appropriation occurs, this section requires coexistent intent to permanently deprive of use and benefit. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Although a conspiracy to commit theft may continue beyond the commission of the immediate crime, permanent deprivation is not an element of theft. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The return of the property is not a defense. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The fact that a thief may recant and elect to return to the owner the fruits of his larcenous conduct does not purge him of guilt or serve as a defense to prosecution. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

The fact that the defendant eventually returned the proceeds of a check that had been diverted without authorization is not a defense to a theft charge. *People v. Pedrie*, 727 P.2d 859 (Colo. 1986).

The contention that the crime of larceny was not completed because the TV set, though moved out of the house, was left standing at the owner's back property line has no merit. The defendants did have complete control of the TV set, even if only for a few minutes, and did have it in their possession on and off the premises of the owner without his consent. *Scott v. People*, 166 Colo. 432, 444 P.2d 388 (1968).

If a permanent deprivation of property were necessary before a conviction could be sustained, every time stolen property was recovered and returned to its true owner the thief would have to be acquitted; such a rule would be insane. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Return of allegedly stolen property does not necessarily negate the existence of a wrongful intent. *People v. Am. Health Care, Inc.*, 42 Colo. App. 209, 591 P.2d 1343 (1979).

Attempt to return property does not negate theft element of intent. *People v. Collie*, 682 P.2d 1208 (Colo. App. 1983).

There is no taking where property is delivered to defendant for his use and convenience by the person in charge. *Lee v. People*, 138 Colo. 321, 332 P.2d 992 (1958).

Agent may form intent to appropriate. Where money has been voluntarily delivered to accused as agent, the fact that he formed the intent to appropriate it at or before the time he received it does not prevent a prosecution for embezzlement or larceny. *Lewis v. People*, 109 Colo. 89, 123 P.2d 398 (1942).

Larceny by bailee can occur at any time after items are stolen. *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962).

The failure of a debtor to pay his creditor does not constitute embezzlement. *Kelley v. People*, 157 Colo. 417, 402 P.2d 934 (1965).

To sustain a conviction of the crime of embezzlement, it must appear that the accused received the money or property of another as a fiduciary. Merely refusing to pay money lent cannot be converted into embezzlement. *Simpson v. People*, 47 Colo. 612, 108 P. 169 (1910).

Failure to report moneys owed pursuant to debtor-creditor relationship is not felony theft. Failure of lessee who sold beverages in park pursuant to lease with county to report money owed to the county based on percentage of gross income as rent does not constitute felony theft. *People v. Rotello*, 754 P.2d 765 (Colo. 1988).

Larceny is considered a continuing crime and every asportation considered a new taking; thus larceny could be prosecuted not only at the place where the goods were stolen, but also wherever the goods were subsequently brought. *People v. Martinez*, 37 Colo. App. 71, 543 P.2d 1290 (1975).

A conspiracy to commit theft does not con-

tinue, per se, until the proceeds are returned. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Statute does not create a separate and continuing crime of theft by deception. Doctrine of continuing crimes can apply only when legislature has unmistakably communicated intent to create such an offense and nothing in statute suggests the intent to create a separate and distinct crime of theft by deception that continues until deception ends. *Roberts v. People*, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

Statute requires all thefts committed by the same person within six-month period be joined and prosecuted as a single felony, the classification of which is determined by the aggregate value of all things involved. *Roberts v. People*, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

A defendant may not rely on the defense of legal impossibility in a prosecution for attempted theft. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Defendant may raise the defense of general mistake of fact by alleging that he never believed the goods were stolen. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

The fact that the items were not in fact stolen does not provide a defense to attempted theft where the defendant believed they were stolen. *People v. Darr*, 37 Colo. App. 143, 551 P.2d 735 (1975), *aff'd*, 193 Colo. 445, 568 P.2d 32 (1977).

Lack of consent of both equitable and legal owners of property need not be proven to support a conviction for theft. *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973).

Whether or not stolen checks were subsequently recovered and returned to owner is irrelevant to the criminal liability for taking the instruments in the first instance. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

Crime of joyriding is not a lesser included offense of crime of theft, nor is attempted joyriding a lesser included offense of attempted theft. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

Theft is not a lesser included offense of robbery. *People v. Moore*, 184 Colo. 110, 518 P.2d 944 (1974).

Theft and theft by receiving are separate crimes. Where convictions for theft and theft by receiving arise out of the same transaction, the defendant could not properly be found guilty of both. *People v. Taylor*, 647 P.2d 682 (Colo. 1982).

First degree criminal trespass is distinct from misdemeanor theft. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

Where defendant had contracted with a church to promote an arts festival to raise money for the church and she had an interest in the festival funds similar to that of the church and was the party designated to receive the funds, she could not be guilty of theft under the statute. *People v. McCain*, 191 Colo. 229, 552 P.2d 20 (1976).

Where there is ample evidence in the record that the defendant was the "moving force" behind a corporate operation, it is not cause for dismissal of any theft charges that the defendant may not have participated directly in every act constituting the thefts. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Subsection (5) does not apply where a defendant, through the use of a series of short-change transactions, deceptively obtained money from a store clerk. The enhanced punishment provided by this subsection is for situations where the theft raises a danger of confrontation and involves an invasion of the victim's person and privacy. *People v. Warner*, 790 P.2d 866 (Colo. App. 1989).

Theft from the person of another involves circumstances, such as pickpocketing, where something of value is taken from one who is unconscious or unaware of the theft. The invasion of the victim's person presents an element of danger absent in other theft offenses, which justifies the greater penalty accorded those who violate subsection (5). *People v. Warner*, 801 P.2d 1187 (Colo. 1990).

Theft from the person of another is intended to cover those thefts involving an invasion of the victim's person of which the victim is unaware, but which are not accomplished through the use of force, threats, or intimidation. *People v. Warner*, 801 P.2d 1187 (Colo. 1990), *aff'd*, 801 P.2d 1187 (Colo. 1990).

B. Threat or Deception.

Law reviews. For note, "False Pretenses, Confidence Game, and Short Check in Colorado", see 25 *Rocky Mt. L. Rev.* 325 (1953).

This section annexed former false pretenses and confidence games provisions. *Norman v. People*, 178 Colo. 190, 496 P.2d 1029 (1972).

For essential elements of former crime of false pretenses, see *People v. Orris*, 52 Colo. 244, 121 P. 163 (1911); *Stumpff v. People*, 51 Colo. 202, 117 P. 134 (1911); *Stoltz v. People*, 59 Colo. 342, 148 P. 865 (1915); *Tracy v. People*, 65 Colo. 226, 176 P. 280 (1918); *Clarke v. People*, 64 Colo. 164, 171 P. 69 (1918); *People v. Martin*, 78 Colo. 200, 240 P. 695 (1925); *Updike v. People*, 92 Colo. 125, 18 P.2d 472 (1933); *Chilton v. People*, 95 Colo. 268, 35 P.2d 870 (1934); *Montez v. People*, 110 Colo. 208, 132 P.2d 970 (1942); *Johnson v. People*, 110 Colo. 283, 133 P.2d 789 (1943); *Rogers v. Peo-*

ple, 161 Colo. 317, 422 P.2d 377 (1966); *Woodman v. People*, 168 Colo. 80, 450 P.2d 330 (1969); *Small v. People*, 173 Colo. 304, 479 P.2d 386 (1970).

For essential elements of former crime of confidence game, see *Lace v. People*, 43 Colo. 199, 95 P. 302 (1908); *Wheeler v. People*, 49 Colo. 402, 113 P. 312 (1911); *Powers v. People*, 53 Colo. 43, 123 P. 642 (1912); *Elliott v. People*, 56 Colo. 236, 138 P. 39 (1914); *Davis v. People*, 96 Colo. 212, 40 P.2d 968 (1935); *Bomareto v. People*, 111 Colo. 99, 137 P.2d 402 (1943); *Olde v. People*, 112 Colo. 15, 145 P.2d 100 (1944); *People v. Lindsay*, 119 Colo. 248, 202 P.2d 951 (1949); *Kelly v. People*, 121 Colo. 243, 215 P.2d 336 (1950); *McBride v. People*, 126 Colo. 277, 248 P.2d 725 (1952); *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955); *Bevins v. People*, 138 Colo. 123, 330 P.2d 709 (1958); *Fischer v. People*, 138 Colo. 559, 335 P.2d 871 (1959); *Gonzales v. People*, 149 Colo. 548, 369 P.2d 786 (1962); *Woodard v. People*, 154 Colo. 162, 389 P.2d 411 (1964); *Dodge v. People*, 168 Colo. 531, 452 P.2d 759 (1969); *Small v. People*, 173 Colo. 304, 479 P.2d 386 (1970); *Digiallonardo v. People*, 175 Colo. 560, 488 P.2d 1109 (1971).

Elements of theft by deception. Where the defendant obtained cash owned by the bank with full knowledge that under no circumstances was he entitled to it, and where the knowledge that the initial check used to open an account was false, shows knowledge that the two subsequent checks drawn on that account were equally false, the necessary elements of the charge of theft by deception are established. *Lewis v. People*, 174 Colo. 334, 483 P.2d 949 (1971).

Statute does not create a separate and continuing crime of theft by deception. Doctrine of continuing crimes can apply only when legislature has unmistakably communicated intent to create such an offense and nothing in statute suggests the intent to create a separate and distinct crime of theft by deception that continues until deception ends. *Roberts v. People*, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

Statute requires all thefts committed by the same person within six-month period be joined and prosecuted as a single felony, the classification of which is determined by the aggregate value of all things involved. *Roberts v. People*, 203 P.3d 513 (Colo. 2009) (decided prior to 2009 amendment).

Intent to defraud necessary for deception. When deception is used to perpetrate a theft, the requisite mental state is necessarily an intent to defraud. *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979); *People v. Freda*, 817 P.2d 588 (Colo. App. 1991).

Theft by deception statute does not require proof of culpable mental state of specific intent. *People v. Quick*, 713 P.2d 1282 (Colo. 1986).

Intent to defraud deemed part of § 38-22-137. Because an intent to defraud, necessary to this section, must be proven in order to convict a defendant under § 38-22-137, a prosecution for violation of § 38-22-137 does not conflict with the constitutional prohibition of imprisonment for civil debt in § 12 of art. II, Colo. Const. *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979).

Reliance of victim necessary for theft by deception. The offense of theft by deception requires proof that misrepresentations made to the victim caused the victim to part with something of value in reliance upon those misrepresentations. *People v. Norman*, 703 P.2d 1261 (Colo. 1985); *People v. Carlson*, 72 P.3d 411 (Colo. App. 2003).

There is no requirement in the theft statute that the accused personally make the threat toward the victim of the crime. *People v. Truesdale*, 190 Colo. 286, 546 P.2d 494 (1976).

Rather, it is sufficient if defendant obtained property as consequence. It is sufficient under this section if a threat was made and the accused knowingly obtained anything of value from the victim of the threat, with specific intent to deprive the victim permanently of the use or benefit of the property. *People v. Truesdale*, 190 Colo. 286, 546 P.2d 494 (1976).

Thus, a threat by a confederate would suffice to establish this element of the offense. *People v. Truesdale*, 190 Colo. 286, 546 P.2d 494 (1976).

A threat is defined as a declaration of purpose or intention to work injury to the person, property, or rights of another by the commission of an unlawful act. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971).

Theft by deception established. Prosecution established that the defendants obtained control of money belonging to the department store by deceptive practice with the intent to deprive the store of the money. *People v. Todd*, 189 Colo. 117, 538 P.2d 433 (1975).

Deception made upon a victim's agent in an effort to commit theft from a victim's estate satisfies the requirements of subsection (1). *People v. Devine*, 74 P.3d 440 (Colo. App. 2003).

Where evidence showed debtor obtained control over creditor's products by misrepresentation and debtor had no intention of reimbursing creditor for products supplied, such evidence is sufficient to support charge of theft by deception. *People v. Stewart*, 739 P.2d 854 (Colo. 1987).

Issuance of check on known closed account deemed deception. The mere issuance of a check on an account the defendant knew had been closed is a means of deception proscribed by this section. *People v. Attebury*, 196 Colo. 509, 587 P.2d 281 (1978).

Theft by threat is not lesser included offense of robbery. *Schott v. People*, 174 Colo. 15, 482 P.2d 101 (1971); *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

There is no indication that the general assembly enacted the theft by receiving statute in § 18-4-410 to preclude prosecution under the theft statute. Therefore, prosecutor can determine statute under which to prosecute the alleged crime. *People v. Smith*, 938 P.2d 111 (Colo. 1997).

III. INDICTMENT OR INFORMATION.

The general assembly authorized the use of the term "theft" in an information and that "theft" is to be substituted for "larceny" wherever it appears in a law of this state. *White v. People*, 172 Colo. 271, 472 P.2d 674 (1970).

Offense of theft when charged as provided in statute sufficiently advises jury of nature of offense for which defendant is on trial. *People v. Ingersoll*, 181 Colo. 1, 506 P.2d 364 (1973).

There is no requirement, either constitutional or statutory, that every element of theft be alleged in the information. *People v. Ingersoll*, 181 Colo. 1, 506 P.2d 364 (1973).

There is no requirement, either constitutional or statutory, that every element of the offense be alleged in the information, and a charging document is sufficient if it advises a defendant of the charges he is facing so that he can adequately defend himself. *People v. MacFarland*, 189 Colo. 363, 540 P.2d 1073 (1975).

The phrase "on or about a date certain" in subsection (6) is but a minimum requirement, and language in the information approximating the notice it intends to provide a defendant is sufficient. *People v. Wolfe*, 662 P.2d 502 (Colo. App. 1983); *People v. Stratton*, 677 P.2d 373 (Colo. App. 1983).

Information charging felony theft, complying with the requirements of subsection (1)(b), was sufficient where an identically worded subsection of a prior theft statute withstood constitutional attack. *People v. MacFarland*, 189 Colo. 363, 540 P.2d 1073 (1975).

When bill of particulars required. Where the crime of theft is charged in the words of the statute, an order for a bill of particulars is mandatory upon the defendant's request. *People v. District Court*, 198 Colo. 501, 603 P.2d 127 (1979); *People v. Stratton*, 677 P.2d 373 (Colo. App. 1983).

Purpose of bill of particulars. The requirement in subsection (6) that, upon request, a bill of particulars must be supplied to a defendant constitutes a safeguard to insure that the information by which a defendant is charged will be sufficiently definite in its terms. *People v. Wolfe*, 662 P.2d 502 (Colo. App. 1983).

Specific intent need not be alleged in charging document although proof of specific intent is essential element of felony theft. *People v. Ingersoll*, 181 Colo. 1, 506 P.2d 364 (1973).

An indictment charging officers of insurance company with unlawful conspiracy to convert to their own use moneys of the company, held to sufficiently charge larceny by bailee, although there was no express allegation that the property involved was converted to their use "with an intent to steal the same". *Helser v. People*, 100 Colo. 371, 68 P.2d 543 (1937).

Property must be described with reasonable certainty. In an information under this section, where the thing embezzled is a writing, it must be described with reasonable certainty, or a sufficient reason must appear for the omission of particularity. "One bank check of the value of", etc., "the property of", etc., held fatally insufficient. *Moody v. People*, 65 Colo. 339, 176 P. 476 (1918); *People v. Allen*, 167 Colo. 158, 446 P.2d 223 (1968).

Check. The contention that a criminal charge of the conversion of money was not sustained by proof of conversion of a bank check, is overruled, since the negotiation of a check is equivalent to the receipt of money upon it. *McGuire v. People*, 83 Colo. 154, 262 P. 1015 (1928).

The information charged the defendant with embezzlement of money, whereas the proof showed embezzlement of a check. Where the check was merely the means by which the money alleged to have been embezzled was procured, there was no variance. *People v. Allen*, 167 Colo. 158, 446 P.2d 223 (1968).

Where the information charged defendant with theft of money, rather than theft of a check, negotiation of the check was the necessary "last act" to begin the running of the statute of limitations under §16-5-401. The date the check was issued was immaterial for purposes of determining the statute of limitations. *People v. Chavez*, 952 P.2d 828 (Colo. App. 1997).

Description of money. Under this section an indictment for conspiracy to defraud a bank by unlawfully converting to defendants' own use a specified sum in money, the property of the bank, of the value of the same sum, contains a sufficient description of the property. *Imboden v. People*, 40 Colo. 142, 90 P. 608 (1907).

In a prosecution for embezzlement where sums of money were alleged to have been converted at different times, it was proper to charge the conversions in a lump sum. *Price v. People*, 78 Colo. 223, 240 P. 688 (1925).

Where conduct violates two provisions, prosecutor determines under which provision crime prosecuted. Where the alleged conduct of a defendant violates both the general theft statute and the more specific motor vehicle theft statute, it is the function of the prosecuting attorney and not the trial court to determine under which statute the alleged crime shall be

prosecuted. *People v. Westrum*, 624 P.2d 1302 (Colo. 1981).

Joinder of two subjects in one count is not duplicitous. It is the common case of an indictment for larceny where various goods and chattels, the subject of a single larceny, are joined in one count, and where proof of the larceny of any one of them sustains the indictment. Such a count is not bad for duplicity. *Kollenberger v. People*, 9 Colo. 233, 11 P. 101 (1886).

Where the information alleges, in a charge of robbery, that money was taken, "money" will be construed to mean money of the United States, and the court will take judicial notice of its value. *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066 (1933).

Allegation of ownership sufficient. Allegation of qualified ownership in a criminal information is sufficient to support the charge of embezzlement so far as the element of ownership is concerned. *Price v. People*, 78 Colo. 223, 240 P. 688 (1925).

The purposes of the allegation of ownership in an indictment include showing that the property alleged to have been stolen is not the property of the accused and advising the accused whose property is alleged to have been stolen so that he can be prepared to meet and refute the charges at trial. *People v. Singer*, 663 P.2d 626 (Colo. App. 1983).

Variance in ownership not fatal. It is not a fatal variance to allege property to be that of bailee, and prove, inter alia, real ownership in bailor. *Romero v. People*, 134 Colo. 342, 304 P.2d 639 (1956).

While the true name of the alleged owner of the stolen property should be correctly set forth in the information, the ownership may be laid in one by the name by which he is usually known although it is not his proper name. *Pownall v. People*, 135 Colo. 325, 311 P.2d 714 (1957).

One purpose of allegations of ownership in larceny cases is to show that the property alleged to have been stolen is not the property of the accused or that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. Defendant was not deceived by the allegations in the information and proof that actual title to the car was registered in a name by which the complaining witness was also known was not prejudicial to the defendant where his defense was that he had the consent of the identical person whom he knew under two names. *Pownall v. People*, 135 Colo. 325, 311 P.2d 714 (1957).

Failure to prove corporate status of victim of theft was an immaterial variance. *Straub v. People*, 145 Colo. 275, 358 P.2d 615 (1961).

Variance between information alleging that defendant stole from named corporation and exhibits introduced to prove theft and showing names of other corporations or organizations

was not fatal where various business names were used by enterprise and defendant, as general manager, could not have been misled or deceived. *Martinez v. People*, 177 Colo. 272, 493 P.2d 1350 (1972).

Statutory language in subsection (4) permits consolidating theft losses suffered by separate victims into one count of theft over \$10,000. *People v. Collie*, 682 P.2d 1208 (Colo. App. 1983).

IV. EVIDENCE.

A. In General.

The corpus delicti must be established, since it is clearly not permissible that anyone be adjudged guilty until it is shown that a larceny has been committed; and unless the state has shown, *prima facie*, that a larceny has been committed, a defendant is not put on proof. *Lee v. People*, 138 Colo. 321, 332 P.2d 992 (1958).

Intent inferred. Intent to permanently deprive another of use or benefit of a thing of value does not have to be proven by direct, substantive evidence but can be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. *People v. Becker*, 187 Colo. 344, 531 P.2d 386 (1975); *People v. Am. Health Care, Inc.*, 42 Colo. App. 209, 591 P.2d 1343 (1979); *People v. Piskula*, 197 Colo. 148, 595 P.2d 219 (1979).

Intent to permanently deprive may be inferred from the defendant's conduct and the circumstances of the case. *People v. Johnson*, 618 P.2d 262 (Colo. 1980).

Intent to commit felony theft may be inferred from the defendant's conduct in the circumstances of the case. *Miller v. District Court*, 641 P.2d 966 (Colo. 1982).

Intent to commit embezzlement of public property, official misconduct, and theft may be inferred from the defendants' conduct and the circumstances of the case. *People v. Luttrell*, 636 P.2d 712 (Colo. 1981).

Crime may be established by circumstantial evidence. The crime denounced by this section may be established by circumstantial evidence alone. *Montez v. People*, 110 Colo. 208, 132 P.2d 970 (1942).

Circumstantial evidence, when tied together, can support and provide a foundation for instructions on each of the crimes of first degree murder, first degree burglary, and theft arising out of the same transaction. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

The name of the owner of property stolen is material only to the extent it serves a descriptive purpose, or to show that it is not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or

refute the charge at the trial. Where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results. *Straub v. People*, 145 Colo. 275, 358 P.2d 615 (1961).

Possession without legal ownership is sufficient proof. In a larceny case, it is sufficient to show that the named victim had possession, control, and custody of the chattel which was the alleged object of the larceny, without determining the legal ownership. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

Proof of a defacto corporate existence is sufficient where corporate ownership is an element of the crime. *Straub v. People*, 145 Colo. 275, 358 P.2d 615 (1961).

Possession, control, and custody of the named victim is sufficient in a larceny case, without determining the *de jure* corporate entity. *Kelley v. People*, 166 Colo. 322, 443 P.2d 734 (1968).

Intent need not be proven by direct, substantive evidence, but may be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. *People v. Carr*, 841 P.2d 361 (Colo. App. 1992).

Proof that misrepresentations cause victim to part with something of value. The very nature of the crime of theft by deception requires proof that misrepresentations cause the victim to part with something of value and that the victim relied upon the swindler's misrepresentation. *People v. Terranova*, 38 Colo. App. 476, 563 P.2d 363 (1976); *People v. Warner*, 801 P.2d 1187 (Colo. 1990).

Where there was no proof that the misrepresentation caused the undercover agent to purchase stock from the defendant, prosecution for the completed substantive crime of theft by deception was not possible. *People v. Terranova*, 38 Colo. App. 476, 563 P.2d 363 (1976).

Admissibility of evidence to show intent. Any evidence going to the intent of a defendant charged with embezzlement is proper. *Hopkins v. People*, 89 Colo. 296, 1 P.2d 937 (1931).

In an action against officers of an insurance company for conspiracy to convert moneys of the company to their own use, evidence of the insolvency of the officers and subsidiary corporations controlled by said officers, held admissible, as having a definite bearing upon their intent, purpose, and design. *Helser v. People*, 100 Colo. 371, 68 P.2d 543 (1937).

That defendant intended to convert bailor's property to his own use by pledging it as security for a loan and using the proceeds of the loan for the payment of another obligation could be inferred from his executing a chattel mortgage representing himself as the owner of the car and from his furnishing the title and power of attorney to the bank. *Poe v. People*, 163 Colo. 20, 428 P.2d 77 (1967).

Where intent is an element of the crime, it is defendant's acts and conduct, not the victim's stated reaction, which is relevant. *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

Where intent is a material element of the offense charged, theft, a defendant has the right to testify specifically as to his intention in the commission of the acts which it is claimed constitute the offense. *People in Interest of J. S. C. v. J. S. C.*, 30 Colo. App. 381, 493 P.2d 671 (1972).

Evidence of other similar crimes in which a defendant has participated is competent and admissible for the purpose of showing plan or design of defendant in his alleged unlawful activities. *Clark v. People*, 105 Colo. 335, 97 P.2d 440 (1939); *Peiffer v. People*, 106 Colo. 533, 107 P.2d 799 (1940).

Evidence of similar offenses offered for the stated purpose of showing intent, motive, design, and system, followed by proper instructions of limitation, is admissible. *Montez v. People*, 110 Colo. 208, 132 P.2d 970 (1942).

Evidence of transaction similar to that charged in information held admissible. *Moore v. People*, 125 Colo. 306, 243 P.2d 425 (1952).

Where the evidence in a prosecution for embezzlement discloses that the victim and mode of operation were identical in each of several transactions, and the defendant seemingly acted pursuant to the same criminal impulse, felonious purpose and intent, such evidence is not subject to challenge for duplicity. *Gill v. People*, 139 Colo. 401, 339 P.2d 1000 (1959).

Where defendant denies knowledge that property was stolen or that he had an intent to withhold it from its true owner, it is proper for the prosecution to present evidence that loot from other burglaries found in defendant's possession to prove scienter, or guilty knowledge with respect to the crime of larceny by bailee. *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962).

Evidence of thefts committed subsequent to the theft for which defendant was being tried was admissible for the purpose of showing plan, scheme, design, intent, or guilty knowledge where the proper procedures were followed. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Testimony of thief against one charged with receiving stolen goods is not subject to infirmities attached to accomplice testimony. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

Scope of discovery. Where the prosecution informs the defendant of the specific section of the theft statute upon which it is relying, of the things of value allegedly taken, of the witnesses who would be called, and of the overt acts it intends to prove in connection with a conspiracy count, the trial court may deny further requests

regarding areas more properly the subject of discovery proceedings. *People v. Lewis*, 671 P.2d 985 (Colo. App. 1983).

B. Proof of Value.

Where the larceny is from the person of another the crime shall be a felony, and no proof of value is required. *People v. McIntosh*, 149 Colo. 555, 369 P.2d 987 (1962).

Evidence of value necessary to fix grade of offense. The necessity of the proof of the real value exists where it is provided that the punishment shall be greater or different when the thing stolen is of or above a certain value, for in such cases the value of the property taken must be established by the evidence in order to ascertain the grade of the offense, and a conviction of the higher grade of offense must be based on sufficient evidence that the property taken was of or above the value fixed by statute for such purpose. In such cases, without proof of the value of stolen property there can be no conviction. *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968).

When a conviction for a higher grade offense turns on the value of the property taken, it is incumbent on the prosecution to prove the value of stolen property. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

Test of value is reasonable market value of the stolen article at the time of the commission of the alleged offense. *People v. Austin*, 185 Colo. 229, 523 P.2d 989 (1974).

The value of a stolen item is measured by its fair market value. *People v. Elkhatib*, 198 Colo. 287, 599 P.2d 897 (1979).

The measure of value to be attached to items that are stolen is their reasonable market value at the time of the taking. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980); *People v. Rosa*, 928 P.2d 1365 (Colo. App. 1996).

For purposes of the theft statute, "value" is generally proven by evidence of market value at the time and place of the theft. *Beaudoin v. People*, 627 P.2d 739 (Colo. 1981).

Market value defined. Value in a theft case is market value, where market value is what a willing buyer will pay in cash to the true owner for the stolen item. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

It is the obligation of the people to prove the reasonable market value of the goods at the time involved. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970).

To make a prima facie case for violations under these sections it was incumbent upon the people to present competent evidence of the reasonable market value of the goods in question at the time of the commission of the alleged offense. *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973).

There must be some basis other than pure speculation for a determination of the real value where the value of the money or goods stolen determines the grade of the offense. *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968); *People v. In Interest of A.G.*, 43 Colo. App. 514, 605 P.2d 487 (1979); *People v. Leonard*, 43 Colo. App. 471, 608 P.2d 832 (1979).

Where no evidence is presented as to any value amount for items, there is insufficient evidence of the value of those items. *People v. Jamison*, 220 P.3d 992 (Colo. App. 2009).

Value at time of commission of crime. While an owner of goods is always competent to testify as to the value of his property in prosecution for theft and receiving stolen goods, it must relate to its value at the time of the commission of the crime, and where the owner testifies only as to the purchase price of the goods, such testimony is competent evidence of fair market value only where the goods are so new, and thus, have depreciated in value so insubstantially, as to allow a reasonable inference that the purchase price is comparable to current fair market value. *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973); *People v. In Interest of A.G.*, 43 Colo. App. 514, 605 P.2d 487 (1979).

It is not error to aggregate the value of the goods. *People v. Zallar*, 191 Colo. 492, 553 P.2d 756 (1976).

Taking where value not expressible as market price also proscribed. This section proscribes the unlawful taking, obtaining, or exercising of control over anything of value, not just those things whose value may be expressed in terms of a market price. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Prima facie value of check is its face value. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974); *People v. Myers*, 43 Colo. App. 256, 609 P.2d 1104 (1979).

For purposes of valuing stolen checks, restrictive indorsements are irrelevant. *People v. Marques*, 184 Colo. 262, 520 P.2d 113 (1974).

Value of credit card. The peculiar value of a credit card is not normally a price which the holder may command for the transfer of his card. It is instead the worth of the privilege to purchase goods or services on credit. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

One objective measure of the value of a credit card is its price on the "street", i.e., in the course of unlawful or illegal trade with a view to its criminal abuse. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

"Street" value is a reflection of the purchasing power of a particular credit card. Accordingly, the authorized line of credit on the card or

its "floor limit", i.e., the value of a purchase that could be completed without the necessity of obtaining express authorization from the credit card company, is also an objective measure of a card's value. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Rewards offered by the issuer of credit cards for the return of lost or stolen cards may also constitute an objective measure of the value of the card. *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), *aff'd*, 193 Colo. 415, 566 P.2d 1059 (1977).

Where a stolen item, such as a credit card, has no market value in lawful channels, other objective evidence of value may be admitted including evidence of the "illegitimate" market value. *Miller v. People*, 193 Colo. 415, 566 P.2d 1059 (1977).

Evidence of the dollar amount which may be purchased by using the credit card without card company approval provides an objective means of evaluating the illegitimate market value of credit cards. *Miller v. People*, 193 Colo. 415, 566 P.2d 1059 (1977).

Jury is not required to place a precise value upon property involved. *People v. Austin*, 185 Colo. 229, 523 P.2d 989 (1974).

Without competent evidence of fair market value in prosecution for theft and receiving stolen goods, the jury would have to base its determination of the value of the goods in question at the time of commission of the crime on pure speculation, and thus the judge properly removed the case from the jury's consideration. *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973).

An owner is always competent to testify as to the value of his property. An owner not in the business of selling such items but putting them to use does not have them appraised. The evidence of value is competent regardless of the lack of current used market value. *Rodriguez v. People*, 168 Colo. 190, 450 P.2d 645 (1969).

Testimony of victim of theft as to value of items taken was competent and could properly be admitted for purposes of valuation. *People v. Evans*, 44 Colo. App. 288, 612 P.2d 1153 (1980).

Evidence of retail price is evidence of market value, especially where the items were being sold over the counter on a more-or-less daily basis, and there is nothing to indicate that the retail price is higher than the true market value. *Maisel v. People*, 166 Colo. 161, 442 P.2d 399 (1968); *People v. Velarde*, 790 P.2d 903 (Colo. App. 1989).

Evidence of retail price is not only admissible but is perhaps the best evidence of market value. *Maisel v. People*, 166 Colo. 161, 442 P.2d 399 (1968).

Evidence of fair market value and retail price was competent evidence to sustain the jury's

finding on the question of value. *Lee v. People*, 137 Colo. 465, 326 P.2d 660 (1958).

The retail price of stolen goods is the best evidence of their value, not the wholesale price. *People v. Lindsay*, 636 P.2d 1318 (Colo. App. 1981); *People v. Binkley*, 687 P.2d 480 (Colo. App. 1984), *aff'd* on other grounds, 716 P.2d 1111 (Colo. 1986); *People v. Rosa*, 928 P.2d 1365 (Colo. App. 1996).

Purchase price, junk price, replacement cost, the use of the article, and common knowledge all may be considered in the absence of evidence of market value of a particular item. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

Amounts paid to obtain cooperation of one believed to be coconspirator should not be deducted in determining the value of stolen goods when the payments were returned to the owner of the goods. *People v. Elkhatib*, 198 Colo. 287, 599 P.2d 897 (1979).

A condemnation proceeding is not authority for establishing the value of personal property. There is just too much difference between the depreciation of land and office machines. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970).

Evidence of owner based on original cost sufficient. Testimony of witness as to the value of several stolen articles aggregating more the \$800, which jury found as the value of the stolen property, was sufficient to establish value even though based on original cost of items, and owner being competent to testify to the value of his property. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

In a prosecution for felony theft of a used car from the dealer, counsel for both sides stipulated that the value of the car was over \$100, but then the car lot owner was called and testified that he had invested \$4800 in the car, but that it was worth much more on the retail market, and he also stated, over defense objection, that it cost \$1800 to repair the automobile from damage caused by the defendant's driving. The evidence may have been prejudicial, but was not inadmissible because the defendant caused the damage while driving the stolen vehicle, and the testimony was all part of the circumstances surrounding the theft and defendant's efforts to escape with the car. *People v. Hanson*, 189 Colo. 101, 537 P.2d 739 (1975).

Evidence of felony insufficient. The only testimony on the value of the money taken was that it was "in the vicinity of one hundred dollars". Such evidence is insufficient to support a conviction of the crime of grand larceny. *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968); *People v. Coddington*, 191 Colo. 168, 551 P.2d 192 (1976).

Sufficient evidence to sustain petty theft. *People v. Coddington*, 191 Colo. 168, 551 P.2d 192 (1976).

Evidence held sufficient to support felony conviction. *People v. Vigil*, 180 Colo. 104, 502 P.2d 418 (1972).

C. Possession of Stolen Property.

When possession supports inference of guilt. Where defendants were found in possession of ore under circumstances clearly indicating that they did not come by it honestly, and they offered no explanation of how they came by it, and the ore was identified as coming from the mine in which defendants were employed, the jury was justified in finding them guilty of larceny. *Bergdahl v. People*, 27 Colo. 302, 61 P. 228 (1900).

Possession of stolen goods after a burglary or theft is sufficient to warrant a conviction, unless the attending circumstances, or other evidence is such as to overcome the presumption raised by such possession, sufficient to create a reasonable doubt of the defendant's guilt. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958, cert. denied, 362 U.S. 923, 80 S. Ct. 673, 4 L. Ed.2d 744 (1960).

In a prosecution for larceny or burglary, the jury may infer that the accused committed the theft from the circumstances of his recent, unexplained, exclusive possession of the stolen articles involved. *Noble v. People*, 173 Colo. 333, 478 P.2d 662 (1970); *Diebold v. People*, 175 Colo. 96, 485 P.2d 900 (1971); *People v. Austin*, 185 Colo. 229, 523 P.2d 989 (1974).

Where there is no direct evidence of entry of vehicle from which articles were stolen, court could infer from unexplained possession of stolen articles by defendants shortly thereafter that they were persons who entered vehicle and stole articles. *People v. Romero*, 179 Colo. 159, 499 P.2d 604 (1972).

What is meant by "recent" possession of stolen goods is to be determined by the facts in each particular case and it may vary from a few days to two years. Generally, whether the period of time is "recent" is a question for the jury, and a period of six weeks has been upheld. *Rueda v. People*, 141 Colo. 504, 348 P.2d 958, cert. denied, 362 U.S. 923, 80 S. Ct. 673, 4 L. Ed.2d 744 (1960).

If one agrees in advance to buy stolen property, knowing that the property is to be stolen, he thereby encourages the perpetration of the theft and, if the crime is committed, he is deemed a principal and punished accordingly. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933).

Mailing of stolen check to defendant inferred control. In prosecution for theft by deception, control over the money can be inferred from evidence that the check which was the basis of the prosecution was mailed to the defendants' home address in the usual course of business. *People v. Todd*, 189 Colo. 117, 538 P.2d 433 (1975).

Control need not be unauthorized from the outset. *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977).

Defendant exercised absolute possession. Where defendant removed shirts from the store rack and concealed them in a sack he was carrying, he exercised complete, independent, and absolute control and possession over the goods and it was not necessary for the goods to be removed from the owner's premises to prove the element of loss to the owners. *People v. Contreras*, 195 Colo. 80, 575 P.2d 433 (1978).

Possession need not be sole to constitute the requisite control over stolen goods under this section; where the defendant was merely a passenger in an automobile owned by another, exercising no actual control over the stolen weapons in the automobile, he could nevertheless be found guilty of theft if a jury could reasonably conclude that he was cognizant of the stolen weapons. *People v. Maes*, 43 Colo. App. 365, 607 P.2d 1028 (1979).

D. Sufficiency.

Each of the essential elements of theft as set forth in this section must be proven beyond a reasonable doubt to support a conviction even where theft is sought to be proven by showing a violation of § 38-22-127. *People v. Erickson*, 695 P.2d 804 (Colo. App. 1984).

Trial court erred in applying only subsection (1)(a) without also considering the application of subsection (1)(b). In the context of theft of construction project funds, fact finder must consider both the "intends to deprive" element of subsection (1)(a) and the "knowingly uses" element in subsection (1)(b) in determining liability for civil theft. Failure to consider evidence under "knowingly uses" element in subsection (1)(b) constitutes reversible error. *AC Excavating, Inc. v. Yale*, __ P.3d __ (Colo. App. 2010).

Sufficiency of proof of ownership. In an action under this section, evidence was held sufficient to prove the ownership and possession by the alleged owner of the cattle at the time of the alleged theft. *Cahill v. People*, 111 Colo. 173, 138 P.2d 936 (1943).

Evidence did not establish intent to steal. *Bare v. People*, 164 Colo. 93, 432 P.2d 630 (1967).

No intent to steal where property retained on police order. Where defendant was found guilty of larceny as bailee of stolen copper wire which he purchased as a junk dealer and held on hold order of police, it was held that the retention of the property in reliance upon the police order did not constitute an intent to steal, which is one of the essential elements of the crime under this section. *Schiff v. People*, 111 Colo. 333, 141 P.2d 892 (1943).

Inference of intent proper. From a defendant's action of wrongfully appropriating a check, converting it into a cashier's check, and giving it to third party, a jury could properly infer intent. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Unexplained exclusive possession of recently stolen property creates no more than inference of participation in the offense. *People v. Beamer*, 668 P.2d 990 (Colo. App. 1983).

Circumstantial evidence insufficient. In a prosecution for larceny and conspiracy to commit larceny the supreme court held the guilty verdicts to be forced verdicts based upon circumstantial evidence insufficient in quantity and quality to support a verdict of guilty. Even had the jury been initially properly instructed on circumstantial evidence, every reasonable hypothesis of innocence was not eliminated by the people's evidence. *Drahn v. People*, 174 Colo. 157, 483 P.2d 209 (1971).

Evidence held insufficient to convict defendant of theft of car. *Union Ins. Soc'y v. Robertson*, 88 Colo. 590, 298 P. 1064 (1931); *People v. Rogers*, 177 Colo. 155, 493 P.2d 21 (1972); *People v. Cheney*, 180 Colo. 138, 503 P.2d 338 (1972).

In a prosecution for larceny of an automobile where the evidence discloses that a defendant is permitted to take a car by the person in charge thereof, and is furnished license plates for his convenience and protection in driving the same, no felonious taking under this section is shown. *Lee v. People*, 138 Colo. 321, 332 P.2d 992 (1958).

Sufficient evidence to sustain conviction of theft. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971); *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972); *People v. Drumright*, 181 Colo. 137, 507 P.2d 1097 (1973); *Lamb v. People*, 181 Colo. 446, 509 P.2d 1267 (1973); *People v. Diaz*, 182 Colo. 369, 513 P.2d 444 (1973); *People v. Miller*, 37 Colo. App. 294, 549 P.2d 1092 (1976), aff'd, 193 Colo. 415, 566 P.2d 1059 (1977); *People v. Maes*, 43 Colo. App. 365, 607 P.2d 1028 (1979); *People v. Mandez*, 997 P.2d 1254 (Colo. App. 1999).

Sufficiency of conversion to constitute larceny. *Quinn v. People*, 32 Colo. 135, 75 P. 396 (1904); *Compton v. People*, 89 Colo. 407, 3 P.2d 418 (1931); *Moore v. People*, 125 Colo. 306, 243 P.2d 425 (1952).

Evidence from which the jury might conclude that defendant had come into possession of stolen property lawfully, that he thereafter learned that such property had been stolen in a burglary, and with full knowledge thereof converted such property to his own use withholding it from its lawful owner, is sufficient to support a conviction of larceny by bailee. *Peters v. People*, 151 Colo. 35, 376 P.2d 170 (1962).

Negotiation of a check is equivalent to receipt of money, and failure to pay over the money

collected for another is a conversion of it. *Hucal v. People*, 176 Colo. 529, 493 P.2d 23 (1971).

Administrator of estate guilty of embezzlement. *Hopkins v. People*, 89 Colo. 296, 1 P.2d 937 (1931).

Conviction for embezzlement by a warehouseman reversed when there is no evidence to show that the defendant actually took part in the crime and the prosecution failed to establish that the defendant had some knowledge that the manager had perpetrated the crime. *Dressel v. People*, 178 Colo. 115, 495 P.2d 544 (1972).

Evidence insufficient to support conviction of false pretenses. *Rogers v. People*, 161 Colo. 317, 422 P.2d 377 (1966).

Evidence sufficient to support conviction of obtaining property by false pretenses. *Shemwell v. People*, 62 Colo. 146, 161 P. 157 (1916); *Montez v. People*, 110 Colo. 208, 132 P.2d 970 (1942).

Evidence sufficient to support conviction of confidence game. *Munsell v. People*, 122 Colo. 420, 222 P.2d 615 (1950); *McBride v. People*, 126 Colo. 277, 248 P.2d 725 (1952); *Krantz v. People*, 150 Colo. 469, 374 P.2d 199 (1962), cert. denied, 372 U.S. 921, 83 S. Ct. 735, 9 L. Ed.2d 725 (1963); *Dodge v. People*, 168 Colo. 531, 452 P.2d 759 (1969).

Evidence insufficient to sustain conviction of confidence game. *Bomareto v. People*, 111 Colo. 99, 137 P.2d 402 (1943); *Graham v. People*, 126 Colo. 351, 248 P.2d 730 (1952); *White v. People*, 126 Colo. 365, 249 P.2d 823 (1952); *Bevins v. People*, 138 Colo. 123, 330 P.2d 709 (1958); *Bledsoe v. People*, 138 Colo. 490, 335 P.2d 284 (1959).

Evidence insufficient to show specific intent to deprive customers of their money. *People v. McClure*, 186 Colo. 274, 526 P.2d 1323 (1974).

Evidence insufficient for conviction. *People v. Ferrell*, 197 Colo. 253, 591 P.2d 1038 (1979).

V. JURY AND INSTRUCTIONS.

Sufficient evidence to go to jury. *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973).

Jury determines grade of crime. It is for the jury under proper instructions, and not the trial judge, to weigh and consider the evidence and determine therefrom what grade of crime, if any, was committed. *People v. Chapman*, 174 Colo. 545, 484 P.2d 1234 (1971).

Where evidence supports misdemeanor offense, to instruct only to felony theft error. Where there was evidence to support the defendant's request for an instruction on a lesser included class 2 misdemeanor offense of theft of goods, it was error for the trial court to instruct the jury only as to felony theft. *Beaudoin v. People*, 627 P.2d 739 (Colo. 1981).

Defendant is entitled to an instruction on the grade of the offense when there is evidence

which tends to reduce the grade. *People v. Chapman*, 174 Colo. 545, 484 P.2d 1234 (1971).

Instruction on specific intent. Where the trial court adequately instructs the jury on the issue of specific intent required as an element of attempted theft, no error can be assigned. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

Where instruction permits jury to convict of crime of theft without proof of essential element of that crime, intent to permanently deprive another of use and benefit of property, there is plain error and reversal is required. *People v. Butcher*, 180 Colo. 429, 506 P.2d 362 (1973).

The instruction "the laws of the State of Colorado provide that any person commits theft when he knowingly obtains or exerts unauthorized control over anything of value of another person with intent to deprive such other person permanently of the use or benefit of the thing of value" clearly spells out the intent required to commit the crime of theft. *People v. Gilmer*, 182 Colo. 96, 511 P.2d 494 (1973).

Erroneously instructing the jury that the defendant must have acted "intentionally" rather than "knowingly" in taking a thing of value from another person was harmless error as to the defendant because it worked to the defendant's benefit in that "intentionally" requires a more serious form of mental culpability. *Blehm v. People*, 817 P.2d 988 (Colo. 1991).

No plain error where jury not instructed that defendant must know he or she is deceiving the victims. Deception involves the element of intentional misrepresentation with the purpose of misleading and thus such an instruction is redundant and unnecessary. *People v. Collie*, 995 P.2d 765 (Colo. App. 1999).

Instruction that failed to require a finding that a defendant must know that any exercise of control is without authorization is erroneous. *People v. Bornman*, 953 P.2d 952 (Colo. App. 1997); *Auman v. People*, 109 P.3d 647 (Colo. 2005).

While the standard of proof for the crime of theft by deception requires proof that, in reliance upon misrepresentations by the defendant, the victim parted with something of value, the court is not required to separately instruct the jury on the standard if the jury otherwise is instructed in accordance with the theft statute. *People v. Pollard*, 3 P.3d 473 (Colo. App. 2000).

Instruction could have been interpreted to permit a conviction when the defendant mistakenly believed that she was authorized to take the money and thus was an incorrect statement of the law, but no objection was raised to the jury instruction, the error was not a structural defect, and a review of the evidence found no plain error. *People v. Price*, 969 P.2d 766 (Colo. App. 1998).

Where issue before jury, affirmative defense instructions must be given. Where an issue of renunciation and abandonment is before a jury, proper instructions on this affirmative defense must be given to the jury. *People v. Traubert*, 625 P.2d 991 (Colo. 1981).

Relationship of intent and intoxication. Where court's instruction correctly informed the jury that the "intent to permanently deprive" was an element of theft, and further instructed the jury that the defense of intoxication could be considered in determining whether defendant was incapable of forming "the intent to commit the crime charged", when the two instructions are read together it is apparent that the jury was adequately advised of the relationship between the requisite specific intent and the defense of intoxication. *People v. Gilmer*, 182 Colo. 96, 511 P.2d 494 (1973).

Test applicable to defendant's request for an instruction on the crime of theft is whether there existed a rational basis to acquit him of simple robbery but still convict him of theft; the test is not whether there is a total absence of evidence showing the defendant to be guilty of simple robbery. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Instructions for crimes of theft and burglary which were phrased in the language of the statutes were sufficient. *People v. Bowen*, 182 Colo. 294, 512 P.2d 1157 (1973).

Where, at a minimum, defendant committed simple robbery, no theft instruction. Because the uncontroverted evidence before the jury established, at a minimum, that the defendant had committed simple robbery, he was not entitled to an instruction on the crime of theft. *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980).

Required instructions by court. Where the defendant is charged with aggravated robbery and declines the court's offer to instruct on simple robbery, the court is obligated to instruct on the lesser nonincluded offense of theft only if there is no evidence of the defendant's guilt of the lesser included offense of simple robbery. *People v. Graham*, 41 Colo. App. 390, 590 P.2d 511 (1978), *aff'd*, 199 Colo. 439, 610 P.2d 494 (1980).

There is no reason for including irrelevant portions of theft statute in instruction, but there is no prejudice to the defendant by their inclusion. *People v. Becker*, 187 Colo. 344, 531 P.2d 386 (1975).

Instruction on all sections of a theft statute is not prejudicial although not all sections apply to defendant. *People v. Pack*, 797 P.2d 774 (Colo. App. 1990).

Instruction to jury regarding unexplained, recent possession of stolen property, which indicated to the jury that the burden of proving rightful possession was on the defendant shifted the burden to the defendant to prove his inno-

cence and was prejudicial error. *Martinez v. People*, 163 Colo. 503, 431 P.2d 765 (1967).

The instruction to the jury that the possession of stolen property recently after the commission of a theft or larceny may be a criminal circumstance tending to show that the person in whose possession it was found is guilty of the crime of larceny unless he has satisfied you from the evidence that he came into possession of the property honestly is prejudicial error. *Attwood v. People*, 165 Colo. 345, 439 P.2d 40 (1968).

An instruction which permits the jury to infer guilt of either theft or burglary if recent, exclusive and unexplained possession of stolen property was established beyond a reasonable doubt was not defective. *People v. Maes*, 43 Colo. App. 365, 607 P.2d 1028 (1979).

Instruction on circumstantial evidence should include the essential limiting language that in order to convict on circumstantial evidence alone, circumstances must be such as to exclude every reasonable hypothesis of defendants' innocence. *Drahn v. People*, 174 Colo. 157, 483 P.2d 209 (1971).

Special instruction on "knowingly" as applied to "without authorization" is not required. *People v. Gresham*, 647 P.2d 243 (Colo. App. 1981).

Failure to instruct on mens rea of theft. Definitional instruction on whether a person acts "knowingly" failed to instruct properly on mens rea of theft, the ulterior crime of burglary, and was plainly erroneous with regard to burglary in that it did not require jury to be satisfied beyond a reasonable doubt that the taking had to be practically certain in order to obtain from the defendant's conduct the determination that the defendant had the requisite culpability for commission of theft. *People v. Reed*, 692 P.2d 1122 (Colo. App. 1984).

Accessory instruction proper. Where there was evidence presented at trial to the effect that the defendant had stated, prior to the theft, that he would take all the television sets which could be provided, and there was evidence from which a jury could properly infer that the defendant knew that they would be stolen, the evidence was sufficient to permit submission of the theft by taking count to the jury, it being properly instructed as to an accessory becoming liable as a principal. *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

Accomplice instruction improper. Where witness admitted burglarizing an establishment and delivering articles stolen to defendant who was charged with receiving stolen goods, such witness was not an accomplice and an instruction concerning the testimony of an accomplice was not appropriate. *Burns v. People*, 148 Colo. 245, 365 P.2d 698 (1961).

Instruction on lesser included offense held sufficient. *People v. Mingo*, 191 Colo. 155, 551 P.2d 196 (1976).

VI. VERDICT AND SENTENCE.

No equal protection violation where person convicted of class 4 felony theft is punished more severely than a class 4 felony sex offender. *People v. Friesen*, 45 P.3d 784 (Colo. App. 2001).

General verdict of guilty held sufficient. Where the indictment sets out the value of the property unlawfully obtained, a general verdict of "guilty in manner and form as charged in the indictment", is sufficient to support a conviction without a finding of the value of the property taken. *Montez v. People*, 110 Colo. 208, 132 P.2d 970 (1942); *Archer v. People*, 129 Colo. 313, 269 P.2d 700 (1954).

Trial court is without authority to amend or alter jury finding of value where the jury by its verdict fixes the value of the property taken in the amount of \$325. *People v. Chapman*, 174 Colo. 545, 484 P.2d 1234 (1971).

Larceny from person is felony regardless of value. Where crime charged was larceny from the person, a statement by victim of the amount of money taken from him was immaterial, and it was error to impose sentence as for misdemeanor because amount taken from person was less than \$50. *People v. McIntosh*, 149 Colo. 555, 369 P.2d 987 (1962).

Verdicts of guilt as to theft, but not as to burglary, are consistent. Where evidence linking the defendant with burglary was conflicting or was rebutted, but the evidence clearly established that the defendant was in possession of property recently taken in a burglary, there was evidence to sustain a conviction of larceny and the verdicts of not guilty of burglary but guilty of larceny were not inconsistent as being irreconcilable with the evidence of each case. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Verdict of innocent as to theft but not as to conspiracy to commit theft consistent. Where the evidence under which the jury acquitted the defendant of the charge of theft was separate and independent from evidence before the jury on the charge of conspiracy to commit theft, which jury convicted defendant of, conspiracy conviction was not an inconsistent verdict. *People v. Forbes*, 185 Colo. 410, 524 P.2d 1377 (1974).

Verdicts held not inconsistent. Since the statutory elements of aggravated robbery and theft over \$200 are different, jury verdicts convicting a defendant of aggravated robbery of an employee but acquitting the defendant of theft from the employer are not inconsistent and repugnant. *People v. Williams*, 40 Colo. App. 30, 569 P.2d 339 (1977).

Sentence concurrent with life sentence proper. Where the defendant was sentenced for life imprisonment for first degree murder and lesser sentences for first degree burglary and theft which the jury found he had committed, and all sentences were imposed concurrently with the life sentence which the jury ordered, there was no error. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Consecutive sentences for burglary and for larceny are improper. *Maes v. People*, 169 Colo. 200, 454 P.2d 792 (1969).

When the burglary and the larceny involve one transaction, typical of many burglary-larceny situations, double, consecutive sentencing for the same transaction is inherently wrong and basically unjust, and evades the legislative intent. *Maynes v. People*, 169 Colo. 186, 454 P.2d 797 (1969).

All separately prosecutable thefts committed within a six-month period are a unit of prosecution for double jeopardy purposes. Two convictions for theft within the same six-month period must be merged into one conviction. *People v. Gardner*, 250 P.3d 1262 (Colo. App. 2010).

Defendant who pled guilty to a single count of theft in return for a dismissal of other counts may not be ordered to pay restitution to the victims in the counts that were dismissed. When an offense requires proof of the identity of a particular victim, the court may not order restitution to another. *People v. Armijo*, 989 P.2d 224 (Colo. App. 1999).

When defendant's actions do not constitute theft from the person of another, the defendant may be convicted of theft, but the court must enter the lowest level of a theft charge if the jury does not find the value of the items stolen. *People v. Smith*, 121 P.3d 243 (Colo. App. 2005).

18-4-402. Theft of rental property. (1) A person commits theft of rental property if he:

(a) Obtains the temporary use of personal property of another, which is available only for hire, by means of threat or deception, or knowing that such use is without the consent of the person providing the personal property; or

(b) Having lawfully obtained possession for temporary use of the personal property of another which is available only for hire, knowingly fails to reveal the whereabouts of or to return said property to the owner thereof or his representative or to the person from whom he has received it within seventy-two hours after the time at which he agreed to return it.

(2) (Deleted by amendment, L. 2007, p. 1691, § 4, effective July 1, 2007.)

(3) Theft of rental property is a class 2 misdemeanor where the value of the property involved is less than five hundred dollars.

(3.5) Theft of rental property is a class 1 misdemeanor where the value of the property involved is five hundred dollars or more but less than one thousand dollars.

(4) Theft of rental property is a class 5 felony where the value of the property involved is one thousand dollars or more but less than twenty thousand dollars.

(5) Theft of rental property is a class 3 felony where the value of the property involved is twenty thousand dollars or more.

(6) When a person commits theft of rental property twice or more within a period of six months, two or more of the thefts of rental property may be aggregated and charged in a single count, in which event the thefts so aggregated and charged shall constitute a single offense, and, if the aggregate value of the property involved is one thousand dollars or more but less than twenty thousand dollars, it is a class 5 felony; however, if the aggregate value of the property involved is twenty thousand dollars or more, it is a class 3 felony.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-402. L. 75: (2) and (3) amended and (4) added, p. 619, § 11, effective July 21. L. 77: (1)(b) amended, p. 963, § 24, effective July 1; (2) and (4) amended and (5) added, p. 973, § 3, effective July 1. L. 84: (3) and (4) amended, p. 537, § 7, effective July 1. L. 87: (6) added, p. 615, § 6, effective July 1. L. 89: (4) and (6) amended, p. 833, § 45, effective July 1. L. 92: (2) to (6) amended, p. 434, § 2, effective April 10. L. 98: (3), (4), and (6) amended, p. 1437, § 12, effective July 1; (3), (4), and (6) amended, p. 795, § 3, effective July 1. L. 2007: (2) to (6) amended and (3.5) added, p. 1691, § 4, effective July 1. L. 2009: (6) amended, (HB 09-1334), ch. 244, p. 1100, § 3, effective May 11.

Cross references: For the legislative declaration contained in the 2007 act amending subsections (2) to (6) and enacting subsection (3.5), see section 1 of chapter 384, Session Laws of Colorado 2007. For the legislative declaration contained in the 2009 act amending subsection (6), see section 1 of chapter 244, Session Laws of Colorado 2009.

ANNOTATION

This section is constitutional. *People v. Cardinal*, 197 Colo. 425, 593 P.2d 966 (1979).

Culpable mental state required. The use of the term “knowingly” in subsection (1)(b) indicates the requirement of a culpable mental state. *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1979).

Not specific intent. The culpable mental state required in a statute dealing with theft must be more than mere negligence, but it need not be specific intent. *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1979).

But conscious culpability. In order to be convicted under this section, the defendant must have the knowledge that his acts constituted a wrongful retention of rental property. Implicit in this statutory provision is the element of conscious culpability. *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1979); *People v. Cardinal*, 197 Colo. 425, 593 P.2d 966 (1979).

Allegations of time are substantive. Subsection (1)(b) proscribes only conduct which occurs after the expiration of the rental period specified in a rental agreement. In prosecutions com-

menced under this subsection, allegations of time are, therefore, substantive allegations — not mere matters of form which may be altered by amendment at any time prior to the rendering of a verdict in the absence of prejudice to the defendant. *People v. Moody*, 674 P.2d 366 (Colo. 1984).

Detention of defendant and search of defendant's car are unwarranted where there is no reasonable basis for law enforcement officer to suspect that defendant has violated subsection (1)(b), no valid investigatory stop, and no reason for law enforcement officer to believe that defendant is armed or dangerous. *People v. Litchfield*, 902 P.2d 921 (Colo. App. 1995), *aff'd* on other grounds, 918 P.2d 1099 (Colo. 1996).

Section distinguished from § 18-4-401. This section clearly applies to an unlawful temporary deprivation of rental property as distinguished from a permanent deprivation of property generally as required by § 18-4-401. *People v. Trigg*, 184 Colo. 78, 518 P.2d 841 (1974).

Applied in *People v. Donelson*, 194 Colo. 175, 570 P.2d 542 (1977).

18-4-403. Statutory intent. If any law of this state refers to or mentions larceny, stealing, embezzlement (except embezzlement of public moneys), false pretenses, confi-

dence games, or shoplifting, that law shall be interpreted as if the word "theft" were substituted therefor; and in the enactment of sections 18-4-401 to 18-4-403 it is the intent of the general assembly to define one crime of theft and to incorporate therein such crimes, thereby removing distinctions and technicalities which previously existed in the pleading and proof of such crimes.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-403.

ANNOTATION

Law reviews. For note, "Larceny, Embezzlement, and False Pretenses in Colorado — A Need for Consolidation", see 23 Rocky Mt. L. Rev. 446 (1951). For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 (1953).

Annotator's note. Since § 18-4-403 is similar to former § 40-5-2, C.R.S. 1963, a relevant case construing that provision has been included in the annotations to this section.

The theft statute is clearly meant to encompass generally acquisition type crimes. Hucal v. People, 176 Colo. 529, 493 P.2d 23 (1971).

This section is a short-cut method of substituting the word "theft" in every statute in which the words larceny, stealing, embezzlement (except embezzlement of public moneys), false pretenses, confidence game, or shoplifting

are used, without having to list all the statutes affected; this technique avoids rendering inoperative, by inadvertence, any statute containing one of the enumerated words. Hucal v. People, 176 Colo. 529, 493 P.2d 23 (1971).

Exception for embezzlement of public money is not limitation. Just because the word "theft" should not be substituted for "embezzlement of public moneys" is no indication of a limitation on the general theft statute. Clearly, the crime of embezzlement is included, for unless the general assembly intent is clearly shown to be otherwise, enactment of a specific criminal statute does not preclude prosecution under a general criminal statute, but rather allows the single criminal transaction to be prosecuted under either statute. Hucal v. People, 176 Colo. 529, 493 P.2d 23 (1971).

18-4-404. Obtaining control over any stolen thing of value - conviction. Every person who obtains control over any stolen thing of value, knowing the thing of value to have been stolen by another, may be tried, convicted, and punished whether or not the principal is charged, tried, or convicted.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-404.

ANNOTATION

Annotator's note. Since § 18-4-404 is similar to former § 40-5-11, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section makes the buying or receiving of stolen goods a crime. Burns v. People, 148 Colo. 245, 365 P.2d 698 (1961).

For distinctions between larceny and receipt of stolen goods under former statute, see People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972).

Receiving stolen goods is a distinct crime from the original larceny of the property, and the party committing the larceny is not the accomplice of one who purchased the goods from him knowing them to have been stolen. Burns v. People, 148 Colo. 245, 365 P.2d 698 (1961).

An ingredient of the crime of receiving stolen property is knowledge that it has been stolen. Stull v. People, 140 Colo. 278, 344 P.2d 455 (1959); Noble v. People, 173 Colo. 333, 478

P.2d 662 (1970); People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973).

It is fundamental that knowledge of the fact that the property received is stolen is an essential element of the crime, and lack of such proof requires a dismissal. People v. Schamber, 182 Colo. 355, 513 P.2d 205 (1973).

Guilty knowledge must be both alleged and proved, and the burden of establishing knowledge on the part of the defendant is upon the prosecution. Noble v. People, 173 Colo. 333, 478 P.2d 662 (1970).

Mere proof of recent, unexplained possession insufficient to support conviction. In order to support a conviction of knowingly receiving stolen goods there must be proof of some circumstances showing knowledge of the theft beyond mere proof of recent, unexplained, exclusive possession of the property. Noble v. People, 173 Colo. 333, 478 P.2d 662 (1970); People v. Manning, 180 Colo. 14, 501 P.2d 1046 (1972).

And juries should be so instructed. Noble v. People, 173 Colo. 333, 478 P.2d 662 (1970).

Although jury may consider such evidence. Recent, unexplained, exclusive possession is a fact which the jury may well consider along with other evidence, either direct or circumstantial, of knowledge of the theft. Noble v. People, 173 Colo. 333, 478 P.2d 662 (1970).

Instruction on inference created by possession of stolen property. It is never proper, in a case for receiving stolen goods knowing them to have been stolen, for the jury to be instructed that the unexplained possession alone of such recently stolen property is either a circumstance from which guilt may be inferred or that such possession is a circumstance strongly indicative of guilt which would justify, support, or warrant a verdict for the state, where such possession is unaided by other proof tending to show that the accused received such property knowing it to have been stolen. Noble v. People, 173 Colo. 333, 478 P.2d 662 (1970).

Where the defendant contended that since the court instructed the jury that the exclusive possession of stolen property recently after the commission of a theft may be an incriminating circumstance, the court should have further given an instruction defining "recently" after the commission of a theft, it was held that the court did not err as such instruction could only have stated that whether or not defendant's possession was recent was a matter for the determination of the jury. Tatum v. People, 174 Colo. 301, 483 P.2d 964 (1971).

Manner of describing property. As in larceny, so in receiving, the property is identified by description of the stolen things and their ownership, namely, the thing stolen must be described in the same manner as in larceny. Miller v. People, 13 Colo. 166, 21 P. 1025 (1889).

Testimony of thief against one charged with receiving the stolen goods is not subject to infirmities attached to accomplice testimony. Where witness admitted burglarizing an

establishment and delivering articles stolen to defendant who was charged with receiving stolen goods, such witness was not an accomplice and an instruction concerning the testimony of an accomplice was not appropriate. Burns v. People, 148 Colo. 245, 365 P.2d 698 (1961).

Evidence of market value required. To make a prima facie case for violations under this section, it was incumbent upon the people to present competent evidence of the reasonable market value of the goods in question at the time of the commission of the alleged offense. People v. Paris, 182 Colo. 148, 511 P.2d 893 (1973).

Evidence of price of goods insufficient to prove guilty knowledge. Where sole evidence of receipt of stolen goods was that defendant purchased the goods at a price which was not much lower than the fair market price of the goods, it was insufficient to establish guilty knowledge. People v. Manning, 180 Colo. 14, 501 P.2d 1046 (1972).

And case lacking proof of knowledge is not for jury. Negation of the essential element of guilt, a defendant's knowledge that property received was stolen at the time he received it, makes an incomplete case, one which should not be submitted to a jury for deliberation and verdict. Stull v. People, 140 Colo. 278, 344 P.2d 455 (1959).

Evidence sufficient to go to jury. Where the evidence shows that a defendant has in his possession goods of the same kind as those stolen, and there is additional evidence and other circumstances from which an inference can reasonably be made that the goods are the same as those previously stolen, or that the accused had knowledge of their stolen character, the case is properly submitted to the jury. Tatum v. People, 174 Colo. 301, 483 P.2d 964 (1971).

Sufficient evidence to support conviction. People v. Bailey, 191 Colo. 366, 552 P.2d 1014 (1976).

Evidence insufficient for conviction. People v. Maestas, 181 Colo. 180, 508 P.2d 782 (1973).

Applied in People v. Montoya, 667 P.2d 1377 (Colo. 1983).

18-4-405. Rights in stolen property. All property obtained by theft, robbery, or burglary shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. The owner may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property. In any such action, the owner may recover two hundred dollars or three times the amount of the actual damages sustained by him, whichever is greater, and may also recover costs of the action and reasonable attorney fees; but monetary damages and attorney fees shall not be recoverable from a good-faith purchaser or good-faith holder of the property.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-405. L. 73: p. 536, § 1. L. 87: Entire section amended, p. 668, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado-Part I", see 30 Colo. Law. 7 (April 2001). For article, "Treble Damages for Civil Theft in Colorado After *Itin v. Ungar*", see 31 Colo. Law. 49 (March 2002). For article, "Bona Fide Purchasers of Real Property: Fraud is Not Civil Theft", see 32 Colo. Law. 101 (December 2003).

Section conflicts with Uniform Commercial Code, § 4-2-403, which holds that a good faith purchaser takes valid title from a person who obtained voluntary delivery from a seller in exchange for a check that is later dishonored. UCC section prevails because it was later in time and because original owner was in a better position to protect his or her interests than the subsequent good faith purchaser. *West v. Roberts*, 143 P.3d 1037 (Colo. 2006).

Section should not be read as a codification of the remedy of replevin or as a delineation of the grounds for creating a constructive trust. In *re Allen*, 724 P.2d 651 (Colo. 1986).

Return of property does not necessarily preclude a finding of wrongful intent nor purge the defendant of guilt. *Ziegler v. Inabata of Am., Inc.*, 316 F. Supp. 2d 908 (D. Colo. 2004).

Although funds from a "Ponzi scheme" were obtained by theft, the subsequent transfer of these funds by the debtor represented the transfer of an "interest of the debtor in property" for purposes of a chapter 7 bankruptcy action. In *re M & L Business Mach. Co., Inc.*, 160 B.R. 851 (B.R. D. Colo. 1994), *aff'd*, 167 B.R. 219 (Bankr. D. Colo. 1994).

This section was intended to be a punitive measure depriving thieves and persons who buy and sell stolen goods of the immediate fruits of their criminal activities. In *re Allen*, 724 P.2d 651 (Colo. 1986); *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994).

Employer of "taker" of property, never having had possession of the property and not being involved in criminal activity, was not subject to this section. *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994).

The requisite burden of proof for awarding treble damages under this section is the preponderance of evidence standard rather than the higher burden used in criminal matters of beyond a reasonable doubt. In *re Dorland*, 374 B.R. 765 (Bankr. D. Colo. 2007).

"Actual damages" include noneconomic damages as well as economic damages. *Gorsich v. Double B Trading Co., Inc.*, 893 P.2d 1357 (Colo. App. 1994).

Trial court did not err in concluding that under this section a rightful owner could not recover from a vendor funds belonging to a

company that had been embezzled and used to purchase and improve property the vendor reacquired after embezzler's default on a land contract, as vendor no longer had possession of company funds. *Cedar Lane Inv. v. Am. Roofing*, 919 P.2d 879 (Colo. App. 1996).

Damages may be obtained under this section without proof that the taker of stolen property was convicted of theft, burglary, or robbery. *Chryar v. Wolf*, 21 P.3d 428 (Colo. App. 2000); *Itin v. Bertrand T. Ungar, P.C.*, 17 P.3d 129 (Colo. 2000).

This statute provides an owner with a private remedy against the taker that requires proof of a specified criminal act but not proof of a prior criminal conviction to recover treble damages, fees, and costs. *Itin v. Bertrand T. Ungar, P.C.*, 17 P.3d 129 (Colo. 2000).

If all of the conditions leading to the award of treble damages have already occurred, then the award of those damages is not contingent, and, if the damages are readily ascertainable, they are liquidated. It is appropriate, therefore, to consider the inclusion of treble damages in calculating debtor's eligibility for chapter 13 bankruptcy relief under 11 U.S.C. § 109(e). In *re Krupka*, 317 B.R. 432 (Bankr. D. Colo. 2004).

The award of treble damages is not discretionary. Because the language of this section speaks in terms of what the owner may recover as opposed to what the court may award, the statutory language does not support the argument that discretion lies with the trial court to either award treble damages or not as it may deem appropriate. It is appropriate, therefore, to consider the inclusion of treble damages in calculating debtor's eligibility for chapter 13 bankruptcy relief under 11 U.S.C. § 109(e). In *re Krupka*, 317 B.R. 432 (Bankr. D. Colo. 2004).

There was no justification for assessing the criminal penalty of treble damages, attorney fees, and costs where plaintiff did not prove all the components of "theft" by a preponderance of the evidence. Although there was a violation of § 38-26-109, resulting in an award of actual damages, there was no proof, evidence, or finding of conduct necessary to show criminal conduct or criminal liability under applicable Colorado case law. In *re Dorland*, 374 B.R. 765 (Bankr. D. Colo. 2007).

Attempt to collect damages unavailing where there was no showing of a criminal act. In *re Duran*, 483 F.3d 653 (10th Cir. 2007).

Restaurant owners who intentionally intercepted satellite signal to broadcast fight program without paying sub-licensing fee violated this section. *Kingvision Pay-Per-View, Ltd. v. Gutierrez*, 544 F. Supp. 2d 1179 (D. Colo. 2008).

Plaintiff not entitled to damages under this section, however, because court awarded it statutory damages under the Federal Communications Act, 47 U.S.C. § 605. Any award under this section would therefore constitute impermissible double recovery for the same injury. *Kingvision Pay-Per-View, Ltd. v. Gutierrez*, 544 F. Supp. 2d 1179 (D. Colo. 2008).

This section does not authorize recovery against a good faith purchaser who holds record title to real property earlier conveyed under fraudulent circumstances. *Strekal v. Espe*, 114 P.3d 67 (Colo. App. 2004).

The statute of limitations in § 13-80-102, and not that in § 16-5-401 (1)(a), applies to a

theft claim brought under this section. *Michaelson v. Michaelson*, 923 P.2d 237 (Colo. App. 1995).

This section imposes a statutory penalty within the meaning of C.R.C.P. 98, requiring that the action be tried in the county where the claim arose. *Ehrlich Feedlot, Inc. v. Oldenburg*, 140 P.3d 265 (Colo. App. 2006).

Award of reasonable attorney fees to a prevailing plaintiff on a civil theft claim is mandatory. *Steward Software Co. v. Kopcho*, ___ P.3d ___ (Colo. App. 2010).

Applied in *In re Allen*, 691 P.2d 749 (Colo. App. 1984).

18-4-406. Concealment of goods. If any person willfully conceals unpurchased goods, wares, or merchandise owned or held by and offered or displayed for sale by any store or other mercantile establishment, whether the concealment be on his own person or otherwise and whether on or off the premises of said store or mercantile establishment, such concealment constitutes prima facie evidence that the person intended to commit the crime of theft.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-406.

ANNOTATION

Section held to be constitutional. A statute susceptible to different interpretations should be construed in a manner consistent with constitutional principles when reasonable to do so; therefore, the reference to prima facie evidence contained in this section establishes a permissive inference permitting but not requiring the finder of fact to find from evidence of willful concealment that the defendant intended to steal merchandise concealed. *People in Interest of R.M.D.*, 829 P.2d 852 (Colo. 1992).

Willful concealment of goods that results in prima facie evidence of intent to commit theft does not violate due process standards. This section does not eliminate the prosecution's burden of proving intent to commit crime beyond a reasonable doubt. "Prima facie" does not require the fact finder to conclude that the prosecution has met such burden, but establishes a permissible inference. *People In The Matter of R.M.D.*, 829 P.2d 852 (Colo. 1992).

18-4-407. Questioning of person suspected of theft without liability. If any person triggers an alarm or a theft detection device as defined in section 18-4-417 (2) or conceals upon his person or otherwise carries away any unpurchased goods, wares, or merchandise held or owned by any store or mercantile establishment, the merchant or any employee thereof or any peace officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may detain and question such person, in a reasonable manner for the purpose of ascertaining whether the person is guilty of theft. Such questioning of a person by a merchant, merchant's employee, or peace or police officer does not render the merchant, merchant's employee, or peace officer civilly or criminally liable for slander, false arrest, false imprisonment, malicious prosecution, or unlawful detention.

Source: L. 71: R&RE, p. 429, § 1. C.R.S. 1963: § 40-4-407. L. 2001: Entire section amended, p. 512, § 1, effective July 1.

ANNOTATION

Annotator's note. Since § 18-4-407 is similar to former § 40-5-31, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Section protects inquiry as to shoplifting. This section affords a degree of protection to one who, acting in good faith and upon probable cause based upon reasonable grounds, questions

another for the purpose of ascertaining whether or not the person thus questioned is guilty of shoplifting. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

Such protection is not restricted to situations where person stopped has actually committed the offense of shoplifting. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

Actions of store are not actions of state. The statute permitting the detention of suspected shoplifters by the store management merely grants a license under state law to detain a suspect; it does not invest the individual with the authority of state law. The statute is intended merely to license a shopkeeper to undertake self-help to protect his property; it does not vest him with the authority of the state. The actions of the storekeepers in pursuit of their own personal interests cannot be considered to have been taken under color of state law under the civil rights act. *Warren v. Cummings*, 303 F. Supp. 803 (D. Colo. 1969).

The phrase "Such questioning of a person" can only mean the questioning of a person for the purpose of ascertaining whether or not he is guilty of shoplifting. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

18-4-408. Theft of trade secrets - penalty. (1) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his own use or to the use of another, steals or discloses to an unauthorized person a trade secret, or, without authority, makes or causes to be made a copy of an article representing a trade secret, commits theft of a trade secret.

(2) As used in this section:

(a) "Article" means any object, material, device, or substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map.

(b) "Copy" means any facsimile, replica, photograph, or other reproduction of an article, and any note, drawing, or sketch made of or from an article.

(c) "Representing" means describing, depicting, containing, constituting, reflecting, or recording.

(d) "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a trade secret the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(3) (a) Theft of a trade secret is a class 1 misdemeanor. A second or subsequent offense under this section committed within five years after the date of a prior conviction is a class 5 felony.

(b) Notwithstanding section 16-5-401 (1) (a), C.R.S., any prosecution for violation of this section shall be commenced within three years after discovery of the offense.

Source: L. 71: R&RE, p. 430, § 1. C.R.S. 1963: § 40-4-408. L. 89: (3) amended, p. 833, § 46, effective July 1. L. 98: (3) amended, p. 156, § 1, effective July 1.

Cross references: For the "Uniform Trade Secrets Act", see article 74 of title 7.

Reasonable grounds to stop and question is issue of law. The issue as to whether the defendant's agents in stopping the plaintiff and questioning him acted in good faith and upon probable cause based upon reasonable grounds posed an issue of law which should have been resolved by the trial court under an appropriate instruction to the jury. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

Reasonableness of actions thereafter is issue of fact. The issue as to whether its agents, even though they had the right to stop and question the plaintiff, thereafter acted in a reasonable manner, which they must also do if they are to be given protection afforded by this section, was a genuinely controverted issue of fact which was properly one to be resolved by the jury. *J. S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

In action by shopper, who had been detained as a suspected shoplifter, for false imprisonment and slander, whether, under the statutory privilege relied on by the defendants, the manner and extent of the investigation and detention of the shopper were reasonable and whether there was probable cause to detain him were questions of fact. *Gonzales v. Harris*, 189 Colo. 518, 542 P.2d 842 (1975).

ANNOTATION

Law reviews. For article, "Trade Secret Litigation: Injunctions and Other Equitable Remedies", see 48 U. Colo. L. Rev. 189 (1977). For article, "Protecting Technical Information: The Role of the General Practitioner", see 12 Colo. Law. 1215 (1983). For article, "Help for Colorado Trade Secret Owners", see 15 Colo. Law.

1993 (1986). For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado-Part I", see 30 Colo. Law. 7 (April 2001). For article, "Computer Security and Privacy: The Third Wave of Property Law", see 33 Colo. Law. 57 (February 2004).

18-4-409. Aggravated motor vehicle theft. (1) As used in this section, unless the context otherwise requires:

(a) "Motor vehicle" means all vehicles of whatever description propelled by any power other than muscular, except vehicles running on rails.

(b) "Vehicle identification number" means the serial number placed upon the motor vehicle by the manufacturer thereof or assigned to the motor vehicle by the department of revenue.

(2) A person commits aggravated motor vehicle theft in the first degree if he or she knowingly obtains or exercises control over the motor vehicle of another without authorization or by threat or deception and:

(a) Retains possession or control of the motor vehicle for more than twenty-four hours; or

(b) Attempts to alter or disguise or alters or disguises the appearance of the motor vehicle; or

(c) Attempts to alter or remove or alters or removes the vehicle identification number; or

(d) Uses the motor vehicle in the commission of a crime other than a traffic offense; or

(e) Causes five hundred dollars or more property damage, including but not limited to property damage to the motor vehicle involved, in the course of obtaining control over or in the exercise of control of the motor vehicle; or

(f) Causes bodily injury to another person while he or she is in the exercise of control of the motor vehicle; or

(g) Removes the motor vehicle from this state for a period of time in excess of twelve hours; or

(h) Unlawfully attaches or otherwise displays in or upon the motor vehicle license plates other than those officially issued for the motor vehicle.

(3) Aggravated motor vehicle theft in the first degree is a:

(a) Class 4 felony if the value of the motor vehicle or motor vehicles involved is twenty thousand dollars or less;

(b) Class 3 felony if the value of the motor vehicle or motor vehicles involved is more than twenty thousand dollars or if the defendant has twice previously been convicted or adjudicated of charges separately brought and tried either in this state or elsewhere of an offense involving theft of a motor vehicle under the laws of this state, any other state, the United States, or any territory subject to the jurisdiction of the United States.

(4) A person commits aggravated motor vehicle theft in the second degree if he or she knowingly obtains or exercises control over the motor vehicle of another without authorization or by threat or deception and if none of the aggravating factors in subsection (2) of this section are present. Aggravated motor vehicle theft in the second degree is a:

(a) Class 5 felony if the value of the motor vehicle or motor vehicles involved is twenty thousand dollars or more;

(b) Class 6 felony if the value of the motor vehicle or motor vehicles involved is one thousand dollars or more but less than twenty thousand dollars;

(c) Class 1 misdemeanor if the value of the motor vehicle or motor vehicles involved is less than one thousand dollars.

(4.5) Whenever a person is convicted of, pleads guilty or nolo contendere to, receives a deferred judgment or sentence for, or is adjudicated a juvenile delinquent for, a violation

of this section, the offender's driver's license shall be revoked as provided in section 42-2-125, C.R.S.

(5) Consistent with section 18-1-202, if the theft of a motor vehicle occurs in one jurisdiction and the motor vehicle is recovered in another jurisdiction, the offender may be tried in the jurisdiction where the theft occurred, in any jurisdiction through which the motor vehicle was operated or transported, or in the jurisdiction in which the motor vehicle was recovered.

Source: **L. 71:** R&RE, p. 430, § 1. **C.R.S. 1963:** § 40-4-409. **L. 77:** Entire section R&RE, p. 974, § 4, effective July 1. **L. 79:** (2)(e) amended and (2)(f) added, p. 736, § 1, effective April 25; (2)(e) and (4) amended and (2)(g) and (2)(h) added, p. 727, §§ 4, 5, effective July 1. **L. 80:** IP(2), IP(3), and (4) amended, p. 532, § 1, effective January 29. **L. 87:** (2)(a) and (2)(g) amended, p. 668, § 2, effective July 1. **L. 92:** (3) amended, p. 434, § 3, effective April 10. **L. 95:** (3)(b) and (4) amended, p. 1253, § 12, effective July 1. **L. 99:** Entire section amended, p. 1164, § 1, effective July 1, 2000. **L. 2001:** (2)(e) amended, p. 59, § 1, effective August 8. **L. 2003:** (4.5) added, p. 1845, § 1, effective July 1. **L. 2007:** (3) and (4) amended, p. 1692, § 5, effective July 1.

Cross references: For the legislative declaration contained in the 2007 act amending subsections (3) and (4), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Annotator's note. Since § 18-4-409 is similar to former § 40-5-2, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Elements of the crimes of theft and motor vehicle theft are clearly different, and therefore it does not violate equal protection to prosecute under the latter rather than the former. *People v. Westrum*, 624 P.2d 1302 (Colo. 1981).

Where conduct violates both provisions, prosecutor determines under which provision crime prosecuted. Where the alleged conduct of a defendant violates both the general theft statute and the more specific motor vehicle theft statute, it is the function of the prosecuting attorney and not the trial court to determine under which statute the alleged crime shall be prosecuted. *People v. Westrum*, 624 P.2d 1302 (Colo. 1981).

Crime defined by offender's conduct and mental state. This section defined the crime of aggravated motor vehicle theft in terms of the offender's conduct and his culpable mental state and does not condition criminal responsibility on the action of a third party after the prohibited conduct already has occurred. *People v. Andrews*, 632 P.2d 1012 (Colo. 1981).

Inference based on possession of recently stolen automobile. If there is independent evidence which proves beyond a reasonable doubt that a theft occurred, defendant's possession of a recently stolen automobile permits the jury to infer that defendant was the person who exercised control from the time of the theft to the time of apprehension. *People v. Clay*, 644 P.2d 81 (Colo. App. 1982).

Jury could reasonably conclude that defendant exercised dominion and control over a

car where the evidence supported a reasonable inference that the defendant (1) had possession of the car keys, (2) was in the car long enough to gather items of value, (3) poured accelerant on the car and set it on fire, and (4) walked away as it burned, still carrying the keys. *People v. Harper*, 205 P.3d 452 (Colo. App. 2008).

Elements of culpable mental state. Subsection (2)(a) contemplates a culpable mental state involving an awareness by the offender that he is obtaining or exercising control over the vehicle of another and that his control is indeed without authorization. *People v. Andrews*, 632 P.2d 1012 (Colo. 1981); *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

Liability for first degree aggravated motor vehicle theft is to be imposed whenever a person who has knowingly stolen a motor vehicle uses that motor vehicle in the commission of a crime other than a traffic offense, regardless of the mens rea associated with the particular crime committed. *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

Not every alteration is a subsection (2)(b) aggravating factor. Not every act that alters the appearance of a vehicle is an aggravating factor falling within the purview of subsection (2)(b). *People v. Hale*, 654 P.2d 849 (Colo. 1982).

Such as changing license plates. Prior to adoption of subsection (2)(h), placing unrelated license plates on a car did not constitute altering or disguising the appearance of the vehicle within the meaning of subsection (2)(b). *People v. Hale*, 654 P.2d 849 (Colo. 1982).

Trial court erred in its answer to a jury question regarding whether defendant had to know license plates on stolen truck did not

belong to the truck. Trial court's response telling the jury that defendant did not have to know that the plates did not belong to the truck was incorrect, and its subsequent reminder that all elements of the relevant jury instruction had to be proved beyond a reasonable doubt was inadequate to rectify the error. *People v. Manier*, 197 P.3d 254 (Colo. App. 2008).

Such error was not harmless. While there was ample evidence connecting defendant with the stolen truck, there was little if any evidence that could be inferred that defendant had any involvement in attaching or displaying fictitious license plates on it. *People v. Manier*, 197 P.3d 254 (Colo. App. 2008).

The evidence was sufficient, however, to establish defendant's liability for second degree aggravated motor vehicle theft. *People v. Manier*, 197 P.3d 254 (Colo. App. 2008).

Under previous version of statute, aggravator that yields a felony only if "committed by a person who has been twice previously convicted" requires that both prior convictions have entered before the commission of the instant offense. *People v. Houcks*, 75 P.3d 1155 (Colo. App. 2003).

Defendant convicted of aggravated motor vehicle theft even though vehicle was taken after crime of first-degree assault had been committed because the vehicle was used to flee the scene of the crime of first degree assault. *People v. McCoy*, 944 P.2d 577 (Colo. App. 1996).

Defendant was not entitled to instructions on intoxication defense and defining "voluntary act" as provided in § 18-1-501 (9) where he was charged with aggravated motor vehicle

theft under this section. *People v. Huskey*, 624 P.2d 899 (Colo. App. 1980).

Joyriding is less severe offense than larceny of motor vehicle. *People v. Rivera*, 185 Colo. 337, 524 P.2d 1082 (1974).

The crime of joyriding is not a lesser included offense of the crime of theft, nor is attempted joyriding a lesser included offense of attempted theft. *Sandoval v. People*, 176 Colo. 414, 490 P.2d 1298 (1971).

Crime of joyriding is not a lesser included offense of the crime of theft. *People v. Gilmer*, 182 Colo. 96, 511 P.2d 494 (1973).

Vehicular homicide is not a lesser included offense of aggravated motor vehicle theft under the strict elements test even if its proof might satisfy an element of aggravated motor vehicle theft under the facts of a particular case. *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

Second degree aggravated motor vehicle theft is not a lesser included offense of theft. Therefore conviction of the former should not merge into a conviction of the latter. *People v. Meads*, 58 P.3d 1137 (Colo. App. 2002), *aff'd*, 78 P.3d 290 (Colo. 2003).

Convictions for aggravated motor vehicle theft and attempted aggravated robbery are factually and legally inconsistent. *People v. James*, 981 P.2d 637 (Colo. App. 1998).

No private cause of action under this section. *In re Duran*, 483 F.3d 653 (10th Cir. 2007).

Applied in *People v. R.V.*, 43 Colo. App. 349, 606 P.2d 1311 (1979); *Chavez v. District Court*, 648 P.2d 658 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983); *People v. Martinez*, 656 P.2d 1317 (Colo. 1983); *People v. Eastepp*, 884 P.2d 305 (Colo. 1994).

18-4-410. Theft by receiving. (1) Except as provided in subsection (6) of this section, a person commits theft by receiving when he receives, retains, loans money by pawn or pledge on, or disposes of anything of value of another, knowing or believing that said thing of value has been stolen, and when he intends to deprive the lawful owner permanently of the use or benefit of the thing of value.

(2) (Deleted by amendment, L. 2007, p. 1692, § 6, effective July 1, 2007.)

(3) Where the value of the thing involved is less than five hundred dollars, theft by receiving is a class 2 misdemeanor.

(3.5) Where the value of the thing involved is five hundred dollars or more but less than one thousand dollars, theft by receiving is a class 1 misdemeanor.

(4) Where the value of the thing involved is one thousand dollars or more but less than twenty thousand dollars, theft by receiving is a class 4 felony.

(5) Where the value of the thing involved is twenty thousand dollars or more, theft by receiving is a class 3 felony.

(6) When the aggregate value of the thing or things involved is one thousand dollars or more and the person committing theft by receiving is engaged in the business of buying, selling, or otherwise disposing of stolen goods for a profit, theft by receiving is a class 3 felony.

(7) When a person commits theft by receiving twice or more within a period of six months, two or more of the thefts by receiving may be aggregated and charged in a single count, in which event the thefts so aggregated and charged shall constitute a single offense,

and, if the aggregate value of the things involved is one thousand dollars or more but less than twenty thousand dollars, it is a class 4 felony; however, if the aggregate value of the things involved is twenty thousand dollars or more, it is a class 3 felony.

Source: **L. 75:** Entire section added, p. 619, § 12, effective July 21. **L. 77:** Entire section R&RE, p. 975, § 5, effective July 1. **L. 84:** (3), (4), and (6) amended, p. 537, § 8, effective July 1, 1985. **L. 87:** (6) amended, p. 607, § 14, effective July 1. **L. 92:** (2) to (6) amended, p. 435, § 4, effective April 10. **L. 98:** (3), (4), and (6) amended, p. 795, § 4, effective July 1; (3), (4), and (6) amended and (7) added, p. 1438, § 13, effective July 1. **L. 99:** (7) amended, p. 797, § 11, effective July 1. **L. 2007:** (2) to (7) amended and (3.5) added, p. 1692, § 6, effective July 1. **L. 2009:** (7) amended, (HB 09-1334), ch. 244, p. 1100, § 4, effective May 11.

Cross references: For the legislative declaration contained in the 2007 act amending subsections (2) to (7) and enacting subsection (3.5), see section 1 of chapter 384, Session Laws of Colorado 2007. For the legislative declaration contained in the 2009 act amending subsection (7), see section 1 of chapter 244, Session Laws of Colorado 2009.

ANNOTATION

Subject is appropriate one for legislation. Trafficking in stolen property directly affects public safety and welfare and is an appropriate and constitutional subject for legislation in the exercise of the police power. *People v. Myrick*, 638 P.2d 34 (Colo. 1981).

Since there is a legitimate governmental interest in seeking to interrupt the flow of stolen property, it is not irrational for the general assembly to attempt to accomplish this by making the receipt of nonstolen property, which is believed to be stolen, a crime. *People v. Myrick*, 638 P.2d 34 (Colo. 1981).

Where governor's signature is necessary for bill to become law, the date of passage for the 1992 amendment to subsection (3) was the date the governor signed the bill. *People v. Wu*, 894 P.2d 40 (Colo. App. 1995).

In enacting this section, general assembly intended to reach distinct group of wrongdoers. The class includes those persons who receive, retain, or dispose of property received from another person with the knowledge or reasonable belief that the property has been stolen. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

This section is not unconstitutional for being overbroad. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977).

While belief is entirely subjective and therefore difficult to detect or prove, this merely compounds the people's burden of proof and does not render the "believing" standard of subsection (1) of this section unconstitutionally vague. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977).

This section does not infringe any right to freedom of commerce as there is no constitutional right to deal in property known or believed to be stolen. *People v. Adler*, 629 P.2d 569 (Colo. 1981); *People v. Myrick*, 638 P.2d 34 (Colo. 1981).

Former provisions of subsection (1) held unconstitutional. *People v. Johnson*, 193 Colo. 99, 564 P.2d 116 (1977).

Conviction not violating constitution. If a defendant receives a thing of value believing it to have been stolen and with the specific intent on the part of the defendant to deprive the owner of the article permanently, his conviction of theft does not violate the constitution. *People v. Johnson*, 193 Colo. 99, 564 P.2d 116 (1977).

Where appellant knew items were stolen and on this basis agreed to cash checks as an integral part of an overall scheme to acquire and sell stolen goods, he could be properly tried and convicted as an aider and abettor to theft-receiving and thus as a principal. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed.2d 167 (1976).

The stealing of several articles of property at the same time and place, as one continuous act or transaction, may be prosecuted as a single offense, although the several articles belong to several different owners. *People v. District Court*, 192 Colo. 355, 559 P.2d 1106 (1977).

The phrase, "where the value of the thing involved", as used in subsections (2) through (5), may include the aggregate value of things stolen in a single criminal impulse. Defendant properly charged with class 4 felony under the statute in effect at time of arrest for theft of multiple items whose valued totaled \$500 or more. *People v. Crawford*, 230 P.3d 1232 (Colo. App. 2009) (decided under law in effect prior to 2007 amendment).

The nature of the offense of theft by receiving is such that the general assembly must have intended it to be a continuing course of conduct when the charge is based on the defendant's retention of stolen property. *People v. Zuniga*, 80 P.3d 965 (Colo. App. 2003).

Completely conclusory statement by a witness/coconspirator is insufficient when standing alone to prove theft or theft-receiving. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed.2d 167 (1976).

By using the word "retain" in the theft by receiving statute, the general assembly defined the crime to include the offense of possession of stolen property. *People v. Zuniga*, 80 P. 3d 965 (Colo. App. 2003).

Theft and theft by receiving are two separate and distinct crimes. The penalty for each is the same, but conviction of one would not support a conviction of the other. *People v. Griffie*, 44 Colo. App. 46, 610 P.2d 1079 (1980).

A defendant cannot be convicted of both theft and theft by receiving when the charges arise out of the same transaction and involve the same property. However, theft and theft by receiving are separate and distinct crimes, and the prosecution may charge the person who stole property with theft by receiving the property instead of theft. *People v. Zuniga*, 80 P.3d 965 (Colo. App. 2003).

Participant in theft cannot be convicted of both crimes. A person who has actively participated in a theft cannot be convicted of both the theft and theft by receiving of the stolen property. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

Theft by receiving and theft are separate crimes. Where convictions for theft and theft by receiving arise out of the same transaction, the defendant could not properly be found guilty of both. *People v. Taylor*, 647 P.2d 682 (Colo. 1982).

There is no indication that the general assembly enacted the theft by receiving statute to preclude prosecution under the theft statute. Therefore, prosecutor can determine statute under which to prosecute the alleged crime. *People v. Smith*, 938 P.2d 111 (Colo. 1997).

Defendant charged under "fencing" provision may not thereafter be charged for underlying offenses. Where the prosecution elected to initially charge the defendant with the enhanced "fencing" component of theft by receiving, it may not prosecute the defendant again for offenses that constituted the factual basis of the prior charge, which was litigated to a conclusion under a "unit of prosecution" selected by the prosecution in the first instance. *People v. Williams*, 651 P.2d 899 (Colo. 1982).

Subsection (6) offense is "hybrid" crime. The offense set forth in subsection (6) is a hybrid crime involving two principal components: It requires a primary act of theft by receiving and what might be characterized as the "fencing" element. *People v. Williams*, 651 P.2d 899 (Colo. 1982).

The "fencing" element of the offense connotes an ongoing course of conduct involving

the knowing purchase or sale or other disposition of stolen goods for a profit, with the specific intent to deprive the lawful owner permanently of the use or benefit of such goods. *People v. Williams*, 651 P.2d 899 (Colo. 1982).

Legislative intent to broaden crime. Unlike its predecessor, § 18-4-401 (1), which required knowledge that the property was stolen, this section requires knowledge or belief that the property was stolen. The clear import of this change is that the general assembly intended to broaden the crime of theft by receiving to include the purchase of property, whether stolen or not, which the purchaser believes is stolen. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977).

Theft by receiving under this section includes property not actually stolen and the section is neither vague nor overbroad. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977); *People v. Adler*, 629 P.2d 569 (Colo. 1981).

Uncontroverted testimony of investigator in theft by receipt case that boxes depicted in photographs contained video cassette recorders, that the value of the recorders was \$1200, and that the amount paid for the recorders was \$300 provided sufficient evidence for jury finding regarding items in such boxes and the value of such items. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

For conviction under § 18-2-101 (1) or former subsection (1), it is irrelevant whether the goods are recovered stolen goods or have never been stolen. The intent and acts of the defendant, not the surrounding circumstances, are the crucial elements of the attempt offense. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

The portion of § 18-2-101(1) which provides that impossibility "is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be" in effect substitutes "believing" the goods to be stolen, the element of culpability required in attempted theft by receiving, for "knowing" the goods to be stolen, the element of culpability for a completed theft by receiving. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

Section requires proof that accused knew or believed goods stolen. Theft by receiving says nothing as to who initially acquired the property, nor is there even a requirement of proof that the goods were ever actually stolen, but it does require proof that at the time the accused received, retained, loaned money on, or disposed of the goods, he knew or believed that they had been stolen, basic elements not required for a theft conviction. *People v. Griffie*, 44 Colo. App. 46, 610 P.2d 1079 (1980).

His state of mind inferred from conduct or circumstances. The defendant's state of mind as to whether the goods were stolen may be inferred from his conduct or from the circum-

stances of the case. *People v. Tumbarello*, 623 P.2d 46 (Colo. 1981).

There is no inconsistency between the element of belief that the goods are stolen and the element of intent to permanently deprive the lawful owner of the use or benefit of the thing of value. Although mistaken as to his identity, an accused can still intend to deprive the lawful owner, whoever he is, of his property. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977).

Mistaken belief of fact is not defense to theft by receiving. It is no defense to prosecution for theft by receiving under this section that the defendant mistakenly believed the goods were stolen. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977).

Although originally proposed, this section does not expressly establish mistaken belief of fact as a defense and such legislative intent cannot be inferred in this section. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977).

Under this section, appellee's mistaken belief that the pistol was stolen would not negate a necessary mental element of the charge; on the contrary, such belief is itself an element of theft by receiving. *People v. Holloway*, 193 Colo. 450, 568 P.2d 29 (1977).

A mistake of fact is not a defense to attempted theft by receiving. *Darr v. People*, 193 Colo. 445, 568 P.2d 32 (1977).

Subsection (6) is a greater offense and encompasses the lesser included offense set forth in subsection (4). *People v. Tumbarello*, 623 P.2d 46 (Colo. 1981).

"Victim" construed for purposes of restitution. Crime of theft by receiving includes the element of disposition of the stolen property. The transfer of stolen property to a bona fide purchaser necessarily victimizes the purchaser since his interests must yield to the title of the rightful owner. Therefore, the bona fide purchaser of stolen property was a victim for purposes of ordering restitution and the trial court properly included in the amount of restitution an

amount to reimburse the purchaser, an antique dealer, for expenses for restoration of the property. *People v. Schmidt*, 700 P.2d 925 (Colo. App. 1985).

Evidence was insufficient to establish an inference of state of mind necessary to violate this statute where the evidence established that the defendant purchased partially dismantled car from person found stripping car in field and title was not immediately transferred. *People v. Ayala*, 770 P.2d 1265 (Colo. 1989).

Evidence sufficient to convict for theft by receiving. *People v. Hepler*, 665 P.2d 627 (Colo. App. 1982); *People v. Albright*, 722 P.2d 430 (Colo. App. 1986).

The court erred by instructing jury on class three felony theft by receiving when defendant was originally charged with a class four felony. Although evidence may have shown defendant committed class three felony theft by receiving, there was no authority to instruct jury on such charge since defendant was not charged with a class three felony. *People v. Al-Yousif*, 206 P.3d 824 (Colo. App. 2006).

Former version of this section applied to defendant's crime which was committed before July 1, 1985, applicability date of amended section that increased the value of items involved in a theft for the commission of a class 4 felony. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

Regardless of whether former or amended version of this section applied, special jury finding made it necessary to impose a sentence for a class 4 felony. Jury finding that items involved in crime were valued at \$1200 meets requirement for a class 4 felony conviction under former and amended version of this section. *People v. McCoy*, 764 P.2d 1171 (Colo. 1988).

No private cause of action under this section. *In re Duran*, 483 F.3d 653 (10th Cir. 2007).

Applied in *People v. Jamerson*, 196 Colo. 63, 580 P.2d 805 (1978); *People v. Jamerson*, 198 Colo. 92, 596 P.2d 764 (1979); *People v. Wolf*, 635 P.2d 213 (Colo. 1981); *People v. Bowen*, 658 P.2d 269 (Colo. 1983).

18-4-411. Transactions for profit in stolen goods. If any person commits theft by receiving as defined in section 18-4-410 (1), when such offense involves two or more separate stolen things of value each of which is the property of a separate owner, such commission of theft by receiving constitutes prima facie evidence that the person is engaged in the business of buying, selling, or otherwise disposing of stolen goods for a profit.

Source: **L. 77:** Entire section added, p. 890, § 3, effective July 1. **L. 81:** Entire section amended, p. 989, § 1, effective April 23. **L. 87:** Entire section amended, p. 669, § 3, effective July 1.

ANNOTATION

Purpose of section. The apparent purpose of this section is to assist the prosecution in proving the "fencing" element of § 18-4-410 (6).

People v. Williams, 651 P.2d 899 (Colo. 1982); *People v. Salazar*, 715 P.2d 1265 (Colo. App. 1985), cert. denied, 744 P.2d 80 (Colo. 1987).

Presumption of former section violative of due process. The value of a stolen article has no significant relationship to the business of buying, selling, or otherwise disposing of stolen goods for a profit, as merely proving the fact of value does not create a probability that one is engaged in such business. Thus, the criminal statutory presumption found in this section prior to the 1981 amendment did not satisfy due process standards. *Brown v. District Court*, 197 Colo. 219, 591 P.2d 99 (1979).

Instruction to jury correct. Where the evidence supported the inference that the defendant

possessed three or more separate items belonging to separate owners, the trial court correctly instructed the jury in accordance with this section even though no single count of information charged possession of "three or more separate things of value". *People v. Salazar*, 715 P.2d 1265 (Colo. App. 1985), cert. denied, 744 P.2d 80 (Colo. 1987).

Applied in *People v. Williams*, 651 P.2d 899 (Colo. 1982).

18-4-411.5. Interagency task force on organized retail theft - legislative declaration - repeal. (Repealed)

Source: L. 2006: Entire section added, p. 1278, § 2, effective July 1.

Editor's note: Subsection (6) provided for the repeal of this section, effective February 1, 2007. (See L. 2006, p. 1278.)

18-4-412. Theft of medical records or medical information - penalty. (1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

(2) As used in this section:

(a) "Medical record" means the written or graphic documentation, sound recording, or computer record pertaining to medical, mental health, and health care services, including medical marijuana services, performed at the direction of a physician or other licensed health care provider on behalf of a patient by physicians, dentists, nurses, service providers, emergency medical service providers, mental health professionals, prehospital providers, or other health care personnel. "Medical record" includes such diagnostic documentation as X rays, electrocardiograms, electroencephalograms, and other test results. "Medical record" includes data entered into the prescription drug monitoring program under section 12-42.5-403, C.R.S.

(b) "Medical information" means any information contained in the medical record or any information pertaining to the medical, mental health, and health care services performed at the direction of a physician or other licensed health care provider which is protected by the physician-patient privilege established by section 13-90-107 (1) (d), C.R.S.

(c) "Proper authorization" means:

(I) A written authorization signed by the patient or his or her duly designated representative; or

(II) An appropriate order of court; or

(III) Authorized possession pursuant to law or regulation for claims processing, possession for medical audit or quality assurance purposes, possession by a consulting physician to the patient, or possession by hospital personnel for record-keeping and billing purposes; or

(IV) Authorized possession pursuant to section 18-3-415.5, 18-7-201.5, 18-7-205.5, 25-1-122, or 30-10-606 (6), C.R.S.; or

(V) Authorized possession by a law enforcement officer or agency, acting in official capacity and pursuant to an official investigation.

(d) "Copy" means any facsimile, replica, photograph, sound recording, magnetic or electronic recording, or other reproduction of a medical record and any note, drawing, or sketch made of or from a medical record.

(3) Theft of a medical record or medical information is a class 6 felony.

(4) The obtaining, accessing, use, or disclosure of relevant medical records or medical information pursuant to 18 U.S.C. sec. 922 (t) and sections 24-33.5-424, 13-5-142, and 13-9-123, C.R.S., by the Colorado bureau of investigation, the clerk of the court of any judicial district in the state, the clerk of the probate court of the city and county of Denver, or by any of their employees and accessing such records and information through the NICS system shall not constitute theft of a medical record or medical information under this section.

(5) This section shall not apply to covered entities, their business associates, or health oversight agencies as each is defined in the federal "Health Insurance Portability and Accountability Act of 1996" as amended by the federal "Health Information Technology for Economic and Clinical Health Act" and the respective implementing regulations.

Source: **L. 79:** Entire section added, p. 727, § 6, effective July 1. **L. 89:** (3) amended, p. 834, § 47, effective July 1. **L. 99:** (2)(c) amended, p. 1003, § 11, effective May 29. **L. 2000:** (4) added, p. 12, § 4, effective March 7; (2)(a) amended, p. 545, § 22, effective July 1. **L. 2001:** (2)(c)(IV) amended, p. 736, § 6, effective July 1. **L. 2002:** (4) amended, p. 756, § 3, effective January 1, 2003. **L. 2003:** (2)(c)(IV) amended, p. 1021, § 2, effective April 17; (5) added, p. 1785, § 20, effective July 1. **L. 2007:** (2)(a) and (2)(b) amended, p. 1689, § 9, effective July 1. **L. 2010:** (2)(c)(V) added and (5) amended, (SB 10-167), ch. 296, p. 1399, §§ 15, 16, effective May 26. **L. 2011:** (2)(a) amended, (SB 11-192), ch. 230, p. 987, § 12, effective July 1; (2)(a) amended, (HB 11-1043), ch. 266, p. 1214, § 27, effective July 1. **L. 2012:** (2)(a) amended, (HB 12-1059), ch. 271, p. 1436, § 15, effective July 1; (2)(a) amended, (HB 12-1311), ch. 281, p. 1619, § 44, effective July 1.

Editor's note: (1) Amendments to subsection (2)(a) by House Bill 11-1043 and Senate Bill 11-192 were harmonized. Amendments to subsection (2)(a) by House Bill 12-1059 and House Bill 12-1311 were harmonized.

(2) Section 26 of chapter 271, Session Laws of Colorado 2012, provides that the act amending subsection (2)(a) applies to acts committed on or after July 1, 2012.

Cross references: (1) For the legislative declaration contained in the 2000 act enacting subsection (4), see section 1 of chapter 5, Session Laws of Colorado 2000. For the legislative declaration in the 2010 act adding subsection (2)(c)(V) and amending subsection (5), see section 1 of chapter 296, Session Laws of Colorado 2010.

(2) For the "Health Insurance Portability and Accountability Act of 1996", see Pub.L. 104-191, codified at 42 U.S.C. sec. 201 et seq.

ANNOTATION

Law reviews. For article, "The Authorization to Release Medical Information Form: Its Genesis and Usage", see 11 Colo. Law. 1179 (1982). For article, "The Legal Risks of AIDS: Moving Beyond Discrimination", see 18 Colo. Law. 606 (1989).

Employment-required drug tests and physical ability tests do not fall under the defini-

tion of either medical record or medical information as defined in subsection (2), thus, the defense failed to establish a prima facie case of theft of the defendant's medical records. People v. Palomo, 31 P.3d 879 (Colo. 2001).

18-4-413. Mandatory sentencing for repeated felony theft from a store - store defined. (1) For purposes of this section and section 18-4-414, "store" means any establishment primarily engaged in the sale of goods at retail.

(2) Any person convicted of felony theft, which felony theft was from a store, who within the immediately preceding four years was twice convicted of felony theft, which felony theft was each time from a store, shall be sentenced to at least the minimum term provided for such offense. A person convicted under this section shall not be eligible for probation or suspension of sentence.

(3) The mandatory sentencing requirements specified in subsection (2) of this section shall not apply when the person is being sentenced pursuant to section 18-4-401 (4).

Source: **L. 85:** Entire section added, p. 668, § 1, effective July 1. **L. 2003:** (2) amended, p. 1427, § 8, effective April 29.

18-4-414. Evidence of value. (1) For purposes of this part 4, when theft occurs from a store, evidence of the retail value of the thing involved shall be prima facie evidence of the value of the thing involved. Evidence offered to prove retail value may include, but shall not be limited to, affixed labels and tags, signs, shelf tags, and notices.

(2) For the purposes of this part 4, in all cases where theft occurs, evidence of the value of the thing involved may be established through the sale price of other similar property and may include, but shall not be limited to, testimony regarding affixed labels and tags, signs, shelf tags, and notices tending to indicate the price of the thing involved. Hearsay evidence shall not be excluded in determining the value of the thing involved.

Source: **L. 85:** Entire section added, p. 668, § 1, effective July 1. **L. 88:** Entire section amended, p. 713, § 20, effective July 1.

ANNOTATION

Section does not violate the defendant's sixth amendment constitutional right to confront his accuser. *People v. Schmidt*, 928 P.2d 805 (Colo. App. 1996).

By enacting this section, the general assembly has determined that a price tag affixed to an item for sale ordinarily is sufficiently trustworthy so as to speak for itself regarding that item's value and that the utility of confrontation is very remote. The statute allows an accused to rebut the presumption of value by calling a store manager or another witness to establish a value other than that specified on the price tag. *People v. Schmidt*, 928 P.2d 805 (Colo. App. 1996).

Kelley blue book may be admitted as proof of value under this section without the need for expert testimony to substantiate the blue book's valuation. The blue book indicates the sale price of other similar property, and thus the officer's valuation based thereon was not subject to exclusion as hearsay, even if such an objection had been raised. *People v. Thornton*, 251 P.3d 1147 (Colo. App. 2010).

Statute creates a specific hearsay exception. *People v. Schmidt*, 928 P.2d 805 (Colo. App. 1996).

Applied in *People v. Pearman*, 209 P.3d 1144 (Colo. App. 2008).

18-4-415. Use of photographs, video tapes, or films of property. Pursuant to section 13-25-130, C.R.S., photographs, video tapes, or films of property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully are competent evidence if the photographs, video tapes, or films are admissible into evidence under the rules of law governing the admissibility of photographs, video tapes, or films into evidence.

Source: **L. 85:** Entire section added, p. 577, § 3, effective July 1.

Cross references: For similar provisions concerning the use of photographs, video tapes, or films of property with respect to the crimes of robbery and trespass, tampering, and criminal mischief, see §§ 18-4-305 and 18-4-514.

18-4-416. Theft by resale of a lift ticket or coupon. Any unauthorized person who, with the intent to profit therefrom, resells or offers to resell any ticket, pass, badge, pin, coupon, or other device which then entitles the bearer to the use, benefit, or enjoyment of any skiing service or skiing facility commits a class 2 petty offense. The penalty of a violation of this section shall be a fine in an amount not to exceed three hundred dollars. Under no circumstances shall a person being charged with this class 2 petty offense be arrested by any peace officer, and a summons to the appropriate court of jurisdiction shall be issued to the accused person.

Source: **L. 90:** Entire section added, p. 986, § 10, effective April 24.

18-4-417. Unlawful acts - theft detection devices. (1) (a) It is unlawful for any person to knowingly manufacture, distribute, or sell a theft detection shielding device or a theft detection deactivating device with the knowledge that some person intends to use the device in the commission of an offense involving theft.

(b) It is unlawful for any person to possess a theft detection shielding device or a theft detection deactivating device with the intent to use the device possessed, or with the knowledge that some person intends to use the device possessed, in the commission of an offense involving theft.

(c) It is unlawful for any person to knowingly deactivate or remove a theft detection device or any component thereof in any store or mercantile establishment without authorization prior to purchase.

(2) As used in this section:

(a) "Theft detection deactivating device" means any tool, instrument, mechanism, or other article adapted, designed, engineered, used, or operated to inactivate, incapacitate, or remove a theft detection device without authorization. "Theft detection deactivating device" includes, but is not limited to, jumper wires, wire cutters, and electronic article surveillance removal devices.

(b) "Theft detection device" means an electronic or magnetic mechanism, machine, apparatus, tag, or article designed and operated for the purpose of detecting the unauthorized removal of merchandise from a store or mercantile establishment.

(c) "Theft detection shielding device" means any tool, instrument, mechanism, or article adapted, designed, engineered, used, or operated to avoid detection by a theft detection device during the commission of an offense involving theft. "Theft detection shielding device" includes, but is not limited to, foil-lined or otherwise modified clothing, bags, purses, or containers capable of and for the sole purpose of avoiding detection devices.

(3) Any person who violates any of the provisions of subsection (1) of this section commits a class 1 misdemeanor.

Source: **L. 2001:** Entire section added, p. 512, § 2, effective July 1. **L. 2012:** (2)(a) and (2)(c) amended, (HB 12-1304), ch. 237, p. 1050, § 3, effective May 29.

Cross references: For the legislative declaration in the 2012 act amending subsections (2)(a) and (2)(c), see section 1 of chapter 237, Session Laws of Colorado 2012.

18-4-418. Fuel piracy. (1) A person commits fuel piracy when such person knowingly leaves the premises of an establishment that offers fuel for sale after dispensing fuel and knowingly fails to pay for such fuel.

(2) Fuel piracy is:

(a) A class 3 misdemeanor if the value of such fuel is less than one hundred dollars;

(b) A class 2 misdemeanor if the value of such fuel is one hundred dollars or more but less than five hundred dollars.

(3) In addition to any other penalty authorized by law, after a defendant has been convicted of or has entered a plea of guilty or nolo contendere to fuel piracy, the mandatory minimum fine shall be two hundred fifty dollars.

Source: **L. 2002:** Entire section added, p. 1131, § 1, effective July 1.

18-4-419. Newspaper theft. (1) A person commits the offense of newspaper theft when that person obtains or exerts unauthorized control over more than five copies of an edition of a newspaper from a newspaper distribution container owned or leased by the newspaper publisher with the intent to prevent other individuals from reading that edition of the newspaper. Control is unauthorized if there is a notice on the newspaper or on the newspaper distribution container that possession of more than five copies with intent to prevent other individuals from reading that edition of the newspaper is illegal.

(2) Newspaper theft is a misdemeanor and shall be punished by a fine of:

(a) Up to one thousand dollars if the number of newspapers involved was one hundred or fewer or the number of newspapers involved was not determined;

(b) Up to two thousand five hundred dollars if the number of newspapers involved was more than one hundred and fewer than five hundred;

(c) Up to five thousand dollars if the number of newspapers involved was five hundred or more.

(3) As used in this section:

(a) "Edition of a newspaper" means a single press run of a newspaper.

(b) "Newspaper" means a periodical that includes news, editorials, opinion, features, or other matters of public interest that is distributed on a complimentary basis. Newspaper includes any student periodical distributed at any institution of higher education.

(c) "Periodical" means a publication produced on a regular interval.

(4) Notwithstanding any other remedies provided under this section, a newspaper publisher who is the victim of newspaper theft, an advertiser who placed an advertisement in a newspaper that was subject to newspaper theft, or a newspaper reader who regularly reads the newspaper subject to newspaper theft shall have a private civil right of action as provided in section 13-21-123, C.R.S., against the person or persons who acted in violation of subsection (1) of this section.

(5) This section shall not apply to a person who, with the authority or permission of the person who possesses real or personal property, removes or disposes of newspapers that have been deposited in or left on that property without the authority or permission of the person who possesses the real or personal property.

Source: L. 2004: Entire section added, p. 445, § 2, effective July 1.

Cross references: For the legislative intent contained in the 2004 act enacting this section, see section 1 of chapter 147, Session Laws of Colorado 2004.

PART 5

TRESPASS, TAMPERING, AND CRIMINAL MISCHIEF

18-4-501. Criminal mischief. (1) A person who knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person in which another person has a possessory or proprietary interest, in the course of a single criminal episode commits a class 2 misdemeanor where the aggregate damage to the real or personal property is less than five hundred dollars. Where the aggregate damage to the real or personal property is five hundred dollars or more but less than one thousand dollars, the person commits a class 1 misdemeanor. Where the aggregate damage to the real or personal property is one thousand dollars or more but less than twenty thousand dollars, the person commits a class 4 felony. Where the aggregate damage to the real or personal property is twenty thousand dollars or more, the person commits a class 3 felony.

(2) and (3) Repealed.

Source: L. 71: R&RE, p. 431, § 1. C.R.S. 1963: § 40-4-501. L. 77: entire section amended, p. 963, § 25, effective July 1. L. 81: entire section amended, p. 975, § 12, effective July 1. L. 84: entire section amended, p. 537, § 9, effective July 1, 1985. L. 92: entire section amended, p. 435, § 5, effective April 10. L. 98: entire section amended, p. 1438, § 14, effective July 1; entire section amended, p. 795, § 5, effective July 1. L. 99: entire section amended, p. 391, § 1, effective July 1. L. 2002: (1) amended, p. 1581, § 7, effective July 1. L. 2003: (2) amended, p. 1904, § 3, effective July 1; (3) added, p. 1845, § 2, effective July 1. L. 2007: (1) amended, p. 1693, § 7, effective July 1. L. 2009: (2) and (3) repealed, (HB 09-1266), ch. 347, p. 1814, § 1, effective August 5.

Cross references: For the legislative declaration contained in the 2007 act amending subsection (1), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For article, "Highlights of the 1955 Legislative Session — Criminal Law and Procedure", see 28 Rocky Mt. L. Rev. 69 (1955). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962).

Annotator's note. Since § 18-4-501 is similar to former §§ 49-18-1 and 40-18-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is criminal, and it is not its province to make simply the intentional doing of an unlawful act, which injures another's property, a crime, independent of any evil purpose or intention. *Mayn v. People*, 56 Colo. 170, 136 P. 1016 (1913); *Koch v. People*, 71 Colo. 119, 204 P. 332 (1922); *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

Civil prosecution for same acts prohibited by this section has no part in a prosecution under this section. *Mayn v. People*, 56 Colo. 170, 136 P. 1016 (1913).

There must exist criminal intention. In a prosecution under this section for injury occasioned to a bridge, there can be no conviction, unless a criminal intention on the part of the accused appears. *Mayn v. People*, 56 Colo. 170, 136 P. 1016 (1913); *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

Criminal intent need not be expressly proved in criminal mischief cases, but may be implied or inferred from the surrounding facts and circumstances or from the relation existing between the defendant and the owner of the property injured or destroyed. *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

It must be the direct and not incidental object of an act. Neither the mere concealment of the crime, the omitting of the performance of a statutory duty, nor the mere intentional doing of an act prohibited by statute, constitutes criminal mischief, although it may damage the property of another. A conspiracy with a fraudulent or malicious intent wrongfully to injure the property of another is punishable. The mischief must be the direct object of the act, and not incidental to some other lawful or unlawful act, or must be the natural consequence of the act. *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

Abandonment is no defense to completed crime of criminal mischief. *People v. Johnson*, 41 Colo. App. 220, 585 P.2d 306 (1978).

The damage element in criminal mischief relates to economic loss caused by the knowing infliction of damage to the real or personal

property of another. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Value is an essential element of felony criminal mischief. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Theft distinguished. The gravamen of criminal mischief is the knowing causation of damage to another's property with resulting economic loss to the owner or possessor of the property. The crime of theft, in contrast, is a crime of misappropriation or wrongful taking with no added element of damage or destruction to the property taken. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Value is relevant to the damage element because an offender cannot cause an economic loss that surpasses the actual value of the property damaged. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

Actual value will generally be determined by market value, that is, the price a willing buyer would pay for the object in the open market. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983); *People v. Dobson*, 847 P.2d 176 (Colo. App. 1992).

Unless there is no market for the item. Where, however, there is no market for the particular item, then such factors as the original purchase price, replacement cost, the general use and purpose of the article, and salvage value may be considered as some evidence of actual value. *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983); *People v. Dobson*, 847 P.2d 176 (Colo. App. 1992).

The crime of criminal mischief is not a lesser included burglary offense because the elements are far different. While criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

The pulling up of one or more posts of a fence in process of erection warrants a conviction under this section. *Olson v. People*, 56 Colo. 199, 138 P. 21 (1914).

This section does not apply to the pulling down of a fence by defendant, erected across land claimed by him and in his possession without his consent. *Koch v. People*, 71 Colo. 119, 204 P. 332 (1922).

Police officer's undisputed testimony of estimated damage is admissible at a preliminary hearing. *People ex rel. Russel v. Hall*, 620 P.2d 34 (Colo. 1980).

Evidence held sufficient to sustain a conviction. *People v. O'Donnell*, 184 Colo. 434, 521 P.2d 771 (1974).

Evidence held insufficient to sustain a conviction. *Schtul v. People*, 96 Colo. 217, 40 P.2d 970 (1935).

For instructions on previously required element of malice, see *People v. Woods*, 179 Colo. 441, 501 P.2d 117 (1972).

Instruction on intentional conduct not plain error. An instruction that the culpable mental state for criminal mischief is intentional conduct does not constitute plain error as intentional conduct is a higher degree of culpability than the knowing conduct required by this section, and, therefore, the erroneous instruction actually benefits the defendant. *People v. Founds*, 631 P.2d 1166 (Colo. App. 1981).

Self-defense instruction inappropriate for charge of criminal mischief where case involved unreasonable or excessive force by police during an arrest. Although self-defense instruction is required when evidence has been presented that officers displayed weapons and

were commanded to discharge them in course of effecting arrest and that their conduct was unreasonable or excessive under the circumstances, such instruction was not appropriate as to charge of criminal mischief arising from events after defendant was taken into custody. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

Applied in *Corder v. People ex rel. Smiley*, 87 Colo. 251, 287 P. 85 (1930); *Schindelar v. Michaud*, 411 F.2d 80 (10th Cir.), cert. denied, 396 U.S. 956, 90 S. Ct. 426, 24 L. Ed.2d 420 (1969); *People v. Griffith*, 197 Colo. 544, 595 P.2d 231 (1979); *People v. Trujillo*, 631 P.2d 146 (Colo. 1981); *People ex rel. Hunter v. District Court*, 634 P.2d 44 (Colo. 1981); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981); *People v. Holloway*, 649 P.2d 318 (Colo. 1982); *People v. Thompson*, 655 P.2d 416 (Colo. 1982).

18-4-502. First degree criminal trespass. A person commits the crime of first degree criminal trespass if such person knowingly and unlawfully enters or remains in a dwelling of another or if such person enters any motor vehicle with intent to commit a crime therein. First degree criminal trespass is a class 5 felony.

Source: L. 71: R&RE, p. 431, § 1. C.R.S. 1963: § 40-4-502. L. 77: Entire section amended, p. 963, § 26, effective July 1. L. 92: Entire section amended, p. 404, § 16, effective June 3. L. 93: Entire section amended, p. 1732, § 17, effective July 1. L. 98: Entire section amended, p. 1443, § 31, effective July 1.

ANNOTATION

Annotator's note. Since § 18-4-502 is similar to former § 40-3-8 C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

For the treatment of breaking and entering under previous statute, see *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970); *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971); *People v. Major*, 179 Colo. 204, 499 P.2d 1200 (1972).

Under previous statute, entering motor vehicle included box part of pickup. *People v. Romero*, 179 Colo. 159, 499 P.2d 604 (1972).

Proof of dwelling crucial for first degree trespass. The crucial distinction between first degree criminal trespass and second and third degree is that the prosecution must prove the additional element that the property which was unlawfully entered is a dwelling for first degree trespass. *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978).

"Dwelling" encompasses the entire residential structure, including an attached garage. *People v. Hanna*, 981 P.2d 627 (Colo. App. 1998).

That the dwelling is "of another" is an essential element of first degree criminal trespass. Pattern jury instruction was incorrect because it omitted that element. *People v. Peoples*, 8 P.3d 577 (Colo. App. 2000).

"With intent to commit a crime therein" is only an element to first degree criminal trespass of a motor vehicle. It does not apply to first degree criminal trespass of a dwelling. *People v. Rodriguez*, 43 P.3d 641 (Colo. App. 2001).

Criminal trespass charge is defective if the count failed to identify an ulterior crime. *People v. Williams*, 961 P.2d 533 (Colo. App. 1997), aff'd, 984 P.2d 56 (Colo. 1999).

Criminal trespass charge is defective in form but not in substance if the count fails to identify an ulterior crime. *People v. Williams*, 984 P.2d 56 (Colo. 1999).

Even the absence of a restraining order, an estranged spouse is not privileged or licensed to enter the separate residence of the other spouse so as to create a defense to a charge of first degree criminal trespass. *People v. Johnson*, 906 P.2d 122 (Colo. 1995).

First degree trespass of motor vehicle. First degree criminal trespass embraces situations where a person knowingly and unlawfully enters a motor vehicle with the intent to steal something of value. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

Unlawful entry into semitrailer included in offense. The general assembly intended to make the crime of first degree criminal trespass encompass unlawful entry into a semitrailer for the purpose of theft. *People v. Walters*, 39 Colo. App. 119, 568 P.2d 61 (1977).

The general assembly intended to include tractor-trailer units as "motor vehicles" for the purpose of criminal trespass. *People v. Walters*, 39 Colo. App. 119, 568 P.2d 61 (1977).

By entering the open portion of a pickup truck, one "enters [a] motor vehicle" as that phrase is used in this section. *People v. Banuelos*, 40 Colo. App. 267, 577 P.2d 305 (1977).

It was reversible error for the prosecution to tell the jury that in order to be guilty of first degree criminal trespass of a motor vehicle, the defendant could form unlawful intent at any time, because the prosecutor's argument improperly permitted the jury to adopt a version of the law pursuant to which it could find defendant guilty, regardless of when he formed the intent to steal property from the van. *People v. Anderson*, 991 P.2d 319 (Colo. App. 1999).

Entry into motor vehicle not required to be "knowing and unlawful", so no error in trial court's refusal to instruct the jury that defendant's entry into a van must have been "unlawful". *People v. Anderson*, 991 P.2d 319 (Colo. App. 1999).

Conviction of being accessory to first degree criminal trespass requires a showing that the accused knew that the principal had committed an unlawful trespass in acquiring the stolen property. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

First degree criminal trespass is not a lesser included offense of second degree burglary. *People v. Garcia*, 920 P.2d 878 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 357 (Colo. 1997).

First degree criminal trespass is not a lesser included offense of first degree burglary.

However, it is a lesser non-included offense, and the trial court may instruct a jury on such offense over the objection of the defendant if the charging document provides notice that defendant might have to defend against that charge. *People v. Satre*, 950 P.2d 667 (Colo. App. 1997).

Attempted first degree criminal trespass may be a lesser included offense to attempted second degree burglary. *People v. Austin*, 799 P.2d 408 (Colo. App. 1990).

Third degree criminal trespass is not a lesser included offense of attempted first degree criminal trespass. While unlawful entry upon the premises is a necessary element of the completed offense of third degree criminal trespass, it is not a necessary element of attempted first degree criminal trespass. *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

First degree criminal trespass is distinct from misdemeanor theft. *People v. Martinez*, 640 P.2d 255 (Colo. App. 1981).

Evidence sufficient for a finding of intent under this section. *People v. Sorber*, 179 Colo. 434, 501 P.2d 121 (1972).

Conviction for residential criminal trespass is a crime of violence and thus an aggravated felony qualifying defendant for an increased sentence under the United States sentencing guidelines. *United States v. Venegas-Ornelas*, 348 F.3d 1273 (10th Cir. 2003).

Applied in People in Interest of D.G.P., 194 Colo. 238, 570 P.2d 1293 (1977); *People v. Newman*, 195 Colo. 367, 578 P.2d 1051 (1978); *People v. Huston*, 197 Colo. 125, 589 P.2d 1367 (1979); *People v. Ortega*, 198 Colo. 179, 597 P.2d 1034 (1979); *People v. Horne*, 619 P.2d 53 (Colo. 1980); *Bollier v. People*, 635 P.2d 543 (Colo. 1981); *People v. Schreyer*, 640 P.2d 1147 (Colo. 1982); *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

18-4-503. Second degree criminal trespass. (1) A person commits the crime of second degree criminal trespass if such person:

(a) Unlawfully enters or remains in or upon the premises of another which are enclosed in a manner designed to exclude intruders or are fenced; or

(b) Knowingly and unlawfully enters or remains in or upon the common areas of a hotel, motel, condominium, or apartment building; or

(c) Knowingly and unlawfully enters or remains in a motor vehicle of another.

(2) Second degree criminal trespass is a class 3 misdemeanor, but:

(a) It is a class 2 misdemeanor if the premises have been classified by the county assessor for the county in which the land is situated as agricultural land pursuant to section 39-1-102 (1.6), C.R.S.; and

(b) It is a class 4 felony if the person trespasses on premises so classified as agricultural land with the intent to commit a felony thereon.

(3) Whenever a person is convicted of, pleads guilty or nolo contendere to, receives a deferred judgment or sentence for, or is adjudicated a juvenile delinquent for, a violation of paragraph (c) of subsection (1) of this section, the offender's driver's license shall be revoked as provided in section 42-2-125, C.R.S.

Source: L. 71: R&RE, p. 431, § 1. C.R.S. 1963: § 40-4-503. L. 81: Entire section amended, p. 990, § 1, effective June 4. L. 83: Entire section amended, p. 666, § 8,

effective July 1. **L. 84:** (2)(a) amended, p. 1119, § 14, effective June 7. **L. 93:** (1) amended, p. 1732, § 18, effective July 1. **L. 94:** (1) amended, p. 1718, § 11, effective July 1. **L. 2002:** (1) amended, p. 1582, § 11, effective July 1. **L. 2003:** (3) added, p. 1846, § 4, effective July 1.

ANNOTATION

Proof of dwelling crucial for first degree trespass. The crucial distinction between first degree criminal trespass and second and third degree is that the prosecution must prove the additional element that the property which was unlawfully entered is a dwelling for first degree trespass. *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978).

Second degree criminal trespass is a lesser included offense of second degree burglary (§18-4-203). Second degree criminal trespass requires the defendant to unlawfully enter or remain on the premises of another that are en-

closed in a manner designed to exclude intruders. By definition, if a building or structure exists, entry of which is required for second degree burglary, the building or structure is designed to exclude intruders. Thus, all of the elements of second degree criminal trespass are included in the offense of second degree burglary. *People v. MacBlane*, 952 P.2d 824 (Colo. App. 1997).

Applied in *People in Interest of D.G.P.*, 194 Colo. 238, 570 P.2d 1293 (1977); *People v. Smith*, 638 P.2d 1 (Colo. 1981).

18-4-504. Third degree criminal trespass. (1) A person commits the crime of third degree criminal trespass if such person unlawfully enters or remains in or upon premises of another.

(2) Third degree criminal trespass is a class 1 petty offense, but:

(a) It is a class 3 misdemeanor if the premises have been classified by the county assessor for the county in which the land is situated as agricultural land pursuant to section 39-1-102 (1.6), C.R.S.; and

(b) It is a class 5 felony if the person trespasses on premises so classified as agricultural land with the intent to commit a felony thereon.

Source: **L. 71:** R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-504. **L. 83:** Entire section amended, p. 666, § 9, effective July 1. **L. 84:** (2)(a) amended, p. 1119, § 15, effective June 7. **L. 89:** (2)(b) amended, p. 834, § 48, effective July 1. **L. 93:** (1) amended, p. 1732, § 19, effective July 1.

ANNOTATION

Law reviews. For comment, "People v. Emmert: A Step Backward for Recreational Water Use in Colorado", see 52 U. Colo. L. Rev. 247 (1981).

Public has no right to use of water overlying private lands for recreational purposes without the consent of the owner. *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979).

"Breaking the close" is trespass. Whoever "breaks the close" — intrudes upon the space above the surface of the land — without the permission of the owner, whether it be for fishing or for other recreational purposes, such as floating, commits a trespass. *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979).

Proof of dwelling crucial for first degree trespass. The crucial distinction between first degree criminal trespass and second and third

degree is that the prosecution must prove the additional element that the property which was unlawfully entered is a dwelling for first degree trespass. *People v. Marshall*, 196 Colo. 381, 586 P.2d 41 (1978).

But third degree criminal trespass is not a lesser included offense of attempted first degree criminal trespass. *People v. Griffith*, 58 P.3d 1111 (Colo. App. 2002).

Officers who enter under a warrant and rightfully seize certain property but wrongfully seize other property are liable as trespassers *ab initio* as to the property wrongfully seized. *Walker v. City of Denver*, 720 P.2d 619 (Colo. App. 1986).

Applied in *People v. Huston*, 197 Colo. 125, 589 P.2d 1367 (1979); *People v. Hight*, 198 Colo. 299, 599 P.2d 885 (1979).

18-4-504.5. Definition of premises. As used in sections 18-4-503 and 18-4-504, "premises" means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.

Source: L. 77: Entire section added, p. 977, § 1, effective June 10.

ANNOTATION

Law reviews. For comment, "People v. Emmert: A Step Backward for Recreational Water Use in Colorado", see 52 U. Colo. L. Rev. 247 (1981).

Applied in People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979); Bollier v. People, 635 P.2d 543 (Colo. 1981).

18-4-505. First degree criminal tampering. Except as provided in sections 18-4-506.3 and 18-4-506.5, a person commits the crime of first degree criminal tampering if, with intent to cause interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection, he tampers with property of a utility or institution. First degree criminal tampering is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-505. **L. 80:** Entire section amended, p. 534, § 2, effective July 1. **L. 89:** Entire section amended, p. 905, § 2, effective July 1.

18-4-506. Second degree criminal tampering. Except as provided in sections 18-4-506.3 and 18-4-506.5, a person commits the crime of second degree criminal tampering if he tampers with property of another with intent to cause injury, inconvenience, or annoyance to that person or to another or if he knowingly makes an unauthorized connection with property of a utility. Second degree criminal tampering is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-506. **L. 77:** Entire section amended, p. 963, § 27, effective July 1. **L. 80:** Entire section amended, p. 533, § 1, effective January 29; entire section amended, p. 535, § 3, effective July 1. **L. 89:** Entire section amended, p. 905, § 3, effective July 1.

ANNOTATION

This section fairly describes prohibited conduct in terms sufficiently understandable so that persons who wish to comply with it may do so; therefore, it is not constitutionally void for vagueness. People v. Edmonds, 195 Colo. 358, 578 P.2d 655 (1978).

Words "unauthorized connections" are intended to reach the situation in which a person

connects to the property of a utility an apparatus which procures the services of the utility without cost. People v. Edmonds, 195 Colo. 358, 578 P.2d 655 (1978).

Applied in People v. Shearer, 650 P.2d 1293 (Colo. App. 1982); Nowakowski v. District Court, 664 P.2d 709 (Colo. 1983).

18-4-506.3. Tampering with equipment associated with oil or gas gathering operations - penalty. (1) Any person who in any manner knowingly destroys, breaks, removes, or otherwise tampers with or attempts to destroy, break, remove, or otherwise tamper with any equipment associated with oil or gas gathering operations commits a class 2 misdemeanor.

(2) Any person who in any manner, without the consent of the owner or operator, knowingly alters, obstructs, interrupts, or interferes with or attempts to alter, obstruct, interrupt, or interfere with the action of any equipment used or associated with oil or gas gathering operations commits a class 2 misdemeanor.

Source: L. 89: Entire section added, p. 905, § 1, effective July 1.

18-4-506.5. Tampering with a utility meter - penalty. (1) Any person who connects any pipe, tube, stopcock, wire, cord, socket, motor, or other instrument or contrivance with any main, service pipe, or other medium conducting or supplying gas, water, or electricity to any building without the knowledge and consent of the person supplying such gas, water, or electricity commits a class 2 misdemeanor.

(2) Any person who in any manner alters, obstructs, or interferes with the action of any meter provided for measuring or registering the quantity of gas, water, or electricity passing through said meter without the knowledge and consent of the person owning said meter commits a class 2 misdemeanor.

(3) Nothing in this section shall be construed to apply to any licensed electrical or plumbing contractor while performing usual and ordinary services in accordance with recognized customs and standards.

Source: L. 80: Entire section added, p. 534, § 1, effective July 1.

18-4-507. Defacing or destruction of written instruments. Every person who defaces or destroys any written instrument evidencing a property right, whether vested or contingent, with the intent to defraud commits a class 1 misdemeanor.

Source: L. 71: R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-507.

18-4-508. Defacing, destroying, or removing landmarks, monuments, or accessories. (1) Any person who knowingly cuts, fells, alters, or removes any certain boundary tree knowing such is a boundary tree, monument, or other allowed landmark, to the damage of any person, or any person who intentionally defaces, removes, pulls down, injures, or destroys any location stake, side post, corner post, landmark, or monument, or any other legal land boundary monument in this state, designating or intending to designate the location, boundary, or name of any mining claim, lode, or vein of mineral, or the name of the discoverer or date of discovery thereof, commits a class 2 misdemeanor.

(2) Any person who knowingly removes or knowingly causes to be removed any public land survey monument, as defined by section 38-53-103 (18), C.R.S., or control corner, as defined in section 38-53-103 (6), C.R.S., or a restoration of any such monument or who knowingly removes or knowingly causes to be removed any bearing tree knowing such is a bearing tree or other accessory, as defined by section 38-53-103 (1), C.R.S., even if said person has title to the land on which said monument or accessory is located, commits a class 2 misdemeanor unless, prior to such removal, said person has caused a Colorado professional land surveyor to establish at least two witness corners or reference marks for each such monument or accessory removed and has filed or caused to be filed a monument record pursuant to article 53 of title 38, C.R.S.

Source: L. 71: R&RE, p. 431, § 1. **C.R.S. 1963:** § 40-4-508. **L. 77:** Entire section amended, p. 963, § 28, effective July 1. **L. 79:** Entire section amended, p. 478, § 4, effective July 1. **L. 84:** (2) amended, p. 1119, § 16, effective June 7. **L. 94:** (2) amended, p. 1507, § 37, effective July 1.

Cross references: For the definition of professional land surveyor, see § 12-25-202 (7).

18-4-509. Defacing property - definitions. (1) (a) Any person who destroys, defaces, removes, or damages any historical monument commits the crime of defacing property.

(b) Any person who defaces or causes, aids in, or permits the defacing of public or private property without the consent of the owner by any method of defacement, including but not limited to painting, drawing, writing, or otherwise marring the surface of the property by use of paint, spray paint, ink, or any other substance or object, commits the crime of defacing property.

(c) (I) Any person who, with regard to a cave that is public property or the property of another, knowingly performs any of the following acts without the consent of the owner commits the crime of defacing property:

(A) Breaking or damaging any lock, fastening, door, or structure designed to enclose or protect any such cave;

(B) Defacing, damaging, or breaking from any part of such cave any cave resource; or

(C) Removing from such cave any cave resource.

(II) For purposes of this section:

(A) "Cave" means any naturally occurring void, cavity, recess, lava tube, or system of interconnected passages that occurs beneath the surface of the earth or within a cliff or ledge, including any cave resource therein, but not including any mine, tunnel, aqueduct, or other artificial excavation, and that is large enough to permit an individual to enter, regardless of whether the entrance is naturally formed or has been artificially created or enlarged. "Cave" includes any natural pit, sinkhole, or other feature that is an extension of the entrance.

(B) "Cave resource" includes any material or substance occurring naturally in caves, such as animal life, plant life, paleontological deposits, sediments, minerals, speleogens, and speleothems.

(B.5) "Juvenile" shall have the same meaning as set forth in section 19-1-103 (68), C.R.S.

(C) "Speleogen" means relief features on the walls, ceiling, or floor of any cave that are part of the surrounding rock, including, but not limited to, anastomoses, scallops, meander niches, petromorphs, and rock pendants in solution caves and similar features unique to volcanic caves.

(D) "Speleothem" means any natural mineral formation or deposit occurring in a cave, including, but not limited to, any stalactite, stalagmite, helictite, cave flower, flowstone, concretion, drapery, rimstone, or formation of clay or mud.

(2) (a) (I) Defacing property is a class 2 misdemeanor; except that:

(A) A second or subsequent conviction for the offense of defacing property is a class 1 misdemeanor and the court shall impose a mandatory minimum fine of seven hundred fifty dollars upon conviction; and

(B) If a person violates paragraph (b) of subsection (1) of this section twice or more within a period of six months, the damages caused by two or more of the violations may be aggregated and charged in a single count, in which event the violations so aggregated and charged shall constitute a single offense, and, if the aggregate damages are five hundred dollars or more, it is a class 1 misdemeanor and the court shall impose a mandatory minimum fine of seven hundred fifty dollars upon conviction.

(II) In sentencing a person who violates this section, the court has discretion to impose alternatives in sentencing as described in part 1 of article 1.3 of this title, including but not limited to restorative justice practices, as defined in section 18-1-901 (3) (o.5), or in the case of a juvenile offender, to impose restorative justice, as defined in section 19-1-103 (94.1), C.R.S.

(III) The court may suspend all or part of the mandatory minimum fine associated with a conviction under this section upon the offender's successful completion of any sentence alternative imposed by the court pursuant to subparagraph (II) of this paragraph (a).

(IV) Fifty percent of the fines collected pursuant to this paragraph (a) shall be credited to the highway users tax fund, created in section 43-4-201, C.R.S., and allocated and expended as specified in section 43-4-205 (5.5) (a), C.R.S., and fifty percent of the fines collected pursuant to this paragraph (a) shall be credited to the juvenile diversion cash fund created in section 19-2-303.5, C.R.S.; except that the fines collected pursuant to paragraph (c) of subsection (1) of this section shall be credited to the Colorado travel and tourism promotion fund created in section 24-49.7-106, C.R.S.

(b) Any person convicted of defacing property pursuant to paragraph (b) or (c) of subsection (1) of this section shall be ordered by the court to personally make repairs to any property damaged, or properties similarly damaged, if possible. If the property cannot be repaired, the court shall order a person convicted of defacing property to replace or

compensate the owner for the damaged property but may, in the case of a violation of paragraph (b) of subsection (1) of this section, limit such compensation to two thousand five hundred dollars.

(c) Repealed.

Source: L. 71: R&RE, p. 431, § 1. C.R.S. 1963: § 40-4-509. L. 89: (2) R&RE, p. 875, § 10, effective June 5. L. 93: (2) amended, p. 1732, § 20, effective July 1. L. 94: (2) amended, p. 1463, § 2, effective July 1. L. 97: (2) amended, p. 1536, § 2, effective July 1. L. 2003: Entire section amended, p. 1903, § 1, effective July 1. L. 2004: (1)(c) added and (2) amended, pp. 69, 70, §§ 1, 2, effective August 4. L. 2005: (2)(a) amended, p. 140, § 3, effective April 5. L. 2009: (2)(c) repealed, (HB 09-1266), ch. 347, p. 1814, § 2, effective August 5. L. 2011: (1)(c)(II)(B.5) added and (2)(a) amended, (SB 11-256), ch. 254, pp. 1101, 1099, §§ 3, 1, effective August 10.

ANNOTATION

Evidence held insufficient for conspiracy to destroy property. Bates v. People, 179 Colo. 81, 498 P.2d 1136 (1972) (decided under former § 40-18-1, C.R.S. 1963).

Applied in People v. Shearer, 650 P.2d 1293 (Colo. App. 1982).

18-4-510. Defacing posted notice. Any person who knowingly mars, destroys, or removes any posted notice authorized by law commits a class 1 petty offense.

Source: L. 71: R&RE, p. 432, § 1. C.R.S. 1963: § 40-4-510. L. 77: Entire section amended, p. 964, § 29, effective July 1.

Cross references: For penalty for willfully defacing or destroying notices, see § 30-15-202.

18-4-511. Littering of public or private property. (1) Any person who deposits, throws, or leaves any litter on any public or private property or in any waters commits littering.

(2) It shall be an affirmative defense that:

(a) Such property is an area designated by law for the disposal of such material and the person is authorized by the proper public authority to so use the property; or

(b) The litter is placed in a receptacle or container installed on such property for that purpose; or

(c) Such person is the owner or tenant in lawful possession of such property, or he has first obtained written consent of the owner or tenant in lawful possession, or the act is done under the personal direction of said owner or tenant.

(3) (a) The term "litter" as used in this section means all rubbish, waste material, refuse, garbage, trash, debris, or other foreign substances, solid or liquid, of every form, size, kind, and description.

(b) The phrase "public or private property" as used in this section includes, but is not limited to, the right-of-way of any road or highway, any body of water or watercourse, including frozen areas or the shores or beaches thereof, any park, playground, or building, any refuge, conservation, or recreation area, and any residential, farm, or ranch properties or timberlands.

(4) Except as otherwise provided in sections 33-15-108 (2) and 42-4-1406, C.R.S., littering is a class 2 petty offense punishable, upon conviction, by a mandatory fine of not less than twenty dollars nor more than five hundred dollars upon a first conviction, by a mandatory fine of not less than fifty dollars nor more than one thousand dollars upon a second conviction, and by a mandatory fine of not less than one hundred dollars nor more than one thousand dollars upon a third or subsequent conviction.

(5) It is in the discretion of the court, upon the conviction of any person and the imposition of a fine under this section, to suspend any or all of the fine in excess of the

mandatory minimum fine upon the condition that the convicted person gather and remove from specified public property or specified private property, with prior permission of the owner or tenant in lawful possession thereof, any litter found thereon, or upon the condition that the convicted person pick up litter at a time prescribed by and a place within the jurisdiction of the court for not less than eight hours upon a first conviction or for not less than sixteen hours upon a second or subsequent conviction.

(6) Whenever litter is thrown, deposited, dropped, or dumped from any motor vehicle in violation of this section, the operator of said motor vehicle is presumed to have caused or permitted the litter to be so thrown, deposited, dropped, or dumped therefrom.

(7) In addition to those law enforcement officers and agencies of this state and the political subdivisions thereof authorized to enforce this section, the officers of the Colorado state patrol and the district wildlife managers and other commissioned officers of the division of parks and wildlife are expressly authorized, empowered, and directed to enforce the provisions of this section.

Source: L. 71: R&RE, p. 432, § 1. C.R.S. 1963: § 40-4-511. L. 73: p. 537, § 1. L. 77: (4) amended, p. 1195, § 2, effective July 1. L. 79: (7) amended, p. 1212, § 2, effective June 21. L. 81: (4) amended, p. 2025, § 18, effective July 14. L. 85: (4) R&RE and (5) amended, p. 670, §§1, 2, effective July 1. L. 2002, 3rd Ex. Sess.: (4) amended, p. 53, § 3, effective July 18.

Cross references: For the power and duty of the executive director of the department of natural resources to establish programs to control litter in Colorado, see § 24-33-102 (5); for prohibitions against putting foreign matters on highways, see § 42-4-1406; for littering lands or waters under the control of the division of wildlife in the department of natural resources, see §§ 33-10-102 (10) and 33-15-108; for affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For note, "Water Pollution Control in Colorado", see 36 U. Colo. L. Rev. 413 (1964).

Annotator's note. Since § 18-4-511 is similar to former § R.S. 08, § 1817, relevant cases construing that provision have been included in the annotations to this section.

Purpose of section. This section plainly shows a design to protect from pollution the waters of creeks used as the feeders for reservoirs for public use, without any reference to whether such pollution in fact appreciably affects the waters when arrived at the reservoir. Nor does such construction render this act objectionable. The design of the act is not to take property for public use, nor does it do so within the meaning of the constitution. It is intended to restrain and regulate the use of private property so as to protect the common right of all the citizens of the state. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

Scope of police power. Former section prohibiting pollution of streams held within the

police power of the state, and it is the duty of the courts to enforce it. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

Health being the sine qua non of all personal enjoyment, it is not only the right but the duty of a state or of a municipality possessing the police power to pass such laws or ordinances as may be necessary for the preservation of the health of the people. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

Section applies to municipalities. On the question as to whether municipalities have a right to pollute state public streams this section controls. There is nothing inherent in a municipality which gives it any greater right to do than that which a natural person has. *Mack v. Craig*, 68 Colo. 337, 191 P. 101 (1920).

And it applies to hotel discharging waste in running stream. The manager of a hotel or eating house who discharges into a running stream the waste from his premises, or other offensive matter, is within this section, and liable to the penalty thereby imposed. *People v. Hupp*, 53 Colo. 80, 123 P. 651 (1912).

18-4-512. Abandonment of a motor vehicle. (1) Any person who abandons any motor vehicle upon a street, highway, right-of-way, or any other public property, or upon any private property without the express consent of the owner or person in lawful charge of that private property commits abandonment of a motor vehicle.

(2) To "abandon" means to leave a thing with the intention not to retain possession of or assert ownership over it. The intent need not coincide with the act of leaving.

- (3) It is prima facie evidence of the necessary intent that:
 - (a) The motor vehicle has been left for more than seven days unattended and unmoved;
or
 - (b) License plates or other identifying marks have been removed from the motor vehicle; or
 - (c) The motor vehicle has been damaged or is deteriorated so extensively that it has value only for junk or salvage; or
 - (d) The owner has been notified by a law enforcement agency to remove the motor vehicle, and it has not been removed within three days after notification.
- (4) Abandonment of a motor vehicle is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 432, § 1. C.R.S. 1963: § 40-4-512.

Cross references: For the towing and storage of abandoned and illegally parked motor vehicles, see part 18 of article 4 of title 42.

18-4-513. Criminal use of a noxious substance. (1) Any person who deposits on the land or in the building or vehicle of another, without his consent, any stink bomb or device, irritant, or offensive-smelling substance with the intent to interfere with another's use or enjoyment of the land, building, or vehicle commits a class 3 misdemeanor.

(2) It shall be an affirmative defense that a peace officer in the performance of his duties reasonably used a noxious substance.

Source: L. 71: R&RE, p. 433, § 1. C.R.S. 1963: § 40-4-513. L. 73: p. 538, § 2.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-4-514. Use of photographs, video tapes, or films of property. Pursuant to section 13-25-130, C.R.S., photographs, video tapes, or films of property over which a person is alleged to have exerted unauthorized control or otherwise to have obtained unlawfully are competent evidence if the photographs, video tapes, or films are admissible into evidence under the rules of law governing the admissibility of photographs, video tapes, or films into evidence.

Source: L. 85: Entire section added, p. 577, § 4, effective July 1.

Cross references: For similar provisions concerning the use of photographs, video tapes, or films of property with respect to the crimes of robbery and theft, see §§ 18-4-305 and 18-4-415.

18-4-515. Entry to survey property - exception to criminal trespass. (1) Effective July 1, 1992, no person shall be in violation of the trespass laws of this part 5 if the requirements of this section are met. The provisions of this section provide an exception to the trespass laws only and do not affect or supersede the provisions and requirements of articles 1 to 7 of title 38, C.R.S., concerning condemnation proceedings, notwithstanding any laws to the contrary.

(2) Any person who is licensed as a professional land surveyor pursuant to section 12-25-214, C.R.S., or who is under the direct supervision of such a person as an employee, agent, or representative, may enter public or private land to investigate and utilize boundary evidence and to perform boundary surveys if the notice requirement in this subsection (2) is met. The notice of the pending survey shall contain the identity of the party for whom the survey is being performed and the purpose for which the survey will be performed, the employer of the surveyor, the identity of the surveyor, the dates the land will be entered, the time, location, and timetable for such entry, the estimated completion date, the estimated number of entries that will be required, and a statement requesting the landowner to provide the surveyor with the name of each person who occupies the land as a tenant or lessee, whether on a permanent or a temporary basis. Nothing in this subsection (2) shall be

deemed to confer liability upon a landowner who fails or refuses to provide such requested statement. At least fourteen days before the desired date of entry the professional land surveyor shall cause such notice to be given to the landowner by certified mail, return receipt requested, and by regular mail. Any landowner may waive the requirement that notice be given by certified mail, return receipt requested, and by regular mail. The waivers described in this subsection (2) may be given orally or in writing.

(3) If a landowner does not acknowledge receipt of the notice within fourteen days of such receipt, the professional land surveyor or other persons described in subsection (2) of this section shall have the right to enter the land pursuant to the specifications given in the notice. If a landowner acknowledges receipt of the notice within fourteen days of receipt, such landowner has the right to modify the time and other provisions of the surveyor's access, as long as such modifications do not unreasonably restrict completion of the survey.

(4) All persons described in subsection (2) of this section who enter land pursuant to and for a purpose described in this section shall carry upon their person at all times during entry and stay upon the land sufficient identification to identify themselves and their employer or principal, and shall present such identification upon request.

(5) Persons described in subsection (2) of this section shall be liable for actual damages caused during entry and stay upon a landowner's land. No professional land surveyor or person under such surveyor's direct supervision shall have a civil cause of action against a landowner or lessee for personal injury or property damage incurred while on the land for purposes consistent with those described in subsection (2) of this section, except when such damages and injury were willfully or deliberately caused by the landowner.

Source: L. 92: Entire section added, p. 429, § 1, effective April 29. L. 2004: (2) amended, p. 1310, § 53, effective May 28.

ANNOTATION

Giving the word "affect" its plain and ordinary meaning, this section does not change, alter, or lessen the requirements of articles 1 through 7 of title 38 in condemnation actions. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

Giving the word "supersede" its plain and ordinary meaning, this section does not void, replace, supplant, or make unnecessary any provisions or requirements of articles 1 through 7 of title 38 in condemnation actions. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

This section may not be used in place of applicable condemnation procedures. There is no basis to conclude, however, that it does not apply or may not be used in support of or in conjunction with a contemplated condemnation proceeding. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

A government entity's entry onto private property for survey purposes prior to initiating

ing eminent domain proceedings does not constitute a compensable taking. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

This section provides that a licensed surveyor may lawfully enter land to investigate boundary evidence, to utilize such evidence, and to perform boundary surveys. It does not state or imply that a surveyor must conduct the survey for the benefit of an existing legal interest in neighboring land or that the lawfulness of the entry is conditioned on the manner in which the surveyor will utilize the evidence obtained by the survey or on the purposes motivating the survey. It does not state or imply that the boundary evidence may only be utilized to describe the boundaries themselves and may not be utilized to create a derivative legal description related to the land. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

18-4-516. Criminal operation of a device in motion picture theater. (1) A person who, while within a motion picture theater, knowingly operates an audiovisual recording function of a device for the purpose of recording a motion picture, while a motion picture is being exhibited, without the consent of the owner or lessee of the motion picture theater, commits the offense of criminal operation of a device in a motion picture theater.

(2) Criminal operation of a device in a motion picture theater is a class 1 misdemeanor.

(3) If a person operates or appears to operate an audiovisual recording function for the

purpose of recording a motion picture in a motion picture theater, the owner or lessee of a facility in which a motion picture is being exhibited, or the authorized agent or employee of the owner or lessee, or any peace or police officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may detain and question such person, in a reasonable manner for the purpose of ascertaining whether the person is guilty of criminal operation of a device in motion picture theater. Such questioning of a person by the owner or lessee of a motion picture theater, or the authorized agent or employee of the owner or lessee, or peace or police officer does not render the owner or lessee of a motion picture theater, or the authorized agent or employee of the owner or lessee, or peace or police officer civilly or criminally liable for slander, false arrest, false imprisonment, malicious prosecution, or unlawful detention.

(4) This section does not prevent a lawfully authorized investigative, law enforcement, or intelligence-gathering employee or agent of the state or federal government, while operating within the scope of lawfully authorized investigative, protective, law enforcement, or intelligence-gathering activities, from operating an audiovisual recording function of a device in a motion picture theater.

(5) Nothing in this section prevents prosecution under any other provision of law providing for greater penalty.

(6) As used in this section:

(a) "Audiovisual recording function" means the capability of a device to record or transmit a motion picture or any part thereof by means of any technology now known or hereafter developed.

(b) "Motion picture theater" means a movie theater, screening room, or other venue when used primarily for the exhibition of motion pictures.

Source: L. 2004: Entire section added, p. 922, § 1, effective July 1.

PART 6

THEFT OF SOUND RECORDINGS

18-4-601. Definitions. As used in this part 6, unless the context otherwise requires:

(1) "Aggregate wholesale value" means the average wholesale value of lawfully manufactured and authorized sound or audio-visual recordings corresponding to the number of nonconforming recorded articles involved in the offense. Proof of the specific wholesale value of each nonconforming device shall not be required.

(1.3) "Article" means a tangible medium on which sounds, images, or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio or video cassette, wire, film, memory card, flash drive, hard drive, data storage device, or other medium now existing or developed later on which sounds, images, or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates, in whole or in part, the original.

(1.5) "Copyright" means the ownership rights that accrue to an owner and relate solely to the common law copyright accruing to such owner. The term "copyright" does not include a federal copyright, which inures to the benefit of owners pursuant to Public Law 92-140, as amended by Public Law 93-573, which became effective February 15, 1972. For the purposes of this part 6, no common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner.

(1.7) "Manufacturer" means the person who actually makes a recording or causes a recording to be made. "Manufacturer" does not include a person who manufactures a medium upon which sounds or images can be recorded or stored, or who manufactures the cartridge or casing itself, unless such person actually makes the recording or causes the recording to be made.

(2) "Owner" means the person who owns the copyright on the original fixation of sounds embodied in the master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or

other articles upon which sound is recorded and from which the transferred recorded sounds are directly derived.

(3) "Person" means any individual, firm, partnership, corporation, or association.

Source: L. 76: Entire part added, p. 553, § 1, effective July 1. L. 2009: (1) amended and (1.3), (1.5), and (1.7) added, (SB 09-036), ch. 185, p. 809, § 1, effective August 5.

18-4-602. Unlawful transfer for sale. (1) A person who knowingly and without the consent of the owner transfers any copyrighted sounds recorded on a phonograph record, video disc, wire, tape, film, or other article on which sounds are recorded with the intent to sell such article on which such sounds are so transferred or to cause the same to be sold for profit or to be used to promote the sale of any product commits unlawful transfer for sale.

(2) Unlawful transfer for sale is a class 6 felony.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1. L. 77: (1) amended, p. 978, § 1, effective May 26. L. 89: (2) amended, p. 834, § 49, effective July 1.

18-4-603. Unlawful trafficking in unlawfully transferred articles. (1) A person who knowingly, or who reasonably should have such knowledge, advertises, offers for sale or resale, sells or resells, distributes, or possesses for any of the purposes provided in this subsection (1) any article that has been transferred without consent of the owner as provided in section 18-4-602 commits unlawful trafficking in unlawfully transferred articles.

(2) Each act of unlawful trafficking in unlawfully transferred articles is a class 3 misdemeanor.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1.

18-4-604. Dealing in unlawfully packaged recorded articles. (1) A person who knowingly and for commercial advantage or private financial gain advertises, offers for sale or resale, sells or resells, transports, or possesses for any of the purposes provided in this subsection (1) any article on which sounds are recorded, the cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual name and address of the manufacturer, commits dealing in unlawfully packaged recorded articles.

(2) Dealing in unlawfully packaged recorded articles is a class 1 misdemeanor. If the offense involves more than one hundred unlawfully packaged recorded articles or the offense is a second or subsequent offense, the court shall assess a fine of at least one thousand dollars.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1. L. 2005: Entire section amended, p. 202, § 1, effective July 1. L. 2009: Entire section amended, (SB 09-036), ch. 185, p. 810, § 2, effective August 5.

18-4-604.3. Unlawful recording of a live performance. (1) A person who, without the consent of the owner of the right to record a live performance, records or causes to be recorded the live performance on a phonograph record, compact disc, video disc, wire, tape, film, or other article on which a live performance is recorded with the intent to sell the article on which the live performance is recorded or to cause the same to be sold for profit or to be used to promote the sale of any product commits unlawful recording of a live performance.

(2) In the absence of a written agreement or law to the contrary, the performer or performers of a live performance are presumed to own the rights to record the live performance.

(3) For purposes of this section, a person who is authorized to maintain custody and control of business records that reflect whether the owner of the live performance consented to having the live performance recorded is a competent witness in a proceeding regarding the issue of consent.

(4) Unlawful recording of a live performance is a class 1 misdemeanor.

(5) As used in this section, "live performance" means a recitation, rendering, or playing of a series of images, musical, spoken, or other sounds, or a combination of images and sounds, in an audible sequence.

Source: L. 2005: Entire section added, p. 202, § 2, effective July 1.

18-4-604.7. Trafficking in unlawfully recorded live performance. (1) A person who knows or reasonably should know that an article has been recorded in violation of section 18-4-604.3 and advertises, offers for sale or resale, sells or resells, or distributes the article, or possesses the article for any of the said purposes, commits trafficking in an unlawfully recorded live performance.

(2) Each act of trafficking in an unlawfully recorded live performance is a class 1 misdemeanor.

Source: L. 2005: Entire section added, p. 202, § 2, effective July 1.

18-4-605. Applicability. (1) This part 6 shall not apply to:

(a) Any broadcaster who, in connection with or as part of a radio, television, or cable broadcast transmission or for the purpose of archival preservation, transfers any copyrighted sounds recorded on a sound recording;

(b) Any person who transfers copyrighted sounds in the home for personal use and without compensation for such transfer.

(2) This part 6 shall neither enlarge nor diminish the rights of the respective parties in a civil litigation concerning the subject matter of this part 6.

Source: L. 76: Entire part added, p. 554, § 1, effective July 1.

18-4-606. Confiscation and disposition of items. (1) A law enforcement officer shall, upon discovery, confiscate all unlawfully labeled, transferred, or recorded articles possessed for the purposes of selling or distributing in violation of this part 6 and all equipment and components used or intended to be used to knowingly and unlawfully transfer, manufacture, or record articles for the purposes of selling or distributing in violation of this part 6.

(2) Notwithstanding any other provision of law, recorded articles and equipment and components that are confiscated pursuant to subsection (1) of this section are contraband and shall be delivered to the district attorney in the county in which the confiscation was made. Upon conviction of the person, the district attorney may request a court order for destruction of the recorded articles and a court order for distribution of the equipment and components. Upon conviction of the person and motion of the district attorney, the court shall order the recorded articles to be destroyed or otherwise disposed of if the court finds that the person claiming title to the recorded articles possessed the recorded articles for the purposes of selling or distributing in violation of this part 6. The court shall order the equipment and components distributed to a charitable or educational organization if the court finds that the person claiming title to the equipment possessed the equipment to record nonconforming articles for the purposes of selling or distributing in violation of this part 6.

Source: L. 2009: Entire section added, (SB 09-036), ch. 185, p. 810, § 3, effective August 5.

18-4-607. Restitution. Notwithstanding any other provision of law, upon conviction of a violation of this part 6, the convicted person shall be ordered to make restitution to the owner or lawful producer of the master sound or audio-visual recording, or to the trade association representing the owner or lawful producer who suffered injury resulting from the crime. The order of restitution shall be based on the aggregate wholesale value of

lawfully manufactured and authorized recordings corresponding to the number of nonconforming recorded articles involved in the offense unless a greater value can be proven. The order of restitution shall also include investigative costs relating to the offense.

Source: L. 2009: Entire section added, (SB 09-036), ch. 185, p. 811, § 3, effective August 5.

PART 7

THEFT OF CABLE TELEVISION SERVICE

18-4-701. Theft of cable service - definitions. (1) As used in this part 7, unless the context otherwise requires:

(a) "Cable operator" means any person who:

(I) Provides cable service over a cable system in which such person directly or through one or more affiliates owns a significant interest; or

(II) Controls or is responsible for the management and operation of such cable system through any arrangement.

(b) "Cable service" means:

(I) The one-way transmission to subscribers of a video programming service;

(II) Two-way interactive services delivered over a cable system;

(III) Subscriber interaction, if any, that is required for the selection or use of such video programming or interactive service.

(c) "Cable system" means a facility consisting of a set of closed transmission paths and associated signal operation, reception, and control equipment that is designed to provide cable service.

(2) A person commits theft of cable service if such person knowingly:

(a) Obtains cable service from a cable operator by trick, artifice, deception, use of an unauthorized device or decoder, or other means without authorization or with the intent to deprive such cable operator of lawful compensation for the services rendered;

(b) (I) Makes or maintains, without authority from or payment to a cable operator, a connection or connections, whether physical, electrical, mechanical, acoustical, or otherwise with any cable, wire, component, or other device used for the distribution of cable services.

(II) Notwithstanding subparagraph (I) of this paragraph (b), this paragraph (b) shall not include circumstances where a person has attached a wire or cable to extend service that the person has paid for or that has been authorized to an additional outlet, or where the cable operator has failed to disconnect a previously authorized cable service.

(c) Modifies, alters, or maintains a modification or alteration to a device installed or capable of being installed with the authorization of a cable operator, which modification or alteration is for the purpose of intercepting or receiving cable service carried by such cable operator without authority from or payment to such cable operator;

(d) Possesses without authority, with the intent to receive cable operator services without authorization from or payment to a cable operator, a device or printed circuit board designed in whole or in part to facilitate the following acts:

(I) To receive cable services offered for sale over a cable system; or

(II) To perform or facilitate the performance of any act set forth in paragraphs (a) to (c) of this subsection (2).

(e) Manufactures, imports into this state, distributes, sells, leases, or offers or advertises for sale or lease, with the intent to receive cable services or with the intent to promote the reception of cable services without payment or authorization from a cable operator, any device, printed circuit board, or plan or kit for a device or printed circuit board designed in whole or in part to facilitate the following acts:

(I) To receive any cable services offered for sale over a cable system; or

(II) To perform or facilitate the performance of any act set forth in paragraphs (a) to (c) of this subsection (2).

- (f) Fails to return or surrender equipment used to receive cable service and provided by a cable operator, after such service has been terminated for any reason.
- (3) This section does not apply to satellite dishes.
- (4) Any person who violates this section commits a class 2 misdemeanor.

Source: L. 84: Entire part added, p. 544, § 1, effective July 1. L. 98: Entire section amended, p. 411, § 1, effective August 5.

18-4-702. Civil action - damages. (1) (a) A licensed or duly permitted cable operator may bring a civil action for damages against any person who commits civil theft of cable service.

(b) Civil theft of cable service is the willful or intentional commission of any act described in section 18-4-701 (2).

(c) No plaintiff that files an action pursuant to this section for theft of cable services shall be required to plead damages with particularity as a condition precedent for maintaining such an action.

(d) There is a rebuttable presumption that a violation of section 18-4-701 (2) (a) has occurred if there exists in the actual possession of the person a device that permits the reception of unauthorized cable services for which no payment has been made to a cable operator and no legitimate purpose exists.

(e) There is a rebuttable presumption that a violation of section 18-4-701 (2) (b) has occurred if cable service to the person's business or residential property was disconnected by a cable operator, notification of such action by certified mail was provided to such person, and a connection of such service exists at such person's business or residential property after the date of the disconnection.

(f) There is a rebuttable presumption that a violation of section 18-4-701 (2) (c) has occurred if the cable operator, as a matter of standard procedure:

(I) Places written warning labels on its converters or decoders explaining that tampering with such devices is a violation of law and a converter or decoder is found to have been tampered with, altered, or modified so as to allow the reception or interception of cable services without authority from or payment to a cable operator; or

(II) Seals its converters or decoders with a label or mechanical device and the label or device has been removed or broken.

(g) There is a rebuttable presumption that a violation of section 18-4-701 (2) (d) has occurred if a person possesses ten or more devices or printed circuit boards. If such rebuttable presumption is not overcome, the court shall find that such person committed civil theft of cable service willfully and for purposes of commercial advantage and shall increase the damages award in accordance with paragraph (a) of subsection (3) of this section.

(h) There is a rebuttable presumption that a violation of section 18-4-701 (2) (e) has occurred if the person, while engaging in any of the prohibited acts, made apparent to the buyer that the product would enable the buyer to obtain cable service without payment to a cable operator. If such rebuttable presumption is not overcome, the court shall find that such person committed civil theft of cable service willfully and for purposes of commercial advantage and shall increase the damages award in accordance with paragraph (a) of subsection (3) of this section.

(i) There is a rebuttable presumption that a violation of section 18-4-701 (2) (f) has occurred if a cable operator mailed by certified mail to the person, at the provided address, a written demand requesting the return of an operator-owned converter, decoder, or other device and the person failed to return said device or to make reasonable arrangements to do so within fifteen days after the date of such notice. Such reasonable arrangements may include requesting that the cable operator collect the equipment, subject to the cable operator's policies.

(2) In any civil action brought pursuant to this section, a cable operator shall be entitled, upon proof of civil theft of cable service, to recover the greater of the following amounts as damages:

- (a) Four thousand dollars; or

- (b) Three times the amount of any actual damages sustained.
- (3) (a) Notwithstanding any provision of subsection (2) of this section to the contrary, a court may increase the award of damages in any civil action brought pursuant to this section by an amount of not more than fifty thousand dollars if such court finds that civil theft of cable service was committed willfully and for the purpose of commercial advantage.
- (b) In any civil action described in paragraph (a) of this subsection (3), a cable operator need not prove that the final purchaser actually used the device, plan, kit, or printed circuit board without authorization from or payment to a cable operator.
- (c) No attempt by a person to limit or shift legal liability in an action described in this subsection (3) by requiring purchasers to sign a disclaimer acknowledging their responsibility to report use of a device, plan, kit, or printed circuit board to a cable operator shall be effective, and any such disclaimer shall be void.
- (d) (Deleted by amendment, L. 98, p. 830, § 57, effective August 5, 1998.)
- (4) In any action for civil theft of cable service, the prevailing party shall be awarded reasonable attorney fees and direct costs incurred as a result of such theft, including, but not limited to, the costs of any investigation, disconnection or reconnection, service calls, employees, equipment, and expert witnesses and costs of the civil action.
- (5) A cable operator may seek an injunction to enjoin or restrain a violation of this section and damages arising from such violation in the same action.

Source: L. 84: Entire part added, p. 545, § 1, effective July 1. L. 98: Entire section amended, p. 413, § 2, effective August 5; (1)(g), (1)(h), and (3)(d) amended, p. 830, § 57, effective August 5.

18-4-703. Severability. If any provision of this part 7 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions or applications of this part 7 which can be given effect without the invalid provision or application, and to this end the provisions of this part 7 are declared to be severable.

Source: L. 84: Entire part added, p. 545, § 1, effective July 1.

PART 8

THEFT OF PUBLIC TRANSPORTATION SERVICES

18-4-801 and 18-4-802. (Repealed)

Source: L. 2012: Entire part repealed, (SB 12-044), ch. 274, p. 1448, § 4, effective June 8.

Editor's note: This part 8 was added in 1998. For amendments to this part 8 prior to its repeal in 2012, consult the 2011 Colorado Revised Statutes and the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

ARTICLE 5

Offenses Involving Fraud

Editor's note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor's note following the title heading.

PART 1	18-5-102.	Forgery.
FORGERY, SIMULATION,	18-5-103.	Second degree forgery. (Repealed)
IMPERSONATION,	18-5-104.	Second degree forgery.
AND RELATED OFFENSES	18-5-104.5.	Use of forged academic record.
	18-5-105.	Criminal possession of a forged instrument.
18-5-101.	Definitions.	

- 18-5-106. Criminal possession of second degree forged instrument. (Repealed)
- 18-5-107. Criminal possession of second degree forged instrument.
- 18-5-108. Merger of offenses.
- 18-5-109. Criminal possession of forgery devices.
- 18-5-110. Criminal simulation.
- 18-5-110.5. Trademark counterfeiting.
- 18-5-111. Unlawfully using slugs.
- 18-5-112. Obtaining signature by deception.
- 18-5-113. Criminal impersonation.
- 18-5-114. Offering a false instrument for recording.
- 18-5-115. Charitable fraud. (Repealed)
- 18-5-116. Controlled substances - inducing consumption by fraudulent means.
- 18-5-117. Unlawful possession of personal identifying information. (Repealed)
- 18-5-118. Offenses involving forgery of a penalty assessment notice issued to a minor under the age of eighteen years - suspension of driving privilege. (Repealed)
- 18-5-119. Theft of personal identifying information. (Repealed)
- 18-5-120. Gathering personal information by deception. (Repealed)

PART 2

FRAUD IN OBTAINING
PROPERTY OR SERVICES

- 18-5-201. Definitions. (Repealed)
- 18-5-201.1. Definitions relating to guaranteed check cards. (Repealed)
- 18-5-202. Fraudulent use of a credit device. (Repealed)
- 18-5-202.1. Fraudulent use of guaranteed check card. (Repealed)
- 18-5-203. Theft of credit device or guaranteed check card. (Repealed)
- 18-5-204. Criminal possession of credit device or guaranteed check card. (Repealed)
- 18-5-205. Fraud by check - definitions - penalties.
- 18-5-206. Defrauding a secured creditor or debtor.
- 18-5-207. Purchase on credit to defraud.
- 18-5-208. Dual contracts to induce loan.
- 18-5-209. Issuing a false financial statement - obtaining a financial transaction device by false statements.

- 18-5-210. Receiving deposits in a failing financial institution.

PART 3

FRAUDULENT AND DECEPTIVE
SALES AND BUSINESS PRACTICES

- 18-5-301. Fraud in effecting sales.
- 18-5-302. Unlawful activity concerning the selling of land.
- 18-5-303. Bait advertising.
- 18-5-304. False statements as to circulation.
- 18-5-305. Identification number - altering - possession.
- 18-5-306. Counterfeit or imitation controlled substances. (Repealed)
- 18-5-307. Fee paid to private employment agencies.
- 18-5-308. Electronic mail fraud.
- 18-5-309. Money laundering - illegal investments - penalty - definitions.

PART 4

BRIBERY AND RIGGING OF CONTESTS

- 18-5-401. Commercial bribery and breach of duty to act disinterestedly.
- 18-5-402. Rigging publicly exhibited contests.
- 18-5-403. Bribery in sports.

PART 5

OFFENSES RELATING TO THE
UNIFORM COMMERCIAL CODE

- 18-5-501. Definitions.
- 18-5-502. Failure to pay over assigned accounts.
- 18-5-503. Criminal liability of transferor of a bulk transfer. (Repealed)
- 18-5-504. Concealment or removal of secured property.
- 18-5-505. Failure to pay over proceeds unlawful.
- 18-5-506. Fraudulent receipt - penalty.
- 18-5-507. False statement in receipt - penalty.
- 18-5-508. Duplicate receipt not marked - penalty.
- 18-5-509. Warehouse's goods mingled - receipts - penalty.
- 18-5-510. Delivery of goods without receipt - penalty.
- 18-5-511. Mortgaged goods receipt - penalty.
- 18-5-512. Issuance of bad check.

PART 6

18-5-707.

Unlawful manufacture of a financial transaction device.

IMITATION CONTROLLED SUBSTANCES
ACT

PART 8

18-5-601 to
18-5-606.

(Repealed)

EQUITY SKIMMING
AND RELATED OFFENSES

PART 7

18-5-801.

Definitions.

18-5-802.

Equity skimming of real property.

FINANCIAL TRANSACTION
DEVICE CRIME ACT

18-5-803.

Equity skimming of a vehicle.

18-5-804.

Civil action.

18-5-701.

Definitions.

18-5-702.

Unauthorized use of a financial transaction device.

18-5-703.

Criminal possession of a financial transaction device. (Repealed)

18-5-704.

Sale or possession for sale of a financial transaction device. (Repealed)

18-5-705.

Criminal possession or sale of a blank financial transaction device.

18-5-706.

Criminal possession of forgery devices.

PART 9

IDENTITY THEFT AND RELATED
OFFENSES

18-5-901.

Definitions.

18-5-902.

Identity theft.

18-5-903.

Criminal possession of a financial device.

18-5-903.5.

Criminal possession of an identification document.

18-5-904.

Gathering identity information by deception.

18-5-905.

Possession of identity theft tools.

PART 1

FORGERY, SIMULATION, IMPERSONATION,
AND RELATED OFFENSES

18-5-101. Definitions. As used in sections 18-5-101 to 18-5-110, unless the context otherwise requires:

(1) "Complete written instrument" means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof.

(1.5) "Document-making implement" means any implement or impression, including, but not limited to, a template or a computerized template or form, specially designed or primarily used for making identification documents, false identification documents, or another document-making implement.

(2) To "falsely alter" a written instrument means to change a written instrument without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such instrument in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

(3) To "falsely complete" a written instrument means:

(a) To transform an incomplete written instrument into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or

(b) To transform an incomplete written instrument into a complete one by adding or inserting materially false information or adding or inserting a materially false statement. A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

(4) To "falsely make" a written instrument means to make or draw a written instrument, whether complete or incomplete, which purports to be an authentic creation of its

ostensible maker, but which is not, either because the ostensible maker is fictitious or because, if real, he did not authorize the making or the drawing thereof.

(5) "Forged instrument" means a written instrument which has been falsely made, completed, or altered.

(6) "Government" means the United States, any state, county, municipality, or other political unit, any department, agency, or subdivision of any of the foregoing, or any corporation or other entity established by law to carry out governmental functions.

(6.5) "Identification document" means a document made or issued by or under the authority of the United States government, a state, political subdivision of a state, a foreign government, political subdivision of a foreign government, an international governmental, or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

(7) "Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

(7.5) "Produce" includes alter, authenticate, or assemble.

(8) "Utter" means to transfer, pass, or deliver, or attempt or cause to be transferred, passed, or delivered, to another person any written instrument, article, or thing.

(9) "Written instrument" means any paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, credit card, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, which is capable of being used to the advantage or disadvantage of some person.

Source: L. 71: R&RE, p. 433, § 1. C.R.S. 1963: § 40-5-101. L. 94: (3) amended, p. 1718, § 12, effective July 1. L. 2000: (1.5), (6.5), and (7.5) added, p. 646, § 2, effective July 1. L. 2005: (3)(b) amended, p. 1499, § 3, effective July 1.

ANNOTATION

Law reviews. For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (October 2006).

Authentic, in legal parlance, means vested with all due formalities and legally attested. Downing v. Brown, 3 Colo. 571 (1877) (decided under former R.S. 08, § 69).

Where deletion of computer records was basis for forgery, computer disk was a "written instrument" and the deletion of records on the disk constituted a "false alteration". People v. Avila, 770 P.2d 1330 (Colo. App. 1988).

Applied in People v. Gray, 710 P.2d 1149 (Colo. App. 1985).

18-5-102. Forgery. (1) A person commits forgery, if, with intent to defraud, such person falsely makes, completes, alters, or utters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:

(a) Part of an issue of money, stamps, securities, or other valuable instruments issued by a government or government agency; or

(b) Part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property; or

(c) A deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or

(d) A public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant; or

(e) A written instrument officially issued or created by a public office, public servant, or government agency; or

(f) Part of an issue of tokens, transfers, certificates, or other articles manufactured and designed for use in transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation; or

(g) Part of an issue of lottery tickets or shares designed for use in the lottery held pursuant to part 2 of article 35 of title 24, C.R.S.; or

(h) A document-making implement that may be used or is used in the production of a false identification document or in the production of another document-making implement to produce false identification documents.

(2) Forgery is a class 5 felony.

(3) Uttering a forged document to a peace officer shall create a presumption that the person intended to defraud such peace officer.

Source: L. 71: R&RE, p. 434, § 1. **C.R.S. 1963:** § 40-5-102. **L. 89:** (2) amended, p. 834, § 50, effective July 1. **L. 93:** Entire section R&RE, p. 1988, § 16, effective July 1. **L. 2000:** (1)(h) added, p. 647, § 3, effective July 1. **L. 2003:** (3) added, p. 1888, § 2, effective May 22.

ANNOTATION

Annotator's note. Since § 18-5-102 is similar to former § 40-6-1, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Reasonable distinctions can be drawn between crimes prohibited by credit card and forgery statutes, and the existence of the specific statute regarding the misuse of credit cards does not preclude prosecution or conviction of appellant under the state's general forgery statute. *People v. James*, 178 Colo. 401, 497 P.2d 1256 (1972).

Circumstances sufficient to establish prima facie case of forgery. *Duncan v. People*, 178 Colo. 314, 497 P.2d 1029 (1972).

To satisfy subsection (1)(c), a document must purport to have legal efficacy that affects some right or status, and fraudulent letter to the prosecutor's office recanting the initial statement of events and purporting to contain the victim's signature meets statutory requirements, since the prosecutor would likely rely on the letter in determining whether probable cause exists to move forward with the

prosecution, which would affect defendant's legal status in the pending criminal matter. *People v. Cunefare*, 102 P.3d 302 (Colo. 2004).

Evidence of giving a forged resident alien card to a police officer was insufficient to support a charge of forgery with the intent to defraud the immigration and naturalization service. *People v. Miralda*, 981 P.2d 676 (Colo. App. 1999).

Requisite intent to commit forgery can exist in case where defendant used a false written instrument prepared by another. Prosecution is not obligated to prove defendant either mailed the false instrument or explicitly directed another to do so on defendant's behalf. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006).

Section 42-3-133 does not preclude prosecution under this section for altering and displaying a temporary license plate; therefore, this section is an appropriate statute to prosecute persons who alter temporary license plates. *People v. Stansberry*, 83 P.3d 1188 (Colo. App. 2003).

Applied in *People v. Smith*, 195 Colo. 404, 579 P.2d 1129 (1978).

18-5-103. Second degree forgery. (Repealed)

Source: L. 71: R&RE, p. 434, § 1. **C.R.S. 1963:** § 40-5-103. **L. 82:** (1)(d) amended and (1)(e) added, p. 385, § 3, effective April 30. **L. 89:** (2) amended, p. 834, § 51, effective July 1. **L. 93:** Entire section repealed, p. 1988, § 17, effective July 1.

18-5-104. Second degree forgery. (1) A person commits second degree forgery if, with intent to defraud, such person falsely makes, completes, alters, or utters a written instrument of a kind not described in section 18-5-102 or 18-5-104.5.

(2) Second degree forgery is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-104. **L. 93:** Entire section amended, p. 1989, § 18, effective July 1. **L. 96:** (1) amended, p. 841, § 2, effective July 1.

ANNOTATION

Applied in *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

18-5-104.5. Use of forged academic record. (1) A person commits use of a forged academic record if, with intent to seek employment or with intent to seek admission to a public or private institution of higher education in this state or for the purpose of securing a scholarship or other form of financial assistance from the institution itself or from other public or private sources of financial assistance, such person falsely makes, completes, alters, or utters a written instrument which is or purports to be, or is calculated to become or to represent if completed, a bona fide academic record of an institution of secondary or higher education.

(2) For purposes of this section:

(a) "Academic record" means a transcript, diploma, grade report, or similar document of an institution of secondary or higher education.

(b) "Financial assistance" means financial assistance for educational purposes, including, but not limited to, loans, scholarships, grants, fellowships, assistantships, work-study programs, or other forms of financial aid.

(3) Use of a forged academic record is a class 1 misdemeanor.

Source: L. 96: Entire section added, p. 840, § 1, effective July 1.

18-5-105. Criminal possession of a forged instrument. A person commits a class 6 felony when, with knowledge that it is forged and with intent to use to defraud, such person possesses any forged instrument of a kind described in section 18-5-102.

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-105. **L. 89:** Entire section amended, p. 834, § 52, effective July 1. **L. 93:** Entire section amended, p. 1989, § 19, effective July 1.

ANNOTATION

Section requires guilty knowledge and intent to defraud. This crime requires not only possession of the forged or counterfeit instruments with knowledge that they were counterfeit, but also the intent to utter and pass the same with intent to defraud. *People v. Colosacco*, 177 Colo. 219, 493 P.2d 650 (1972) (decided under former § 40-6-4, C.R.S. 1963).

Mere possession of a forged instrument is insufficient to support a conviction under this section. Merely handing a forged resident alien card to a police officer upon demand was insufficient to establish an intent to defraud. *People v. Miralda*, 981 P.2d 676 (Colo. App. 1999).

18-5-106. Criminal possession of second degree forged instrument. (Repealed)

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-106. **L. 93:** Entire section repealed, p. 1989, § 20, effective July 1.

18-5-107. Criminal possession of second degree forged instrument. A person commits a class 2 misdemeanor, when, with knowledge that it is forged, and with intent to defraud, such person possesses any forged instrument of a kind covered by section 18-5-104.

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-107. **L. 93:** Entire section amended, p. 1989, § 21, effective July 1.

18-5-108. Merger of offenses. A person may not be convicted of both forgery and criminal possession of a forged instrument with respect to the same written instrument.

Source: L. 71: R&RE, p. 435, § 1. C.R.S. 1963: § 40-5-108.

18-5-109. Criminal possession of forgery devices. (1) A person commits criminal possession of forgery devices when:

(a) Such person makes or possesses with knowledge of its character any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting, unlawfully simulating, or otherwise forging written instruments or counterfeit marks; or

(b) Such person makes or possesses any device, apparatus, equipment, or article capable of or adaptable to a use specified in paragraph (a) of this subsection (1), with intent to use it, or to aid or permit another to use it, for purposes of forgery or the production of counterfeit marks; or

(c) Such person illegally possesses a genuine plate, die, or other device used in the production of written instruments or counterfeit marks, with intent to fraudulently use the same; or

(d) Such person unlawfully makes, produces, possesses, or utters a document-making implement knowing that such document-making implement may be used or is used in the production of a false identification document or counterfeit mark or another implement for the production of false identification documents or counterfeit marks.

(2) Criminal possession of forgery devices is a class 6 felony.

(3) As used in this section, "counterfeit mark" has the meaning set forth in section 18-5-110.5 (3) (a).

Source: L. 71: R&RE, p. 435, § 1. C.R.S. 1963: § 40-5-109. L. 89: (2) amended, p. 834, § 53, effective July 1. L. 2000: (1)(d) added, p. 647, § 4, effective July 1. L. 2001: Entire section amended, p. 768, § 3, effective August 8.

Cross references: For the legislative declaration contained in the 2001 act amending this section, see section 1 of chapter 224, Session Laws of Colorado 2001.

18-5-110. Criminal simulation. (1) A person commits a criminal simulation, when:

(a) With intent to defraud, he makes, alters, or represents any object in such fashion that it appears to have an antiquity, rarity, source or authorship, ingredient, or composition which it does not in fact have; or

(b) With knowledge of its true character and with intent to use to defraud, he utters, misrepresents, or possesses any object made or altered as specified in paragraph (a) of this subsection (1).

(2) Criminal simulation is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 435, § 1. C.R.S. 1963: § 40-5-110. L. 87: (1)(b) amended, p. 1578, § 23, effective July 10.

ANNOTATION

Applied in *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

18-5-110.5. Trademark counterfeiting. (1) A person commits trademark counterfeiting if such person intentionally manufactures, displays, advertises, distributes, offers for sale, sells, or possesses with intent to sell or distribute marks, goods, or services that the person knows are, bear, or are identified by one or more counterfeit marks and has possession, custody, or control of more than twenty-five items bearing a counterfeit mark.

(2) (a) Trademark counterfeiting is:

(i) A class 2 misdemeanor if a person has not previously been convicted under this

section and the violation involves fewer than one hundred items that are, bear, or are identified by a counterfeit mark or the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is less than one thousand dollars;

(II) A class 1 misdemeanor if:

(A) A person has one or more previous convictions under this section; or

(B) The violation involves one hundred or more items that are, bear, or are identified by a counterfeit mark or the total retail value of all goods or services that are, bear, or are identified by a counterfeit mark is one thousand dollars or more.

(b) In addition to the penalties specified in paragraph (a) of this subsection (2), any person convicted under this section shall be liable for a fine in an amount equal to three times the total retail value of all goods or services that bear or are identified by a counterfeit mark unless extenuating circumstances are shown by such person.

(c) The remedies provided in this section are in addition to, and not in lieu of, any other civil or criminal penalties or remedies provided by law.

(3) For purposes of this section:

(a) "Counterfeit mark" means a mark identical to or substantially indistinguishable from a trademark that, without the permission of the owner of the trademark, is:

(I) Affixed or designed to be affixed to, or displayed or otherwise associated with, goods; or

(II) Displayed in advertising for, or otherwise associated with, services.

(b) (I) "Retail value" means the counterfeiter's regular selling price for the goods or services that bear or are identified by a counterfeit mark.

(II) In the case of items bearing a counterfeit mark that are components of a finished product, "retail value" means the counterfeiter's regular selling price for the finished product.

(III) For purposes of subsection (2) of this section, the quantity or retail value of goods or services shall include the aggregate quantity or retail value of all marks, goods, and services that are, bear, or are identified by counterfeit marks.

(c) "Trademark" means any trademark registered under the laws of this state or of the United States.

(4) In a trial under this section, any state or federal certificate of registration of a trademark shall be prima facie evidence of the facts stated therein.

Source: L. 2001: Entire section added, p. 767, § 2, effective August 8.

Cross references: For the legislative declaration contained in the 2001 act enacting this section, see section 1 of chapter 224, Session Laws of Colorado 2001.

18-5-111. Unlawfully using slugs. (1) A person commits unlawfully using slugs, if:

(a) With intent to defraud the vendor of property or a service sold by means of a coin machine, he knowingly inserts, deposits, or uses a slug in such machine or causes the machine to be operated by any other unauthorized means; or

(b) He makes, possesses, or disposes of a slug or slugs with intent to enable a person to use it or them fraudulently in a coin machine.

(2) "Coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin or bill of a certain denomination or token made for the purpose and, in return for the insertion or deposit thereof, to offer, to provide, to assist in providing, or to permit the acquisition of some property or some public or private service.

(3) "Slug" means any object or article which, by virtue of its size, shape, or any other quality, is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token, and of thereby enabling a person to obtain without valid consideration the property or service sold through the machine.

(4) Unlawfully using slugs is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 435, § 1. **C.R.S. 1963:** § 40-5-111.

18-5-112. Obtaining signature by deception. (1) A person commits obtaining signature by deception if, by deception and with intent to defraud or to acquire a benefit for himself or another, he causes another to sign or execute a written instrument.

(2) As used in this section, "by deception" means by knowingly:

(a) Creating or confirming another's impression which is false and which the deceiver does not believe to be true; or

(b) Failing to correct a false impression held by another which the deceiver previously has created or confirmed; or

(c) Preventing another from acquiring information pertinent to any matter material to a proper understanding of any transaction in which the signature of such person is procured.

(3) Obtaining signatures by deception is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 436, § 1. C.R.S. 1963: § 40-5-112.

ANNOTATION

Falsely inducing another to indorse check is within section. One who by false representations induces another to indorse a check for the payment of money, which the indorser thereafter is compelled to pay to a holder for value, is guilty of obtaining a thing of value by false

pretenses. *Miller v. People*, 72 Colo. 375, 211 P. 380 (1922) (decided under former R.S. 08, § 1849).

Applied in *People v. Vesely*, 41 Colo. App. 325, 587 P.2d 802 (1978).

18-5-113. Criminal impersonation. (1) A person commits criminal impersonation if he or she knowingly:

(a) Assumes a false or fictitious identity or legal capacity, and in such identity or capacity he or she:

(I) Marries, or pretends to marry, or to sustain the marriage relation toward another without the connivance of the latter;

(II) Becomes bail or surety for a party in an action or proceeding, civil or criminal, before a court or officer authorized to take the bail or surety; or

(III) Confesses a judgment, or subscribes, verifies, publishes, acknowledges, or proves a written instrument which by law may be recorded, with the intent that the same may be delivered as true; or

(b) Assumes a false or fictitious identity or capacity, legal or other, and in such identity or capacity he or she:

(I) Performs an act that, if done by the person falsely impersonated, might subject such person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty; or

(II) Performs any other act with intent to unlawfully gain a benefit for himself, herself, or another or to injure or defraud another.

(2) Criminal impersonation is a class 6 felony.

(3) For the purposes of subsection (1) of this section, using false or fictitious personal identifying information, as defined in section 18-5-901 (13), shall constitute the assumption of a false or fictitious identity or capacity.

Source: L. 71: R&RE, p. 436, § 1. C.R.S. 1963: § 40-5-113. L. 77: IP(1) amended, p. 964, § 30, effective July 1. L. 89: (2) amended, p. 834, § 54, effective July 1. L. 2011: (1) amended and (3) added, (SB 11-201), ch. 217, p. 947, § 1, effective May 27.

ANNOTATION

Annotator's note. Since § 18-5-113 is similar to former CSA, C. 48, § 338, a relevant case

construing that provision has been included in the annotations to this section.

Subsection (1)(e) is not unconstitutionally vague and overbroad. *People v. Lambert*, 194 Colo. 421, 572 P.2d 839 (1978).

Criminal impersonation defined. This section defines criminal impersonation as (now knowingly) assuming a false or fictitious identity or capacity, and in that identity or capacity, doing any act with intent to unlawfully gain a benefit or injure or defraud another. *People v. Brown*, 193 Colo. 120, 562 P.2d 754 (1977); *People v. Borrego*, 738 P.2d 59 (Colo. App. 1987).

To falsely impersonate means to pretend to be a particular person without lawful authority. *People v. Horkans*, 109 Colo. 177, 123 P.2d 824 (1942).

And to perform act in assumed character for benefit. It is an offense under this section to falsely impersonate another, and in such assumed character to do any act whereby any benefit might accrue to the offender or to another person. *People v. Horkans*, 109 Colo. 177, 123 P.2d 824 (1942).

Even though such person is dead. The offense of impersonation may be committed although the person who is impersonated is dead. *People v. Horkans*, 109 Colo. 177, 123 P.2d 824 (1942).

Continuing offense. The offense of criminal impersonation can be continuing or can occur at a specific time. *People v. Perez*, 129 P.3d 1090 (Colo. App. 2005).

Venue is not an element of the crime of criminal impersonation. *People v. Perez*, 129 P.3d 1090 (Colo. App. 2005).

Section does not require two overt acts to be committed. Section requires assuming a false identity and doing an act with the intent to gain a benefit. Giving a fictitious name to police because the defendant was on parole from another state satisfies both requirements. *People v. Johnson*, 30 P.3d 718 (Colo. App. 2000).

Paragraphs (d) and (e) of subsection (1) may be construed independently of the first three paragraphs, and any construction need not relate back to them. *People v. Horkans*, 109 Colo. 177, 123 P.2d 824 (1942).

Subsection (1)(e) criminalizes knowingly using a false or fictitious identity or capacity with the intent to unlawfully gain a benefit for himself or another person or to injure or defraud another person. Subsection (1)(e) requires the prosecution to prove one act and two culpable mental states. In this case, the defendant used a fictitious name to avoid arrest on an outstanding warrant to commit criminal impersonation. *Alvarado v. People*, 132 P.3d 1205 (Colo. 2006).

The requisite intent to gain a benefit may be inferred from the accused's knowing use of a false identity and the acknowledged intent to secure some advantage from the impersonation.

People v. Borrego, 738 P.2d 59 (Colo. App. 1987).

The common meaning of "assumes a false or fictitious identity" is not to hold oneself out as someone that he or she is not; it requires the assumption of the identity of another person, whether that other person is real or fictitious. *People v. Jones*, 841 P.2d 372 (Colo. App. 1992).

Attorney with suspended license guilty of criminal impersonation for practicing law. The court held that "continuing to represent himself as an attorney and performing legal work when he was aware that he had no valid license to do so amounts to the assumption of a false or fictitious capacity for purposes of the criminal impersonation statute." *People v. Bauer*, 80 P.3d 896 (Colo. App. 2003).

Failure to provide an accurate social security number was not equivalent to the assumption of another persona where such information was not the sole, identifying fact. *People v. Jones*, 841 P.2d 312 (Colo. App. 1992); *Montes-Rodriguez v. People*, 241 P.3d 924 (Colo. 2010).

Use of a false social security number did not constitute the assumption of a false capacity. A lender's requirements to obtain a loan are different from the legal requirements to obtain a loan. *Montes-Rodriguez v. People*, 241 P.3d 924 (Colo. 2010).

Even though he supplied a false social security number, defendant did not assume a false identity since he provided his correct name, address, birth date, and place of employment. *Montes-Rodriguez v. People*, 241 P.3d 924 (Colo. 2010).

Defendant's giving of a false birth date did not satisfy the "any other act" element of criminal impersonation under subsection (1)(e). *People v. Peay*, 5 P.3d 398 (Colo. App. 2000).

Passing falsified gift certificates. The second element of criminal impersonation, i.e., an act with intent unlawfully to gain a benefit or to defraud another, was met by the defendant's passing in exchange for property gift certificates falsified when a false name was written to facilitate the passing. The defendant knew the certificates, as signed, were false, and from this, intent to defraud could be inferred. Further, writing the false name demonstrated that the defendant knew he was not entitled to exchange the certificates for merchandise. *People v. Brown*, 193 Colo. 120, 562 P.2d 754 (1977).

Indictment under this section should allege that the injury or benefit mentioned in the section would accrue. *People v. Horkans*, 109 Colo. 177, 123 P.2d 824 (1942).

Indictment sufficient. An indictment alleging that accused at a certain time and place did then and there wilfully, unlawfully, feloniously, and falsely impersonate another, and in such assumed character did agree to take, and did take a civil service examination given on a

certain day, and by reason thereof did receive a certain sum of money from the person falsely impersonated, is sufficient and states a complete offense under this section. *People v. Horkans*, 109 Colo. 177, 123 P.2d 824 (1942).

Where no evidence that false name resulted in benefit, no guilty verdict. Where the prosecution failed to present evidence to the jury that the use of a false name would result in a benefit to the defendant, the evidence was insufficient to sustain a guilty verdict of criminal impersonation. *People v. Shaw*, 44 Colo. App. 533, 616 P.2d 185 (1980).

Trial court did not abuse its discretion in excluding character witness testimony because defendant admitted to using a false social security number he knew was not his own, and any evidence pertaining to his character for truthfulness was irrelevant in that respect. *People v. Montes-Rodriguez*, 219 P.3d 340 (Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

Similarly, trial court did not abuse its discretion in excluding evidence regarding

whether or not defendant knew whose social security number he used. Because defendant admitted to using a social security number that was not his own, the evidence was irrelevant. *People v. Montes-Rodriguez*, 219 P.3d 340 (Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

Defendant was not entitled to jury instruction that offense of false reporting to authorities was a lesser included offense of criminal impersonation because false reporting has the additional element of making or transmission of a report to law enforcement authorities. *People v. Vasallo-Hernandez*, 939 P.2d 440 (Colo. App. 1995).

Nor did evidence support jury instruction on offense of false reporting to authorities as a lesser non-included offense of criminal impersonation absent the initiation of affirmative action intended to communicate information. *People v. Vasallo-Hernandez*, 939 P.2d 440 (Colo. App. 1995).

Applied in *People v. Stinson*, 632 P.2d 631 (Colo. App. 1981).

18-5-114. Offering a false instrument for recording. (1) A person commits offering a false instrument for recording in the first degree if, knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contains a material false statement or material false information, and with intent to defraud, he presents or offers it to a public office or a public employee, with the knowledge or belief that it will be registered, filed, or recorded or become a part of the records of that public office or public employee.

(2) Offering a false instrument for recording in the first degree is a class 5 felony.

(3) A person commits offering a false instrument for recording in the second degree if, knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contains a material false statement or material false information, he presents or offers it to a public office or a public employee, with the knowledge or belief that it will be registered, filed, or recorded or become a part of the records of that public office or public employee.

(4) Offering a false instrument for recording in the second degree is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 437, § 1. C.R.S. 1963: § 40-5-114. L. 80: Entire section amended, p. 536, § 1, effective April 13.

ANNOTATION

Comparison with section 18-8-114. Abuse of public records under § 18-8-114 was not meant to cover the offense of offering a false instrument for recording under this section. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46 (1975).

Information charging this offense must set forth alleged false statements, either verbatim or in substance. *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 749 P.2d 952 (Colo. 1988).

Offering a false instrument for recording in the second degree is a lesser included offense of offering a false instrument for recording in

the first degree. *People v. Freda*, 817 P.2d 588 (Colo. App. 1991).

The use of an intermediary to file a false statement with a public office will not insulate a person from liability. Because there was evidence that defendant directed that medicaid billings be prepared with false information and that the defendant had knowledge that these forms would be submitted to the medicaid office, the trial court did not err in finding that there was sufficient evidence that the defendant "offered or presented" the billings. *People v. Freda*, 817 P.2d 588 (Colo. App. 1991).

Applied in *People v. Swearingen*, 649 P.2d 1102 (Colo. 1982), *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

18-5-115. Charitable fraud. (Repealed)

Source: **L. 75:** Entire section added, p. 636, § 1, effective July 14. **L. 77:** (1)(b) and (1)(c) amended, p. 964, § 31, effective July 1. **L. 84:** (1)(a) amended and (1)(d) added, p. 546, § 1, effective April 12. **L. 87:** (1)(e) to (1)(g) added, p. 611, § 24, effective July 1. **L. 88:** Entire section repealed, p. 359, § 3, effective July 1.

18-5-116. Controlled substances - inducing consumption by fraudulent means.

(1) It is unlawful for any person, surreptitiously or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge, to cause any other person to unknowingly consume or receive the direct administration of any controlled substance, as defined in section 18-18-102 (5); except that nothing in this section shall diminish the scope of health care authorized by law.

(2) Any person who violates the provisions of this section commits a class 4 felony.

Source: **L. 80:** Entire section added, p. 538, § 1, effective February 14. **L. 81:** (1) amended, p. 738, § 22, effective July 1. **L. 2012:** (1) amended, (HB 12-1311), ch. 281, p. 1619, § 45, effective July 1.

18-5-117. Unlawful possession of personal identifying information. (Repealed)

Source: **L. 2004:** Entire section added, p. 1960, § 5, effective August 4. **L. 2005:** (3) amended, p. 766, § 28, effective June 1. **L. 2006:** Entire section repealed, p. 1318, § 3, effective July 1.

18-5-118. Offenses involving forgery of a penalty assessment notice issued to a minor under the age of eighteen years - suspension of driving privilege. (Repealed)

Source: **L. 2004:** Entire section added, p. 1336, § 10, effective July 1, 2005. **L. 2009:** Entire section repealed, (HB 09-1266), ch. 347, p. 1815, § 3, effective August 5.

18-5-119. Theft of personal identifying information. (Repealed)

Source: **L. 2005:** Entire section added, p. 847, § 6, effective July 1. **L. 2006:** Entire section repealed, p. 1318, § 4, effective July 1.

18-5-120. Gathering personal information by deception. (Repealed)

Source: **L. 2005:** Entire section added, p. 796, § 1, effective July 1. **L. 2006:** Entire section repealed, p. 1318, § 5, effective July 1.

Editor's note: This section was originally numbered as § 18-5-119 in House Bill 05-1347 but was renumbered on revision for ease of location.

Cross references: For current provisions relating to gathering identity information by deception, see § 18-5-904.

PART 2

FRAUD IN OBTAINING PROPERTY OR SERVICES

18-5-201. Definitions. (Repealed)

Source: L. 71: R&RE, p. 437, § 1. C.R.S. 1963: § 40-5-201. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-201.1. Definitions relating to guaranteed check cards. (Repealed)

Source: L. 81: Entire section added, p. 991, § 1, effective April 30. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-202. Fraudulent use of a credit device. (Repealed)

Source: L. 71: R&RE, p. 437, § 1. C.R.S. 1963: § 40-5-202. L. 72: p. 593, § 68. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-202.1. Fraudulent use of guaranteed check card. (Repealed)

Source: L. 81: Entire section added, p. 991, § 1, effective April 30. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-203. Theft of credit device or guaranteed check card. (Repealed)

Source: L. 71: R&RE, p. 438, § 1. C.R.S. 1963: § 40-5-203. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-204. Criminal possession of credit device or guaranteed check card. (Repealed)

Source: L. 71: R&RE, p. 438, § 1. C.R.S. 1963: § 40-5-204. L. 84: Entire section repealed, p. 552, § 3, effective July 1.

18-5-205. Fraud by check - definitions - penalties. (1) As used in this section, unless the context otherwise requires:

(a) "Check" means a written, unconditional order to pay a sum certain in money, drawn on a bank, payable on demand, and signed by the drawer. "Check", for the purposes of this section only, also includes a negotiable order of withdrawal and a share draft.

(b) "Drawee" means the bank upon which a check is drawn or a bank, savings and loan association, industrial bank, or credit union on which a negotiable order of withdrawal or a share draft is drawn.

(c) "Drawer" means a person, either real or fictitious, whose name appears on a check as the primary obligor, whether the actual signature be that of himself or of a person authorized to draw the check on himself.

(d) "Insufficient funds" means a drawer has insufficient funds with the drawee to pay a check when the drawer has no checking account, negotiable order of withdrawal account, or share draft account with the drawee or has funds in such an account with the drawee in an amount less than the amount of the check plus the amount of all other checks outstanding at the time of issuance; and a check dishonored for "no account" shall also be deemed to be dishonored for "insufficient funds".

(e) "Issue". A person issues a check when he makes, draws, delivers, or passes it or causes it to be made, drawn, delivered, or passed.

(f) "Negotiable order of withdrawal" and "share draft" mean negotiable or transferable instruments drawn on a negotiable order of withdrawal account or a share draft account, as the case may be, for the purpose of making payments to third persons or otherwise.

(g) "Negotiable order of withdrawal account" means an account in a bank, savings and loan association, or industrial bank, and "share draft account" means an account in a credit union, on which payment of interest or dividends may be made on a deposit with respect to which the bank, savings and loan association, or industrial bank or the credit union, as the case may be, may require the depositor to give notice of an intended withdrawal not less than thirty days before the withdrawal is made, even though in practice such notice is not required and the depositor is allowed to make withdrawal by negotiable order of withdrawal or share draft.

(2) Any person, knowing he has insufficient funds with the drawee, who, with intent to defraud, issues a check for the payment of services, wages, salary, commissions, labor, rent, money, property, or other thing of value, commits fraud by check.

(3) Fraud by check is:

(a) (Deleted by amendment, L. 2007, p. 1693, § 8, effective July 1, 2007.)

(b) A class 2 misdemeanor if the fraudulent check was for the sum of less than five hundred dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling less than five hundred dollars in the aggregate;

(b.5) A class 1 misdemeanor if the fraudulent check was for the sum of five hundred dollars or more but less than one thousand dollars or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling five hundred dollars or more but less than one thousand dollars in the aggregate;

(c) A class 6 felony if the fraudulent check was for the sum of one thousand dollars or more, or if the offender is convicted of fraud by check involving the issuance of two or more checks within a sixty-day period in the state of Colorado totaling one thousand dollars or more in the aggregate, or if the offender has been twice previously convicted under this section or a former statute of this state of similar content and purport;

(d) A class 6 felony if the fraudulent check was drawn on an account which did not exist or which has been closed for a period of thirty days or more prior to the issuance of said check.

(4) Any person having acquired rights with respect to a check which is not paid because the drawer has insufficient funds shall have standing to file a complaint under this section, whether or not he is the payee, holder, or bearer of the check.

(5) Any person who opens a checking account, negotiable order of withdrawal account, or share draft account using false identification or an assumed name for the purpose of issuing fraudulent checks commits a class 2 misdemeanor.

(6) If deferred prosecution is ordered, the court as a condition of supervision shall require the defendant to make restitution on all checks issued by the defendant that are unpaid as of the date of commencement of the supervision in addition to other terms and conditions appropriate for the treatment or rehabilitation of the defendant.

(7) A bank, a savings and loan association, an industrial bank, or a credit union shall not be civilly or criminally liable for releasing information relating to the drawer's account to a sheriff, deputy sheriff, undersheriff, police officer, agent of the Colorado bureau of investigation, division of gaming investigator, division of lottery investigator, parks and outdoor recreation officer, Colorado wildlife officer, district attorney, assistant district attorney, deputy district attorney, or authorized investigator for a district attorney or the attorney general investigating or prosecuting a charge under this section.

(8) This section does not relieve the prosecution from the necessity of establishing the required culpable mental state. However, for purposes of this section, the issuer's knowledge of insufficient funds is presumed, except in the case of a postdated check or order, if:

(a) He has no account upon which the check or order is drawn with the bank or other drawee at the time he issues the check or order; or

(b) He has insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

(9) Restitution for offenses described in this section may be collected as a condition of pretrial diversion by a district attorney, an employee of a district attorney's office, or a person under contract with a district attorney's office. Such collection is governed by the provisions of article 18.5 of title 16, C.R.S., and is not the collection of a debt.

Source: **L. 71:** R&RE, p. 438, § 1. **C.R.S. 1963:** § 40-5-205. **L. 72:** p. 281, § 2. **L. 75:** (3) amended, p. 619, § 13, effective July 21. **L. 77:** (1), (2), (3)(b), (3)(c), and (5) R&RE and (3)(d) added, pp. 979, 980, §§ 1, 2, effective June 2. **L. 80:** (1)(a), (1)(b), (1)(d), (5), and (7) amended and (1)(f) and (1)(g) added, p. 539, § 1, effective April 13. **L. 81:** (3)(a), (3)(b), and (3)(c) amended and (8) added, p. 993, §§ 1, 2, effective July 1. **L. 84:** (3)(b) and (3)(c) amended, p. 538, § 12, effective July 1, 1985. **L. 89:** (3)(c) and (3)(d) amended, p. 834, § 55, effective July 1. **L. 92:** (3) amended, p. 435, § 6, effective April 10. **L. 93:** (3) amended, p. 971, § 1, effective July 1. **L. 94:** (7) amended, p. 1719, § 13, effective July 1. **L. 98:** (3)(b) and (3)(c) amended, p. 1438, § 15, effective July 1; (3)(b) and (3)(c) amended, p. 796, § 6, effective July 1. **L. 2000:** (6) amended, p. 1050, § 17, effective September 1. **L. 2002:** (9) added, p. 760, § 7, effective July 1. **L. 2003:** (7) amended, p. 1632, § 77, effective August 6. **L. 2007:** (3)(a), (3)(b), and (3)(c) amended and (3)(b.5) added, p. 1693, § 8, effective July 1.

Cross references: (1) For issuance of a bad check, see § 18-5-512.

(2) For the legislative declaration contained in the 2007 act amending subsections (3)(a), (3)(b), and (3)(c) and enacting subsection (3)(b.5), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For comment on *Moore v. People* (124 Colo. 197, 235 P.2d 798 (1951)), see 24 *Rocky Mt. L. Rev.* 123 (1951). For note, "False Pretenses, Confidence Game, and Short Check in Colorado", see 25 *Rocky Mt. L. Rev.* 325 (1953). For article, "One Year Review of Criminal Law and Procedure", see 36 *Dicta* 34 (1959). For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with bank crime, see 61 *Den. L.J.* 255 (1984).

Annotator's note. Since § 18-5-205 is similar to former § 40-14-20, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

For history of section, see *Moore v. People*, 124 Colo. 197, 235 P.2d 798 (1951); *People v. Gutierrez*, 1 P.3d 241 (Colo. App. 1999).

This section gives fair warning of forbidden conduct so that men of common intelligence can understand the statute's meaning and application. *People v. Quinn*, 190 Colo. 534, 549 P.2d 1332 (1976).

For the unconstitutionality of subsection (2) before the 1977 amendment, see *People v. Quinn*, 190 Colo. 534, 549 P.2d 1332 (1976).

For the unconstitutionality of former version of section, see *People v. Vinnola*, 177 Colo. 405, 494 P.2d 826 (1972).

For the former definition of "insufficient funds" which was invalid, see *People v. Vinnola*, 177 Colo. 405, 494 P.2d 826 (1972).

Liability is imposed by the writing of the check, and not by a bank's subsequent failure to

honor it. The language of the current statute satisfies the standard set out in *People v. Vinnola* (177 Colo. 405, 494 P.2d 826 (1972)), which would construe as constitutional a statute which "creates a crime when the drawer knows at the time of issuance that the check will not be paid". *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

"Thing of value" construed. The right to possession and ownership of goods is a "thing of value" within the meaning of this section. *People v. Kunzelman*, 649 P.2d 340 (Colo. App. 1982).

Check must be written as payment for something of value. The requirement of subsection (2) that a check be for payment of "services, wages, salary, commissions, labor, rent, money, property, or other thing of value", means only that the check may be written as payment for anything of value, including the above-named items. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

District court erred in reasoning that defendant could not be convicted because she had not obtained "thing of value" in exchange for check when prosecution presented sufficient evidence for a jury to determine that the short check was issued for "wages". *People v. Steerman*, 735 P.2d 876 (Colo. 1987).

The issuance of an insufficient funds check in payment, or partial payment, of a pre-existing debt can constitute fraud by check. The plain meaning of "for the payment of" is not limited to a contemporaneous exchange. The

check need not induce the giving of things of value because a causal relationship between the issuance of the check and the act of obtaining the thing of value is no longer necessary. *People v. Gutierrez*, 1 P.3d 241 (Colo. App. 1999).

"Money" includes loan proceeds. Therefore, the payment of an outstanding loan is payment for "money". *People v. Gutierrez*, 1 P.3d 241 (Colo. App. 1999).

General rule that criminal intent will be presumed from commission of the unlawful act does not apply under this section, because the crime consists of the act combined with a specific intent, and proof of the commission of the act does not warrant any presumption that defendant had specific intent to defraud. Before the defendant can be convicted, it must be shown that he intended to defraud, and did defraud, the complaining witness. *Moore v. People*, 124 Colo. 197, 235 P.2d 798 (1951); *Shreeves v. People*, 126 Colo. 413, 249 P.2d 1020 (1952).

The law does not allow an intent to defraud to be presumed whenever a bank refuses to honor a check. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

Prosecution will not be permitted to utilize presumption of guilt as basis for obtaining conviction. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

Specific intent to defraud payee is necessary element of proof in the commission of this offense. *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974).

Specific intent to deceive must be demonstrated. This section requires the prosecution to demonstrate that the defendant formed a specific intent to deceive in order to sustain a verdict of guilty. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

Prosecution must prove drawer of check knew there were insufficient funds in his account to pay the check. *People v. Kanan*, 186 Colo. 255, 526 P.2d 1339 (1974).

Intent to defraud negated. The intent to defraud the payee would be conclusively negated if a defendant disclosed, at the time of the issuance of a check, that he did not have sufficient funds on deposit to cover the check. *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974).

Specific intent not negated by subsequent restitution. Neither the defendant's belated, partial payment of the check nor his promise to pay off the balance in the near future serves to negate, as a matter of law, probable cause to believe that the defendant had the specific intent to defraud when the check was issued. *People v. Taylor*, 655 P.2d 382 (Colo. 1982).

The fact that defendant at some time after the check was cashed attempted to make restitution, or tried to undo the wrong, is not a defense; nor does such conduct negate, as a matter of law, a

finding of the specific intent to defraud. *People v. Nicholas*, 700 P.2d 921 (Colo. App. 1984).

It is the defendant's state of mind at the time of the issuance of the check which is determinative of his criminal liability for fraud by check, not his state of mind at some time subsequent to the completion of the transaction. The making of restitution in order to compensate a victim for a loss caused by the accused's past conduct is not a legal defense to a criminal charge based upon that conduct. *People v. Taylor*, 655 P.2d 382 (Colo. 1982).

Postdated check implies notice of insufficient funds. A postdated check, in the absence of a present representation that the check is good, carries on its face implied notice that the maker does not presently have sufficient funds on deposit to pay the check, but before this notice will be implied, the payee must be made aware that the check is, in fact, postdated. *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974); *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Function of jury to consider question of intent. In a prosecution for obtaining property by means of a worthless check, where defendant contended that he did not intend to defraud or deceive anyone by issuing a check on a bank in which he had no account, it was the function of the jury to pass on the question of intent from a consideration of all the testimony, and its verdict if amply supported by the evidence will not be disturbed. *Parrott v. People*, 144 Colo. 587, 357 P.2d 634 (1960).

Intent evidenced by absence of funds in bank. Where defendant passed a short check without resorting to any fraudulent scheme by which he sought to obtain the confidence of the complaining witness, and no special confidence was reposed in defendant, such case comes squarely within the terms of this section, if there was intent to defraud, which is clearly evidenced by the fact that defendant had no funds whatever in the bank at the time he gave the check. *People v. Lindsay*, 119 Colo. 248, 202 P.2d 951 (1949).

Convictions for fraud by check vacated where jury instruction had the effect of removing the "knowing" element by creating a mandatory presumption that defendant knew he had insufficient funds to pay the check. Such an instruction violates due process by shifting the burden of producing evidence or the burden of persuasion on an essential element of the crime. *People v. Felgar*, 58 P.3d 1122 (Colo. App. 2002).

Probable cause to support crime. At a preliminary hearing, evidence that the defendant issued a check knowing that he had insufficient funds to pay the check, that he failed to deliver a trade-in vehicle as part payment for his purchase, and that he failed to take actions which would have placed funds into his account establishes probable cause to believe that the defen-

dant had the intent to defraud at the time he issued the check. *People v. Spurrier*, 712 P.2d 486 (Colo. 1986).

Evidence of financial resources is relevant.

Evidence that defendant's stepbrother had the financial ability to make an expected deposit into defendant's account, which would tend to corroborate in part defendant's testimony, is relevant in dealing with whether defendant had the specific intent to defraud. *Nora v. People*, 176 Colo. 454, 491 P.2d 62 (1971).

Evidence of plan, design, and scheme was material to show intent to defraud. *People v. Lindsay*, 119 Colo. 248, 202 P.2d 951 (1949).

The argument of a defendant convicted of issuing a check on a bank in which he did not have sufficient funds that the admission of evidence of other checks did not tend to prove intent, design, or motive in the commission of the charge being tried because of the remoteness of time of the other checks involved, is without merit where the checks were all passed within one month prior to the issuance of the check on which defendant was convicted. *Van Pelt v. People*, 173 Colo. 201, 476 P.2d 999 (1970).

Subsection (4) not limitation on filing felony actions. Subsection (4), giving specific authority for certain individuals to file a complaint, refers only to those persons who may file a complaint for petty offense or misdemeanor fraud by check and not to felony fraud by check, which is commenced by filing of a felony complaint. Thus, this provision does not operate to limit filing of complaints in felony actions to persons having acquired rights with respect to a check. *People v. Abbott*, 638 P.2d 781 (Colo. 1981).

Instruction on lesser included offense refused. The contention of defendant who was convicted of issuing a check for \$100 on a bank in which he did not have sufficient funds, that he was entitled to an instruction on the lesser included offense of issuing a short check under \$100, is without merit where in evidence was the check which on its face was for the sum of \$100; a check cannot be for a sum and under that sum at the same time. *Van Pelt v. People*, 173 Colo. 201, 476 P.2d 999 (1970).

Even though there was no proof as to the date the check was presented for collection and therefore the prosecution could not use the statutory presumption of knowledge, the prosecution's evidence was nonetheless sufficient to support a guilty verdict on a charge of fraud by check. *People v. Nicholas*, 700 P.2d 921 (Colo. App. 1984).

No expectation of privacy. In bad check cases, the drawer loses any expectation of privacy in the bank accounts being investigated and the banks were entitled to reveal the existence and status of such accounts to the government. *People v. Lopez*, 776 P.2d 390 (Colo. 1989); *People v. Selph*, 786 P.2d 1078 (Colo. 1989).

Applied in *People ex rel. Metzger v. District Court*, 119 Colo. 451, 208 P.2d 79 (1949); *Best v. People ex rel. Florum*, 121 Colo. 100, 212 P.2d 1007 (1949); *People ex rel. Metzger v. District Court*, 121 Colo. 141, 215 P.2d 327 (1949); *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971); *White v. District Court*, 180 Colo. 152, 503 P.2d 342 (1972); *People v. Emig*, 191 Colo. 223, 552 P.2d 312 (1976); *Brennan v. Zapien*, 470 F. Supp. 1300 (D. Colo. 1979); *People v. Mason*, 643 P.2d 745 (Colo. 1982).

18-5-206. Defrauding a secured creditor or debtor. (1) If a person, with intent to defraud a creditor by defeating, impairing, or rendering worthless or unenforceable any security interest, sells, assigns, transfers, conveys, pledges, encumbers, conceals, destroys, or disposes of any collateral subject to a security interest:

(a) (Deleted by amendment, L. 2007, p. 1694, § 9, effective July 1, 2007.)

(b) The person commits a class 2 misdemeanor if the value of the collateral is less than five hundred dollars;

(b.5) The person commits a class 1 misdemeanor if the value of the collateral is five hundred dollars or more but less than one thousand dollars;

(c) The person commits a class 5 felony if the value of the collateral is one thousand dollars or more but less than twenty thousand dollars; and

(d) The person commits a class 3 felony if the value of the collateral is twenty thousand dollars or more.

(2) If a creditor, with intent to defraud a debtor, sells, assigns, transfers, conveys, pledges, buys, or encumbers a promissory note or contract signed by the debtor:

(a) (Deleted by amendment, L. 2007, p. 1694, § 9, effective July 1, 2007.)

(b) The creditor commits a class 2 misdemeanor if the amount owing on the note or contract is less than five hundred dollars;

(b.5) The creditor commits a class 1 misdemeanor if the amount owing on the note or contract is five hundred dollars or more but less than one thousand dollars;

(c) The creditor commits a class 5 felony if the amount owing on the note or contract is one thousand dollars or more but less than twenty thousand dollars; and

(d) The creditor commits a class 3 felony if the amount owing on the note or contract is twenty thousand dollars or more.

Source: L. 71: R&RE, p. 440, § 1. C.R.S. 1963: § 40-5-206. L. 75: Entire section amended, p. 620, § 14, effective July 21. L. 77: Entire section R&RE, p. 975, § 6, effective July 1. L. 84: (1)(b), (1)(c), (2)(b), and (2)(c) amended, p. 538, § 13, effective July 1, 1985. L. 89: (1)(c) and (2)(c) amended, p. 835, § 56, effective July 1. L. 92: Entire section amended, p. 436, § 7, effective April 10. L. 98: (1)(b), (1)(c), (2)(b), and (2)(c) amended, p. 1439, § 16, effective July 1; (1)(b), (1)(c), (2)(b), and (2)(c) amended, p. 796, § 7, effective July 1. L. 2007: Entire section amended, p. 1694, § 9, effective July 1.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959).

Applied in *People v. Brigner*, 978 P.2d 163 (Colo. App. 1999).

This section applies to any valid security interest, perfected or not. *People v. Armijo*, 197 Colo. 91, 589 P.2d 935 (1979).

18-5-207. Purchase on credit to defraud. A person who purchases any personal property on credit and thereafter, before paying for it, sells, hypothecates, pledges, or disposes of it with intent to defraud the seller or vendor commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 440, § 1. C.R.S. 1963: § 40-5-207.

ANNOTATION

Purpose of section. This section was not intended to have any effect whatever in the determination of the validity or invalidity of any contracts of sale made by the vendor. In this respect, it extended no greater protection to the creditor than the law gave him before this sec-

tion was enacted. It is simply a penal statute, intended to punish the man guilty under its provisions. *Nicholls v. McShane*, 16 Colo. App. 165, 64 P. 375 (1901) (decided under former section).

18-5-208. Dual contracts to induce loan. It is a class 3 misdemeanor for any person to knowingly make, issue, deliver, or receive dual contracts for the purchase or sale of real property. The term "dual contracts", either written or oral, means two separate contracts concerning the same parcel of real property, one of which states the true and actual purchase price and one of which states a purchase price in excess of the true and actual purchase price, and is used, or intended to be used, to induce persons to make a loan or a loan commitment on such real property in reliance upon the stated inflated value.

Source: L. 71: R&RE, p. 440, § 1. C.R.S. 1963: § 40-5-208.

18-5-209. Issuing a false financial statement - obtaining a financial transaction device by false statements. (1) A person commits issuing a false financial statement if, with intent to defraud, he:

(a) Knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of himself or another person and which is false in some material respect and reasonably relied upon; or

(b) Represents in writing that a written instrument purporting to describe another person's financial condition or ability to pay as of a prior date is accurate with respect to

that person's current financial condition or ability to pay, knowing the instrument to be materially false in that respect and reasonably relied upon.

(2) Issuing a false financial statement is a class 2 misdemeanor.

(3) A person commits issuing a false financial statement for purposes of obtaining a financial transaction device, as defined in section 18-5-701 (3), if, with intent to defraud, upon filing an application for a financial transaction device with an issuer, he knowingly makes or causes to be made a false statement or report, which is false in some material respect and reasonably relied upon, relative to his name, occupation, financial condition, assets, or liabilities or willfully and substantially overvalues any assets or willfully omits or substantially undervalues any indebtedness for the purpose of influencing the issuer to issue a financial transaction device.

(4) Issuing a false financial statement for purposes of obtaining a financial transaction device when such device is used to obtain property or services or money is a class 1 misdemeanor.

(5) Issuing two or more false financial statements for purposes of obtaining two or more financial transaction devices when such devices are used to obtain property or services or money is a class 6 felony.

Source: L. 71: R&RE, p. 441, § 1. C.R.S. 1963: § 40-5-209. L. 84: (3) to (5) added, p. 548, § 1, effective July 1. L. 89: (5) amended, p. 835, § 57, effective July 1.

ANNOTATION

Annotator's note. Since § 18-5-209 is similar to former G.S. § 884, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The ingredients of the offense are the obtainment of money by false pretenses with intent to defraud. *Morris v. People*, 4 Colo. App. 136, 35 P. 188 (1893).

Defendant's false representation must be shown. To sustain a conviction under this section, it is necessary to show that the representation of the defendant of his responsibility or wealth was false when made. *Morris v. People*, 4 Colo. App. 136, 35 P. 188 (1893).

And also proof that someone suffered harm. The offense can only be committed by the obtainment of credit on false representations coupled with proof that as a result of it some

person has suffered harm. *Morris v. People*, 4 Colo. App. 136, 35 P. 188 (1893).

But it is not necessary that an intention to defraud any particular person should exist. If the false report which has been procured results in defrauding any person of his property, the offense is complete whether the offender had such person in mind or not. An indictment setting forth that the person charged caused others to report falsely of his honesty, wealth, or mercantile character, and that by means of the report some person or persons, naming them, were imposed upon so that they extended credit to the offender, and that he thereby obtained possession of their property, would contain substantially all the facts necessary to constitute an offense. *Schayer v. People*, 5 Colo. App. 75, 37 P. 43 (1894).

18-5-210. Receiving deposits in a failing financial institution. A person commits a class 6 felony if, as an officer, manager, or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or investment, knowing that the institution is insolvent. A financial institution is insolvent within the meaning of this section when from any cause it is unable to pay its obligations in the ordinary or usual course of business or its liabilities exceed its assets.

Source: L. 71: R&RE, p. 441, § 1. C.R.S. 1963: § 40-5-210. L. 89: Entire section amended, p. 835, § 58, effective July 1.

PART 3

FRAUDULENT AND DECEPTIVE SALES AND BUSINESS PRACTICES

18-5-301. Fraud in effecting sales. (1) A person commits a class 2 misdemeanor if, in the course of business, he knowingly:

- (a) Uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or
- (b) Sells, offers, or exposes for sale or delivers less than the represented quantity of any commodity or service; or
- (c) Takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or
- (d) Sells, offers, or exposes for sale an adulterated or mislabeled commodity. "Adulterated" means varying from the standard of composition or quality prescribed by or pursuant to any statute of the state of Colorado or the United States providing criminal penalties for such variance, or set by established commercial usage. "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed or pursuant to any statute of the state of Colorado or the United States providing criminal penalties for such variance, or set by established commercial usage; or
- (e) Makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services.
- (f) Repealed.

Source: L. 71: R&RE, p. 441, § 1. C.R.S. 1963: § 40-5-301. L. 79: (1)(f) repealed, p. 730, § 11, effective July 1.

ANNOTATION

Law reviews. For article, "Criminal Prosecutions under the Colorado Securities Act", see 47 U. Colo. L. Rev. 233 (1976).

Annotator's note. Since § 18-5-301 is similar to former CSA, C. 48, § 317, a relevant case construing that provision has been included in the annotations to this section.

The state of Colorado has exercised its police power by proscribing false and misleading statements in advertising with a criminal sanction. *Ve-ri-tas, Inc. v. Advertising Review Council of Metro. Denver, Inc.*, 411 F. Supp. 1012 (D. Colo. 1976), *aff'd*, 567 F.2d 963 (10th Cir. 1977).

And has not violated first amendment freedoms. The state of Colorado can sanction false and misleading advertising through the criminal process without violating first amendment freedoms. *Ve-ri-tas, Inc. v. Advertising Review Council of Metro. Denver, Inc.*, 411 F. Supp. 1012 (D. Colo. 1976), *aff'd*, 567 F.2d 963 (10th Cir. 1977).

This section is sufficiently broad to cover practically every known method of public

announcement which can be made or circulated by means of printed matter. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

Publication need not be in newspaper. To hold that in order to violate the provisions of this section the publication must be made in a newspaper is to unduly restrict the meaning of the act and wholly disregard its plain and unambiguous provisions. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

Conspiracy to effect sales. If a defendant's agents and solicitors, in cooperation and agreement with him, make false and misleading statements in order to effectuate sales of defendant's publications, the latter is guilty of a conspiracy to effect sales under the provisions of this section. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

Truth of statements is a jury question. Whether written statements and representations concerning a book to be published were untrue and misleading was for the jury. *People v. Byrnes*, 117 Colo. 528, 190 P.2d 584 (1948).

18-5-302. Unlawful activity concerning the selling of land. (1) Any person who, after once selling, bartering, or disposing of any land, or executing any bond or agreement for sale of any land, again sells, barters, or disposes of the same tract of land or any part thereof, or executes any bond or agreement to sell or barter or dispose of the same land or any part thereof, to any other person, with intent to defraud, commits selling land twice. Selling land twice is a class 5 felony.

(2) Any person who knowingly makes a false representation as to the existence of an ownership interest in land which he has as a seller or which his principal has, and which is relied upon, commits a class 6 felony.

(3) A person who signs a lien waiver for a construction loan under section 38-22-119,

C.R.S., and knowingly fails to timely pay any debts resulting from a construction agreement covered by the waiver commits a class 1 misdemeanor, unless there is a bona fide dispute as to the existence or amount of the debt.

Source: L. 71: R&RE, p. 442, § 1. C.R.S. 1963: § 40-5-302. L. 89: Entire section amended, p. 835, § 59, effective July 1. L. 2009: (3) added, (SB 09-137), ch. 145, p. 610, § 1, effective July 1.

ANNOTATION

The second sale must be for a consideration to make out a case under this section. *Clement v. Major*, 1 Colo. App. 297, 29 P. 19 (1892); *Clement v. Major*, 8 Colo. App. 86, 44 P. 776 (1896)(both cases decided under former G.S. § 888).

Term "ownership interest in land" not vague. The term "ownership interest in land", in the context of a false representation made to another, is not so vague or uncertain that persons of ordinary intelligence must guess as to its meaning or necessarily differ as to its application. *People v. Alexander*, 663 P.2d 1024 (Colo. 1983).

Subsection (2) requires actual reliance by the victim, without regard to how a reasonable

person might have understood and reacted to the misrepresentation, and this requirement of actual reliance satisfies due process standards. *People v. Alexander*, 663 P.2d 1024 (Colo. 1983).

True representation not basis for conviction. This section does not permit a conviction for the making of a true representation as to an ownership interest in land, notwithstanding the fact that the true representation may create a false or mistaken belief in the victim with respect to the nature of the seller's interest in the land. *People v. Alexander*, 663 P.2d 1024 (Colo. 1983).

18-5-303. Bait advertising. (1) A person commits bait advertising if, in any manner, including advertising or any other means of communication, he offers property or services as part of a scheme or plan, with the intent, plan, or purpose not to sell or provide the advertised property or services at all, or not at the price at which he offered them, or not in a quantity sufficient to meet the reasonable expected public demand, unless the quantity is specifically stated in the advertisement.

(2) It shall be an affirmative defense that a television or radio broadcasting station or a publisher or printer of a newspaper, magazine, or other form of printed advertising which broadcasted, published, or printed a false advertisement prohibited by section 18-5-301 (1) (e) or a bait advertisement prohibited by subsection (1) of this section or a telephone company which furnished service to a subscriber did so without knowledge of the advertiser's or subscriber's intent, plan, or purpose.

(3) Bait advertising is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 442, § 1. C.R.S. 1963: § 40-5-303. L. 73: p. 538, § 3.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

This section and § 42-5-102 (2) prescribe different, albeit related, criminal conduct. *People v. Bossert*, 722 P.2d 998 (Colo. 1986).

18-5-304. False statements as to circulation. It is a class 1 petty offense for any person engaged in the publication of any newspaper, magazine, periodical, or other advertising medium published in the state of Colorado or for any employee of any such publisher knowingly to make any statement concerning the circulation of the newspaper,

magazine, periodical, or other advertising medium which is untrue or misleading where such publisher fixes his charges for advertising space in the publication on the amount of its circulation.

Source: L. 71: R&RE, p. 442, § 1. C.R.S. 1963: § 40-5-304.

18-5-305. Identification number - altering - possession. (1) A person commits the crime of altering identification number if, with intent that identification of an article be hindered or prevented, he obscures an identification number or in the course of business he sells, offers for sale, leases, or otherwise disposes of an article knowing that an identification number thereon is obscured.

(2) "Identification number" means a serial or motor number placed by the manufacturer upon an article as a permanent individual identifying mark.

(3) "Obscure" means to destroy, remove, alter, conceal, or deface so as to render illegible by ordinary means of inspection.

(4) Possession of an article on which an identification number is obscured is prima facie evidence that the person possessing it obscured the number with intent to hinder or prevent identification of the article, and that he knows that the identification number is obscured, unless, prior to his arrest or the issuance of a warrant for a search of the premises where the article is kept, whichever is earlier, he reports possession of the article to the police or other appropriate law enforcement agency.

(5) Altering identification number is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 442, § 1. C.R.S. 1963: § 40-5-305.

ANNOTATION

Obliteration of number is probable cause for arrest and seizure. Upon discovery that the serial number on a piece of equipment had been obliterated, this is evidence that a crime has

been committed and there is probable cause to arrest and seize the property incident to the arrest. *People v. Mangum*, 189 Colo. 246, 539 P.2d 120 (1975).

18-5-306. Counterfeit or imitation controlled substances. (Repealed)

Source: L. 81: Entire section added, p. 995, § 1, effective July 1; (1)(a) amended, p. 2031, § 46, effective January 1, 1982. L. 83: Entire section repealed, p. 704, § 4, effective July 1.

18-5-307. Fee paid to private employment agencies. (1) As used in this section:

(a) "Applicant" means any person applying to a private employment agency in order to secure employment with any person, firm, association, or corporation other than the private employment agency.

(b) "Employment" means every character of service rendered or to be rendered for wages, salary, commission, or other form of remuneration.

(b.5) "Fee-paid position" means a position of employment which is available to an applicant where no fee or cost accrues to the applicant as a condition of obtaining such position.

(c) (I) "Private employment agency" means any nongovernmental person, firm, association, or corporation which secures or attempts to secure employment, arranges an interview between an applicant and a specific employer other than itself, or, by any form of advertising or representation, holds itself out to a prospective applicant as able to secure employment for the applicant with any person, firm, association, or corporation other than itself, or engages in employment counseling and in connection therewith supplies or represents that it is able to supply employers or available jobs, where an applicant may become liable for the payment of a fee, either directly or indirectly.

(II) "Private employment agency" also means any nongovernmental person, firm, association, or corporation which provides a list of potential employers or available jobs in

a publication, if the primary purpose of the publication, as represented by the provider, is to enable applicants to find employment or to list available jobs and if the applicant is charged more than twenty dollars within any period of time of thirty days or less for access to the publication or revisions or updates thereof, unless the listings of all jobs in the publication are initiated by employers rather than the provider.

(2) Any fee paid by an applicant to a private employment agency shall be by written contractual agreement which includes specific provisions for refunds and extended payment options. The exclusion of said options from the contractual agreement shall be explicitly stated in said agreement.

(3) No fee shall be charged by a private employment agency until an applicant is placed in employment.

(4) In the event employment terminates for any reason within one hundred calendar days, an applicant shall not be required to pay a fee to a private employment agency in excess of one percent of the total fee for each calendar day elapsed between the beginning and termination of employment. For purposes of this subsection (4), the amount of the total fee shall be based on the actual gross income earned, annualized in accordance with the contractual fee schedule.

(5) In the event employment terminates for any reason within one hundred calendar days, a private employment agency shall refund any portion of a fee paid by an applicant in excess of the limits specified in subsection (4) of this section. Such a refund shall be made in full within seven calendar days of said agency's receipt of written notification of the termination of employment; except that, if it has not been determined within that period of time that the instrument used to pay the fee is backed by sufficient funds, the refund is due upon such determination. If a refund is not made when due, the private employment agency is liable to the applicant for the refund due plus an additional sum equal to the amount of the refund.

(5.5) It shall be unlawful for any private employment agency knowingly to do or cause to be done any of the following:

(a) Send an applicant to any fictitious job or position or make any false representation concerning the availability of employment;

(b) Send an applicant to any place where a strike or lockout exists or is impending without notifying the applicant of the circumstances;

(c) Conspire or arrange with any employer to secure the discharge of an employee or give or receive any gratuity or divide or share with an employer any fee, charge, or remuneration received from any applicant for employment;

(d) Circulate or publish, by advertisement or otherwise, any false statements or representations to persons seeking employment or to employers seeking employees;

(e) Fail to refund fees to an applicant where such refund is due pursuant to subsection (5) of this section;

(f) Advertise or represent the availability of fee-paid positions where no cost accrues to the applicant if hired in such a manner as to confuse such position with other available positions which are not available on a fee-paid basis;

(g) Advertise or represent that an available position is available on a free or no fee basis or otherwise indicate that no charge or cost accrues to anyone when in fact the employer is obligated to pay a fee contingent upon the acceptance of employment of the applicant;

(h) Advertise for any position, including personnel for its own staff, without identifying in the advertisement that it is a private employment agency.

(6) A private employment agency or any employee of such agency commits a misdemeanor if said agency or employee knowingly violates any provision of this section. An agency found guilty of such a crime shall be subject to a fine of not more than one thousand dollars per conviction, and any employee of such agency found directly responsible for committing acts in violation of this section shall be subject to a fine of not more than one thousand dollars, or by imprisonment for not more than one year in the county jail, or by both such fine and imprisonment.

(7) A private employment agency which has been convicted of a misdemeanor pursuant to this article, or any person connected therewith pursuant to paragraph (c) of subsection (1) of this section prior to conducting business in this state after such conviction, regardless of

how classified as person, firm, association, or corporation, shall file with the department of labor and employment a cash or corporate surety bond in the sum of twenty thousand dollars. Such bond shall be executed by the private employment agency as principal and by a surety company authorized to do business in this state. Said private employment agency shall maintain such bond in effect as long as it conducts business in this state. Any person who suffers loss or damage as the result of a violation of this article, including any person who is owed a refund or any part thereof pursuant to subsections (4) and (5) of this section, may recover against the bond to the extent of the loss or damage suffered. A surety on any bond filed under the provisions of this section shall be released therefrom after such surety serves written notice thereof to the department of labor and employment at least sixty days prior to such release. Said release shall not discharge or otherwise affect any claim for loss or damage which occurred while said bond was in effect or which occurred under any contract executed during any period of time when said bond was in effect, except when another bond is filed in a like amount and provides indemnification for any such loss. The sole responsibilities of the department of labor and employment under this subsection (7) shall be to serve as a repository of bonds filed pursuant to this subsection (7) and to notify the district attorney in the county in which a private employment agency is located when the department of labor and employment receives written notice from a surety seeking release from a bond that has been filed with the department of labor and employment by said private employment agency pursuant to this subsection (7). A private employment agency that violates the provisions of this section with regard to any three or more different applicants in any one-year period shall be deemed a class 1 public nuisance and shall be subject to the provisions of part 3 of article 13 of title 16, C.R.S. Any surety bond filed by such agency shall be forfeited and the proceeds distributed as provided in section 16-13-311, C.R.S.

Source: L. 83: Entire section added, p. 699, § 1, effective June 10. L. 88: (1)(b.5), (5.5), and (7) added and (1)(c) amended, pp. 346, 347, §§ 13, 14, effective July 1.

18-5-308. Electronic mail fraud. (1) A person commits electronic mail fraud if he or she violates any provision of 18 U.S.C. sec. 1037 (a).

(2) This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message.

(3) Electronic mail fraud is a class 2 misdemeanor; except that a second or subsequent offense within two years is a class 1 misdemeanor.

Source: L. 2008: Entire section added, p. 596, § 2, effective August 5.

18-5-309. Money laundering - illegal investments - penalty - definitions. (1) A person commits money laundering if he or she:

(a) Conducts or attempts to conduct a financial transaction that involves money or any other thing of value that he or she knows or believes to be the proceeds, in any form, of a criminal offense:

(I) With the intent to promote the commission of a criminal offense; or

(II) With knowledge or a belief that the transaction is designed in whole or in part to:

(A) Conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or

(B) Avoid a transaction reporting requirement under federal law;

(b) Transports, transmits, or transfers a monetary instrument or moneys:

(I) With the intent to promote the commission of a criminal offense; or

(II) With knowledge or a belief that the monetary instrument or moneys represent the proceeds of a criminal offense and that the transportation, transmission, or transfer is designed, in whole or in part, to:

(A) Conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or

(B) Avoid a transaction reporting requirement under federal law; or

(c) Intentionally conducts a financial transaction involving property that is represented to be the proceeds of a criminal offense, or involving property that the person knows or believes to have been used to conduct or facilitate a criminal offense, to:

(I) Promote the commission of a criminal offense;

(II) Conceal or disguise the nature, location, source, ownership, or control of property that the person believes to be the proceeds of a criminal offense; or

(III) Avoid a transaction reporting requirement under federal law.

(2) Money laundering is a class 3 felony.

(3) As used in this section, unless the context otherwise requires:

(a) "Conducts or attempts to conduct a financial transaction" includes, but is not limited to, initiating, concluding, or participating in the initiation or conclusion of a transaction.

(b) "Financial transaction" means a transaction involving:

(I) The movement of moneys by wire or other means;

(II) One or more monetary instruments;

(III) The transfer of title to any real property, vehicle, vessel, or aircraft; or

(IV) The use of a financial institution.

(c) "Monetary instrument" means:

(I) Coin or currency of the United States or any other country; a traveler's check; a personal check; a bank check; a cashier's check; a money order; a bank draft of any country; or gold, silver, or platinum bullion or coins;

(II) An investment security or negotiable instrument in bearer form or in other form such that title passes upon delivery; or

(III) A gift card or other device that is the equivalent of money and can be used to obtain cash, property, or services.

(d) "Represent" includes, but is not limited to, the making of a representation by a peace officer, a federal officer, or another person acting at the direction of, or with the approval of, a peace officer or federal officer.

(e) "Transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition and, with respect to a financial institution, includes a deposit; a withdrawal; a transfer between accounts; an exchange of currency; a loan; an extension of credit; a purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument; the use of a safe deposit box; or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means.

Source: L. 2010: Entire section added, (HB 10-1081), ch. 256, p. 1138, § 1, effective August 11.

PART 4

BRIBERY AND RIGGING OF CONTESTS

18-5-401. Commercial bribery and breach of duty to act disinterestedly. (1) A person commits a class 6 felony if he solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

(a) Agent or employee; or

(b) Trustee, guardian, or other fiduciary; or

(c) Lawyer, physician, accountant, appraiser, or other professional adviser; or

(d) Officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or

(e) Duly elected or appointed representative or trustee of a labor organization or employee welfare trust fund; or

(f) Arbitrator or other purportedly disinterested adjudicator or referee.

(2) A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services

commits a class 6 felony if he knowingly solicits, accepts, or agrees to accept any benefit to alter, modify, or change his selection, appraisal, or criticism.

(3) A person commits a class 6 felony if he confers or offers or agrees to confer any benefit the acceptance of which would be a felony under subsections (1) and (2) of this section.

Source: L. 71: R&RE, p. 443, § 1. C.R.S. 1963: § 40-5-401. L. 77: (2) amended, p. 964, § 32, effective July 1. L. 89: IP(1), (2), and (3) amended, p. 835, § 60, effective July 1.

Cross references: For bribery of a public servant, see § 18-8-302.

ANNOTATION

Constitutionality of subsection (1)(a) and (1)(d). Subsection (1)(a) and (1)(d) is not void for vagueness and provides sufficient notice that conduct contemplated by the defendants was prohibited so as to serve as predicate acts for RICO prosecution and also provides a sufficiently clear, objective standard to satisfy due

process. U.S. v. Gaudreau, 860 F.2d 357 (10th Cir. 1988).

Statute does not unconstitutionally delegate legislative power to private persons to define duty of fidelity. People v. Lee, 717 P.2d 493 (Colo. 1986).

18-5-402. Rigging publicly exhibited contests. (1) A person commits a class 3 misdemeanor if, with the intent to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it, he:

(a) Confers or offers or agrees to confer any benefit upon, or threatens any detriment to a participant, official, or other person associated with the contest or exhibition; or

(b) Tampers with any person, animal, or thing; or

(c) Knowingly solicits, accepts, or agrees to accept any benefit the conferring of which is prohibited by paragraph (a) of this subsection (1).

(2) A person commits a class 3 misdemeanor if he knowingly engages in, sponsors, produces, judges, or otherwise participates in a publicly exhibited or advertised contest knowing that the contest is not being conducted in compliance with the rules and usages purporting to govern it, by reason of conduct prohibited by this section.

Source: L. 71: R&RE, p. 443, § 1. C.R.S. 1963: § 40-5-402.

18-5-403. Bribery in sports. (1) As used in this section:

(a) "Sports contest" means any professional or amateur sport or athletic game, race, or contest viewed by the public.

(b) "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant, or member of a team, or as a coach, manager, trainer, owner, or other person directly associated with a player, contestant, team, or entry.

(c) "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge, or otherwise to officiate at a sports contest.

(2) A person commits bribery in sports if:

(a) He confers, or offers or agrees to confer, any benefit upon or threatens any detriment to a sports participant with intent to influence him not to give his best efforts in a sports contest; or

(b) He confers, or offers or agrees to confer, any benefit upon or threatens any detriment to a sports official with intent to influence him to perform his duties improperly; or

(c) Being a sports participant, he knowingly accepts, agrees to accept, or solicits any benefit from another person upon an understanding that he will thereby be influenced not to give his best efforts in a sports contest; or

(d) Being a sports official, he knowingly accepts, agrees to accept, or solicits any benefit from another person upon an understanding that he will perform his duties improperly; or

(e) With intent to influence the outcome of a sports contest, he tampers with any sports participant, sports official, or any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.

(3) Bribery in sports is a class 6 felony.

Source: L. 71: R&RE, p. 444, § 1. C.R.S. 1963: § 40-5-403. L. 77: (2)(c) and (2)(d) amended, p. 964, § 33, effective July 1. L. 89: (3) amended, p. 836, § 61, effective July 1.

PART 5

OFFENSES RELATING TO THE UNIFORM COMMERCIAL CODE

18-5-501. Definitions. The definitions set forth in the “Uniform Commercial Code”, title 4, C.R.S., shall apply to sections 18-5-502 to 18-5-511.

Source: L. 71: R&RE, p. 444, § 1. C.R.S. 1963: § 40-5-501.

18-5-502. Failure to pay over assigned accounts. Where, under the terms of an assignment of an account, as defined in section 4-9-102 (a) (2), C.R.S., the assignor, being permitted to collect the proceeds from the debtor, is to pay over to the assignee any of the proceeds and, after collection thereof, the assignor willfully and wrongfully fails to pay over to the assignee the proceeds amounting to one thousand dollars or more, the person commits a class 5 felony. Where the amount of the proceeds withheld by the assignor is less than one thousand dollars, the person commits a class 1 misdemeanor.

Source: L. 71: R&RE, p. 444, § 1. C.R.S. 1963: § 40-5-502. L. 89: Entire section amended, p. 836, § 62, effective July 1. L. 98: Entire section amended, p. 796, § 8, effective July 1. L. 2001: Entire section amended, p. 1446, § 39, effective July 1. L. 2007: Entire section amended, p. 1695, § 10, effective July 1.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

18-5-503. Criminal liability of transferor of a bulk transfer. (Repealed)

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-503. L. 91: Entire section repealed, p. 270, § 8, effective July 1.

18-5-504. Concealment or removal of secured property. If a person who has given a security interest in personal property, as security interest is defined in section 4-1-201 (b) (35), C.R.S., or other person with actual knowledge of the security interest, during the existence of the security interest, knowingly conceals or removes the encumbered property from the state of Colorado without written consent of the secured creditor, the person commits a class 5 felony where the value of the property concealed or removed is one thousand dollars or more. Where the value of the property concealed or removed is less than one thousand dollars, the person commits a class 1 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-504. L. 77: Entire section amended, p. 964, § 34, effective July 1. L. 89: Entire section amended, p. 836, § 63, effective July 1. L. 98: Entire section amended, p. 797, § 9, effective July 1. L. 2006: Entire section amended, p. 503, § 46, effective September 1. L. 2007: Entire section amended, p. 1695, § 11, effective July 1.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

This section applies to any valid security interest, perfected or not. People v. Armijo, 197 Colo. 91, 589 P.2d 935 (1979).

This section is designed to protect the ability of a secured creditor to look to the particular security underlying a debt in the event of default. Removal and concealment of security is conduct which impairs that ability and is thus violative of this section. People v. O'Cana, 725 P.2d 1139 (Colo. 1986).

This section provides ample notice to the populace of the prohibited conduct and a sufficiently precise standard for those charged with its enforcement to satisfy constitutional standards of specificity and to withstand a void for vagueness challenge. People v. O'Cana, 725 P.2d 1139 (Colo. 1986).

No affirmative conduct by any third party is necessary to complete the offense defined in this section. Even though a secured party who is the victim of the conduct proscribed by this

section may elect not to report such conduct to prosecuting officials does not alter the fact that the offense is completed by the accused's conduct. People v. O'Cana, 725 P.2d 1139 (Colo. 1986).

The offense of removing secured property established by this section requires proof that the defendant knew of the existence of the security interest, knew that he was removing the secured property from Colorado without first having obtained the creditor's written consent to such removal, and knew that such removal would impair the creditor's security interest. People v. O'Cana, 725 P.2d 1139 (Colo. 1986).

Leaving the state with a vehicle in which a former client has a security interest was found to be a violation of this section in an attorney disciplinary proceeding and was a basis for disbarment. People v. Odom, 941 P.2d 919 (Colo. 1997).

18-5-505. Failure to pay over proceeds unlawful. Where, under the terms of an instrument creating a security interest in personal property, as security interest is defined in section 4-1-201 (b) (35), C.R.S., the person giving the security interest and retaining possession of the encumbered property and having liberty of sale or other disposition, is required to account to the secured creditor for the proceeds of the sale or other disposition, and willfully and wrongfully fails to pay to the secured creditor the amounts due on account thereof, the person giving the security interest commits a class 5 felony where the amount of the proceeds withheld is one thousand dollars or more. If the amount of the proceeds withheld is less than one thousand dollars, the person commits a class 1 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-505. L. 89: Entire section amended, p. 836, § 64, effective July 1. L. 98: Entire section amended, p. 797, § 10, effective July 1. L. 2006: Entire section amended, p. 503, § 47, effective September 1. L. 2007: Entire section amended, p. 1695, § 12, effective July 1.

Cross references: For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 384, Session Laws of Colorado 2007.

18-5-506. Fraudulent receipt - penalty. A warehouse, as defined in section 4-7-102 (a) (13), C.R.S., or any officer, agent, or servant of a warehouse, that issues or aids in issuing a receipt knowing that the goods for which the receipt is issued have not been actually received by the warehouse, or are not under the warehouse's actual control at the time of issuing the receipt, commits a class 6 felony.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-506. L. 89: Entire section amended, p. 837, § 65, effective July 1. L. 2006: Entire section amended, p. 504, § 48, effective September 1.

18-5-507. False statement in receipt - penalty. A warehouse, as defined in section 4-7-102 (a) (13), C.R.S., or any officer, agent, or servant of a warehouse, that fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-507. L. 2006: Entire section amended, p. 504, § 49, effective September 1.

18-5-508. Duplicate receipt not marked - penalty. A warehouse, as defined in section 4-7-102 (a) (13), C.R.S., or any officer, agent, or servant of a warehouse, that issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without placing upon the face thereof the word "duplicate", except in case of a lost or destroyed receipt after proceedings as provided for in section 4-7-601, C.R.S., commits a class 6 felony.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-508. L. 89: Entire section amended, p. 837, § 66, effective July 1. L. 2006: Entire section amended, p. 504, § 50, effective September 1.

18-5-509. Warehouse's goods mingled - receipts - penalty. Where there are deposited with or held by a warehouse, as defined in section 4-7-102 (a) (13), C.R.S., goods of which the warehouse is owner, either solely or jointly or in common with others, the warehouse or any of the warehouse's officers, agents, or servants that, knowing this ownership, issue or aid in issuing a negotiable receipt for the goods that does not state such ownership commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 445, § 1. C.R.S. 1963: § 40-5-509. L. 2006: Entire section amended, p. 504, § 51, effective September 1.

18-5-510. Delivery of goods without receipt - penalty. A warehouse, as defined in section 4-7-102 (a) (13), C.R.S., or any officer, agent, or servant of a warehouse, that delivers goods out of the possession of such warehouse, knowing that a negotiable receipt the negotiation of which would transfer the right of the possession of those goods is outstanding and uncanceled, without obtaining the possession of that receipt at or before the time of the delivery, except the cases provided for in section 4-7-601, C.R.S., commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 446, § 1. C.R.S. 1963: § 40-5-510. L. 2006: Entire section amended, p. 504, § 52, effective September 1.

18-5-511. Mortgaged goods receipt - penalty. Any person who deposits goods to which the person does not have title, or upon which there is a security interest in personal property, as security interest is defined in section 4-1-201 (b) (35), C.R.S., and who takes for such goods a negotiable receipt that the person afterwards negotiates for value with intent to deceive and without disclosing the person's want of title or the existence of such security interest, commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 446, § 1. C.R.S. 1963: § 40-5-511. L. 2006: Entire section amended, p. 505, § 53, effective September 1.

18-5-512. Issuance of bad check. (1) In adopting this section, the general assembly declares as a matter of policy that the issuance and delivery of a known bad check by any person is, in itself, not only harmful to the person to whom it is given but is also injurious to the community at large and is, therefore, a proper subject for criminal sanction without regard to the purpose for which the check was given.

(2) "Insufficient funds" means not having a sufficient balance in account with a bank or other drawee for the payment of a check or order when the check or order is presented for payment and it remains unpaid thirty days after such presentment.

(3) Except as provided in section 18-5-205, a person commits a class 3 misdemeanor if he issues or passes a check or similar sight order for the payment of money, knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.

(4) This section does not relieve the prosecution from the necessity of establishing the required knowledge by evidence. However, for purposes of this section, the issuer's knowledge of insufficient funds is presumed, except in the case of a postdated check or order, if:

(a) He has no account with the bank or other drawee at the time he issues the check or order; or

(b) He has insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

(5) A bank shall not be civilly or criminally liable for releasing information relating to the issuer's account to a sheriff, deputy sheriff, undersheriff, police officer, agent of the Colorado bureau of investigation, division of gaming investigator, division of lottery investigator, parks and outdoor recreation officer, Colorado wildlife officer, district attorney, assistant district attorney, deputy district attorney, or authorized investigator for a district attorney investigating or prosecuting a charge under this section.

(6) Restitution for offenses described in this section may be collected as a condition of pretrial diversion by a district attorney, an employee of a district attorney's office, or a person under contract with a district attorney's office. Such collection is governed by the provisions of article 18.5 of title 16, C.R.S., and is not the collection of a debt.

Source: L. 72: p. 284, § 2. C.R.S. 1963: § 40-5-512. L. 89: (2) amended, p. 757, § 6, effective July 1. L. 2002: (6) added, p. 760, § 8, effective July 1. L. 2003: (5) amended, p. 1632, § 78, effective August 6.

Cross references: For the recovery of damages for insufficient funds or no account instruments, see § 13-21-109.

ANNOTATION

This section does not contain the former constitutionally infirm language of section 18-5-205 (2), which made a bank's failure to honor the check a material element of the crime of

fraud by check. People v. Quinn, 190 Colo. 534, 549 P.2d 1332 (1976).

Applied in People v. Attebury, 196 Colo. 509, 587 P.2d 281 (1978).

PART 6

IMITATION CONTROLLED SUBSTANCES ACT

18-5-601 to 18-5-606. (Repealed)

Source: L. 92: Entire part repealed, p. 393, § 25, effective July 1.

Editor's note: This part 6 was added in 1983. For amendments to this part 6 prior to its repeal in 1992, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

PART 7

FINANCIAL TRANSACTION DEVICE CRIME ACT

Cross references: For obtaining a financial transaction device by false statements, see § 18-5-209.

18-5-701. Definitions. As used in this part 7, unless the context otherwise requires:

(1) "Account holder" means the person or business entity named on the face of a financial transaction device to whom or for whose benefit the financial transaction device is issued by an issuer.

(2) "Automated banking device" means any machine which, when properly activated by a financial transaction device or a personal identification code, may be used for any of the purposes for which a financial transaction device may be used.

(3) "Financial transaction device" means any instrument or device whether known as a credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card, or account number representing a financial account or affecting the financial interest, standing, or obligation of or to the account holder, that can be used to obtain cash, goods, property, or services or to make financial payments, but shall not include a "check", a "negotiable order of withdrawal", and a "share draft" as defined in section 18-5-205.

(4) "Issuer" means any person or banking, financial, or business institution, corporation, or other business entity that assigns financial rights by acquiring, distributing, controlling, or cancelling a financial transaction device.

(5) "Personal identification code" means any grouping of letters, numbers, or symbols assigned to the account holder of a financial transaction device by the issuer to permit authorized electronic use of that financial transaction device.

(6) "Sales form" means any written record of a financial transaction involving use of a financial transaction device.

Source: L. 84: Entire part added, p. 549, § 2, effective July 1.

18-5-702. Unauthorized use of a financial transaction device. (1) A person commits unauthorized use of a financial transaction device if he uses such device for the purpose of obtaining cash, credit, property, or services or for making financial payment, with intent to defraud, and with notice that either:

(a) The financial transaction device has expired, has been revoked, or has been cancelled; or

(b) For any reason his use of the financial transaction device is unauthorized either by the issuer thereof or by the account holder.

(2) For purposes of paragraphs (a) and (b) of subsection (1) of this section, "notice" includes either notice given in person or notice given in writing to the account holder. The sending of a notice in writing by registered or certified mail, return receipt requested, duly stamped and addressed to such account holder at his last address known to the issuer, evidenced by a signed returned receipt signed by the account holder, is prima facie evidence that the notice was received.

(3) Unauthorized use of a financial transaction device is:

(a) (Deleted by amendment, L. 2007, p. 1695, § 13, effective July 1, 2007.)

(b) A class 1 misdemeanor if the value of the cash, credit, property, or services obtained or of the financial payments made is less than one thousand dollars;

(c) A class 5 felony if the value of the cash, credit, property, or services obtained or of the financial payments made is one thousand dollars or more but less than twenty thousand dollars;

(d) A class 3 felony if the value of the cash, credit, property, or services obtained or of the financial payments made is twenty thousand dollars or more.

(4) The value of the cash, credit, property, or services obtained and the financial payments made shall be the total value of the cash, credit, property, or services obtained or financial payments made by unauthorized use of a single financial transaction device within a six-month period from the date of the first unauthorized use.

Source: L. 84: Entire part added, p. 549, § 2, effective July 1; (3)(b) and (3)(c) amended, p. 539, § 16, effective July 1, 1985. L. 89: (3)(c) amended, p. 837, § 67, effective July 1. L. 92: (3) amended, p. 436, § 8, effective April 10. L. 98: (3)(b) and (3)(c) amended, p. 1439, § 17, effective July 1; (3)(b) and (3)(c) amended, p. 797, § 11, effective July 1. L. 2007: (3) amended, p. 1695, § 13, effective July 1.

Cross references: For the legislative declaration contained in the 2007 act amending subsection (3), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Fraudulent use of credit card. In prosecution based upon fraudulent use of another's credit card, fact that defendant was charged under § 18-5-103 rather than this more specific section was not error requiring dismissal. *People v. Ortega*, 181 Colo. 223, 508 P.2d 784 (1973) (decided under former § 40-14-21, C.R.S. 1963).

Notice requirement applies to the account holder or to one in possession of the financial transaction device with permission of the account holder and not to one using an allegedly lost or stolen device. Therefore, the prosecution was not required to prove that the defendant who had used a lost or stolen device had been

given notice that his use was not authorized in order to get a conviction. *People v. Pipkin*, 762 P.2d 736 (Colo. App. 1988).

Trial court did not err in refusing to give jury instruction defining the affirmative defense of consent where proof of the elements of the charged offense necessarily required disproof of the issues raised by said defense. *People v. Bush*, 948 P.2d 16 (Colo. App. 1997).

Section requires proof that a defendant in fact obtained possession or use of cash, credit, property, or services through the unauthorized use of a financial transaction device. *People v. Novitskiy*, 81 P.3d 1070 (Colo. App. 2003).

18-5-703. Criminal possession of a financial transaction device. (Repealed)

Source: **L. 84:** Entire part added, p. 550, § 2, effective July 1. **L. 86:** (3) amended, p. 770, § 7, effective July 1. **L. 89:** (3) and (4) amended, p. 837, § 68, effective July 1. **L. 2006:** Entire section repealed, p. 1318, § 6, effective July 1.

Cross references: For current provisions relating to criminal possession of a financial device, see § 18-5-903.

18-5-704. Sale or possession for sale of a financial transaction device. (Repealed)

Source: **L. 84:** Entire part added, p. 550, § 2, effective July 1. **L. 89:** (1) amended, p. 837, § 69, effective July 1. **L. 2006:** Entire section repealed, p. 1319, § 7, effective July 1.

18-5-705. Criminal possession or sale of a blank financial transaction device.

(1) A person commits criminal possession or sale of a blank financial transaction device if, without the authorization of the issuer or manufacturer, he has in his possession or under his control or receives from another person, with intent to use, deliver, circulate, or sell it or with intent to cause the use, delivery, circulation, or sale of it, or sells any financial transaction device which has not been embossed or magnetically encoded with the name of the account holder, personal identification code, expiration date, or other proprietary institutional information.

(2) Criminal possession of a blank financial transaction device is a class 6 felony.

(3) Criminal possession of two or more blank financial transaction devices is a class 5 felony.

(4) Delivery, circulation, or sale of one blank financial transaction device is a class 5 felony.

(5) Delivery, circulation, or sale of two or more blank financial transaction devices is a class 3 felony.

(6) For purposes of this section, a blank financial transaction device is one that has at least one or more characteristics of a financial transaction device but does not contain all of the characteristics of a completed financial transaction device.

Source: **L. 84:** Entire part added, p. 550, § 2, effective July 1. **L. 89:** (2) to (4) amended, p. 837, § 70, effective July 1.

18-5-706. Criminal possession of forgery devices. (1) A person commits possession of forgery devices if he possesses any tools, photographic equipment, printing equipment, or any other device adapted, designed, or commonly used for committing or facilitating the commission of an offense involving the unauthorized manufacture, printing, embossing, or magnetic encoding of a financial transaction device or the altering or addition of any uniform product codes, optical characters, or holographic images to a financial transaction device, and intends to use the thing possessed, or knows that some person intends to use the thing possessed, in the commission of such an offense.

(2) Possession of a forgery device is a class 6 felony.

Source: L. 84: Entire part added, p. 551, § 2, effective July 1. L. 89: (2) amended, p. 838, § 71, effective July 1.

18-5-707. Unlawful manufacture of a financial transaction device. (1) A person commits unlawful manufacture of a financial transaction device if, with intent to defraud, he:

(a) Falsely makes or manufactures, by printing, embossing, or magnetically encoding, a financial transaction device; or

(b) Falsely alters or adds uniform product codes, optical characters, or holographic images to a device which is or purports to be, or which is calculated to become or to represent if completed, a financial transaction device; or

(c) Falsely completes a financial transaction device by adding to an incomplete device to make it a complete one.

(2) As used in this section, unless the context otherwise requires:

(a) To "falsely alter" a financial transaction device means to change such device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

(b) To "falsely complete" a financial transaction device means to transform an incomplete device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

(c) To "falsely make" a financial transaction device means to make or manufacture a device, whether complete or incomplete, which purports to be an authentic creation of its ostensible issuer, but which is not, either because the ostensible issuer is fictitious or because, if real, he did not authorize the making or the manufacturing thereof.

(3) Unlawful manufacture of a financial transaction device is a class 5 felony.

Source: L. 84: Entire part added, p. 551, § 2, effective July 1; (1)(b) amended, p. 1125, § 43, effective July 1. L. 89: (3) amended, p. 838, § 72, effective July 1.

ANNOTATION

Annotator's note. Since § 18-5-707 is similar to former § 40-14-21, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Credit card may be forged. In an instruction on the subject of the forgery, a credit card not only has legal efficacy, but also specifically falls within the language of the forgery statute. *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

And prosecutor may proceed under forgery or credit card provisions. Since the credit

card and forgery statutes have as their subject matter two different kinds of criminal transactions, the existence of the specific credit card statute does not preclude prosecution under the state's general forgery statute and also it is the proper discretionary function of the prosecutor to elect to proceed under the felony rather than the misdemeanor statute. *People v. Couch*, 179 Colo. 324, 500 P.2d 967 (1972).

Reasonable distinctions can be drawn between the two crimes which are the subject matter of the credit card and forgery statutes,

and the existence of the specific statute regarding the misuse of credit cards does not preclude prosecution or conviction of appellant under the

state's general forgery statute. *People v. James*, 178 Colo. 401, 497 P.2d 1256 (1972).

PART 8

EQUITY SKIMMING AND RELATED OFFENSES

18-5-801. Definitions. As used in this part 8, unless the context otherwise requires:

(1) "Lease" means any grant of use and possession for consideration, with or without an option to buy.

(2) "Real property" means land and any interest or estate in land and includes a manufactured home as defined in section 42-1-102 (106) (b), C.R.S.

(3) "Rent" means any moneys or any other thing of value received as a payment or as a deposit for the privilege of living in or using real property.

(4) "Security interest" means an interest in personal property which secures payment or performance of an obligation.

(5) "Vehicle" means any device of conveyance capable of moving itself or of being moved from place to place upon wheels or a track or by water or air, whether or not intended for the transport of persons or property, and includes any space within such "vehicle" adapted for overnight accommodation of persons or animals or for the carrying on of business. "Vehicle" does not include a manufactured home as defined in section 42-1-102 (106) (b), C.R.S.

Source: L. 87: Entire part added, p. 670, § 1, effective July 1. L. 94: (2) and (5) amended, p. 2552, § 42, effective January 1, 1995.

18-5-802. Equity skimming of real property. (1) A person commits the crime of equity skimming of real property if the person knowingly:

(a) Acquires an interest in real property that is encumbered by a loan secured by a mortgage or deed of trust and the loan is in arrears at the time the person acquires the interest or is placed in default within eighteen months after the person acquires the interest; and

(b) Either:

(I) Fails to provide all rent derived from the person's interest in the real property first toward the satisfaction of all outstanding payments due on the loan and second toward any fees due to any association of real property owners that charges such fees for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property is a part before appropriating the remainder of such rent or any part thereof for any other purpose except for the purpose of repairs necessary to prevent waste of the real property; or

(II) After a foreclosure in which title has vested pursuant to section 38-38-501, C.R.S., collects rent on behalf of any person other than the owner of the real property.

(2) Repealed.

(3) Equity skimming of real property is a class 5 felony.

(4) It shall be an affirmative defense to this section:

(a) That all deficiencies in all underlying encumbrances at the time of acquisition have been fully satisfied and brought current and that, in addition, any regular payments on the underlying encumbrances during the succeeding nine months after the date of acquisition have been timely paid in full; except that this shall not be an affirmative defense to a crime that includes the element set forth in subparagraph (II) of paragraph (b) of subsection (1) of this section;

(b) That any fees due to an association of real property owners for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property is a part have been paid in full.

(5) The provisions of this section shall not apply to any bona fide lender who accepts a deed in lieu of foreclosure or who forecloses upon the real property.

(6) The provisions of this section shall not apply to any bona fide purchaser who acquires fee title in any real property without agreeing to pay all underlying encumbrances and takes fee title subject to all underlying encumbrances, if the following written, verbatim warning was provided to the seller in capital letters of no less than ten-point, bold-faced type and acknowledged by the seller's signature:

WARNING: PURCHASER, _____, WILL NOT ASSUME OR PAY ANY PRESENT MORTGAGE, DEEDS OF TRUST, OR OTHER LIENS OR ENCUMBRANCES AGAINST THE PROPERTY. THE SELLER, _____, UNDERSTANDS HE/SHE WILL REMAIN RESPONSIBLE FOR ALL PAYMENTS DUE ON SUCH MORTGAGES, DEEDS OF TRUST, OR OTHER LIENS OR ENCUMBRANCES AND FOR ANY DEFICIENCY JUDGMENT UPON FORECLOSURE.

I HAVE HAD THE FOREGOING READ TO ME AND UNDERSTAND THE PURCHASER, _____, WILL NOT ASSUME ANY PRESENT MORTGAGES, DEEDS OF TRUST, OR OTHER LIENS OR ENCUMBRANCES AGAINST THE PROPERTY DESCRIBED AS _____.

DATE _____

SELLER _____.

Source: L. 87: Entire part added, p. 671, § 1, effective July 1. **L. 89:** (1)(b) and (4) amended, p. 907, § 1, effective April 24; (2) repealed and (3), (4)(a), and (6) amended, pp. 861, 838, §§ 156, 73, effective July 1. **L. 2009:** (1) and (4)(a) amended, (HB 09-1227), ch. 155, p. 668, § 1, effective September 1.

ANNOTATION

Law reviews. For article, "Equity Skimming: A Crisis in Residential Real Estate", see 19 Colo. Law. 871 (1990).

Violation of this section subjects attorney to disciplinary action as engaging in conduct

involving dishonesty, conduct reflecting adversely on the practice of law, and conduct which constitutes the violation of a criminal law. *People v. Phelps*, 837 P.2d 755 (Colo. 1992).

18-5-803. Equity skimming of a vehicle. (1) A person commits equity skimming of a vehicle if, knowing the vehicle is subject to a security interest, lien, or lease, he accepts possession of or exercises any control over the vehicle in exchange for consideration given which may be verbal assurance or otherwise, and:

(a) Obtains or exercises control over the vehicle of another and then sells or leases the vehicle to a third party without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party, unless the entire balance of the security interest, lien, or lease is paid or satisfied within thirty days of said transaction; or

(b) Arranges the sale or lease of the vehicle of another to a third party without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party and exercises control over any part of the funds received, unless the entire balance of the security interest, lien, or lease is paid or satisfied within thirty days of said transaction; or

(c) Knowingly fails to ascertain on a monthly basis whether payments are due to the secured creditor, lienholder, or lessor and to apply all funds he receives for any lease or sale of the vehicle toward the satisfaction of any outstanding payment due to the secured creditor, lienholder, or lessor in a timely manner.

(2) Equity skimming of a vehicle is a class 6 felony.

Source: L. 87: Entire part added, p. 671, § 1, effective July 1. **L. 89:** (2) amended, p. 839, § 74, effective July 1.

18-5-804. Civil action. A condominium association, a property owners' association, or any like association of real property owners which charges fees for the upkeep of a housing facility, a housing project, or a common area thereof may proceed pursuant to rule 102 of the Colorado rules of civil procedure if such fees have not been received by the condominium association, property owners' association, or any like association for a period of ninety days or more.

Source: L. 87: Entire part added, p. 672, § 1, effective July 1.

PART 9

IDENTITY THEFT AND RELATED OFFENSES

18-5-901. Definitions. As used in this part 9, unless the context otherwise requires:

(1) "Account holder" means any person or business entity named on or associated with the account or named on the face of a financial device to whom or for whose benefit the financial device is issued by an issuer.

(2) "Extension of credit" means any loan or agreement, express or implied, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(3) To "falsely alter" a written instrument or financial device means to change a written instrument or financial device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that the written instrument or financial device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

(4) To "falsely complete" a written instrument or financial device means:

(a) To transform an incomplete written instrument or financial device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument or financial device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or

(b) To transform an incomplete written instrument or financial device into a complete one by adding or inserting materially false information or adding or inserting a materially false statement. A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

(5) To "falsely make" a written instrument or financial device means to make or draw a written instrument or financial device, whether it be in complete or incomplete form, that purports to be an authentic creation of its ostensible maker, but that is not, either because the ostensible maker is fictitious or because, if real, the ostensible maker did not authorize the making or the drawing of the written instrument or financial device.

(6) "Financial device" means any instrument or device that can be used to obtain cash, credit, property, services, or any other thing of value or to make financial payments, including but not limited to:

(a) A credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card;

(b) A check;

(c) A negotiable order of withdrawal;

(d) A share draft; or

(e) A money order.

(7) "Financial identifying information" means any of the following that can be used, alone or in conjunction with any other information, to obtain cash, credit, property, services, or any other thing of value or to make a financial payment:

(a) A personal identification number, credit card number, banking card number, checking account number, debit card number, electronic fund transfer card number, guaranteed check card number, or routing number; or

(b) A number representing a financial account or a number affecting the financial interest, standing, or obligation of or to the account holder.

(8) "Government" means:

(a) The United States and its departments, agencies, or subdivisions;

(b) A state, county, municipality, or other political unit and its departments, agencies, or subdivisions; and

(c) A corporation or other entity established by law to carry out governmental functions.

(9) "Issuer" means a person, a banking, financial, or business institution, or a corporation or other business entity that assigns financial rights by acquiring, distributing, controlling, or cancelling an account or a financial device.

(10) "Number" includes, without limitation, any grouping or combination of letters, numbers, or symbols.

(11) "Of another" means that of a natural person, living or dead, or a business entity as defined in section 16-3-301.1 (11) (b), C.R.S.

(12) "Personal identification number" means a number assigned to an account holder by an issuer to permit authorized use of an account or financial device.

(13) "Personal identifying information" means information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; a social security number; a password; a pass code; an official, government-issued driver's license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number.

(14) "Utter" means to transfer, pass, or deliver, or to attempt or cause to be transferred, passed, or delivered, to another person a written instrument or financial device, article, or thing.

(15) "Written instrument" means a paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, that is capable of being used to the advantage or disadvantage of another.

Source: L. 2006: Entire part added, p. 1319, § 8, effective July 1.

18-5-902. Identity theft. (1) A person commits identity theft if he or she:

(a) Knowingly uses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment;

(b) Knowingly possesses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority, with the intent to use or to aid or permit some other person to use such information or device to obtain cash, credit, property, services, or any other thing of value or to make a financial payment;

(c) With the intent to defraud, falsely makes, completes, alters, or utters a written instrument or financial device containing any personal identifying information or financial identifying information of another;

(d) Knowingly possesses the personal identifying information or financial identifying information of another without permission or lawful authority to use in applying for or completing an application for a financial device or other extension of credit;

(e) Knowingly uses or possesses the personal identifying information of another without permission or lawful authority with the intent to obtain a government-issued document; or

(f) (Deleted by amendment, L. 2009, (SB 09-093), ch. 326, p. 1737, § 1, effective July 1, 2009.)

(2) Identity theft is a class 4 felony.

(3) The court shall be required to sentence the defendant to the department of corrections for a term of at least the minimum of the presumptive range and may sentence the defendant to a maximum of twice the presumptive range if:

(a) The defendant is convicted of identity theft or of attempt, conspiracy, or solicitation to commit identity theft; and

(b) The defendant has a prior conviction for a violation of this part 9 or a prior conviction for an offense committed in any other state, the United States, or any other territory subject to the jurisdiction of the United States that would constitute a violation of this part 9 if committed in this state, or for attempt, conspiracy, or solicitation to commit a violation of this part 9 or for attempt, conspiracy, or solicitation to commit an offense in another jurisdiction that would constitute a violation of this part 9 if committed in this state.

Source: L. 2006: Entire part added, p. 1322, § 8, effective July 1. L. 2009: (1)(a), (1)(f), and (3) amended, (SB 09-093), ch. 326, p. 1737, § 1, effective July 1.

ANNOTATION

Definition of “thing of value” in identity theft statute is narrower than definition contained in § 18-1-901 (3)(r). The term does not include nonpecuniary benefits of misleading and influencing actions of police officer by obtaining use of another person’s driving record. *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008).

Defendant providing false name at traffic stop could not be charged with using false information to obtain a “thing of value” under identity theft statute. *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008).

18-5-903. Criminal possession of a financial device. (1) A person commits criminal possession of a financial device if the person has in his or her possession or under his or her control any financial device that the person knows, or reasonably should know, to be lost, stolen, or delivered under mistake as to the identity or address of the account holder.

(2) (a) Criminal possession of one financial device is a class 1 misdemeanor.

(b) Criminal possession of two or more financial devices is a class 6 felony.

(c) Criminal possession of four or more financial devices, of which at least two are issued to different account holders, is a class 5 felony.

Source: L. 2006: Entire part added, p. 1323, § 8, effective July 1.

ANNOTATION

Annotator’s note. Since § 18-5-903 is similar to repealed § 18-5-703, a relevant case construing that provision has been included in the annotations to this section.

Because this section is worded in the disjunctive, it includes both a mental culpability offense and a strict liability offense. The court did not err in allowing the prosecution to amend the information to charge the defendant only with the strict liability alternative. *People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994).

This section is not facially unconstitutional based on an overbreadth argument, because

possession of a stolen credit transaction device is neither a fundamental right nor constitutionally protected conduct. *People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994).

This section is not unconstitutionally void for vagueness, because it adequately sets out the circumstances under which a person commits the strict liability offense of possession of a lost or stolen credit transaction device. *People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994).

18-5-903.5. Criminal possession of an identification document. (1) A person commits criminal possession of an identification document if the person knowingly has in his or her possession or under his or her control another person’s actual driver’s license, actual government-issued identification card, actual social security card, or actual passport, knowing that he or she does so without permission or lawful authority.

(2) (a) Criminal possession of one or more identification documents issued to the same person is a class 1 misdemeanor.

(b) Criminal possession of two or more identification documents, of which at least two are issued to different persons, is a class 6 felony.

Source: L. 2009: Entire section added, (SB 09-093), ch. 326, p. 1738, § 2, effective July 1, 2011.

18-5-904. Gathering identity information by deception. (1) A person commits gathering identity information by deception if he or she knowingly makes or conveys a materially false statement, without permission or lawful authority, with the intent to obtain, record, or access the personal identifying information or financial identifying information of another.

(2) Gathering identity information by deception is a class 5 felony.

Source: L. 2006: Entire part added, p. 1323, § 8, effective July 1.

18-5-905. Possession of identity theft tools. (1) A person commits possession of identity theft tools if he or she possesses any tools, equipment, computer, computer network, scanner, printer, or other article adapted, designed, or commonly used for committing or facilitating the commission of the offense of identity theft as described in section 18-5-902, and intends to use the thing possessed, or knows that a person intends to use the thing possessed, in the commission of the offense of identity theft.

(2) Possession of identity theft tools is a class 5 felony.

Source: L. 2006: Entire part added, p. 1323, § 8, effective July 1.

ARTICLE 5.5

Computer Crime

Law reviews: For article, "Ownership of Software and Computer-stored Data", see 13 Colo. Law. 577 (1984); for article, "Computer Security and Privacy: The Third Wave of Property Law", see 33 Colo. Law. 57 (February 2004).

18-5.5-101. Definitions.

18-5.5-102. Computer crime.

18-5.5-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Authorization" means the express consent of a person which may include an employee's job description to use said person's computer, computer network, computer program, computer software, computer system, property, or services as those terms are defined in this section.

(2) "Computer" means an electronic, magnetic, optical, electromagnetic, or other data processing device which performs logical, arithmetic, memory, or storage functions by the manipulations of electronic, magnetic, radio wave, or light wave impulses, and includes all input, output, processing, storage, software, or communication facilities which are connected or related to or operating in conjunction with such a device.

(3) "Computer network" means the interconnection of communication lines (including microwave or other means of electronic communication) with a computer through remote terminals, or a complex consisting of two or more interconnected computers.

(4) "Computer program" means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system.

(5) "Computer software" means computer programs, procedures, and associated documentation concerned with the operation of a computer system.

(6) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, and software.

(6.3) "Damage" includes, but is not limited to, any impairment to the integrity of availability of information, data, computer program, computer software, or services on or via a computer, computer network, or computer system or part thereof.

(6.7) "Exceed authorized access" means to access a computer with authorization and to use such access to obtain or alter information, data, computer program, or computer software that the person is not entitled to so obtain or alter.

(7) "Financial instrument" means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card, debit card, or marketable security.

(8) "Property" includes, but is not limited to, financial instruments, information, including electronically produced data, and computer software and programs in either machine or human readable form, and any other tangible or intangible item of value.

(9) "Services" includes, but is not limited to, computer time, data processing, and storage functions.

(10) To "use" means to instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network.

Source: **L. 79:** Entire article added, p. 728, § 7, effective July 1. **L. 83:** (1) R&RE and (10) added, p. 705, §§ 1, 2, effective July 1. **L. 2000:** (2) amended and (6.3) and (6.7) added, p. 694, § 7, effective July 1.

18-5.5-102. Computer crime. (1) A person commits computer crime if the person knowingly:

(a) Accesses a computer, computer network, or computer system or any part thereof without authorization; exceeds authorized access to a computer, computer network, or computer system or any part thereof; or uses a computer, computer network, or computer system or any part thereof without authorization or in excess of authorized access; or

(b) Accesses any computer, computer network, or computer system, or any part thereof for the purpose of devising or executing any scheme or artifice to defraud; or

(c) Accesses any computer, computer network, or computer system, or any part thereof to obtain, by means of false or fraudulent pretenses, representations, or promises, money; property; services; passwords or similar information through which a computer, computer network, or computer system or any part thereof may be accessed; or other thing of value; or

(d) Accesses any computer, computer network, or computer system, or any part thereof to commit theft; or

(e) Without authorization or in excess of authorized access alters, damages, interrupts, or causes the interruption or impairment of the proper functioning of, or causes any damage to, any computer, computer network, computer system, computer software, program, application, documentation, or data contained in such computer, computer network, or computer system or any part thereof; or

(f) Causes the transmission of a computer program, software, information, code, data, or command by means of a computer, computer network, or computer system or any part thereof with the intent to cause damage to or to cause the interruption or impairment of the proper functioning of or that actually causes damage to or the interruption or impairment of the proper functioning of any computer, computer network, computer system, or part thereof; or

(g) Uses or causes to be used a software application that runs automated tasks over the internet to access a computer, computer network, or computer system, or any part thereof, that circumvents or disables any electronic queues, waiting periods, or other technological measure intended by the seller to limit the number of event tickets that may be purchased by any single person in an on-line event ticket sale as defined in section 6-1-720, C.R.S.

(2) Deleted by amendment, L. 2000, p. 695, § 8, effective July 1, 2000.)

(3) (a) Except as provided in paragraphs (b) and (c) of this subsection (3), if the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by a violation of this section is less than five hundred dollars, computer crime is a class 2 misdemeanor; if five hundred dollars or more but less than one thousand dollars, computer

crime is a class 1 misdemeanor; if one thousand dollars or more but less than twenty thousand dollars, computer crime is a class 4 felony; if twenty thousand dollars or more, computer crime is a class 3 felony.

(b) Computer crime committed in violation of paragraph (a) of subsection (1) of this section is a class 2 misdemeanor; except that, if the person has previously been convicted under this section, a previous version of this section, or a statute of another state of similar content and purport, computer crime committed in violation of paragraph (a) of subsection (1) of this section is a class 6 felony.

(c) (I) Computer crime committed in violation of paragraph (g) of subsection (1) of this section is a class 1 misdemeanor.

(II) If computer crime is committed to obtain event tickets, each ticket purchased shall constitute a separate offense.

(III) Paragraph (g) of subsection (1) of this section shall not prohibit the resale of tickets in a secondary market by a person other than the event sponsor or promoter.

(d) Consistent with section 18-1-202, a prosecution for a violation of paragraph (g) of subsection (1) of this section may be tried in the county where the event has been, or will be, held.

Source: **L. 79:** Entire article added, p. 728, § 7, effective July 1. **L. 83:** (1) amended, p. 705, § 3, effective July 1. **L. 84:** (3) amended, p. 538, § 14, effective July 1, 1985. **L. 89:** (3) amended, p. 839, § 75, effective July 1. **L. 92:** (3) amended, p. 437, § 9, effective April 10. **L. 98:** (3) amended, p. 1440, § 18, effective July 1; (3) amended, p. 797, § 12, effective July 1. **L. 2000:** Entire section amended, p. 695, § 8, effective July 1. **L. 2007:** (3)(a) amended, p. 1696, § 14, effective July 1. **L. 2008:** (1)(g), (3)(c), and (3)(d) added and (3)(a) amended, p. 2230, §§ 3, 4, effective July 1.

Cross references: For the legislative declaration contained in the 2007 act amending subsection (3)(a), see section 1 of chapter 384, Session Laws of Colorado 2007.

ANNOTATION

Law reviews. For article, “Ownership of Software and Computer-stored Data”, see 13 Colo. Law. 577 (1984).

Section not unconstitutionally vague or overbroad. People v. Pahl, 169 P.3d 169 (Colo. App. 2006) (decided under former law).

Term “access”, as used in subsections (1)(c) and (1)(d), is clear and unambiguous as

defined in the dictionary. Therefore, defendant accessed a computer system when she communicated with an automated telephone system by inputting data in response to computer-generated questions about her unemployment status. People v. Rice, 198 P.3d 1241 (Colo. App. 2008).

ARTICLE 6

Offenses Involving the
Family Relations

Editor’s note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor’s note following the title heading.

PART 1		18-6-105.	Distributing abortifacients.
ABORTION			PART 2
			BIGAMY
18-6-101.	Definitions.		
18-6-102.	Criminal abortion.	18-6-201.	Bigamy.
18-6-103.	Pretended criminal abortion.	18-6-202.	Marrying a bigamist.
18-6-104.	Failure to comply.	18-6-203.	Definitions.

PART 3

INCEST

- 18-6-301. Incest.
 18-6-302. Aggravated incest.
 18-6-303. Sentencing.

PART 4

WRONGS TO CHILDREN

- 18-6-401. Child abuse.
 18-6-401.1. Child abuse - limitation for commencing proceedings - evidence - statutory privilege.
 18-6-401.2. Habitual child abusers - indictment or information - verdict of the jury.
 18-6-401.3. Video tape depositions - children - victims of child abuse.
 18-6-401.4. Payment of treatment costs for the victim or victims of an act of child abuse.
 18-6-402. Trafficking in children. (Repealed)
 18-6-403. Sexual exploitation of a child.
 18-6-404. Procurement of a child for sexual exploitation.
 18-6-405. Reports of convictions to department of education.

PART 5

ADULTERY

- 18-6-501. Adultery.

PART 6

HARBORING A MINOR

- 18-6-601. Harboring a minor.

PART 7

CONTRIBUTING TO DELINQUENCY

- 18-6-701. Contributing to the delinquency of a minor.

PART 8

DOMESTIC VIOLENCE

- 18-6-800.3. Definitions.
 18-6-801. Domestic violence - sentencing.
 18-6-801.5. Domestic violence - evidence of similar transactions.
 18-6-801.6. Domestic violence - summons and complaint.
 18-6-802. Domestic violence - local board - treatment programs - liability immunity - repeal. (Repealed)
 18-6-802.5. Domestic violence - treatment programs.
 18-6-803. Commission - manual of standards for treatment of domestic violence perpetrators - repeal. (Repealed)
 18-6-803.5. Crime of violation of a protection order - penalty - peace officers' duties.
 18-6-803.6. Duties of peace officers and prosecuting agencies - preservation of evidence.
 18-6-803.7. Central registry of protection orders - creation.
 18-6-803.8. Foreign protection orders. (Repealed)
 18-6-803.9. Assaults and deaths related to domestic violence - report.
 18-6-804. Repeal of part. (Repealed)
 18-6-805. Repeal of sections. (Repealed)

PART 1

ABORTION

Law reviews: For article, "Abortion in Colorado: If Roe v. Wade is Reversed", see 19 Colo. Law. 807 (1990).

18-6-101. Definitions. As used in sections 18-6-101 to 18-6-104, unless the context otherwise requires:

(1) "Justified medical termination" means the intentional ending of the pregnancy of a woman at the request of said woman or, if said woman is under the age of eighteen years, then at the request of the woman and her then living parent or guardian, or, if the woman is married and living with her husband, at the request of said woman and her husband, by a licensed physician using accepted medical procedures in a licensed hospital upon written certification by all of the members of a special hospital board that:

(a) Continuation of the pregnancy, in their opinion, is likely to result in: The death of the woman; or the serious permanent impairment of the physical health of the woman; or the serious permanent impairment of the mental health of the woman as confirmed in

writing under the signature of a licensed doctor of medicine specializing in psychiatry; or the birth of a child with grave and permanent physical deformity or mental retardation; or

(b) Less than sixteen weeks of gestation have passed and that the pregnancy resulted from conduct defined as criminal in sections 18-3-402 and 18-3-403, or if the female person is unmarried and has not reached her sixteenth birthday at the time of such conduct regardless of the age of the male, or incest, as defined in sections 18-6-301 and 18-6-302, and that the district attorney of the judicial district in which the alleged sexual assault or incest has occurred has informed the committee in writing over his signature that there is probable cause to believe that the alleged violation did occur.

(2) "Licensed hospital" means one licensed or certificated by the department of public health and environment.

(3) "Pregnancy" means the implantation of an embryo in the uterus.

(4) "Special hospital board" means a committee of three licensed physicians who are members of the staff of the hospital where the proposed termination would be performed if certified in accordance with subsection (1) of this section, and who meet regularly or on call for the purpose of determining the question of medical justification in each individual case, and which maintains a written record, signed by each member, of the proceedings and deliberations of the board.

Source: L. 71: R&RE, p. 446, § 1. C.R.S. 1963: § 40-6-101. L. 75: (1)(b) amended, p. 632, § 7, effective July 1. L. 94: (2) amended, p. 2735, § 358, effective July 1.

Editor's note: (1) Language of a Missouri statute requiring parental consent or spousal consent to abortions which was similar to the language found in the introductory portion of subsection (1) was held unconstitutional in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

(2) Portions of this section were held unconstitutional in *People v. Norton*, 181 Colo. 47, 507 P.2d 862 (1973). In that decision, the court interpreted former section 40-6-101, 1971 Perm. Supp., C.R.S. 1963, which was later recodified in 1973 as section 18-6-101. As set forth in an appendix to the decision, the court indicated that the following italicized portions of section 40-6-101 are unconstitutional:

40-6-101. Definitions. As used in sections 40-6-101 to 40-6-104:

(1) "Pregnancy" means the implantation of an embryo in the uterus.

(2) "*Licensed hospital*" means one licensed or certificated by the Colorado department of health.

(3) "*Justified medical termination*" means the intentional ending of the pregnancy of a woman at the request of said woman or, if said woman is under the age of eighteen years, then at the request of said woman and her then living parent or guardian, or, if the woman is married and living with her husband, at the request of said woman and her husband, by a licensed physician using accepted medical procedures in a *licensed hospital upon written certification by all of the members of a special hospital board that:*

(a) *Continuation of the pregnancy, in their opinion, is likely to result in: The death of the woman; or the serious permanent impairment of the mental health of the woman as confirmed in writing under the signature of a licensed doctor of medicine specializing in psychiatry; or the birth of a child with grave and permanent physical deformity or mental retardation; or*

(b) *Less than sixteen weeks of gestation have passed and that the pregnancy resulted from conduct defined as criminal in sections 40-3-401 and 40-3-402, or if the female person is unmarried and has not reached her sixteenth birthday at the time of such conduct regardless of the age of the male; or incest, as defined in sections 40-6-301 and 40-6-302, and that the district attorney of the judicial district in which the alleged rape or incest has occurred has informed the committee in writing over his signature that there is probable cause to believe that the alleged violation did occur.*

(4) "*Special hospital board*" means a committee of three licensed physicians who are members of the staff of the hospital where the proposed termination would be performed if certified in accordance with subsection (3) of this section, and who meet regularly or on call for the purpose of determining the question of medical justification in each individual case, and which maintains a written record, signed by each member, of the proceedings and deliberations of such board.

ANNOTATION

Law reviews. For note, "Colorado's New Abortion Statute", see 40 U Colo. L. Rev. 297 (1968). For note, "Certification of Rape Under the Colorado Abortion Statute", see 42 U. Colo. L. Rev. 121 (1970). For article, "Consent to Treatment and Access to Minors' Medical Records", see 17 Colo. Law. 1323 (1988).

Annotator's note. Since § 18-6-101 is similar to former § 40-2-50, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Portions of this section held unconstitutional. *People v. Norton*, 181 Colo. 47, 507 P.2d 862 (1973).

Language in the introductory portion of subsection (1) requiring parental consent for abortions for women under the age of eighteen is unconstitutional. *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975).

Remaining provisions of statute valid. Enforcement of the remaining sections will continue to further the legislative intent that the woman's health be protected by the requirement that medically acceptable procedures be used. *People v. Franklin*, 683 P.2d 775 (Colo. 1984).

This act provides a single procedure. Colorado's therapeutic abortion act provides a single

procedure for the legal termination of pregnancies in Colorado. A woman desirous of obtaining an abortion must apply to a special hospital board consisting of three physician-members entrusted with deciding whether an applicant is entitled to an abortion on one of the grounds specified in the statute. If all of the board members certify in writing that she is so entitled, a woman may then have an abortion performed in an accredited hospital by a licensed physician using accepted medical procedures. *Doe v. Dunbar*, 320 F. Supp. 1297 (D. Colo. 1970).

Grounds for obtaining a justified medical termination include the following: The pregnancy resulted from rape; continuation of the pregnancy, in the opinion of the board, is likely to result in the death of the woman, the serious impairment of her physical health, or the serious and permanent impairment of her mental health (this must be confirmed in writing by a psychiatrist); or the child is likely to be born physically deformed or mentally retarded. *Doe v. Dunbar*, 320 F. Supp. 1297 (D. Colo. 1970).

Order to compel district attorney to certify action not treated as class action. *Jane Doe v. Seccombe*, 177 Colo. 127, 493 P.2d 30 (1972).

18-6-102. Criminal abortion. (1) Any person who intentionally ends or causes to be ended the pregnancy of a woman by any means other than justified medical termination or birth commits criminal abortion.

(2) Criminal abortion is a class 4 felony, but if the woman dies as a result of the criminal abortion, it is a class 2 felony.

Source: L. 71: R&RE, p. 447, § 1. C.R.S. 1963: § 40-6-102.

ANNOTATION

Law reviews. For article, "State Constitutional Privacy Rights Post Webster — Broader Protection Against Abortion Restrictions?", see 67 Den. U. L. Rev. 401 (1990).

Annotator's note. Since § 18-6-102 is similar to former §§ 40-2-51 and 40-2-23, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section should not be construed too narrowly, but should be considered in the light of its purpose, which is to prevent abortions other than for lawful purposes or by natural causes. *Palmer v. People*, 162 Colo. 92, 424 P.2d 766 (1967).

The word "abortion" is synonymous and equivalent to "miscarriage" in its primary meaning. *Marmaduke v. People*, 45 Colo. 357, 101 P. 337 (1909); *Hall v. People*, 119 Colo. 141, 201 P.2d 382 (1948).

Intent to procure abortion may be inferred from character of means employed. Where

drugs regarded as abortives are administered to a pregnant woman whose general health is good and requires no medicine, and said drugs so administered are calculated to produce serious disturbance in her system, and miscarriage is thereby induced, it may be presumed that the drugs so applied were designed and intended to produce that result. The intention may be rightly inferred from the character of the means employed. *Dougherty v. People*, 1 Colo. 514 (1872).

Malice is not an essential element of murder committed in attempt to cause abortion of a woman with child, and in an information charging such murder it is not necessary to allege that the act was done maliciously or with malice. *Johnson v. People*, 33 Colo. 224, 80 P. 133 (1905).

Prosecution need not negative exceptions. Under former provisions the prosecution was not required to show that the acts of the accused were not necessary to save the life, or to prevent

serious bodily injury, nor that what was done by the accused was not done under the advice of a physician. The exceptions contained in former section are matters of defense, which must be made to appear by the defendant from the evidence, and need not be negated in the indictment, or the negative proved by the prosecution. *Fitch v. People*, 45 Colo. 298, 100 P. 1132 (1909).

In an information, under former section it was held to be unnecessary to negative the exceptions in the statute as matters of justification. *Johnson v. People*, 33 Colo. 224, 80 P. 133 (1905).

But it is not error to do so. The mere fact that the people are not required to negative the exceptions does not make it error for them to do so, either in the charge or the proof. *Max v. People*, 78 Colo. 178, 240 P. 697 (1925).

Refusal to charge as to manslaughter is not error. Where, in an attempt to procure the miscarriage of a woman with child, the death of the woman is caused, there is no element of manslaughter in the homicide, and in a prosecution for murder committed in an attempt to procure such miscarriage, it is not error to refuse to instruct the jury as to the law of manslaughter. *Johnson v. People*, 33 Colo. 224, 80 P. 133 (1905).

Statements of another that he knew defendant produced abortions are inadmissible. When one is on trial charged under this section with a crime of this nature, to admit as evidence in chief for the prosecution statements of an-

other that he knew defendant did such criminal acts, is error. *Sarkisian v. People*, 56 Colo. 330, 138 P. 26 (1914).

But statements of woman were held admissible against persons with whom she conspired to procure an abortion. *Solander v. People*, 2 Colo. 48 (1873).

In a prosecution for murder based on a criminal abortion, ante-mortem statements of deceased concerning the preparation for and purpose of the operation are admissible in evidence. *Max v. People*, 78 Colo. 178, 240 P. 697 (1925).

Evidence held admissible. In a prosecution for murder based on a criminal abortion, evidence that defendant's license to practice as a physician and surgeon had been revoked, and that thereafter he maintained an office equipped with surgical instruments used in procuring abortions was admissible under the facts disclosed by the record. *Max v. People*, 78 Colo. 178, 240 P. 697 (1925).

Evidence held inadmissible. In a prosecution for procuring an abortion, the court did not err in refusing to permit certain witnesses offered by defendant to testify that they were his patients and that he had rendered them satisfactory service, where such witnesses were not called as character witnesses. *Hall v. People*, 119 Colo. 141, 201 P.2d 382 (1948).

Evidence held sufficient to sustain abortion conviction. *Clarke v. People*, 16 Colo. 511, 27 P. 724 (1891); *Willis v. People*, 73 Colo. 369, 215 P. 854 (1923); *Caraway v. People*, 175 Colo. 111, 486 P.2d 17 (1971).

18-6-103. Pretended criminal abortion. (1) Any person who intentionally pretends to end the real or apparent pregnancy of a woman by any means other than justified medical termination or birth commits pretended criminal abortion.

(2) Pretended criminal abortion is a class 5 felony, but if the woman dies as a result of the pretended criminal abortion, it is a class 2 felony.

Source: L. 71: R&RE, p. 447, § 1. C.R.S. 1963: § 40-6-103.

18-6-104. Failure to comply. Nothing in sections 18-6-101 to 18-6-104 requires a hospital to admit any patient under said sections for the purposes of performing an abortion, nor is any hospital required to appoint a special hospital board as defined in section 18-6-101 (4). A person who is a member of or associated with the staff of a hospital or any employee of a hospital in which a justified medical termination has been authorized and who states in writing an objection to the termination on moral or religious grounds is not required to participate in the medical procedures which result in the termination of a pregnancy, and the refusal of any such person to participate does not form the basis for any disciplinary or other recriminatory action against the person.

Source: L. 71: R&RE, p. 447, § 1. C.R.S. 1963: § 40-6-104.

Editor's note: Portions of this section were held unconstitutional in *People v. Norton*, 181 Colo. 47, 507 P.2d 863 (1973). As set forth in an appendix to the decision, the court indicated that the following italicized portions of this section are unconstitutional:

18-6-104. Failure to comply. Nothing in sections 18-6-101 to 18-6-104 requires a hospital to admit any patient under said sections for the purposes of performing an abortion, *nor is any hospital required to appoint a special hospital board as defined in section 18-6-101 (4).* A person who is a member of or associated with the staff of a hospital or any employee of a hospital in which a justified medical termination has been authorized and who states in writing an objection to the termination on moral or religious grounds is not required to participate in the medical procedures which result in the termination of a pregnancy, and the refusal of any such person to participate does not form the basis for any disciplinary or other recriminatory action against the person.

18-6-105. Distributing abortifacients. (1) A person commits distributing abortifacients if he distributes or sells to or for any person other than a licensed medical doctor or osteopathic physician any drug, medicine, instrument, or other substance which is in fact an abortifacient and which he knows to be an abortifacient, and reasonably believes will be used as an abortifacient.

(2) Distributing abortifacients is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 447, § 1. C.R.S. 1963: § 40-6-105.

PART 2

BIGAMY

18-6-201. Bigamy. (1) Any married person who, while still married, marries or cohabits in this state with another commits bigamy, unless as an affirmative defense it appears that at the time of the cohabitation or subsequent marriage:

- (a) The accused reasonably believed the prior spouse to be dead; or
 - (b) The prior spouse had been continually absent for a period of five years during which time the accused did not know the prior spouse to be alive; or
 - (c) The accused reasonably believed that he was legally eligible to remarry.
- (2) Bigamy is a class 6 felony.

Source: L. 71: R&RE, p. 447, § 1. C.R.S. 1963: § 40-6-201. L. 89: (2) amended, p. 839, § 76, effective July 1.

Cross references: For the "Uniform Marriage Act", see article 2 of title 14; for the "Uniform Dissolution of Marriage Act", see article 10 of title 14.

ANNOTATION

Law reviews. For note, "The Presumption of Death and a Second Marriage", see 27 Dicta 414 (1950). For article, "Criminology of Voluntary Sexual Acts in Colorado", see 40 U. Colo. L. Rev. 268 (1968).

Annotator's note. Since § 18-6-201 is similar to former C.L. § 6835, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

"Absent" means being away from the home. The word "absent", as used in bigamy statutes, has been regarded as having such confined and technical meaning as it has in the rule regarding the presumption of death. "Absent" therefore means being away from the home or place where one has established a residence. *Schell v. People*, 65 Colo. 116, 173 P. 1141 (1918).

Remarriage within statutory period is at party's peril. It is the clear intent of this section that one who marries within the period designated by the statute shall do so at his peril. *Schell v. People*, 65 Colo. 116, 173 P. 1141 (1918).

But death of former spouse or divorce may validate prior marriage. Upon the dissolution of the subsisting marriage by death or by a competent decree of divorce, an intended marriage contracted in good faith by a party thereto prior to the removal of the disability is rendered valid and binding by the continued cohabitation of the parties to such union, as the original intention to become husband and wife, is presumed to continue so as to effectuate a valid common-law marriage. *Davis v. People*, 83 Colo. 295, 264 P. 658 (1928).

Cohabitation a question for jury. When acts

and complicating circumstances are proved, it becomes largely a question for the jury to determine whether there was in fact such continuation as amounted to a living together. *People v. Bright*, 77 Colo. 563, 238 P. 71 (1925).

The wife is a competent witness against the husband in a prosecution for bigamy. The offense is construed to be a crime against the wife. *Schell v. People*, 65 Colo. 116, 173 P. 1141 (1918).

Defense of ignorance that former spouse was living must be established by defendant. Clause of this section concerning knowledge that a former spouse is still living constitutes an exception which it is neither for the information to negative, nor for the prosecution in the first instance to disprove. If defendant relies upon the fact that he did not know that his former wife was still alive, he must produce evidence

thereof. *Magee v. People*, 79 Colo. 328, 245 P. 708 (1926).

Spouse held not absent. Defendant deserted his family, leaving them in Nebraska, in 1903, where they continued at their then residence until 1913. Defendant's second marriage occurred in less than two years after the first wife's departure from the former matrimonial domicile. While remaining at such former domicile the first wife was not "absent", within the meaning of this section, and a conviction was affirmed. *Schell v. People*, 65 Colo. 116, 173 P. 1141 (1918).

Information that follows this section is sufficient. An information which describes the offense in the language of this section, or so clearly that what is charged may be readily understood by a jury, is sufficient. *Magee v. People*, 79 Colo. 328, 245 P. 708 (1926).

18-6-202. Marrying a bigamist. Any unmarried person who knowingly marries or cohabits with another in this state under circumstances known to him which would render the other person guilty of bigamy under the laws of this state commits marrying a bigamist, which is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 448, § 1. **C.R.S. 1963:** § 40-6-202.

18-6-203. Definitions. As used in sections 18-6-201 and 18-6-202, "cohabitation" means to live together under the representation of being married.

Source: L. 71: R&RE, p. 448, § 1. **C.R.S. 1963:** § 40-6-203.

ANNOTATION

Term "live together". Under former section proscribing conduct under the term "living together", the term was construed to mean living under the same roof or under such conditions as husband and wife usually live. But occasional

acts of clandestine illicit intercourse are not alone sufficient to constitute living together. *People v. Bright*, 77 Colo. 563, 238 P. 71 (1925) (decided under former C.L. § 6835).

PART 3

INCEST

18-6-301. Incest. (1) Any person who knowingly marries, inflicts sexual penetration or sexual intrusion on, or subjects to sexual contact, as defined in section 18-3-401, an ancestor or descendant, including a natural child, child by adoption, or stepchild twenty-one years of age or older, a brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood commits incest, which is a class 4 felony. For the purpose of this section only, "descendant" includes a child by adoption and a stepchild, but only if the person is not legally married to the child by adoption or the stepchild.

(2) When a person is convicted of, pleads nolo contendere to, or receives a deferred sentence for a violation of the provisions of this section and the victim is a child who is under eighteen years of age and the court knows the person is a current or former employee of a school district or a charter school in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: L. 71: R&RE, p. 448, § 1. C.R.S. 1963: § 40-6-301. L. 83: Entire section amended, p. 695, § 6, effective June 15. L. 86: Entire section amended, p. 770, § 8 effective July 1. L. 90: Entire section amended, p. 1025, § 7, effective July 1. L. 2000: (2) amended, p. 1847, § 32, effective August 2. L. 2003: (2) amended, p. 2514, § 2, effective June 5.

ANNOTATION

Law reviews. For article, "Incest and Ethics: Confidentiality's Severest Test", see 61 Den. L.J. 619 (1984).

Annotator's note. Since § 18-6-301 is similar to former § 40-9-4, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Under former section essential elements of incest were (1) the act of sexual intercourse; and, (2) such an act between persons related within the prohibited degrees defined by statute. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Neither the age of the victim nor the age of the perpetrator is material as a requisite of this offense. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Neither is the unwed status of the female an element. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Rape and incest are separate and distinct crimes, with certain different elements essential to their proof. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Either or both of these crimes may be charged in an appropriate factual situation. Where an act of sexual intercourse occurs between male and female persons who are related

within certain prohibited degrees, where the female is unmarried and under the age of 18, and the male is over the age of 18 years, both the crime of statutory rape and the crime of incest could have been committed in the same transaction, and the people may charge the male participant with either or both crimes. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

The courts failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. In order to convict the defendant of first degree sexual assault or incest the jurors had to accept the victim's testimony because the victim testified unequivocally to actual sexual intercourse while the defendant denied any improper touching at all. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Retrial on habitual criminality barred notwithstanding trial court's erroneous interpretation or application of substantive law in dismissing habitual charges against the defendant where such dismissal occurs after jeopardy attached upon the impaneling and swearing of the jury. *People v. Hrapski*, 718 P.2d 1050 (Colo. 1986).

Evidence held sufficient to sustain conviction under this section. *Kingsbury v. People*, 44 Colo. 403, 99 P. 61 (1908).

18-6-302. Aggravated incest. (1) A person commits aggravated incest when he or she knowingly:

(a) Marries his or her natural child or inflicts sexual penetration or sexual intrusion on or subjects to sexual contact, as defined in section 18-3-401, his or her natural child, stepchild, or child by adoption, but this paragraph (a) shall not apply when the person is legally married to the stepchild or child by adoption. For the purpose of this paragraph (a) only, "child" means a person under twenty-one years of age.

(b) Marries, inflicts sexual penetration or sexual intrusion on, or subjects to sexual contact, as defined in section 18-3-401, a descendant, a brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood who is under ten years of age.

(2) Aggravated incest is a class 3 felony.

(3) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this section and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: L. 71: R&RE, p. 448, § 1. C.R.S. 1963: § 40-6-302. L. 77: (1) amended, p. 965, § 35, effective July 1. L. 83: Entire section added, p. 695, § 7, effective June 15. L. 90: (3) added, p. 1026, § 8, effective July 1. L. 2000: (3) amended, p. 1847, § 33, effective August 2.

ANNOTATION

The “unit of prosecution” for the crime of aggravated incest is the same as for the crime of sexual assault on a child because there is no discernible difference between the language used in subsection (1)(a) of this section and the phrase “any sexual contact” used in § 18-3-405.3. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

To determine if defendant’s actions satisfy more than one unit of prosecution, the court looks at all evidence introduced at trial to determine whether evidence relied upon by jury for conviction supports distinct and separate offenses. Factors to determine distinct offenses include contacts occurring at different locations

or times or whether they were the product of new volitional departures. If the acts are not distinct offenses, they merge into a single conviction. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

Aggravated incest, as defined by this section, constitutes a crime of violence within the meaning of § 4B1.2 of the U.S. sentencing guidelines. *United States v. Vigil*, 334 F.3d 1215 (10th Cir. 2003).

Victim who identified defendant as her natural father was competent to testify concerning her own parentage. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

18-6-303. Sentencing. (1) The court may suspend a portion of the sentence of any person who is convicted of a violation committed prior to November 1, 1998, of any offense listed in this part 3 who is not a habitual sex offender against children, as described in section 18-3-412, if the offender receives a presentence evaluation that recommends a treatment program and the offender satisfactorily completes the recommended treatment program.

(2) In addition to any other penalty provided by law, the court may sentence a defendant who is convicted of a first offense pursuant to this part 3, committed prior to November 1, 1998, to a period of probation for purposes of treatment that, when added to any time served, does not exceed the maximum sentence imposable for the offense.

(3) The court shall sentence a defendant who is convicted of any offense specified in this part 3 committed on or after November 1, 1998, pursuant to the provisions of part 10 of article 1.3 of this title.

Source: **L. 83:** Entire section added, p. 695, § 8, effective June 15. **L. 98:** Entire section amended, p. 1293, § 14, effective November 1. **L. 2002:** (3) amended, p. 1567, § 391, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 4

WRONGS TO CHILDREN

18-6-401. Child abuse. (1) (a) A person commits child abuse if such person causes an injury to a child’s life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child’s life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.

(b) (I) Except as otherwise provided in subparagraph (III) of this paragraph (b), a person commits child abuse if such person excises or infibulates, in whole or in part, the labia majora, labia minora, vulva, or clitoris of a female child. A parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child commits child abuse if he or she allows the excision or infibulation, in whole or in part, of such child’s labia majora, labia minora, vulva, or clitoris.

(II) Belief that the conduct described in subparagraph (I) of this paragraph (b) is required as a matter of custom, ritual, or standard practice or consent to the conduct by the child on whom it is performed or by the child’s parent or legal guardian shall not be an affirmative defense to a charge of child abuse under this paragraph (b).

(III) A surgical procedure as described in subparagraph (I) of this paragraph (b) is not a crime if the procedure:

(A) Is necessary to preserve the health of the child on whom it is performed and is performed by a person licensed to practice medicine under article 36 of title 12, C.R.S.; or

(B) Is performed on a child who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed to practice medicine under article 36 of title 12, C.R.S.

(IV) If the district attorney having jurisdiction over a case arising under this paragraph (b) has a reasonable belief that any person arrested or charged pursuant to this paragraph (b) is not a citizen or national of the United States, the district attorney shall report such information to the immigration and naturalization service, or any successor agency, in an expeditious manner.

(c) (I) A person commits child abuse if, in the presence of a child, or on the premises where a child is found, or where a child resides, or in a vehicle containing a child, the person knowingly engages in the manufacture or attempted manufacture of a controlled substance, as defined by section 18-18-102 (5), or knowingly possesses ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of a controlled substance. It shall be no defense to the crime of child abuse, as described in this subparagraph (I), that the defendant did not know a child was present, a child could be found, a child resided on the premises, or that a vehicle contained a child.

(II) A parent or lawful guardian of a child or a person having the care or custody of a child who knowingly allows the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knows or reasonably should know another person is engaged in the manufacture or attempted manufacture of methamphetamine commits child abuse.

(III) A parent or lawful guardian of a child or a person having the care or custody of a child who knowingly allows the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knows or reasonably should know another person possesses ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of methamphetamine commits child abuse.

(2) In this section, "child" means a person under the age of sixteen years.

(3) The statutory privilege between patient and physician and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for a violation of this section.

(4) No person, other than the perpetrator, complicitor, coconspirator, or accessory, who reports an instance of child abuse to law enforcement officials shall be subjected to criminal or civil liability for any consequence of making such report unless he knows at the time of making it that it is untrue.

(5) Deferred prosecution is authorized for a first offense under this section unless the provisions of subsection (7.5) of this section or section 18-6-401.2 apply.

(6) Repealed.

(7) (a) Where death or injury results, the following shall apply:

(I) When a person acts knowingly or recklessly and the child abuse results in death to the child, it is a class 2 felony except as provided in paragraph (c) of this subsection (7).

(II) When a person acts with criminal negligence and the child abuse results in death to the child, it is a class 3 felony.

(III) When a person acts knowingly or recklessly and the child abuse results in serious bodily injury to the child, it is a class 3 felony.

(IV) When a person acts with criminal negligence and the child abuse results in serious bodily injury to the child, it is a class 4 felony.

(V) When a person acts knowingly or recklessly and the child abuse results in any injury other than serious bodily injury, it is a class 1 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(VI) When a person acts with criminal negligence and the child abuse results in any injury other than serious bodily injury to the child, it is a class 2 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(b) Where no death or injury results, the following shall apply:

(I) An act of child abuse when a person acts knowingly or recklessly is a class 2 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(II) An act of child abuse when a person acts with criminal negligence is a class 3 misdemeanor; except that, if it is committed under the circumstances described in paragraph (e) of this subsection (7), then it is a class 5 felony.

(c) When a person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the child, such person commits the crime of murder in the first degree as described in section 18-3-102 (1) (f).

(d) When a person commits child abuse as described in paragraph (c) of subsection (1) of this section, it is a class 3 felony.

(e) A person who has previously been convicted of a violation of this section or of an offense in any other state, the United States, or any territory subject to the jurisdiction of the United States that would constitute child abuse if committed in this state and who commits child abuse as provided in subparagraph (V) or (VI) of paragraph (a) of this subsection (7) or as provided in subparagraph (I) or (II) of paragraph (b) of this subsection (7) commits a class 5 felony if the trier of fact finds that the new offense involved any of the following acts:

(I) The defendant, who was in a position of trust, as described in section 18-3-401 (3.5), in relation to the child, participated in a continued pattern of conduct that resulted in the child's malnourishment or failed to ensure the child's access to proper medical care;

(II) The defendant participated in a continued pattern of cruel punishment or unreasonable isolation or confinement of the child;

(III) The defendant made repeated threats of harm or death to the child or to a significant person in the child's life, which threats were made in the presence of the child;

(IV) The defendant committed a continued pattern of acts of domestic violence, as that term is defined in section 18-6-800.3, in the presence of the child; or

(V) The defendant participated in a continued pattern of extreme deprivation of hygienic or sanitary conditions in the child's daily living environment.

(7.3) Felony child abuse is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10). Misdemeanor child abuse is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(7.5) If a defendant is convicted of the class 2 or class 3 felony of child abuse under subparagraph (I) or (III) of paragraph (a) of subsection (7) of this section, the court shall sentence the defendant in accordance with section 18-1.3-401 (8) (d).

(8) Repealed.

(9) If a parent is charged with permitting a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, pursuant to paragraph (a) of subsection (1) of this section, and the child was seventy-two hours old or younger at the time of the alleged offense, it shall be an affirmative defense to such charge that the parent safely, reasonably, and knowingly handed the child over to a firefighter, as defined in section 18-3-201 (1), or to a hospital staff member who engages in the admission, care, or treatment of patients, when such firefighter is at a fire station or such hospital staff member is at a hospital.

Source: L. 71: R&RE, p. 448, § 1. C.R.S. 1963: § 40-6-401. L. 73: p. 538, § 4. L. 75: (7) amended and (8) added, p. 620, § 15, effective July 21. L. 79: (7) amended, p. 729, § 8, effective July 1. L. 80: (1) and (7) R&RE and (8) amended, pp. 544, 545, §§ 1, 2, effective May 6. L. 85: (1), (4), and (5) amended, (7) R&RE, and (7.5) added, pp. 672, 673, §§ 1, 2, effective June 7. L. 87: (6) amended, p. 817, § 21, effective October 1.

L. 89: (6) R&RE, p. 924, § 2, effective June 7. **L. 90:** (8) repealed, p. 1037, § 6, effective April 3. **L. 91:** (1) amended, p. 422, § 1, effective May 24. **L. 95:** (7)(a)(I) amended and (7)(c) added, p. 1222, § 4, effective July 1. **L. 99:** (1) amended, p. 803, § 2, effective May 24. **L. 2000:** (9) added, p. 2004, § 1, effective June 3. **L. 2001:** (6) repealed, p. 334, § 1, effective July 1. **L. 2002:** (7.5) amended, p. 1515, § 198, effective October 1. **L. 2003:** (1)(c) and (7)(d) added, p. 2383, §§ 1, 2, effective July 1. **L. 2004:** (7.3) added, p. 636, § 9, effective August 4. **L. 2006:** (1)(c) amended, p. 1705, § 4, effective July 1; (7)(a)(V), (7)(a)(VI), (7)(b)(I), and (7)(b)(II) amended and (7)(e) added, p. 2047, § 1, effective July 1. **L. 2009:** (7)(a)(V), (7)(a)(VI), (7)(b), and (7)(e) amended, (HB 09-1163), ch. 343, p. 1797, § 2, effective July 1. **L. 2011:** (1)(b)(IV) amended, (HB 11-1303), ch. 264, p. 1157, § 33, effective August 10.

Cross references: (1) For the “Child Protection Act of 1987”, see part 3 of article 3 of title 19.

(2) For the statutory privilege between patient and physician and between husband and wife, see § 13-90-107.

(3) For the legislative declaration contained in the 2002 act amending subsection (7.5), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2006 act amending subsection (1)(c), see section 1 of chapter 341, Session Laws of Colorado 2006.

ANNOTATION

Law reviews. For article, “Child Abuse — The Legislative Response”, see 44 Den. L.J. 3 (1967).

This section is not unconstitutionally vague. *People v. Kailey*, 662 P.2d 168 (Colo. 1983).

Subsection (1)(a) is not unconstitutionally vague as applied to defendant stepmother who lived in the same house as abused child, failed to intervene in husband’s child abuse, and actively covered up the abuse. Defendant plainly permitted the child to be placed in a “situation that poses a threat of injury to the child’s life or health” and had adequate notice of the proscribed conduct. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Former subsection (1) constitutional and does not prescribe different degrees of punishment for same conduct. *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

Subsection (1)(c) does not unconstitutionally infringe on parents’ right to raise their children. The state has a *parens patriae* interest in protecting children from imminent physical harm. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment).

Subsection (1)(c) is not unconstitutionally overbroad because it proscribes as felony child abuse the manufacture or attempted manufacture of controlled substances in a home where a child resides without proscribing as child abuse the commission of other crimes in a home where a child resides. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment).

Defendant’s claim that subsection (1)(c) violated equal protection fails because subsections (1)(c) and (7)(a)(I) to (7)(a)(VI) do not

affect persons who are similarly situated. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment).

Prohibition of cruel punishment in former subsection (1)(c) constitutional. The prohibition in the child abuse statute against cruel punishment was sufficiently precise to satisfy due process requirements. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

Classification of child abuse as more serious than negligent homicide constitutional. The legislative classification of child abuse as a crime more serious in penalty than the offense of criminally negligent homicide is neither arbitrary nor unreasonable and does not violate equal protection of the laws. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Mann*, 646 P.2d 352 (Colo. 1982).

Criminally negligent homicide is a lesser included offense of criminally negligent child abuse resulting in death. *People v. Clements*, 732 P.2d 1245 (Colo. App. 1986).

Sections 18-6-401 and 18-3-405 do not proscribe identical conduct. The proscriptions of this section encompass conduct that is particularly abusive to children, that is directed specifically against a child, and that results in injury to that child. Criminally negligent homicide, on the other hand, proscribes in general terms a gross carelessness that causes death to anyone, adult or child. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

More serious penalty than reckless manslaughter constitutional. The legislative classification of felony child abuse as a crime warranting a more serious penalty than reckless manslaughter, though proscribing identical conduct, does not violate equal protection of the

laws. *People v. Christian*, 632 P.2d 1031 (Colo. 1981); *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Common-law limits of parental chastisement codified. The parental privilege set out in § 18-1-703(1)(a) and the definition of criminal child abuse in § 18-1-401 codify common-law principles concerning the limits of permissible parental chastisement. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

This section depends on no source of duty; therefore, defendant was sufficiently charged under the statute, despite the information's failure to allege the defendant's duty to act or the source of such duty. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Under this section, any person owes a legal duty to refrain from either: (1) Permitting a child to be unreasonably placed in a situation that poses a threat; or (2) engaging in a continued pattern of child abuse. This duty attaches even if the person causes no injury to the child victim. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Defendant sufficiently apprised of the charges against him because the information was framed in the words of the statute and the trial court had granted his request for a bill of particulars. *People v. Arevalo*, 725 P.2d 41 (Colo. App. 1986); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Prosecution has burden of establishing guilt beyond reasonable doubt as to each material element of this offense. *People v. Durbin*, 187 Colo. 230, 529 P.2d 630 (1974).

Prosecution must establish guilt of defendant raising affirmative defense beyond reasonable doubt. Where, in a prosecution for child abuse, the evidence raises the affirmative defense of justified physical force for disciplinary purposes, the prosecution must establish the guilt of the defendant beyond a reasonable doubt as to that issue as well as all other elements of the offense. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

"Child", as used in this section to describe a victim of abuse, includes a fetus that is injured while in the womb, is subsequently born and lived outside the womb, and then dies from the injuries sustained. While Colorado has no provisions criminalizing the injuring or killing of a fetus, the state common law "born alive" doctrine permits a criminal prosecution of the perpetrator when a child is born alive and then dies of the prenatal injuries and civil law in the state has held that such a victim is a person within Colorado's wrongful death statute. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009).

The term "health" includes both physical and mental well-being. *People v. Sherrod*, 204

P.3d 472 (Colo. App. 2007), rev'd on other grounds, 204 P.3d 466 (Colo. 2009).

The phrase "without justifiable excuse" in former subsection (1) of this section referred to the specific statute on justification, particularly § 18-1-703 (1)(a), which concerns the use of physical force in the special relationship of one who is entrusted with the care of a minor. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977).

Use of jury instruction containing phrase "without justifiable excuse" instead of word "unreasonably" from subsection (1)(a) was not plain error. *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002).

The word "may" in former subsection (1)(a) of this section was construed to mean that there was a reasonable probability that the child's life or health will be endangered from the situation in which the child is placed. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977); *People v. Jennings*, 641 P.2d 276 (Colo. 1982); *People v. Mann*, 646 P.2d 352 (Colo. 1982).

Lack of jury instruction on meaning of word "may" did not constitute plain error where evidence established a reasonable probability that child's life and health might be endangered and lack of instruction could not be said to have reasonably contributed to defendant's conviction of child abuse. *People v. Rubanowitz*, 688 P.2d 231 (Colo. 1984).

The phrase "endanger the child's . . . health" in former subsection (1)(a) of this section contained no constitutional infirmities. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977).

There is no constitutional impediment to the general assembly punishing conduct creating less than imminent danger, and it is a particularly appropriate standard where the protection of children is the statutory purpose. *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977).

"Endanger" in former subsection (1)(a) meant an imminent danger and "may endanger" in subsection (1)(b) meant a reasonable probability of harm. *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

"Except" deleted. By statutory construction, the court deleted the "except" clauses in former subsections (7)(a)(I), (7)(a)(III), and (7)(a)(V). *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

Child abuse definition sufficiently particular to furnish adequate notice to potential wrongdoers. The term "negligently" (amended to read "through criminal negligence" in 1980), as used in this section, is not irreconcilably at odds with "tortured" and "cruelly punished", and the statutory definition of child abuse is sufficiently particular to furnish adequate notice to potential wrongdoers of the proscribed conduct and to protect against discriminatory enforcement. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Mann*, 646 P.2d 352 (Colo. 1982).

“Knowingly”. The requirement of “knowingly” in former subsection (1) did not refer to the actor’s awareness that his conduct was practically certain to cause the proscribed result; instead, “knowingly” referred to the actor’s general awareness of the abusive nature of his conduct in relation to the child or his awareness of the circumstances in which he committed an act against the well-being of the child. *People v. Noble*, 635 P.2d 203 (Colo. 1981); *People v. Thompson*, 756 P.2d 353 (Colo. 1988).

The mental state “knowingly” is implied in former subsection (1)(c) because the statute required the accused to engage in the manufacture of a controlled substance. Both the terms “engage” and “manufacture” imply that the accused must be aware of the type of conduct participated in, and must seek to accomplish a particular task. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment to subsection (1)(c)).

The culpable mental states applicable to the crime of child abuse relate not to a particular result, but rather to the nature of the offender’s conduct in relation to the child or to the circumstances under which the act or omission occurred. *People v. Deskins*, 927 P.2d 368 (Colo. 1996).

Evidence that abuse resulted in serious bodily injury, as defined in § 18-1-901 (3)(p) sufficient to support charges of felony child abuse must relate to the extent of the injury at the time it occurred, not at the time of trial. *People v. Thompson*, 748 P.2d 793 (Colo. 1988).

Inaction may be act of mistreatment. The child abuse statute proscribes acts of mistreatment which include inaction as well as action. *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

“Tortured” and “cruelly punished”, as used in former subsection (1), referred to *actus reus*, as measured by the consequences wrought on the child. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981); *People v. Jennings*, 641 P.2d 276 (Colo. 1982).

Placing child in debilitating physical situation may be considered torture. A person may negligently cause or permit a child to be placed in a situation so debilitating to the child’s physical well-being that a reasonable juror, looking at the effect of the offender’s conduct on the child, would consider it torture or cruel punishment. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Conduct prohibited by former subsection (1)(b) was punished as provided in subsection (7)(b). *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984).

“Good faith” under former subsection (6) means an objectively reasonable belief that a child is not suffering from a condition which, if medically untreated, will endanger a child’s life or will pose a substantial risk of serious bodily harm to the child. A belief is objectively reason-

able when based on a reasonable assessment of the facts and circumstances known or discernible to the parent. *People v. Lybarger*, 807 P.2d 570 (Colo. 1991) (decided under law in effect prior to 1989 repeal and reenactment of subsection (6)).

Thus, treatment by spiritual means defense is inapplicable where a parent believes that the child is not in danger of death or serious bodily harm but such belief is not based on a reasonable assessment of the facts and circumstances that are known to the parent. *People v. Lybarger*, 807 P.2d 570 (Colo. 1991) (decided under law in effect prior to 1989 repeal and reenactment of subsection (6)).

Treatment by spiritual means was an affirmative defense under former subsection (6) if there was credible evidence that the parent had an honest and reasonable belief that the child was not suffering from a condition which, if untreated, would endanger the child’s life or pose a substantial risk of serious bodily harm to the child, that the parent was a duly accredited practitioner of a recognized church or religious denomination, and the parent elected to treat the child solely by spiritual means in accordance with tenets and practices of the parent’s church. Record shows sufficient evidence raised by defendant to submit affirmative defense to the jury. *People v. Lybarger*, 807 P.2d 570 (Colo. 1991) (decided under law in effect prior to 1989 repeal and reenactment of subsection (6)).

Subsection (7)(a) applies only when death or injury occurs and subsection (7)(b) applies when no such result occurs. *People v. Schwartz*, 678 P.2d 1000 (Colo. 1984); *People v. Lybarger*, 790 P.2d 855 (Colo. App. 1989), rev’d on other grounds, 807 P.2d 570 (Colo. 1991).

A class 3 felony conviction under subsection (7)(a)(III) requires a causal connection between each listed form of child abuse and the alleged serious bodily injury, and, because the prosecution failed to make that connection between the situation that posed a threat of injury to the child and a resulting serious bodily injury, the prosecution lacked sufficient evidence on their second alternative theory of liability. *People v. Dunaway*, 88 P.3d 619 (Colo. 2004).

No reasonable interpretation of subsection (1)(a) would lead to the conclusion that proof of injury or serious bodily injury for purposes of meeting elements in subsection (7)(a) is made or inferred through proof of the conduct listed in subsection (1)(a). *People v. Dunaway*, 88 P.3d 619 (Colo. 2004).

A person commits child abuse if he or she causes injury to a child’s life or health, or permits a child to be unreasonably placed in a situation which poses a threat of injury to the child’s life or health, and such offense does not depend on the offense resulting in death. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

Fact that a child victim dies is a sentence enhancement factor and not an element of the crime of child abuse. *People v. Robinson*, 874 P.2d 453 (Colo. App. 1993).

The distinction of a position of trust in subsection (7)(c) is not nominal and it sufficiently justifies the harsher penalty imposed under that subsection. *People v. Martinez*, 51 P.3d 1046 (Colo. App. 2001), rev'd on other grounds, 74 P.3d 316 (Colo. 2003).

The age distinction for the victims mentioned in subsection (7)(c) is based on differences that are real in fact and that are reasonably related to the more severe penalty associated with subsection (7)(c). *People v. Martinez*, 51 P.3d 1046 (Colo. App. 2001), rev'd on other grounds, 74 P.3d 316 (Colo. 2003).

Acts similar in character admissible to negate claim of justification. Where all the prior acts of child abuse the prosecution sought to introduce into evidence were committed against the same person, each act was occasioned by normal childhood behavior on the part of the victim, each act was similar in severity in that noticeable bruises and marks were left on the child's body, each act took place while the child's mother was absent, and, finally, each act was followed by the defendant's explanation that it was for disciplinary purposes, that acts were sufficiently similar in character to be admissible for purposes of establishing criminal culpability and of negating any claim of accident or justification. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981).

Acquittal on assault charge not bar to prosecution for knowing child abuse. A verdict of acquittal on a charge of assault does not bar reprosecution for knowing child abuse, since a finding that the defendant did not have the specific intent to cause serious injury is not an ultimate fact essential to proof of knowing child abuse because a conviction on that charge may be sustained by conduct that is done knowingly or negligently. *People v. Hoehl*, 629 P.2d 1083 (Colo. App. 1980).

Failure to include the phrase "without justifiable excuse" in a jury instruction on a crime of child abuse was not error where the affirmative defense of reasonable and appropriate discipline was not raised by the defense. *People v.*

Lybarger, 700 P.2d 910 (Colo. 1985), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Jury instruction delivered by trial court constructively amended the count of reckless child abuse resulting in death. The information charged one form of child abuse, causing an injury to a child's life or health, and the jury instruction stated another, uncharged form of child abuse, permitting a child to be unreasonably placed in a situation that may have endangered the child's life or health. *People v. Weinreich*, 98 P.3d 920 (Colo. App. 2004), aff'd, 119 P.3d 1073 (Colo. 2005).

Because the amendment prejudiced defendant's substantial rights, the error rises to plain error. The amendment occurred after the close of evidence, and, therefore, defendant was deprived of the opportunity to present evidence on whether he had unreasonably placed his deceased daughter in a situation that may have endangered her life or health. *People v. Weinreich*, 98 P.3d 920 (Colo. App. 2004), aff'd, 119 P.3d 1073 (Colo. 2005).

Consistency of verdicts. There is no logical inconsistency between the guilty verdicts for the crimes of felony child abuse and reckless manslaughter. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

A guilty verdict for felony child abuse is not inconsistent with an acquittal of extreme indifference murder nor second degree murder. *People v. Noble*, 635 P.2d 203 (Colo. 1981).

Evidence sufficient to support a general verdict of guilty on charge brought under subsection (1)(a) where the evidence challenged on appeal consisted of alternative methods of establishing a single element. Therefore, the rule that requires sufficient evidence to support each alternative theory of prosecution's case does not apply. *People v. Pineda*, 40 P.3d 60 (Colo. App. 2001).

Manufacturing a controlled substance is a lesser included offense of child abuse based on manufacturing a controlled substance. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment to subsection (1)(c)).

Applied in *People v. Sheldon*, 198 Colo. 519, 602 P.2d 869 (1979); *People v. Beland*, 631 P.2d 1130 (Colo. 1981); *People v. Raffaelli*, 647 P.2d 230 (Colo. 1982); *People v. Gordon*, 738 P.2d 404 (Colo. App. 1987).

18-6-401.1. Child abuse - limitation for commencing proceedings - evidence - statutory privilege. (1) For the purposes of this section, "child abuse" means child abuse as defined in section 18-6-401 (1).

(2) No person shall be prosecuted, tried, or punished for an act of child abuse other than the misdemeanor offenses specified in section 18-6-401 (7) (a) (V), (7) (a) (VI), and (7) (b), unless the indictment, information, complaint, or action for the same is found or instituted within ten years after commission of the offense. No person shall be prosecuted, tried, or punished for the misdemeanor offenses specified in section 18-6-401 (7) (a) (V), (7) (a) (VI), and (7) (b), unless the indictment, information, complaint, or action for the same is found or instituted within five years after the commission of the offense.

(3) Out-of-court statements made by a child describing any act of child abuse performed on the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, may be admissible in any proceeding in which the child is a victim of an act of child abuse pursuant to the provisions of section 13-25-129, C.R.S.

(4) All cases involving the commission of an act of child abuse shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed.

(5) The statutory privilege between the victim-patient and his physician and between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an act of child abuse.

Source: L. 85: Entire section added, p. 673, § 3, effective June 7.

Cross references: For provisions concerning sex offenses against children which are similar to the provisions of this section, see § 18-3-411; for the physician-patient and husband-wife privileges, see § 13-90-107.

18-6-401.2. Habitual child abusers - indictment or information - verdict of the jury. (1) For the purposes of this section, "child abuse" means child abuse as defined in section 18-6-401 (1).

(2) Every person convicted in this state of an act of child abuse who has been previously convicted upon charges prior to the commission of the present act, which were separately brought, either in this state or elsewhere, of an act of child abuse or who has been previously convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an unlawful act which, if committed within this state, would be an act of child abuse shall be adjudged an habitual child abuser. If the second or subsequent act of child abuse for which a defendant is convicted constitutes a class 3 felony under section 18-6-401 (7) (a) (II) or a class 4 felony under section 18-6-401 (7) (a) (IV), the sentence imposed shall be served in the department of corrections and shall not be less than the upper limit of the presumptive range for that class felony as set out in section 18-1.3-401. If the second or subsequent act of child abuse for which a defendant is convicted constitutes a misdemeanor, the sentence imposed shall be served in the county jail and shall not be less than the maximum sentence for that class misdemeanor as set out in section 18-1.3-501.

(3) Any previous conviction of an act of child abuse shall be set forth in apt words in the complaint, indictment, or information. For purposes of trial, a duly authenticated copy of the record of previous convictions and judgments of any court of record for any of said crimes of the party indicted, charged, or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. A duly authenticated copy of the records of institutions of treatment or incarceration, including, but not limited to, records pertaining to identification of the party indicted, charged, or informed against, shall be prima facie evidence of the facts contained therein and may be used in evidence against such party.

(4) Any person who is subject to the provisions of this section shall not be eligible for probation or suspension of sentence or deferred prosecution.

(5) The procedures specified in section 18-1.3-803 shall govern in a trial to which the provisions of this section are alleged to apply based on a previous conviction or convictions for an act of child abuse as set out in the complaint, indictment, or information.

Source: L. 85: Entire section added, p. 674, § 3, effective June 7. L. 96: (5) amended, p. 1846, § 19, effective July 1. L. 2002: (2) and (5) amended, p. 1515, § 199, effective October 1. L. 2003: (2) amended, p. 1428, § 9, effective April 29.

Cross references: (1) For provisions concerning habitual sex offenders against children which are similar to the provisions of this section, see § 18-3-412.

(2) For the legislative declaration contained in the 2002 act amending subsections (2) and (5), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-6-401.3. Video tape depositions - children - victims of child abuse. (1) When a defendant has been charged with an act of child abuse, as defined in section 18-6-401 (1), and when the victim at the time of the commission of the act is a child less than fifteen years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

(4) If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b) (1) of the Colorado rules of evidence.

(5) Nothing in this section shall prevent the admission into evidence of any videotaped statements of children that would qualify for admission pursuant to section 13-25-129, C.R.S., or any other statute or rule of evidence.

Source: L. 85: Entire section added, p. 675, § 3, effective June 7. L. 2000: (5) added, p. 453, § 8, effective April 24.

Cross references: For provisions concerning video tape depositions of child victims of sexual offenses which are similar to the provisions of this section, see § 18-3-413.

ANNOTATION

Law reviews. For article, "Children as Witnesses", see 31 Colo. Law. 15 (October 2002).

18-6-401.4. Payment of treatment costs for the victim or victims of an act of child abuse. (1) In addition to any other penalty provided by law, the court may order any person who is convicted of an act of child abuse, as defined in section 18-6-401 (1), to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of his offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims.

Source: L. 85: Entire section added, p. 675, § 3, effective June 7. L. 2003: (2) amended, p. 976, § 14, effective April 17.

Cross references: For provisions concerning payment of treatment costs for victims of sexual offenses against children which are similar to the provisions of this section, see § 18-3-414.

18-6-402. Trafficking in children. (Repealed)

Source: **L. 77:** Entire section added, p. 981, § 1, effective July 1. **L. 2006:** Entire section amended, p. 1308, § 2, effective May 30. **L. 2009:** (2) and (3) amended, (HB 09-1123), ch. 306, p. 1652, § 1, effective May 21. **L. 2010:** Entire section repealed, (SB 10-140), ch. 156, p. 540, § 13, effective April 21.

Editor's note: This section was relocated to § 18-3-502 in 2010.

18-6-403. Sexual exploitation of a child. (1) The general assembly hereby finds and declares: That the sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen years is incapable of giving informed consent to the use of his or her body for a sexual purpose; and that to protect children from sexual exploitation it is necessary to prohibit the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce.

(1.5) The general assembly further finds and declares that the mere possession or control of any sexually exploitative material results in continuing victimization of our children by the fact that such material is a permanent record of an act or acts of sexual abuse of a child; that each time such material is shown or viewed, the child is harmed; that such material is used to break down the will and resistance of other children to encourage them to participate in similar acts of sexual abuse; that laws banning the production and distribution of such material are insufficient to halt this abuse; that in order to stop the sexual exploitation and abuse of our children, it is necessary for the state to ban the possession of any sexually exploitative materials; and that the state has a compelling interest in outlawing the possession of any sexually exploitative materials in order to protect society as a whole, and particularly the privacy, health, and emotional welfare of its children.

(2) As used in this section, unless the context otherwise requires:

(a) "Child" means a person who is less than eighteen years of age.

(b) (Deleted by amendment, L. 2003, p. 1882, § 1, effective July 1, 2003.)

(c) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. "Erotic fondling" shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(d) "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(e) "Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement.

(f) "Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.

(g) "Sadomasochism" means:

(I) Real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or

(II) The real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(h) "Sexual excitement" means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(i) "Sexual intercourse" means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal, between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

(j) "Sexually exploitative material" means any photograph, motion picture, video, video tape, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(k) "Video", "video tape", or "motion picture" means any material that depicts a moving image of a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(3) A person commits sexual exploitation of a child if, for any purpose, he or she knowingly:

(a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material; or

(b) Prepares, arranges for, publishes, including but not limited to publishing through digital or electronic means, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or

(b.5) Possesses or controls any sexually exploitative material for any purpose; except that this paragraph (b.5) does not apply to peace officers or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or

(c) Possesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or

(d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance.

(4) (Deleted by amendment, L. 2003, p. 1882, § 1, effective July 1, 2003.)

(5) (a) Except as provided in paragraph (b) of this subsection (5), sexual exploitation of a child is a class 3 felony.

(b) Sexual exploitation of a child by possession of sexually exploitative material pursuant to paragraph (b.5) of subsection (3) of this section is a class 6 felony; except that said offense is a class 4 felony if:

(I) It is a second or subsequent offense; or

(II) The possession is of a video, video tape, or motion picture or more than twenty different items qualifying as sexually exploitative material.

(6) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

Source: L. 79: Entire section added, p. 737, § 1, effective July 1. L. 81: (3)(a) amended, p. 997, § 1, effective July 1. L. 84: (1) and (3) amended, p. 553, § 1, effective July 1. L. 88: (1.5) and (3)(b.5) added, (2)(c), (2)(d), (2)(f), and (5) amended, and (4) R&RE, pp. 730, 712, 731, §§ 1, 2, 4, 18, 3, effective July 1. L. 98: (2)(j), IP(3), (3)(b), and (3)(c) amended, p. 398, § 3, effective April 21. L. 2003: (2)(b), (3)(a), (3)(c), and (4) amended, p. 1882, § 1, effective July 1. L. 2006: (5) amended, p. 2043, § 1, effective July 1; (5) amended, p. 2056, § 7, effective July 1. L. 2009: (2)(j) and (5) amended and (2)(k) added, (HB 09-1163), ch. 343, p. 1799, § 3, effective July 1.

Editor's note: Amendments to subsection (5) by House Bill 06-1011 and House Bill 06-1092 were harmonized.

ANNOTATION

Constitutionality. This section does not constitute a denial of due process nor infringe upon first amendment freedom of speech. The sale of child pornography is not constitutionally protected conduct. *People v. Enea*, 665 P.2d 1026 (Colo. 1983).

The constitutionality of this section is preserved by the statutory requirements that a person knowingly took sexually explicit photographs of a child and that the content of those photographs, viewed objectively, would lead to sexual gratification or stimulation of a reasonable viewer. *People v. Grady*, 126 P.3d 218 (Colo. App. 2005).

Defining "sexual gratification or stimulation of one or more of the persons involved" objectively, so as to include a reasonable viewer of sexual materials that have been distributed, furthers the statute's legislative intent of protecting children from sexual exploitation and does not cause the statute to be unconstitutionally overbroad and vague. *People v. Grady*, 126 P.3d 218 (Colo. App. 2005).

Subsection (1) is a statement of legislative purpose, and does not alter the elements of the crime as set forth in subsection (3). *People v. Enea*, 665 P.2d 1026 (Colo. 1983).

Section is not unconstitutionally vague. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

Subsection (2)(d) that defines "erotic nudity" is not unconstitutionally overbroad. The category of "sexual conduct" proscribed through the definition of "erotic nudity" in subsection (2)(d) is suitably limited to conduct that is not constitutionally protected. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

Subsection (3)(a) is not constitutionally overbroad on its face because it prohibits only the use of real children in the production of pornography and does not prohibit the making or possession of photographs that "appear to be" of a minor engaged in sexually explicit conduct. *People v. Campbell*, 94 P.3d 1186 (Colo. App. 2004).

Subsection (3)(b) is not unconstitutionally overbroad or vague on its face when used to prosecute for making materials depicting erotic nudity as defined by subsection (2)(d). *People v. Batchelor*, 800 P.2d 599 (Colo. 1990).

Subsection (3)(b) is not overbroad or vague as applied to the defendant who was charged with sexual exploitation of a child because he knowingly made photographs of his daughter for no reason other than defendant's sexual gratification. *People v. Batchelor*, 800 P.2d 599 (Colo. 1990).

Based on the plain language of subsections (3)(b) and (3)(b.5), the general assembly intended the prohibited behavior relating to each discrete item of sexually exploitative material to

constitute an allowable unit of prosecution. Each sexually exploitative image is a permanent record and, therefore, constitutes a discrete act of victimization of the child. *People v. Renander*, 151 P.3d 657 (Colo. App. 2006).

Subsection (3)(b) does not apply to the duplication of photographs by the prosecution for use by defense counsel in preparation for trial when the court has taken adequate precautions to limit their use. *People v. Arapahoe County Court*, 74 P.3d 429 (Colo. App. 2003).

"Arranges for" in subsection (3)(b) does not include either arranging for the distribution of material, or arranging to obtain material. *People v. Mantos*, 250 P.3d 586 (Colo. App. 2009).

The requisite mental state of "knowingly" in subsection (3) must be deemed to apply to every element of the offense of sexual exploitation of a child, including the element of age, absent a clear intent to the contrary. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Section 18-3-406 (1) eliminates the culpable mental state as to age prescribed by subsection (3), "knowingly", and replaces it with that of § 18-3-406 (1), "lack of reasonable belief". *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Section 18-3-406 (1), by providing for the affirmative defense of reasonable belief, manifests clear legislative intent that the culpable mental state of "knowingly" in subsection (3) does not apply to the age of the victim. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

Even if the individual has not developed the film, a prosecution under subsection (3)(a) may be predicated upon an individual's photographing a child engaged in sexually explicit conduct. The critical question for the jury to resolve is whether the individual photographed the child for the purpose of producing a visual depiction of explicit sexual conduct. *People v. St. James*, 75 P.3d 1122 (Colo. App. 2002).

"Prepares" as used in subsection (3)(b) means engaging in the process of creating any sexually exploitative material. *People v. Mantos*, 250 P.3d 586 (Colo. App. 2009).

Evidence that a person has knowingly received prohibited material in an e-mail could be accepted as proof that the person knowingly possessed the material, because a person who knowingly receives an e-mail is aware of the nature of its content and has immediate and knowing dominion or control over it. *Fabiano v. Armstrong*, 141 P.3d 907 (Colo. App. 2006).

Definition of "erotic nudity" does not require that the "real or simulated overt sexual gratification or stimulation" be depicted in the material, but only that the overt sexual gratification or stimulation be of any of the

persons involved in the activity. *People v. Batchelor*, 800 P.2d 599 (Colo. 1990).

A display or picture qualifies as “erotic nudity” under subsection (2)(d) if: (1) The display or picture depicts the human breasts or undeveloped or developing breast area of a child; and (2) the display or picture is for the purpose of real or simulated overt sexual gratification of stimulation of one or more of the persons involved. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

For purposes of this section, “possession” means the non-exclusive control or dominion over sexually exploitative material. *People v. Marsh*, ___ P.3d ___ (Colo. App. 2011).

The presence of digital images in an internet cache can constitute evidence of a prior act of possession. There was enough evidence that the jury could infer that the defendant knowingly viewed the images in the internet cache. *People v. Marsh*, ___ P.3d ___ (Colo. App. 2011).

The requirement of “possesses or controls any sexually exploitative material” in subsection (3)(b.5) does not contain any requirement that the material be retained for any minimum period of time. *Fabiano v. Armstrong*, 141 P.3d 907 (Colo. App. 2006).

Court need not find that photos taken of minor by defendant were obscene in order for defendant to be prosecuted for sexual exploitation of a child. *People v. Gagnon*, 997 P.2d 1278 (Colo. App. 1999).

18-6-404. Procurement of a child for sexual exploitation. Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another person a child for the purpose of sexual exploitation of a child commits procurement of a child for sexual exploitation, which is a class 3 felony.

Source: L. 83: Entire section added, p. 696, § 9, effective June 15.

18-6-405. Reports of convictions to department of education. (1) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this part 4 and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

(2) Repealed.

Source: L. 90: Entire section added, p. 1026, § 9, effective July 1. L. 96: Entire section amended, p. 1291, § 4, effective January 1, 1997. L. 2000: (2) repealed, p. 1722, § 4, effective June 1; (1) amended, p. 1847, § 34, effective August 2.

PART 5

ADULTERY

18-6-501. Adultery. Any sexual intercourse by a married person other than with that person’s spouse is adultery, which is prohibited.

Conduct proscribed by this section is different than conduct proscribed by § 18-3-405, sexual assault on a child, and imposing different penalties for the two sections does not offend equal protection. *People v. Slusher*, 844 P.2d 1222 (Colo. App. 1992).

Defendant can be prosecuted under this section for photographing his 18-year-old wife having sex with a 15-year-old girl even if the defendant’s wife could not be prosecuted for having sex with the girl pursuant to § 18-3-402 (1)(e). *People v. Campbell*, 94 P.3d 1186 (Colo. App. 2004).

When there is nothing in the statute nor any evidence in the record that would support requiring defendants to inquire regarding the victim’s age, the convictions of defendants cannot be sustained based solely on their failure to do so. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

A person convicted of violating 18 U.S.C. § 2252 (a)(2) has engaged in conduct that, if committed in Colorado, would constitute sexual exploitation of a child in violation of subsection (3)(b.5) of this section and is, therefore, subject to the registration requirement of § 16-22-103 (1)(b). *Fabiano v. Armstrong*, 141 P.3d 907 (Colo. App. 2006).

Court could properly impose consecutive sentences for multiple sexual exploitation convictions since the crime recognizes that each sexually exploitive image of a child constitutes a discrete act of victimization of the child. *People v. Rabes*, 258 P.3d 937 (Colo. App. 2010).

Source: L. 71: R&RE, p. 449, § 1. C.R.S. 1963: § 40-6-501.

ANNOTATION

Annotator's note. Since § 18-6-501 is similar to former C.L. § 6837, a relevant case construing that provision has been included in the annotations to this section.

Purpose of section. This section is designed to prohibit and punish the disgraceful and scandalous conduct of those who would, by their evil and immoral example, debase and demoralize society. *People v. Bright*, 77 Colo. 563, 238 P. 71 (1925).

Jury determines weight of evidence. In a criminal prosecution for adultery under former provisions of this section, if there was sufficient evidence to justify the jury in finding that the parties lived together in an open state of adultery, the court erred in dismissing the case, since it was for the jury to determine the weight of the evidence. *People v. Bright*, 77 Colo. 563, 238 P. 71 (1925).

PART 6

HARBORING A MINOR

18-6-601. Harboring a minor. (1) (a) A person commits the crime of harboring a minor if the person knowingly provides shelter to a minor without the consent of a parent, guardian, custodian of the minor, or the person with whom the child resides the majority of the time pursuant to a court order allocating parental responsibilities and if the person intentionally:

(I) Fails to release the minor to a law enforcement officer after being requested to do so by the officer; or

(II) Fails to disclose the location of the minor to a law enforcement officer when requested to do so, if the person knows the location of the minor and had either taken the minor to that location or had assisted the minor in reaching that location; or

(III) Obstructs a law enforcement officer from taking the minor into custody; or

(IV) Assists the minor in avoiding or attempting to avoid the custody of a law enforcement officer; or

(V) Fails to notify the parent, guardian, custodian of the minor, or the person with whom the child resides the majority of the time pursuant to a court order allocating parental responsibilities or a law enforcement officer that the minor is being sheltered within twenty-four hours after shelter has been provided.

(b) If the shelter provided to the minor is by a licensed child care facility, including a licensed homeless youth shelter, the minor, despite the minor's status, may reside at such facility or shelter for a period not to exceed two weeks after the time of intake, pursuant to the procedures set forth in article 5.7 of title 26, C.R.S.

(c) It is a defense to a prosecution under this section that the defendant had custody of the minor or lawful parenting time with the minor pursuant to a court order.

(2) Harboring a minor is a class 2 misdemeanor.

Source: L. 86: Entire part added, p. 780, § 1, effective April 14; (3) amended, p. 1225, § 46, effective May 30. **L. 94:** (2)(b) amended, p. 2656, § 139, effective July 1. **L. 96:** (2)(c) amended, p. 1842, § 7, effective July 1. **L. 97:** Entire section amended, p. 975, § 1, effective May 22. **L. 98:** IP(1)(a), (1)(a)(V), and (1)(c) amended, p. 1403, § 57, effective February 1, 1999.

PART 7

CONTRIBUTING TO DELINQUENCY

18-6-701. Contributing to the delinquency of a minor. (1) Any person who induces, aids, or encourages a child to violate any federal or state law, municipal or county

ordinance, or court order commits contributing to the delinquency of a minor. For the purposes of this section, the term "child" means any person under the age of eighteen years.

(2) Contributing to the delinquency of a minor is a class 4 felony.

(3) When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this section and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: L. 87: Entire part added, p. 817, § 22, effective October 1. L. 90: (3) added, p. 1026, § 10, effective July 1. L. 92: (1) amended, p. 404, § 17, effective June 3. L. 2000: (3) amended, p. 1847, § 35, effective August 2.

ANNOTATION

Law reviews. For article, "Commitment of Misdemeanants to the Colorado State Reformatory", see 29 Dicta 294 (1952).

Annotator's note. The following annotations include cases decided under former § 19-3-119.

A law enforcement officer does not violate this section when, in the completion of undercover activities, he encourages a child to violate a law or ordinance. *People in Interest of M.N.*, 761 P.2d 1124 (Colo. 1988); *People in Interest of J.A.L.*, 761 P.2d 1137 (Colo. 1988) (both cases decided under former § 19-3-119).

An adult may be charged with violating this statute regardless of whether the minor was actually charged with or convicted of a crime or whether the minor was old enough to be charged with or convicted of a crime. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

This is a criminal statute. *Miller v. People in Interest of Edwin*, 102 Colo. 259, 78 P.2d 624 (1938).

The statute does not require that a minor child be charged or convicted of a crime or that the child be older than ten years old for a person to be found guilty of contributing to the delinquency of a minor. *People v. Miller*, 830 P.2d 1092 (Colo. App. 1991).

The required mens rea for an offense under this section is knowingly; except that the mens rea does not apply to the defendant's knowledge of the age of the minor victim. The purpose of this section is to protect minors. Thus, the defendant's awareness of the victim's age is not the focus of the statute, and the intent of the general assembly is to hold the defendant responsible if he or she engaged in the prohibited conduct and the victim's age fell within the

statutorily defined age element. *People v. Hastings*, 983 P.2d 78 (Colo. App. 1999), aff'd, 19 P.3d 662 (Colo. 2000); *People v. Gorman*, 983 P.2d 92 (Colo. App. 1999), aff'd, 19 P.3d 662 (Colo. 2000).

The affirmative defense of reasonable belief with regard to the age of the victim, created in this section, applies to an offense charged under this section. But the trial court did not err in refusing to instruct the jury on the affirmative defense where the defendant failed to present sufficient evidence of the defense at trial. *People v. Hastings*, 983 P.2d 78 (Colo. App. 1999), aff'd, 19 P.3d 662 (Colo. 2000); *People v. Gorman*, 983 P.2d 92 (Colo. App. 1999), aff'd, 19 P.3d 662 (Colo. 2000).

Section materially the same as prior section of law on same subject, and specific violations of liquor code must be prosecuted under that law and not this provision. General assembly's reenactment of this section does not change the result. *People v. O'Donnell*, 926 P.2d 114 (Colo. App. 1996).

Evidence held insufficient. *Moore v. People*, 111 Colo. 584, 144 P.2d 776 (1943).

Possession of marijuana is not a lesser included offense of contributing to the delinquency of a minor under this section or transferring marijuana under § 18-18-406 (7)(b). *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

Applied in *Gibson v. People*, 44 Colo. 600, 99 P. 333 (1908); *Sass v. People*, 48 Colo. 125, 109 P. 263 (1910); *McClelland v. People*, 49 Colo. 538, 113 P. 640 (1911); *Sharp v. People*, 90 Colo. 356, 9 P.2d 483 (1932); *May v. People*, 636 P.2d 672 (Colo. 1981); *People v. Corpening*, 837 P.2d 249 (Colo. App. 1992).

PART 8

DOMESTIC VIOLENCE

Cross references: For provisions relating to domestic abuse programs, see article 7.5 of title 26.

18-6-800.3. Definitions. As used in this part 8, unless the context otherwise requires:

(1) “Domestic violence” means an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. “Domestic violence” also includes any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

(2) “Intimate relationship” means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.

Source: **L. 89:** Entire section added, p. 909, § 1, effective April 4. **L. 94:** (1) amended, p. 2020, § 1, effective June 3; entire section amended, p. 2025, § 1, effective July 1. **L. 95:** IP and (1) amended, p. 566, § 1, effective July 1. **L. 2007:** (1) amended, p. 726, § 7, effective July 1.

Editor’s note: Subsection (1) was amended in Senate Bill 94-51. Those amendments were superseded by the amendment of the entire section in House Bill 94-1253.

ANNOTATION

Law reviews. For article, “Injunctive Remedies for Interpersonal Violence”, see 18 Colo. Law. 1743 (1989). For article, “1994 Legislative Strengthens Domestic Violence Protective Orders”, see 23 Colo. Law. 2327 (1994).

Evidence of a sexual relationship is not necessary to establish the existence of an intimate relationship. People v. Disher, 224 P.3d 254 (Colo. 2010).

A sexual relationship may be an indicator, but never a necessary condition, of an intimate relationship for purposes of the Colorado domestic violence statute. The relationship must be more than that of a roommate, friend, or acquaintance, and there must be a romantic attachment or shared parental status

between the parties. People v. Disher, 224 P.3d 254 (Colo. 2010).

When determining whether a relationship is an “intimate relationship”, a court may take into account the following three factors:

(1) The length of time the relationship has existed or did exist; (2) the nature or type of the relationship; and (3) the frequency of interaction between the parties. People v. Disher, 224 P.3d 254 (Colo. 2010).

The existence of a dating relationship indicates the kind of romantic attachment required by the statute. Whether that dating relationship was sexual in nature should not have been the determining factor. People v. Disher, 224 P.3d 254 (Colo. 2010).

18-6-801. Domestic violence - sentencing. (1) (a) In addition to any sentence that is imposed upon a person for violation of any criminal law under this title, any person who is convicted of any crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1), or any crime against property, whether or not such crime is a felony, when such crime is used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship shall be ordered to complete a treatment program and a treatment evaluation that conform with the standards adopted by the domestic violence offender management board as required by section 16-11.8-103 (4), C.R.S. If an intake evaluation conducted by an approved treatment program provider discloses that sentencing to a treatment program would be inappropriate, the person shall be referred back to the court for alternative disposition.

(b) The court may order a treatment evaluation to be conducted prior to sentencing if a treatment evaluation would assist the court in determining an appropriate sentence. The person ordered to undergo such evaluation shall be required to pay the cost of the treatment evaluation. If such treatment evaluation recommends treatment, and if the court so finds, the person shall be ordered to complete a treatment program that conforms with the standards adopted by the domestic violence offender management board as required by section 16-11.8-103 (4), C.R.S.

(c) Nothing in this subsection (1) shall preclude the court from ordering domestic violence treatment in any appropriate case.

(2) Subsection (1) of this section shall not apply to persons sentenced to the department of corrections.

(3) A person charged with the commission of a crime, the underlying factual basis of which includes an act of domestic violence as defined in section 18-6-800.3 (1), shall not be entitled to plead guilty or plead nolo contendere to an offense which does not include the domestic violence designation required in section 16-21-103, C.R.S., unless the prosecuting attorney makes a good faith representation on the record that such attorney would not be able to establish a prima facie case that the person and the alleged victim were currently or formerly involved in an intimate relationship if the defendant were brought to trial on the original domestic violence offense and upon such a finding by the court. The prosecuting attorney's record and the court's findings shall specify the relationship in the alleged domestic violence case which the prosecuting attorney is not able to prove beyond a reasonable doubt and the reasons therefor. No court shall accept a plea of guilty or nolo contendere to an offense which does not include the domestic violence designation required in section 16-21-103, C.R.S., when the facts of the case indicate that the underlying factual basis includes an act of domestic violence as defined in section 18-6-800.3 (1) unless there is a good faith representation by the prosecuting attorney that he or she would be unable to establish a prima facie case if the defendant were brought to trial on the original offense.

(4) No person accused or convicted of a crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1), shall be eligible for home detention in the home of the victim pursuant to section 18-1.3-105 or 18-1.3-106 or for deferred prosecution pursuant to section 18-1.3-101. Nothing in this subsection (4) is intended to prohibit a court from ordering a deferred sentence for a person accused or convicted of a crime, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as defined in section 18-6-800.3 (1).

(5) Before granting probation, the court shall consider the safety of the victim and the victim's children if probation is granted.

(6) Nothing in this section shall preclude the ability of a municipality to enact concurrent ordinances.

(7) In the event a person is convicted in this state on or after July 1, 2000, of any offense which would otherwise be a misdemeanor, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence as defined in section 18-6-800.3 (1), and that person has been three times previously convicted, upon charges separately brought and tried and arising out of separate and distinct criminal episodes, of a felony or misdemeanor or municipal ordinance violation, the underlying factual basis of which was found by the court on the record to include an act of domestic violence, the prosecuting attorney may petition the court to adjudge the person an habitual domestic violence offender, and such person shall be convicted of a class 5 felony. If the person is adjudged an habitual domestic violence offender, the court shall sentence the person pursuant to the presumptive range set forth in section 18-1.3-401 for a class 5 felony. The former convictions and judgments shall be set forth in apt words in the indictment or information.

Source: **L. 88:** Entire part added, p. 732, § 1, effective July 1. **L. 89:** Entire section R&RE, p. 909, § 2, effective April 4. **L. 94:** (1) amended and (3) to (6) added, p. 2026, § 2, effective July 1. **L. 95:** (3) amended, p. 566, § 2, effective July 1. **L. 2000:** (7) added, p. 1011, § 1, effective July 1; (1)(a) and (1)(b) amended, p. 913, § 2, effective January 1, 2001. **L. 2002:** (4) and (7) amended, p. 1515, § 200, effective October 1. **L. 2009:** (1)(a) and (1)(b) amended, (SB 09-292), ch. 369, p. 1948, § 32, effective August 5.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (4) and (7), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, “What Family Law Practitioners Should Know About Domestic Violence”, see 19 Colo. Law. 53 (1990). For article, “Plea Bargaining, Legislative Limits, and the Separation of Powers”, see 32 Colo. Law. 63 (March 2003). For article, “The New Domestic Violence Treatment Standards for 2010”, see 39 Colo. Law. 45 (September 2010).

Any form of treatment ordered for domestic violence offenders must conform with the standards adopted by the domestic violence offender management board, despite the seeming inconsistency between subsections (1)(a) and (1)(b) regarding recommendation for treatment and what treatment includes. *Partners in Change, L.L.C. v. Philp*, 197 P.3d 232 (Colo. App. 2008).

Subsection (3) does not provide that the absence of the required domestic violence designation in the complaint divests the court of jurisdiction. Because defendant did not object to the form of the complaint and did not show how he was prejudiced, the technical defect could be corrected by remanding the case to the trial court to allow the prosecution to amend the complaint to reflect that the underlying facts involved domestic violence. *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

When there is no dispute that the underlying factual basis for the charges against defendant

included an act of domestic violence and defendant is appropriately advised concerning the nature and consequences of his or her plea such that the placement of a domestic violence designation on the complaint will not alter defendant's understanding of the agreement, the appropriate remedy for the trial court's technical violation of subsection (3) is to remand the case to allow the prosecution to amend the complaint to include a domestic violence designation. *People v. Campbell*, 174 P.3d 860 (Colo. App. 2007).

Under § 16-5-301 and subsection (7) of this section, in order to demand and receive a preliminary hearing, defendant must be charged with a class 4, 5, or 6 felony. Here, the substantive offense with which defendant was charged was a misdemeanor. *People v. Garcia*, 176 P.3d 872 (Colo. App. 2007).

Under subsection (7), defendant could only stand convicted of a class 5 felony if first convicted of the misdemeanor and subsequently adjudged a habitual offender by the court. Because count one of the information did not charge defendant with a substantive felony offense requiring mandatory sentencing, the exception in § 16-5-301 (1)(a) allowing for a preliminary hearing under such circumstances is inapplicable. *People v. Garcia*, 176 P.3d 872 (Colo. App. 2007).

18-6-801.5. Domestic violence - evidence of similar transactions. (1) The general assembly hereby finds that domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness. The general assembly therefore declares that evidence of similar transactions can be helpful and is necessary in some situations in prosecuting crimes involving domestic violence.

(2) In criminal prosecutions involving domestic violence in which the defendant and the victim named in the information have engaged in an intimate relationship as of the time alleged in the information, evidence of any other acts of domestic violence between the defendant and the victim named in the information, and between the defendant and other persons, constitute other acts or transactions for the purposes of this section, and the court may authorize the admission of evidence as provided in subsection (3) of this section.

(3) The proponent of evidence of other acts or transactions under this section shall advise the trial court by offer of proof of such evidence and shall specify whether the evidence is offered to show a common plan, scheme, design, identity, modus operandi, motive, or guilty knowledge or for some other purpose.

(4) Upon the offer of proof under subsection (3) of this section, the trial court shall determine whether the probative value of the evidence of similar acts or transactions is substantially outweighed by the danger of unfair prejudice to the defendant, confusion of the issues, or misleading of the jury if the evidence is allowed or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(5) Upon admitting evidence of other acts or transactions into evidence pursuant to this section and again in the general charge to the jury, the trial court shall direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it.

Source: L. 94: Entire section added, p. 2020, § 2, effective June 3. L. 2001: (2) amended, p. 730, § 1, effective July 1.

ANNOTATION

A court should consider evidence of previously charged acts of domestic violence. This section does not abrogate the standard set forth in *People v. Garner*, 806 P.2d 366 (Colo. 1991), that the prosecution has the burden of proving by a preponderance of the evidence that the prior acts actually occurred. This section does not require, however, that the court hold an evidentiary hearing on an offer of proof. *People v. Ma*, 104 P.3d 273 (Colo. App. 2004), rev'd on other grounds, 121 P.3d 205 (Colo. 2005).

Court applies *People v. Spoto* (795 P.2d 1314 (Colo. 1990)) test in determining admissibility of prior acts and this section does not limit admissibility of evidence of other acts to married partners. *People v. Raglin*, 21 P.3d 419 (Colo. App. 2000).

Evidence of prior transaction properly admitted. *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000).

Evidence of a prior act of domestic violence may be relevant to prove an intent to harm

the victim, rather than to frighten him or her. *People v. Torres*, 141 P.3d 931 (Colo. App. 2006).

Trial court's failure to give contemporaneous limiting instructions in connection with testimony about two prior instances of domestic violence did not cast a serious doubt on the reliability of defendant's conviction and, thus, was not plain error. Although the trial court did not give the limiting instruction during the testimony of two witnesses, it alleviated any potential prejudice by (1) giving the instruction during the testimony of a third witness; (2) stating, at that time, that the instruction applied not only to the testimony of that witness but also to the testimony of the other two witnesses; and (3) providing the jury with a written instruction at the close of the evidence explicitly reminding them that the testimony of the three witnesses had been admitted only for a limited purpose. *People v. Moore*, 117 P.3d 1 (Colo. App. 2004).

18-6-801.6. Domestic violence - summons and complaint. Any person completing or preparing a summons, complaint, summons and complaint, indictment, information, or application for an arrest warrant shall indicate on the face of such document whether the facts forming the basis of the alleged criminal act, if proven, could constitute domestic violence as defined in section 18-6-800.3 (1).

Source: L. 94: Entire section added, p. 2027, § 3, effective July 1.

18-6-802. Domestic violence - local board - treatment programs - liability immunity - repeal. (Repealed)

Source: L. 88: Entire part added, p. 732, § 1, effective July 1. **L. 89:** (3)(a) amended, p. 910, § 3, effective April 4. **L. 94:** (1)(a) amended, p. 2656, § 140, effective July 1. **L. 96:** (2)(e) repealed, p. 1263, § 172, effective August 7. **L. 2000:** (4) added, p. 913, § 3, effective July 1.

Editor's note: Subsection (4) provided for the repeal of this section, effective January 1, 2001. (See L. 2000, p. 913.)

18-6-802.5. Domestic violence - treatment programs. Any defendant who is sentenced to a treatment program pursuant to section 18-6-801 or who is ordered to complete an evaluation pursuant to section 18-6-801 (1) shall pay for the evaluation and treatment programs on a sliding fee basis, as provided in the standardized procedures for the treatment evaluation of domestic violence offenders and the guidelines and standards for a system of programs for the treatment of domestic violence offenders adopted by the domestic violence offender management board pursuant to section 16-11.8-103, C.R.S.

Source: L. 2001: Entire section added, p. 980, § 3, effective August 8.

18-6-803. Commission - manual of standards for treatment of domestic violence perpetrators - repeal. (Repealed)

Source: L. 88: Entire part added, p. 733, § 1, effective July 1. L. 2000: (1) amended and (5) added, p. 913, § 4, effective July 1.

Editor's note: Subsection (5) provided for the repeal of this section, effective January 1, 2001. (See L. 2000, p. 913.)

18-6-803.5. Crime of violation of a protection order - penalty - peace officers' duties. (1) A person commits the crime of violation of a protection order if, after the person has been personally served with a protection order that identifies the person as a restrained person or otherwise has acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identifies the person as a restrained person, the person:

(a) Contacts, harasses, injures, intimidates, molests, threatens, or touches the protected person or protected property, including an animal, identified in the protection order or enters or remains on premises or comes within a specified distance of the protected person, protected property, including an animal, or premises or violates any other provision of the protection order to protect the protected person from imminent danger to life or health, and such conduct is prohibited by the protection order; or

(b) Except as permitted pursuant to section 18-13-126 (1) (b), hires, employs, or otherwise contracts with another person to locate or assist in the location of the protected person.

(1.5) As used in this section:

(a) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

(a.5) (I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person or protected animal, or from entering or remaining on premises, or from coming within a specified distance of a protected person or protected animal or premises or any other provision to protect the protected person or protected animal from imminent danger to life or health, that is issued by a court of this state or a municipal court, and that is issued pursuant to:

(A) Article 14 of title 13, C.R.S., section 18-1-1001, section 19-2-707, C.R.S., section 19-4-111, C.R.S., or rule 365 of the Colorado rules of county court civil procedure;

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S., as those sections existed prior to July 1, 2004;

(C) An order issued as part of the proceedings concerning a criminal municipal ordinance violation; or

(D) Any other order of a court that prohibits a person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises.

(II) For purposes of this section only, "protection order" includes any order that amends, modifies, supplements, or supersedes the initial protection order. "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as defined in section 13-14-104, C.R.S.

(b) "Registry" means the computerized information system created in section 18-6-803.7 or the national crime information center created pursuant to 28 U.S.C. sec. 534.

(c) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(d) (Deleted by amendment, L. 2003, p. 1003, § 6, effective July 1, 2003.)

(2) (a) Violation of a protection order is a class 2 misdemeanor; except that, if the restrained person has previously been convicted of violating this section or a former version of this section or an analogous municipal ordinance, or if the protection order is issued pursuant to section 18-1-1001, the violation is a class 1 misdemeanor.

(a.5) A second or subsequent violation of a protection order is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(b) (Deleted by amendment, L. 95, p. 567, 3, effective July 1, 1995.)

(c) Nothing in this section shall preclude the ability of a municipality to enact concurrent ordinances. Any sentence imposed for a violation of this section shall run consecutively and not concurrently with any sentence imposed for any crime which gave rise to the issuing of the protection order.

(3) (a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

(d) The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made, or the arrested person may be taken to the jail in the county where the protection order was issued. The law enforcement agency or any other locally designated agency shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person. The prosecuting attorney shall present any available arrest affidavits and the criminal history of the restrained person to the court at the time of the first appearance of the restrained person before the court.

(e) The arresting agency arresting the restrained person shall forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency shall give a copy of the agency's report, witness list, and charging list to the protected party. The agency shall delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.

(4) If a restrained person is on bond in connection with a violation or attempted violation of a protection order in this or any other state and is subsequently arrested for violating or attempting to violate a protection order, the arresting agency shall notify the prosecuting attorney who shall file a motion with the court which issued the prior bond for the revocation of the bond and for the issuance of a warrant for the arrest of the restrained person if such court is satisfied that probable cause exists to believe that a violation of the protection order issued by the court has occurred.

(5) A peace officer arresting a person for violating a protection order or otherwise enforcing a protection order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

(6) (a) A peace officer is authorized to use every reasonable means to protect the alleged victim or the alleged victim's children to prevent further violence. Such peace officer may transport, or obtain transportation for, the alleged victim to shelter. Upon the request of the protected person, the peace officer may also transport the minor child of the protected person, who is not an emancipated minor, to the same shelter if such shelter is

willing to accept the child, whether or not there is a custody order or an order allocating parental responsibilities with respect to such child or an order for the care and control of the child and whether or not the other parent objects. A peace officer who transports a minor child over the objection of the other parent shall not be held liable for any damages that may result from interference with the custody, parental responsibilities, care, and control of or access to a minor child in complying with this subsection (6).

(b) For purposes of this subsection (6), “shelter” means a battered women’s shelter, a friend’s or family member’s home, or such other safe haven as may be designated by the protected person and which is within a reasonable distance from the location at which the peace officer found the victim.

(7) The protection order shall contain in capital letters and bold print a notice informing the protected person that such protected person may either initiate contempt proceedings against the restrained person if the order is issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order is issued in a criminal action.

(8) A protection order issued in the state of Colorado shall contain a statement that:

(a) The order or injunction shall be accorded full faith and credit and be enforced in every civil or criminal court of the United States, another state, an Indian tribe, or a United States territory pursuant to 18 U.S.C. sec. 2265;

(b) The issuing court had jurisdiction over the parties and subject matter; and

(c) The defendant was given reasonable notice and opportunity to be heard.

(9) A criminal action charged pursuant to this section may be tried either in the county where the offense is committed or in the county in which the court that issued the protection order is located, if such court is within this state.

Source: **L. 91:** Entire section added, p. 418, § 1, effective May 31. **L. 92:** Entire section amended, p. 294, § 4, effective April 23; (1) and (2) amended, p. 404, § 18, effective June 3; entire section amended, p. 177, § 3, effective July 1. **L. 94:** (2) and (3) amended and (6) added, p. 2027, § 4, effective July 1; entire section amended, p. 2010, § 7, effective January 1, 1995. **L. 95:** (1), (2), and (3)(d) amended, p. 567, § 3, effective July 1. **L. 96:** (3)(d) amended, p. 736, § 6, effective July 1; (1.5)(d) amended, p. 1692, § 26, effective January 1, 1997. **L. 98:** (1.5)(b), (1.5)(d), and (3)(c) amended and (8) added, p. 1232, § 3, effective July 1; (6)(a) amended, p. 1404, § 58, effective February 1, 1999. **L. 99:** (1.5)(d) amended, p. 502, § 11, effective July 1. **L. 2000:** (1) and (1.5)(d) amended, p. 1011, § 2, effective July 1. **L. 2003:** Entire section amended, p. 1003, § 6, effective July 1. **L. 2004:** (1.5)(a.5) amended, p. 555, § 12, effective July 1; (2)(a.5) added, p. 636, § 10, effective August 4. **L. 2005:** (3)(d) amended and (9) added, p. 427, § 6, effective April 29. **L. 2006:** (1) amended, p. 1057, § 2, effective July 1. **L. 2007:** (1)(a) and (1.5)(a.5)(I) amended, p. 726, § 8, effective July 1. **L. 2008:** IP(1) amended, p. 1718, § 1, effective July 1.

Editor’s note: Amendments to this section in House Bill 92-1075 and House Bill 92-1078 were harmonized. Amendments to this section in House Bill 94-1090 and House Bill 94-1253 were harmonized.

ANNOTATION

Law reviews. For article, “1994 Legislature Strengthens Domestic Violence Protective Orders”, see 23 Colo. Law. 2327 (1994).

Because the elements of violation of a mandatory restraining order and the elements of harassment by stalking are not the same, the subsequent prosecution of defendant did not violate double jeopardy protections. *People v. Carey*, 198 P.3d 1223 (Colo. App. 2008).

Because the elements of violation of a protection order and harassment are not the same, the principles of double jeopardy do not

require that the convictions for both offenses be merged. *People v. Thomeczek*, __ P.3d __ (Colo. App. 2011).

Violation may consist of more than coming within specified distance. Where defendant came within 100 feet of protected person and thereafter broke into her apartment with intent to make direct contact with her, the intent to make direct contact supplied the intent to commit a “crime” upon entry so as to support a conviction for first degree burglary. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

The required culpable state of mind of “knowingly” applies to all elements of the crime of violation of a restraining order. People v. Coleby, 34 P.3d 422 (Colo. 2001).

18-6-803.6. Duties of peace officers and prosecuting agencies - preservation of evidence. (1) When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence, as defined in section 18-6-800.3 (1), has been committed, the officer shall, without undue delay, arrest the person suspected of its commission pursuant to the provisions in subsection (2) of this section, if applicable, and charge the person with the appropriate crime or offense. Nothing in this subsection (1) shall be construed to require a peace officer to arrest both parties involved in an alleged act of domestic violence when both claim to have been victims of such domestic violence. Additionally, nothing in this subsection (1) shall be construed to require a peace officer to arrest either party involved in an alleged act of domestic violence when a peace officer determines there is no probable cause to believe that a crime or offense of domestic violence has been committed. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer’s station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made.

(2) If a peace officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine if a crime has been committed by one or more persons. In determining whether a crime has been committed by one or more persons, the officer shall consider the following:

- (a) Any prior complaints of domestic violence;
- (b) The relative severity of the injuries inflicted on each person;
- (c) The likelihood of future injury to each person; and
- (d) The possibility that one of the persons acted in self-defense.

(3) (a) A peace officer is authorized to use every reasonable means to protect the alleged victim or the alleged victim’s children to prevent further violence. Such peace officer may transport, or obtain transportation for, the alleged victim to shelter. Upon the request of the protected person, the peace officer may also transport the minor child of the protected person, who is not an emancipated minor, to the same shelter if such shelter is willing to accept the child, whether or not there is a custody order or an order for the care and control of the child or an order allocating parental responsibilities with respect to the child and whether or not the other parent objects. A peace officer who transports a minor child over the objection of the other parent shall not be held liable for any damages that may result from interference with the custody, parental responsibilities, care, and control of or access to a minor child in complying with this subsection (3).

(b) For purposes of this subsection (3), “shelter” means a battered women’s shelter, a friend’s or family member’s home, or such other safe haven as may be designated by the protected person and which is within a reasonable distance from the location at which the peace officer found the victim.

(4) (a) The arresting agency shall make reasonable efforts to collect and preserve any pertinent evidence until the time of final disposition of the matter, including, but not limited to, the following:

- (I) Any dispatch tape recording relating to the event;
- (II) Any on-scene video or audio tape recordings;
- (III) Any medical records of treatment of the alleged victim or the defendant; and
- (IV) Any other relevant physical evidence or witness statements.

(b) However, in the absence of bad faith, any failure to collect or preserve any evidence listed in paragraph (a) of this subsection (4) shall not be grounds to dismiss the matter.

(4.5) When a peace officer responds to a call or is otherwise responding to a report about an alleged offense involving domestic violence, as defined in section 18-6-800.3 (1), or other domestic dispute, the officer shall include in his or her written or oral report concerning such incident whether children may have seen or heard the alleged offense; except that, in the absence of bad faith, the failure of a peace officer to note that a child may have seen or heard the alleged offense shall not be grounds to dismiss the matter.

(5) A peace officer shall not be held civilly or criminally liable for acting pursuant to this section if the peace officer acts in good faith and without malice.

Source: **L. 94:** Entire section added. p. 2029, § 5, effective July 1. **L. 95:** (1) amended, p. 568, § 4, effective July 1. **L. 98:** (1) amended, p. 1231, § 2, effective July 1; (3)(a) amended, p. 1404, § 59, effective February 1, 1999. **L. 2001:** (4.5) added, p. 980, § 4, effective August 8.

ANNOTATION

Law reviews. For article, "1994 Legislature Strengthens Domestic Violence Protective Orders", see 23 Colo. Law. 2327 (1994).

18-6-803.7. Central registry of protection orders - creation. (1) As used in this section:

(a) "Bureau" means the Colorado bureau of investigation.

(b) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

(b.5) (I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises, that is issued by a court of this state or an authorized municipal court, and that is issued pursuant to:

(A) Article 14 of title 13, C.R.S., section 18-1-1001, section 19-2-707, C.R.S., section 19-4-111, C.R.S., or rule 365 of the Colorado rules of county court civil procedure;

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S., as those sections existed prior to July 1, 2004; or

(C) An order issued as part of the proceedings concerning a criminal municipal ordinance violation.

(II) "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as described in section 13-14-104, C.R.S.

(c) "Registry" means a computerized information system.

(d) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(e) (Deleted by amendment, L. 2003, p. 1007, § 7, effective July 1, 2003.)

(f) "Subsequent order" means an order which amends, modifies, supplements, or supersedes a protection order.

(2) (a) There is hereby created in the bureau a computerized central registry of protection orders which shall be accessible to any state law enforcement agency or to any local law enforcement agency having a terminal which communicates with the bureau. The central registry computers shall communicate with computers operated by the state judicial department.

(b) Protection orders and subsequent orders shall be entered into the registry by the clerk of the court issuing the protection order; except that orders issued pursuant to sections 18-1-1001 and 19-2-707, C.R.S., shall be entered into the registry only at the discretion of the court or upon motion of the district attorney. The clerk of the court issuing the protection order shall be responsible for updating the registry electronically in a timely manner to ensure the notice is as complete and accurate as is reasonably possible with regard to the information specified in subsection (3) of this section.

(c) The restrained person's attorney, if present at the time the protection order or subsequent order is issued, shall notify the restrained person of the contents of such order if the restrained person was absent when such order was issued.

(d) Protection orders and subsequent orders shall be placed in the registry not later than twenty-four hours after they have been issued; except that, if the court issuing the protection order or subsequent order specifies that it be placed in the registry immediately, such order shall be placed in the registry immediately.

(e) Upon reaching the expiration date of a protection order or subsequent order, if any, the bureau shall note the termination in the registry.

(f) In the event the protection order or subsequent order does not have a termination date, the clerk of the issuing court shall be responsible for noting the termination of the protection order or subsequent order in the registry.

(3) (a) In addition to any information, notice, or warning required by law, a protection order or subsequent order entered into the registry shall contain the following information, if such information is available:

(I) The name, date of birth, sex, and physical description of the restrained person to the extent known;

(II) The date the order was issued and the effective date of the order if such date is different from the date the order was issued;

(III) The names of the protected persons and their dates of birth;

(IV) If the protection order is one prohibiting the restrained person from entering in, remaining upon, or coming within a specified distance of certain premises, the address of the premises and the distance limitation;

(V) The expiration date of the protection order, if any;

(VI) Whether the restrained person has been served with the protection order and, if so, the date and time of service;

(VII) The amount of bail and any conditions of bond which the court has set in the event the restrained person has violated a protection order; and

(VIII) An indication whether the conditions of the protection order are also conditions of a bail bond for a felony charge.

(b) If available, the protection order or subsequent order shall contain the fingerprint-based state identification number issued by the bureau to the restrained person.

Source: **L. 94:** Entire section added, p. 2013, § 8, effective January 1, 1995. **L. 96:** (1)(e) amended, p. 1692, § 27, effective January 1, 1997. **L. 98:** (2)(b) amended, p. 947, § 5, effective May 27; (1)(e) amended, p. 1233, § 4, effective July 1. **L. 99:** (1)(e) amended, p. 503, § 12, effective July 1. **L. 2003:** Entire section amended, p. 1007, § 7, effective July 1. **L. 2004:** (1)(b.5) amended, p. 556, § 13, effective July 1. **L. 2010:** (3)(a)(VIII) added, (HB 10-1218), ch. 177, p. 640, § 1, effective April 29.

ANNOTATION

Law reviews. For article, “1994 Legislature Strengthens Domestic Violence Protective Orders”, see 23 Colo. Law. 2327 (1994).

18-6-803.8. Foreign protection orders. (Repealed)

Source: **L. 98:** Entire section added, p. 1233, § 5, effective July 1. **L. 2003:** (4) amended, p. 1009, § 8, effective July 1. **L. 2004:** Entire section repealed, p. 554, § 5, effective July 1.

18-6-803.9. Assaults and deaths related to domestic violence - report. The Colorado bureau of investigation shall prepare a report by November 1, 1995, and by November 1 of each year thereafter, to the governor, the president of the senate, and the speaker of the house of representatives on the number of assaults related to and the number of deaths caused directly by domestic violence, including, but not limited to, homicides of victims, self-defense killings of alleged perpetrators, and incidental killings of children, peace officers, persons at work, neighbors, and bystanders in the course of episodes of domestic violence.

Source: **L. 94:** Entire section added, p. 2029, § 5, effective July 1.

18-6-804. Repeal of part. (Repealed)

Source: **L. 88:** Entire part added, p. 734, § 1, effective July 1. **L. 91:** Entire section amended, p. 399, § 1, effective March 27. **L. 95:** Entire section repealed, p. 569, § 9, effective July 1; entire section repealed, p. 1254, § 13, effective July 1.

18-6-805. Repeal of sections. (Repealed)

Source: **L. 95:** Entire section added, p. 569, § 10, effective July 1. **L. 96:** (1) amended, p. 1470, § 12, effective June 1. **L. 98:** Entire section amended, p. 771, § 1, effective May 22. **L. 99:** (1) amended, p. 623, § 20, effective August 4. **L. 2000:** Entire section repealed, p. 914, § 5, effective July 1.

ARTICLE 6.5

Wrongs to At-risk Adults

18-6.5-101.	Legislative declaration.		cases involving crimes against at-risk adults and at-risk juveniles.
18-6.5-102.	Definitions.		
18-6.5-103.	Crimes against at-risk adults and at-risk juveniles - classifications.	18-6.5-106.	Payment of treatment costs for victims of crimes against at-risk adults or at-risk juveniles - restitution.
18-6.5-103.5.	Video tape depositions - at-risk adult victims and witnesses.	18-6.5-107.	Surcharge - collection and distribution of funds - crimes against at-risk persons surcharge fund - creation - report.
18-6.5-104.	Statutory privilege not allowed.		
18-6.5-105.	Preferential trial dates of		

18-6.5-101. Legislative declaration. The general assembly recognizes that fear of mistreatment is one of the major personal concerns of at-risk adults and at-risk juveniles and that at-risk adults and at-risk juveniles are more vulnerable to and disproportionately damaged by crime in general but, more specifically, by abuse, exploitation, and neglect because they are less able to protect themselves against offenders, a number of whom are in positions of trust, and because they are more likely to receive serious injury from crimes committed against them and not to fully recover from such injury. At-risk adults and at-risk juveniles are more impacted by crime than the general population because they tend to suffer great relative deprivation, financially, physically, and psychologically, as a result of the abuses against them. A significant number of at-risk adults and at-risk juveniles are not as physically or emotionally equipped to protect themselves or aid in their own security as non-at-risk adults and non-at-risk juveniles in society. They are far more susceptible than the general population to the adverse long-term effects of crimes committed against them, including abuse, exploitation, and neglect. The general assembly therefore finds that penalties for specified crimes committed against at-risk adults and at-risk juveniles should be more severe than the penalties for the commission of said crimes against other members of society.

Source: **L. 91:** Entire article added, p. 1778, § 2, effective July 1. **L. 93:** Entire section amended, p. 1733, § 22, effective July 1.

18-6.5-102. Definitions. As used in this article, unless the context otherwise requires:

(1) “At-risk adult” means any person who is sixty years of age or older or any person who is eighteen years of age or older and is a person with a disability as said term is defined in subsection (3) of this section.

(1.5) “At-risk juvenile” means any person who is under the age of eighteen years and is a person with a disability as said term is defined in subsection (3) of this section.

(1.7) “Convicted” and “conviction” mean a plea of guilty accepted by the court, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, a verdict of guilty by a judge or jury, or a plea of no contest accepted by the court.

(1.8) “Crime against an at-risk adult or at-risk juvenile” means any offense listed in section 18-6.5-103 or criminal attempt, conspiracy, or solicitation to commit any of those offenses.

(2) “Neglect” has the same meaning as set forth in section 26-3.1-101 (4) (b), C.R.S.

(3) “Person with a disability” means any person who:

(a) Is impaired because of the loss of or permanent loss of use of a hand or foot or because of blindness or the permanent impairment of vision of both eyes to such a degree as to constitute virtual blindness; or

(b) Is unable to walk, see, hear, or speak; or

(c) Is unable to breathe without mechanical assistance; or

(d) Is developmentally disabled as defined in section 27-10.5-102 (11), C.R.S.; or

(e) Is a person with a mental illness as the term is defined in section 27-65-102 (14), C.R.S.; or

(f) Is mentally impaired as the term is defined in section 24-34-301 (2.5) (b) (III), C.R.S.; or

(g) Is blind as that term is defined in section 26-2-103 (3), C.R.S.; or

(h) Is receiving care and treatment for a developmental disability under article 10.5 of title 27, C.R.S.

(3.5) “Position of trust” means assuming a responsibility, duty, or fiduciary relationship toward an at-risk adult or at-risk juvenile.

(4) Any subsection, or portion of a subsection, of this section declared to be unconstitutional or otherwise invalid shall not impair the remaining provisions of this section.

Source: **L. 91:** Entire article added, p. 1778, § 2, effective July 1. **L. 92:** (3)(d) amended, p. 1397, § 54, effective July 1. **L. 93:** (1.5) added and (3)(a) and (3)(f) amended, pp. 1733, 1637, §§ 23, 21, effective July 1. **L. 2006:** (3)(e) amended, p. 1388, § 17, effective August 7. **L. 2007:** (3.5) added, p. 2006, § 1, effective July 1. **L. 2010:** (3)(e) amended, (SB 10-175), ch. 188, p. 786, § 31, effective April 29. **L. 2012:** (1.7) and (1.8) added, (HB 12-1226), ch. 279, p. 1486, § 1, effective August 15.

Editor’s note: Section 5 of chapter 279, Session Laws of Colorado 2012, provides that the act adding subsections (1.7) and (1.8) applies to convictions on or after August 15, 2012.

18-6.5-103. Crimes against at-risk adults and at-risk juveniles - classifications.

(1) Crimes against at-risk adults and at-risk juveniles shall be as prescribed in this section.

(2) Any person whose conduct amounts to criminal negligence, as defined in section 18-1-501 (3), commits:

(a) A class 4 felony if such negligence results in the death of an at-risk adult or an at-risk juvenile;

(b) A class 5 felony if such negligence results in serious bodily injury to an at-risk adult or an at-risk juvenile; and

(c) A class 6 felony if such negligence results in bodily injury to an at-risk adult or an at-risk juvenile.

(3) (a) Any person who commits a crime of assault in the first degree, as such crime is described in section 18-3-202, and the victim is an at-risk adult or an at-risk juvenile commits a class 4 felony if the circumstances described in section 18-3-202 (2) (a) are present and a class 2 felony if such circumstances are not present.

(b) Any person who commits a crime of assault in the second degree, as such crime is described in section 18-3-203, and the victim is an at-risk adult or an at-risk juvenile commits a class 5 felony if the circumstances described in section 18-3-203 (2) (a) are present and a class 3 felony if such circumstances are not present.

(c) Any person who commits a crime of assault in the third degree, as such crime is described in section 18-3-204, and the victim is an at-risk adult or an at-risk juvenile commits a class 6 felony.

(4) Any person who commits robbery, as such crime is described in section 18-4-301 (1), and the victim is an at-risk adult or an at-risk juvenile, commits a class 3 felony. If the offender is convicted of robbery of an at-risk adult or an at-risk juvenile, the court shall sentence the defendant to the department of corrections for at least the presumptive sentence under section 18-1.3-401 (1).

(5) Any person who commits theft, and commits any element or portion of the offense in the presence of the victim, as such crime is described in section 18-4-401 (1), and the victim is an at-risk adult or an at-risk juvenile, or who commits theft against an at-risk adult or an at-risk juvenile while acting in a position of trust, whether or not in the presence of the victim, commits a class 5 felony if the value of the thing involved is less than five hundred dollars or a class 3 felony if the value of the thing involved is five hundred dollars or more. Theft from the person of an at-risk adult or an at-risk juvenile by means other than the use of force, threat, or intimidation is a class 4 felony without regard to the value of the thing taken.

(6) Any person who knowingly neglects an at-risk adult or an at-risk juvenile or knowingly acts in a manner likely to be injurious to the physical or mental welfare of an at-risk adult or an at-risk juvenile commits a class 1 misdemeanor.

(7) (a) Any person who commits a crime of sexual assault, as such crime is described in section 18-3-402, sexual assault in the first degree, as such crime was described in section 18-3-402, as it existed prior to July 1, 2000, and the victim is an at-risk adult or an at-risk juvenile commits a class 2 felony.

(b) Any person who commits a crime of sexual assault in the second degree, as such crime was described in section 18-3-403, as it existed prior to July 1, 2000, and the victim is an at-risk adult or an at-risk juvenile, commits a class 3 felony.

(c) Any person who commits unlawful sexual contact, as such crime is described in section 18-3-404 or sexual assault in the third degree, as such crime was described in section 18-3-404, as it existed prior to July 1, 2000, and the victim is an at-risk adult or an at-risk juvenile, commits a class 6 felony; except that the person commits a class 3 felony if the person compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402 (4) (a), (4) (b), or (4) (c), or if the actor engages in the conduct described in section 18-3-404 (1) (g) or (1.5).

(d) Any person who commits sexual assault on a child, as such crime is described in section 18-3-405, and the victim is an at-risk juvenile, commits a class 3 felony; except that, if the circumstances described in section 18-3-405 (2) (a), (2) (b), (2) (c), or (2) (d) are present, the person commits a class 2 felony.

(e) Any person who commits sexual assault on a child by one in a position of trust, as such crime is described in section 18-3-405.3, and the victim is an at-risk juvenile, commits a class 2 felony if the victim is less than fifteen years of age or a class 3 felony if the victim is fifteen years of age or older but less than eighteen years of age.

(f) Any person who commits sexual assault on a client by a psychotherapist, as such crime is described in section 18-3-405.5, and the victim is an at-risk adult or an at-risk juvenile, commits a class 3 felony if the circumstances described in section 18-3-405.5 (1) exist or a class 6 felony if such circumstances are not present.

(8) For purposes of subsections (3) to (7) of this section, commission of the offenses described in said subsections shall include the attempt, solicitation, or conspiracy to commit such offenses.

Source: L. 91: Entire article added, p. 1779, § 2, effective July 1. L. 93: Entire section amended, p. 1733, § 24, effective July 1. L. 95: (3) amended, p. 1254, § 14, effective July 1. L. 97: (7) added, p. 1539, § 2, effective July 1. L. 98: (5) amended and (8) added, pp. 1440, 1441, §§ 19, 24, effective July 1. L. 99: (6) amended, p. 799, § 20, effective July 1. L. 2000: (7)(a), (7)(b), and (7)(c) amended, p. 706, § 32, effective July 1. L. 2002: (4) amended, p. 1516, § 201, effective October 1. L. 2003: (4) amended, p. 1428, § 10, effective April 29. L. 2007: (5) amended, p. 2006, § 2, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Subsection (2) is a separate substantive offense, not a sentence enhancer. People v. Lovato, 179 P.3d 208 (Colo. App. 2007).

Subsection (2) is not void for vagueness; it prohibits any criminally negligent act or omission that results in bodily injury to an at-risk adult or juvenile. Although broad, the proscription is not so vague that a person of common intelligence must necessarily guess at its meaning. People v. Lovato, 179 P.3d 208 (Colo. App. 2007).

Although the court's instruction deviated from the language in subsection (2), it was not error. The deviation from the statute worked to defendant's benefit by creating a more demanding standard of culpability, so defendant may not claim error. People v. Lovato, 179 P.3d 208 (Colo. App. 2007).

Robbery of an at-risk adult is a lesser included offense of aggravated robbery; therefore, the conviction for robbery of an at-risk adult must be vacated because it merges with the aggravated robbery conviction. People v. Lovato, 179 P.3d 208 (Colo. App. 2007).

The general assembly's intent is that subsection (7)(b) would apply only to sexual assault crimes committed before July 1, 2000, that fit the previous definition of second degree assault. People v. Renfro, 117 P.3d 43 (Colo. App. 2004).

Subsection (5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense. To prove that a defendant has committed theft from an at-risk adult, the prosecution first must prove that the defendant has committed general theft. People v. McKinney, 99 P.3d 1038 (Colo. 2004).

Trial court did not err in refusing to instruct the jury that knowledge of the age of the victim was an element of the offense of

robbery of an at-risk adult. There is no indication that the general assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. There is no mens rea element in the statute. Hence no defense of reasonable mistake of the victim's age. People v. Davis, 935 P.2d 79 (Colo. App. 1996).

Trial court did not err in refusing to impose a lesser sentence than the presumptive sentence under § 18-1-105 (1), as the sentence was required by this section. By reference only to that section and using the mandatory word "shall", the general assembly did not allow a trial court discretion to engraft probation, part of an entirely separate statutory scheme, onto its sentencing decision. People v. Davis, 935 P.2d 79 (Colo. App. 1996).

Because one of the powers exercised by defendant under father's power of attorney, dealing with personal and family maintenance, required him to maintain father's standard of living, he had a legal duty to exercise that power with due care for father's benefit. Defendant was convicted of second degree assault and causing serious bodily injury to an at-risk adult by criminal negligence when, despite defendant's medical training, defendant failed to respond to father's worsening condition, left father bedridden for a significant length of time without proper change of clothing, toileting, or hygiene, failed to seek professional care for father, and verbally abused father, causing him to fear defendant. People v. Madison, 176 P.3d 793 (Colo. App. 2007).

Convictions for theft from an at-risk adult reversed where at-risk adults signed checks on behalf of a family trust and a common stock company rather than in their individual capacities. People v. Pahl, 169 P.3d 169 (Colo. App. 2006).

18-6.5-103.5. Video tape depositions - at-risk adult victims and witnesses. (1) In any case in which a defendant is charged with a crime against an at-risk adult, as described in section 18-6.5-103, or in any case involving a victim or witness who is an at-risk adult, as defined in section 18-6.5-102 (1), the prosecution may file a motion with the court at any time prior to commencement of the trial, for an order that a deposition be taken of the testimony of the victim or witness and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall file a motion requesting a videotaped deposition at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition. The defendant shall have the right to be present and to be represented by counsel at the deposition.

(3) Upon timely receipt of the motion, the court shall make a preliminary finding regarding whether, at the time of trial, the victim or witness is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding, at a minimum, shall be based on recommendations from the victim's or witness' physician or any other person having direct contact with the victim or witness, whose recommendations are based on specific behavioral indicators exhibited by

the victim or witness. If the court so finds, it shall order that the deposition be taken, preserved on a video imaging format, and conducted pursuant to rule 15 (d) of the Colorado rules of criminal procedure; except that after consultation with the chief judge of the judicial district, the trial court may appoint an active or senior district or county court judge to serve in its place and preside over all aspects of the taking of the deposition. After the deposition is taken, the prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

(4) If at the time of trial the court finds that the victim or witness is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's or witness' deposition as former testimony under rule 804 (b) (1) of the Colorado rules of evidence.

Source: **L. 2000:** Entire section added, p. 416, § 1, effective April 13. **L. 2004:** (3) amended, p. 422, § 1, effective August 4.

18-6.5-104. Statutory privilege not allowed. The statutory privileges provided in section 13-90-107 (1), C.R.S., shall not be available for excluding or refusing testimony in any prosecution for a crime committed against an at-risk adult or an at-risk juvenile pursuant to this article.

Source: **L. 91:** Entire article added, p. 1780, § 2, effective July 1. **L. 93:** Entire section amended, p. 1734, § 25, effective July 1.

18-6.5-105. Preferential trial dates of cases involving crimes against at-risk adults and at-risk juveniles. Consistent with the constitutional right to a speedy trial, all cases involving the commission of a crime against an at-risk adult or an at-risk juvenile shall take precedence before the court, and the court shall hear these cases as soon as possible after they are filed.

Source: **L. 91:** Entire article added, p. 1780, § 2, effective July 1. **L. 93:** Entire section amended, p. 1735, § 26, effective July 1.

18-6.5-106. Payment of treatment costs for victims of crimes against at-risk adults or at-risk juveniles - restitution. (1) In addition to any other penalty provided by law, the court may order any person who is convicted of a crime against an at-risk adult or an at-risk juvenile, as set forth in this article, to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of such person's offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims, which, when added to any time served, does not exceed the maximum sentence imposable for the offense.

(3) If an at-risk adult or an at-risk juvenile has sustained monetary damages as a result of the commission of a crime described in this article against such adult or juvenile, the court shall order the offender to provide restitution pursuant to article 18.5 of title 16 and article 28 of title 17, C.R.S. If, after a reasonable period not to exceed one hundred eighty-two days, the offender has not, in the opinion of the court, completed adequate restitution, the offender's probation may be revoked. However, any remaining amount of restitution shall continue to have the full force and effect of a final judgment and remain enforceable pursuant to article 18.5 of title 16, C.R.S.

Source: **L. 91:** Entire article added, p. 1780, § 2, effective July 1. **L. 93:** Entire section amended, p. 1735, § 27, effective July 1. **L. 2000:** (3) amended, p. 1050, § 18, effective September 1. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 873, § 129, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

18-6.5-107. Surcharge - collection and distribution of funds - crimes against at-risk persons surcharge fund - creation - report. (1) Each person who is convicted of a crime against an at-risk adult or at-risk juvenile or who is convicted of identity theft pursuant to section 18-5-902, when the victim is an at-risk adult or at-risk juvenile, shall be required to pay a surcharge to the clerk of the court for the judicial district in which the conviction occurs.

(2) Surcharges pursuant to subsection (1) of this section shall be in the following amounts:

(a) For each class 2 felony of which a person is convicted, one thousand five hundred dollars;

(b) For each class 3 felony of which a person is convicted, one thousand dollars;

(c) For each class 4 felony of which a person is convicted, five hundred dollars;

(d) For each class 5 felony of which a person is convicted, three hundred seventy-five dollars;

(e) For each class 6 felony of which a person is convicted, two hundred fifty dollars;

(f) For each class 1 misdemeanor of which a person is convicted, two hundred dollars;

(g) For each class 2 misdemeanor of which a person is convicted, one hundred fifty dollars; and

(h) For each class 3 misdemeanor of which a person is convicted, seventy-five dollars.

(3) The clerk of the court shall allocate the surcharge required pursuant to this section as follows:

(a) Five percent shall be retained by the clerk of the court for administrative costs incurred pursuant to this subsection (3). Such amount retained shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(b) Ninety-five percent shall be transferred to the state treasurer, who shall credit the same to the crimes against at-risk persons surcharge fund created pursuant to subsection (4) of this section.

(4) (a) There is hereby created in the state treasury the crimes against at-risk persons surcharge fund, referred to in this section as the "fund", that consists of moneys received by the state treasurer pursuant to this section. The moneys in the fund shall be subject to annual appropriation by the general assembly to the state office on aging in the department of human services, created pursuant to section 26-11-202, C.R.S., for distribution to a fiscal agent that is an affiliate of a national organization that serves individuals affected by a disability and chronic condition across the life span and is working with the state of Colorado to implement the lifespan respite care program, referred to in this section as the "fiscal agent". Provided that programs selected to receive moneys from the fund meet the guidelines for distribution pursuant to paragraph (b) of this subsection (4), the fiscal agent shall award moneys to programs selected by a statewide coalition of nonprofit or not-for-profit organizations that focus on the needs of caregivers of at-risk adults or at-risk juveniles.

(b) The state office on aging in the department of human services shall establish guidelines for the distribution of the moneys from the fund, including but not limited to:

(I) Procedures for programs to use in applying for an award of moneys from the fund;

(II) Procedures for the fiscal agent to use in reporting to the state office on aging pursuant to paragraph (e) of this subsection (4); and

(III) Accountability and performance standards for programs that receive moneys from the fund.

(c) Notwithstanding any provisions of paragraph (a) of this subsection (4) to the contrary, the fiscal agent may use a portion of the moneys that it receives pursuant to paragraph (a) of this subsection (4) for training and to facilitate the coordination of programs that provide respite services for caregivers of at-risk adults or at-risk juveniles. The fiscal agent shall distribute the remainder of the moneys directly to the programs.

(d) Each program that receives moneys from the fund shall:

(I) Provide respite services that allow a caregiver to have a break from caregiving;

(II) Have a signed agreement and protocol with the fiscal agent;

- (III) Conduct a fingerprint-based criminal history record check of staff and providers; and
- (IV) Satisfy the accountability and performance standards established by the state office on aging pursuant to subparagraph (III) of paragraph (b) of this subsection (4).
- (e) The fiscal agent shall report to the state office on aging in the department of human services on a regular basis to be specified by the state office on aging. The report shall include, but need not be limited to:
- (I) A list of all programs that received moneys from the fund in the preceding fiscal year;
- (II) A description of how each program that received moneys from the fund in the preceding fiscal year used those moneys; and
- (III) Documentation demonstrating that each program that received moneys from the fund in the preceding fiscal year satisfied all of the criteria specified in paragraph (d) of this subsection (4).
- (f) The state office on aging shall not expend any moneys until the fund has enough money to pay the expenses necessary to administer the fund.
- (g) All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any moneys not appropriated by the general assembly shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.
- (5) The court may waive all or any portion of the surcharge required by subsection (1) of this section if the court finds that a person convicted of a crime against an at-risk adult or at-risk juvenile is indigent or financially unable to pay all or any portion of the surcharge. The court may waive only that portion of the surcharge that the court finds that the person convicted of a crime against an at-risk adult or at-risk juvenile is financially unable to pay.

Source: L. 2012: Entire section added, (HB 12-1226), ch. 279, p. 1486, § 2, effective August 15.

Editor’s note: Section 5 of chapter 279, Session Laws of Colorado 2012, provides that the act adding this section applies to convictions on or after August 15, 2012.

ARTICLE 7

Offenses Relating to Morals

Editor’s note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor’s note following the title heading.

PART 1		18-7-201.5.	Acquired immune deficiency syndrome testing for persons convicted of prostitution.
OBSCENITY - OFFENSES		18-7-201.7.	Prostitution with knowledge of being infected with acquired immune deficiency syndrome.
18-7-101.	Definitions.	18-7-202.	Soliciting for prostitution.
18-7-102.	Obscenity.	18-7-203.	Pandering.
18-7-103.	Injunctions to restrain the promotion of obscene materials.	18-7-204.	Keeping a place of prostitution.
18-7-104.	Applicability of this part 1. (Repealed)	18-7-205.	Patronizing a prostitute.
18-7-104.5.	Remedies under the “Colorado Organized Crime Control Act”.	18-7-205.5.	Acquired immune deficiency syndrome testing for persons convicted of patronizing a prostitute.
18-7-105.	Severability.	18-7-205.7.	Patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome.
18-7-106.	Constitutional questions expedited. (Repealed)		
PART 2			
PROSTITUTION			
18-7-201.	Prostitution prohibited.	18-7-206.	Pimping.

- 18-7-207. Prostitute making display.
 18-7-208. Promoting sexual immorality.

PART 5

SEXUALLY EXPLICIT MATERIALS
HARMFUL TO CHILDREN

PART 3

PUBLIC INDECENCY

- 18-7-301. Public indecency.
 18-7-302. Indecent exposure.

- 18-7-501. Definitions.
 18-7-502. Unlawful acts.
 18-7-503. Applicability.
 18-7-504. Severability.

PART 4

CHILD PROSTITUTION

- 18-7-401. Definitions.
 18-7-402. Soliciting for child prostitution.
 18-7-403. Pandering of a child.
 18-7-403.5. Procurement of a child.
 18-7-404. Keeping a place of child prostitution.
 18-7-405. Pimping of a child.
 18-7-405.5. Inducement of child prostitution.
 18-7-406. Patronizing a prostituted child.
 18-7-407. Criminality of conduct.
 18-7-408. Severability.
 18-7-409. Reports of convictions to department of education.

PART 6

VISUAL REPRESENTATIONS
CONTAINING ACTUAL VIOLENCE

- 18-7-601. Dispensing violent films to minors - misdemeanors.

PART 7

SEXUAL CONDUCT
IN A CORRECTIONAL INSTITUTION

- 18-7-701. Sexual conduct in a correctional institution.

PART 8

CRIMINAL INVASION OF PRIVACY

- 18-7-801. Criminal invasion of privacy.

PART 1

OBSCENITY - OFFENSES

Editor's note: This title was repealed and reenacted in 1971, and this part 1 was subsequently repealed and reenacted in 1976, 1977, and 1981, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 1 prior to 1981, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume and the editor's note following the title heading. Former C.R.S. section numbers prior to 1981 are shown in editor's notes following those sections that were relocated.

Cross references: For power of boards of county commissioners and governing bodies of municipalities to regulate obscene material or performance, see §§ 30-15-401 (1)(c) and 31-15-401 (1)(g).

18-7-101. Definitions. As used in this part 1, unless the context otherwise requires:

(1) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three-dimensional obscene device.

(1.5) "Minor" means a person under eighteen years of age.

(2) "Obscene" means material or a performance that:

(a) The average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(b) Depicts or describes:

(I) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(II) Patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a

state of sexual stimulation or arousal, or covered male genitals in a discernibly turgid state; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

(3) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of tolerance.

(5) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(6) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(6.5) "Prurient interest" means a shameful or morbid interest.

(7) "Simulated" means the explicit depiction or description of any of the types of conduct set forth in paragraph (b) of subsection (2) of this section, which creates the appearance of such conduct.

(8) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.

(9) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

Source: **L. 81:** Entire part R&RE, p. 998, § 1, effective July 1. **L. 86:** (2)(b)(II) and (4) amended and (6.5) added, p. 782, § 1, effective April 21. **L. 94:** (1.5) added, p. 1720, § 16, effective July 1.

Editor's note: This section is similar to former § 18-7-101 as it existed prior to 1981.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 Den. L.J. 49 (1982). For article, "Obscenity and Pornography: Forging Decency Through the Law", see 17 Colo. Law. 45 (1988).

Annotator's note. Cases decided under the 1971 and 1977 versions of this section which are deemed to be relevant appear below.

The 1977 version of the Colorado obscenity statute was unconstitutional. People v. New Horizons, Inc., 200 Colo. 377, 616 P.2d 106 (1980).

Provisions regulating promotion of obscene devices held unconstitutional. The provisions of the statutory scheme which regulate the promotion of obscene devices impermissibly burden the right of privacy. People v. Seven Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) (decided prior to 1986 amendment).

Definition of "patently offensive" contained in this section is unconstitutionally overbroad. The first amendment to the U.S. Constitution requires a "tolerance" standard, for determining whether material or a performance

is "patently offensive". People v. Seven Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) (decided prior to 1986 amendment).

Subsection (2)(b) held constitutional. The terms used in this paragraph are sufficiently specific to satisfy requirements of Miller v. California, and thus statute is not unconstitutionally overbroad. People v. Seven Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985).

Obscenity statute provides sufficiently adequate standards to enable courts and juries to apply the law consistently and is not impermissibly vague. People v. Ford, 773 P.2d 1059 (Colo. 1989).

Obscenity statute that defines material that is patently offensive in terms of community standards of tolerance satisfies Colorado and U.S. constitutions and is not overbroad. People v. Ford, 773 P.2d 1059 (Colo. 1989).

Terms "materials" and "promote" as used in this section held not constitutionally defective. People v. Seven Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985).

Federal court abstained from determining provisions' constitutionality until state courts determined validity. The United States district court for Colorado chose to abstain from the

determining any federal constitutional question concerning Colorado legislation regulating obscene material, § 18-7-101 et seq., until the Colorado state courts were afforded an opportunity to construe the provisions and determine their validity or invalidity under the state constitution. *Bergstrom v. Ricketts*, 495 F. Supp. 210 (D. Colo. 1980).

United States supreme court decisions binding on state. United States supreme court decisions interpreting the scope of the first amendment's protections in obscenity cases are binding upon the state supreme court. *People v. Berger*, 185 Colo. 85, 521 P.2d 1244 (1974).

A statewide community standard is dictated by the constitution. To impose less than a statewide standard in the interpretation of a state obscenity statute would be to denigrate the constitutional guarantees that are afforded to every person. *People v. Tabron*, 190 Colo. 161, 544 P.2d 380 (1976).

Anything less than a statewide standard is unworkable when state obscenity statutes are involved. *People v. Tabron*, 190 Colo. 161, 544 P.2d 380 (1976).

Obscenity test derived from supreme court decisions. The three-fold test of obscenity set forth in subsection (5)(now (6)) is derived from the United States supreme court's decision in *Roth v. United States* (354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed.2d 1498 (1957)), as further defined in *Memoirs v. Massachusetts* (383 U.S. 413, 86 S. Ct. 975, 16 L. Ed.2d 1 (1968)), and *Redrup v. New York* (386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed.2d 515 (1967)). *People v. Berger*, 185 Colo. 85, 521 P.2d 1244 (1974).

18-7-102. Obscenity. (1) (a) Except as otherwise provided in subsection (1.5) of this section, a person commits wholesale promotion of obscenity if, knowing its content and character, such person wholesale promotes or possesses with intent to wholesale promote any obscene material.

(b) Wholesale promotion of obscenity is a class 1 misdemeanor.

(1.5) (a) A person commits wholesale promotion of obscenity to a minor if, knowing its content and character, such person wholesale promotes to a minor or possesses with intent to wholesale promote to a minor any obscene material.

(b) Wholesale promotion of obscenity to a minor is a class 6 felony.

(2) (a) Except as otherwise provided in subsection (2.5) of this section, a person commits promotion of obscenity if, knowing its content and character, such person:

(I) Promotes or possesses with intent to promote any obscene material; or

(II) Produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(b) Promotion of obscenity is a class 2 misdemeanor.

(2.5) (a) A person commits promotion of obscenity to a minor if, knowing its content and character, such person:

(I) Promotes to a minor or possesses with intent to promote to a minor any obscene material; or

(II) Produces, presents, or directs an obscene performance involving a minor or participates in a portion thereof that is obscene or that contributes to its obscenity.

(b) Promotion of obscenity to a minor is a class 6 felony.

(3) Repealed.

Question of obscenity is one of law, not of fact. *Houston v. Manerbino*, 185 Colo. 1, 521 P.2d 166 (1974).

Whether the statutory tests of subsection (5)(now (6)) have been properly applied in a given case, as well as whether the materials are obscene, are questions of law in the first instance. *People v. Berger*, 185 Colo. 85, 521 P.2d 1244 (1974).

For a review of the history of obscenity regulation, see *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Magazine can be banned where pictures, without reference to text, declared obscene. Where an allegedly obscene magazine consists of both words and pictures, the pictures can be declared obscene and the entire magazine banned under this part without reference to whether the included text or other articles imbue the magazine with serious literary, artistic, political, or scientific value. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Obscenity provisions could not support injunction or criminal charge. The 1977 version of the Colorado obscenity statute could not be relied upon to support either a civil injunction or a criminal charge. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Denver obscenity ordinance held in conflict with legislative grant of power. *Pierce v. City & County of Denver*, 193 Colo. 347, 565 P.2d 1337 (1977).

Applied in Citizens for Free Enter. v. Dept. of Rev., 649 P.2d 1054 (Colo. 1982).

(4) - A person who possesses six or more identical obscene materials is presumed to possess them with intent to promote the same.

(5) This section does not apply to a person who possesses or distributes obscene material or participates in conduct otherwise proscribed by this section when the possession, participation, or conduct occurs in the course of law enforcement activities.

(6) This section does not apply to a person's conduct otherwise proscribed by this section which occurs in that person's residence as long as that person does not engage in the wholesale promotion or promotion of obscene material in his residence.

Source: **L. 81:** Entire part R&RE, p. 999, § 1, effective July 1. **L. 83:** (5) and (6) amended, p. 2048, § 4, effective October 14. **L. 86:** (1)(a), (2)(a)(I), (4), and (5) amended and (3) repealed, pp. 782, 785, §§ 2, 8, effective April 21. **L. 94:** (1) and (2) amended and (1.5) and (2.5) added, p. 1720, § 17, effective July 1.

Editor's note: This section is similar to former §§ 18-7-103, 18-7-104, 18-7-105, and 18-7-106 as they existed prior to 1981.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 *Dicta* 81 (1962). For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 *Den. L.J.* 49 (1982). For article, "Constitutional Law", which discusses a Tenth Circuit decision dealing with obscenity, see 62 *Den. U. L. Rev.* 95 (1985). For article, "Obscenity and Pornography: Forging Decency Through the Law", see 17 *Colo. Law.* 45 (1988).

Annotator's note. Cases decided under the 1971 and 1977 versions of this section which are deemed to be relevant appear below.

For the unconstitutionality of the 1971 statute, see *People v. Hildebrandt*, 190 *Colo.* 167, 554 P.2d 384 (1976).

The 1977 version of the Colorado obscenity statute was unconstitutional. *People v. New Horizons, Inc.*, 200 *Colo.* 377, 616 P.2d 106 (1980).

Provisions regulating promotion of obscene devices held unconstitutional. The provisions of the statutory scheme which regulate the promotion of obscene devices impermissibly burden the right of privacy. *People v. Seven Thirty-five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (decided prior to 1986 amendment).

Presumption of scienter contained in subsection (3) unconstitutional. The requirement that statutes regulating obscenity contain an element of scienter is based upon the potential for a strict liability obscenity provision to inhibit the exercise of protected speech. *People v. Seven*

Thirty-five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) (decided prior to 1986 repeal of subsection 3).

Presumption contained in subsection (4) is constitutional and comports with the requirements of due process. *People v. Seven Thirty-five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

Promotion of obscenity to minor is not unconstitutionally vague. A person of common intelligence reading "promote" in context with the statutory definition would understand its meaning and application. The fact that the legislature defined promote differently than its common meaning does not make it unconstitutional. *People v. Boles*, __ P.3d __ (Colo. App. 2011).

Obscenity statute does not lack criminally culpable mens rea and does not premise liability on the mental state of a third party nor does it premise liability on discretionary acts of a third party. *People v. Ford*, 773 P.2d 1059 (Colo. 1989).

For a review of the history of obscenity regulation, see *People v. New Horizons, Inc.*, 200 *Colo.* 377, 616 P.2d 106 (1980).

Obscenity provisions could not support injunction or criminal charge. The 1977 version of the Colorado obscenity statute could not be relied upon to support either a civil injunction or a criminal charge. *People v. New Horizons, Inc.*, 200 *Colo.* 377, 616 P.2d 106 (1980).

18-7-103. Injunctions to restrain the promotion of obscene materials. (1) The district courts of this state and the judges thereof shall have full power, authority, and jurisdiction to enjoin the wholesale promotion, promotion, or display of obscene materials as specified in this section and to issue all necessary and proper restraining orders, injunctions, and writs and processes in connection therewith not inconsistent with this article.

(2) The district attorney of the county in which a person, firm, or corporation wholesale

promotes, promotes, or displays, or is about to wholesale promote, promote, or display, or has in his, her, or its possession with intent to wholesale promote, promote, or display, or is about to acquire possession with intent to wholesale promote, promote, or display any obscene material may maintain an action for injunction against such person, firm, or corporation to prevent the wholesale promotion, promotion, or display or further wholesale promotion, promotion, or display of said material described or identified in said suit for injunction.

(3) This article shall not authorize the issuance of temporary restraining orders except where exigent circumstances require the same. In matters of exigent circumstances, the restraining order shall provide that the action must be commenced on the earliest possible date. No temporary restraining order may be issued to restrain the continued exhibitions of a motion picture being shown commercially before the public, notwithstanding the existence of exigent circumstances.

(4) No temporary restraining order or temporary injunction may be issued except after notice to the person, firm, or corporation sought to be enjoined and only after all parties have been offered or afforded an opportunity to be heard. A person, firm, or corporation shall be deemed to have been offered or afforded an opportunity to be heard if notice has been given and he, she, or it fails to appear. At such hearing, evidence shall be presented and witnesses examined.

(5) Before or after the commencement of the hearing on an application for a temporary injunction, the court may, and on motion of the party sought to be restrained shall, order the trial on the action on the merits to be advanced and consolidated with the hearing on the application. Where such hearings are not so consolidated, and a temporary injunction or restraining order is issued, the court shall hold a final hearing and a trial of the issues within one day after joinder of issue, and a decision shall be rendered within two days of the conclusion of the trial. If a final hearing is not held within one day after joinder of issue or a decision not rendered within two days of the conclusion of the trial, the injunction shall be dissolved. No temporary injunction or restraining order shall issue until after a showing of probable cause to believe that the material or display is obscene and a showing of probable success on the merits. Any such temporary injunction or restraining order shall provide that the defendant may not be punished for contempt if the material is found not to be obscene after joinder of issue, final hearing, and trial.

(6) Nothing contained in this article shall prevent the court from issuing a temporary restraining order forbidding the removing, destroying, deleting, splicing, or otherwise altering of any motion picture alleged to be obscene.

(7) Any person, firm, or corporation sought to be permanently enjoined shall be entitled to a full adversary trial of the issues within one day after the joinder of issue, and a decision shall be rendered by the court within two days of the conclusion of the trial. If the defendant in any suit for a permanent injunction filed under the terms of this article shall fail to answer or otherwise join issue within the time required to file his, her, or its answer, the court, on motion of the party applying for the injunction, shall enter a general denial for the defendant and set a date for hearing on the question raised in the suit for injunction within fourteen days following the entry of the general denial entered by the court. The court shall render its decision within two days after the conclusion of the hearing.

(8) In the event that a final order or judgment of injunction is entered against the person, firm, or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm, or corporation to surrender to the sheriff of the county in which the action was brought any of the material described in subsection (2) of this section, and such sheriff shall be directed to seize and destroy the same six months after the entry of the said final order unless criminal proceedings or an indictment is brought before that time, in which event, said material may be used as evidence in such criminal proceeding.

(9) In any action brought as herein provided, the district attorney shall not be required to file any undertaking, bond, or security before the issuance of any injunction order provided for above, shall not be liable for costs, and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm, or corporation sought to be enjoined.

(10) Every person, firm, or corporation who wholesale promotes, promotes, displays, or acquires possession with intent to wholesale promote, promote, or display any of the material described in subsection (2) of this section, after the service upon him of a summons and complaint in an action brought pursuant to this article, is chargeable with knowledge of the contents.

Source: **L. 81:** Entire part R&RE, p. 1000, § 1, effective July 1. **L. 86:** (1) to (5) amended, p. 783, § 3, effective April 21. **L. 87:** (8) and (10) amended, p. 1579, § 24, effective July 10. **L. 2012:** (7) amended, (SB 12-175), ch. 208, p. 873, § 130, effective July 1.

Editor's note: (1) This section is similar to former § 18-7-102 as it existed prior to 1981.

(2) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (7) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 *Dicta* 81 (1962). For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 *Den. L.J.* 49 (1982).

This section held constitutional. The procedures established by this statute are sufficient to satisfy due process. *People v. Seven Thirty-five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

Requirement of adversary hearing. Where injunctive relief is sought which amounts to prior restraint, or where a search warrant is sought, there is required an adversary hearing,

which may be on short notice, to determine whether the materials sought to be seized are in fact obscene. *People ex rel. McKevitt v. Harvey*, 176 Colo. 447, 491 P.2d 563 (1971) (decided under former § 40-9-19, C.R.S. 1963).

Obscenity provisions could not support injunction or criminal charge. The 1977 version of the Colorado obscenity statute could not be relied upon to support either a civil injunction or a criminal charge. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980) (decided under former § 18-7-102).

18-7-104. Applicability of this part 1. (Repealed)

Source: **L. 81:** Entire part R&RE, p. 1001, § 1, effective July 1. **L. 86:** Entire section repealed, p. 785, § 8, effective April 21.

Editor's note: This section was similar to former § 18-7-107 as it existed prior to 1981.

18-7-104.5. Remedies under the "Colorado Organized Crime Control Act". When a person or persons, through an enterprise, engage in a pattern of racketeering activity for which the predicate offenses are the promotion or wholesale promotion of obscenity, pursuant to article 17 of this title, the difference in the fair market value of real property in the vicinity of the location of such enterprise from what the value would be if such enterprise or any part thereof were not located in the vicinity, as established by the opinion testimony of experts or otherwise, shall be deemed a compensable injury for which the owners of victimized real property can exercise all civil remedies set forth in article 17 of this title, in addition to any other measure of damages provable pursuant to article 17 of this title.

Source: **L. 86:** Entire section added, p. 784, § 4, effective April 21.

18-7-105. Severability. If any provision of this part 1 is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of this part 1 are valid, unless it appears to the court that the valid provisions of this part 1 are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed that the general assembly would have enacted the valid provisions without the

void provision or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Source: L. 81: Entire part R&RE, p. 1002, § 1, effective July 1.

ANNOTATION

Qualified severability clause used by court in determining legislative intent. Such a clause creates a presumption that the legislature would have been satisfied with the portions of the

statute that remain after the unconstitutional provisions are stricken. *People v. Seven Thirty-five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

18-7-106. Constitutional questions expedited. (Repealed)

Source: L. 81: Entire part R&RE, p. 1002, § 1, effective July 1.

Editor's note: Subsection (2) provided for the repeal of this section, effective January 1, 1983. (See L. 81, p. 1002.)

PART 2

PROSTITUTION

Cross references: For provisions relating to HIV infection and acquired immune deficiency syndrome, see part 14 of article 4 of title 25.

18-7-201. Prostitution prohibited. (1) Any person who performs or offers or agrees to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not his spouse in exchange for money or other thing of value commits prostitution.

(2) (a) "Fellatio", as used in this section, means any act of oral stimulation of the penis.

(b) "Cunnilingus", as used in this section, means any act of oral stimulation of the vulva or clitoris.

(c) "Masturbation", as used in this section, means stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse.

(d) "Anal intercourse", as used in this section, means contact between human beings of the genital organs of one and the anus of another.

(3) Prostitution is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 451, §1. **C.R.S. 1963:** § 40-7-201. **L. 77:** Entire section R&RE, p. 987, § 1, effective May 27.

ANNOTATION

This is an offense involving moral turpitude. *R & F Enters., Inc. v. Bd. of County Comm'rs*, 199 Colo. 137, 606 P.2d 64 (1980).

Applied in *People v. Mason*, 642 P.2d 8 (Colo. 1982).

18-7-201.5. Acquired immune deficiency syndrome testing for persons convicted of prostitution. (1) (a) Any person who is convicted of prostitution pursuant to section 18-7-201 or a comparable municipal ordinance shall be ordered by the court to submit to a diagnostic test for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome. The court shall order that such person shall pay the cost of such diagnostic test as a part of the costs of the action.

(b) As used in this subsection (1), "diagnostic test" means a human immunodeficiency virus (HIV) screening test followed by a supplemental HIV test for confirmation in those instances when the HIV screening test is repeatedly reactive.

(2) The results of any test performed pursuant to this section shall be reported to the person tested and to the district attorney or the municipal prosecuting attorney of the jurisdiction in which the person is prosecuted. The district attorney or municipal prosecuting attorney shall keep the results of such test strictly confidential unless the results of such test indicate the presence of the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome and:

(a) The person is subsequently charged with a violation of section 18-7-201.7 or 18-7-205.7; or

(b) The person is subsequently charged with a violation of section 18-7-201 or 18-7-205 or a comparable municipal ordinance and the district attorney or municipal prosecuting attorney for the charging jurisdiction seeks the test results for purposes of case evaluation, charging, and sentencing. In such case, the district attorney or municipal prosecuting attorney who obtained the original conviction pursuant to section 18-7-201 or a comparable municipal ordinance may release the test results only to the district attorney or municipal prosecuting attorney in the charging jurisdiction or the said district attorney's or municipal prosecuting attorney's designee. Any district attorney or municipal prosecuting attorney who receives test results pursuant to this paragraph (b) shall keep said test results strictly confidential, except as provided in this subsection (2).

(3) (a) The test ordered pursuant to subsection (1) of this section shall be performed by a facility that provides ongoing health care.

(b) An employee of the facility that performs the test shall provide, for purposes of pretrial preparation and in court proceedings, oral and documentary evidence limited to whether the person tested pursuant to subsection (1) of this section and subsequently charged under section 18-7-201.7 or 18-7-205.7 was provided notice prior to the date of the offense that he or she had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome and the date of such notice.

Source: **L. 90:** Entire section added, p. 987, § 13, effective April 24. **L. 99:** Entire section amended, p. 997, § 2, effective May 29. **L. 2000:** (1) amended, p. 452, § 3, effective April 24.

18-7-201.7. Prostitution with knowledge of being infected with acquired immune deficiency syndrome. (1) Any person who performs or offers or agrees to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse, as such terms are defined in section 18-7-201 (2), with any person not his spouse, in exchange for money or any other thing of value, and if such person has been tested for acquired immune deficiency syndrome pursuant to section 18-7-201.5 or 18-7-205.5 or otherwise, and the results of such test indicate the presence of the human immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome, such person commits prostitution with knowledge of being infected with acquired immune deficiency syndrome.

(2) Prostitution with knowledge of being infected with acquired immune deficiency syndrome is a class 5 felony.

(3) (a) In sentencing any person convicted of prostitution with knowledge of being infected with acquired immune deficiency syndrome pursuant to this section, the court may order that such person submit to an assessment for the use of controlled substances or alcohol developed pursuant to section 16-11.5-102 (1) (a), C.R.S. The court may further order that such person comply with the recommendations of such assessment as part of any sentence to probation, county jail, community corrections, or incarceration with the department of corrections. The assessment and compliance with the recommendations of the assessment shall be at the person's own expense, unless the person is indigent.

(b) In addition to treatment for abuse of controlled substances and alcohol, the court may require the person to participate in mental health treatment if such treatment is recommended in the person's presentence report prepared pursuant to section 16-11-102, C.R.S. The mental health treatment shall be at the person's own expense, unless the person is indigent.

Source: L. 90: Entire section added, p. 987, § 13, effective April 24. L. 99: (3) added, p. 998, § 3, effective May 29.

18-7-202. Soliciting for prostitution. (1) A person commits soliciting for prostitution if he:

- (a) Solicits another for the purpose of prostitution; or
 - (b) Arranges or offers to arrange a meeting of persons for the purpose of prostitution; or
 - (c) Directs another to a place knowing such direction is for the purpose of prostitution.
- (2) Soliciting for prostitution is a class 3 misdemeanor. A person who is convicted of soliciting for prostitution may be required to pay a fine of not more than five thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-501, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513, C.R.S.

Source: L. 71: R&RE, p. 451, § 1. C.R.S. 1963: § 40-7-202. L. 2011: (2) amended, (SB 11-085), ch. 257, p. 1128, § 3, effective August 10.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 257, Session Laws of Colorado 2011.

ANNOTATION

Constitutionality. This section does not violate one's due process, equal protection, or constitutional privacy rights, and is neither vague nor overbroad. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

There is no constitutionally protected right the exercise of which would be threatened by the legislative prohibition of soliciting, pandering, and pimping. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

There is an element in pandering not necessarily present in pimping, i.e., the affirmative, knowing action of arranging or offering to arrange an assignation for the practice of prostitution by another; therefore, the two crimes are distinguishable and may entail different punishments. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

18-7-203. Pandering. (1) Any person who does any of the following for money or other thing of value commits pandering:

- (a) Inducing a person by menacing or criminal intimidation to commit prostitution; or
- (b) Knowingly arranging or offering to arrange a situation in which a person may practice prostitution.

(2) (a) Pandering under paragraph (a) of subsection (1) of this section is a class 5 felony. A person who is convicted of pandering under paragraph (a) of subsection (1) of this section shall be required to pay a fine of not less than five thousand dollars and not more than ten thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-401, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513, C.R.S.

(b) Pandering under paragraph (b) of subsection (1) of this section is a class 3 misdemeanor. A person who is convicted of pandering under paragraph (b) of subsection (1) of this section shall be required to pay a fine of not less than five thousand dollars and not more than ten thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-501, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513, C.R.S.

Source: L. 71: R&RE, p. 452, § 1. C.R.S. 1963: § 40-7-203. L. 73: p. 535, § 3. L. 2011: (2) amended, (SB 11-085), ch. 257, p. 1128, § 4, effective August 10.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 257, Session Laws of Colorado 2011.

ANNOTATION

Constitutionality. This section does not violate one's due process, equal protection, or constitutional privacy rights, and is neither vague nor overbroad. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

There is no constitutionally protected right the exercise of which would be threatened by the legislative prohibition of soliciting, pandering, and pimping. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

Subsection (1)(b) is clearly directed at specific type of conduct, and is designed to punish persons who act as "brokers" to bring prosti-

tutes together with their customers. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

There is an element in pandering not necessarily present in pimping, i.e., the affirmative, knowing action of arranging or offering to arrange an assignment for the practice of prostitution by another; therefore, the two crimes are distinguishable and may entail different punishments. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

Applied in *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

18-7-204. Keeping a place of prostitution. (1) Any person who has or exercises control over the use of any place which offers seclusion or shelter for the practice of prostitution and who performs any one or more of the following commits keeping a place of prostitution if he:

(a) Knowingly grants or permits the use of such place for the purpose of prostitution; or

(b) Permits the continued use of such place for the purpose of prostitution after becoming aware of facts or circumstances from which he should reasonably know that the place is being used for purposes of prostitution.

(2) Keeping a place of prostitution is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 452, § 1. C.R.S. 1963: § 40-7-204.

ANNOTATION

Annotator's note. Since § 18-7-204 is similar to former § 40-9-15, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Defendant must have had control of or assisted in management of house. In order to sustain a conviction under this section it must be shown that the accused had control of and conducted, or assisted in the management of the affairs of the house, so as to be in some manner responsible for the immoral practices there carried on; or must at least have been so in control

as to be able to bring about, or assist in bringing about, such immoral practices. To merely aid, abet, advise, or encourage another in the conduct of the house is not within the statute, and to so construe it is to read into it the descriptive elements of an accessory, and so enlarge it by construction. *Trozzo v. People*, 51 Colo. 323, 117 P. 150 (1911).

Statute as basis for jurisdiction. See *People v. Fowler*, 183 Colo. 300, 516 P.2d 428 (1973).

Applied in *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

18-7-205. Patronizing a prostitute. (1) Any person who performs any of the following with a person not his spouse commits patronizing a prostitute:

(a) Engages in an act of sexual intercourse or of deviate sexual conduct with a prostitute; or

(b) Enters or remains in a place of prostitution with intent to engage in an act of sexual intercourse or deviate sexual conduct.

(2) Patronizing a prostitute is a class 1 misdemeanor. A person who is convicted of patronizing a prostitute may be required to pay a fine of not more than five thousand dollars in addition to any penalty imposed by the court pursuant to section 18-1.3-401 or

18-1.3-503, which additional fine shall be transferred to the state treasurer, who shall transfer the same to the prostitution enforcement cash fund created in section 24-33.5-513, C.R.S.

Source: **L. 71:** R&RE, p. 452, § 1. **C.R.S. 1963:** § 40-7-205. **L. 2005:** (2) amended, p. 1332, § 1, effective July 1. **L. 2011:** (2) amended, (SB 11-085), ch. 257, p. 1129, § 5, effective August 10.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 257, Session Laws of Colorado 2011.

18-7-205.5. Acquired immune deficiency syndrome testing for persons convicted of patronizing a prostitute. (1) (a) Any person who is convicted of patronizing a prostitute pursuant to section 18-7-205 or a comparable municipal ordinance shall be ordered by the court to submit to a diagnostic test for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome. The court shall order that such person shall pay the cost of such diagnostic test as a part of the costs of the action.

(b) As used in this subsection (1), “diagnostic test” means a human immunodeficiency virus (HIV) screening test followed by a supplemental HIV test for confirmation in those instances when the HIV screening test is repeatedly reactive.

(2) The results of any test performed pursuant to this section shall be reported to the person tested and to the district attorney or the municipal prosecuting attorney of the jurisdiction in which the person is prosecuted. The district attorney or the municipal prosecuting attorney shall keep the results of such test strictly confidential unless the results of such test indicate the presence of the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome and:

(a) The person is subsequently charged with a violation of section 18-7-201.7 or 18-7-205.7; or

(b) The person is subsequently charged with a violation of section 18-7-201 or 18-7-205 or a comparable municipal ordinance and the district attorney or the municipal prosecuting attorney for the charging jurisdiction seeks the test results for purposes of case evaluation, charging, and sentencing. In such case, the district attorney or municipal prosecuting attorney who obtained the original conviction pursuant to section 18-7-205 or a comparable municipal ordinance may release the test results only to the district attorney or municipal prosecuting attorney in the charging jurisdiction or the said district attorney’s or municipal prosecuting attorney’s designee. Any district attorney or municipal prosecuting attorney who receives test results pursuant to this paragraph (b) shall keep said test results strictly confidential, except as provided in this subsection (2).

(3) (a) The test ordered pursuant to subsection (1) of this section shall be performed by a facility that provides ongoing health care.

(b) An employee of the facility that performs the test shall provide, for purposes of pretrial preparation and in court proceedings, oral and documentary evidence limited to whether the person tested pursuant to subsection (1) of this section and subsequently charged under section 18-7-201.7 or 18-7-205.7 was provided notice prior to the date of the offense that he or she had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome and the date of such notice.

Source: **L. 90:** Entire section added, p. 987, § 13, effective April 24. **L. 99:** Entire section amended, p. 999, § 4, effective May 29. **L. 2000:** (1) amended, p. 452, § 4, effective April 24.

18-7-205.7. Patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome. (1) Any person who performs any of the acts described in section 18-7-205 (1), with any person not his spouse, and if such person has been tested for acquired immune deficiency syndrome pursuant to section 18-7-201.5 or 18-7-205.5 or otherwise, and the results of such test indicate the presence of the human

immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome, such person commits patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome.

(2) Patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome is a class 6 felony.

Source: L. 90: Entire section added, p. 987, § 13, effective April 24.

18-7-206. Pimping. Any person who knowingly lives on or is supported or maintained in whole or in part by money or other thing of value earned, received, procured, or realized by any other person through prostitution commits pimping, which is a class 3 felony.

Source: L. 71: R&RE, p. 452, § 1. C.R.S. 1963: § 40-7-206. L. 72: p. 274, § 3. L. 83: Entire section amended, p. 707, § 1, effective March 22.

ANNOTATION

Annotator's note. Since § 18-7-206 is similar to former § 40-9-11, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not unconstitutionally vague. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

There is an element in pandering not necessarily present in pimping, i.e., the affirmative, knowing action of arranging or offering to arrange an assignation for the practice of prostitution by another; therefore, the two crimes are distinguishable and may entail different punishments. *People v. Johnson*, 195 Colo. 350, 578 P.2d 226 (1978).

The phrase "lives on" is defined as to be maintained in life; to acquire a livelihood, to subsist with, on, or by, as to live on spoils of those who live by labor. *Trozzo v. People*, 51 Colo. 323, 117 P. 150 (1911); *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Receipt of proceeds of prostitution from pimp did not support conviction. See *Trozzo v. People*, 51 Colo. 323, 117 P. 150 (1911).

Receiving money pursuant to legitimate business transaction not proscribed. One who receives money or any other thing of value from a prostitute pursuant to a legitimate business transaction, i.e., in consideration of the sale of merchandise or services, does not come within the proscription of this section. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Evidence that defendant was a pimp under this section was held admissible to show motive in prosecution for murder of police officer who

was attempting to take defendant's "woman" away from him. *Coates v. People*, 106 Colo. 483, 106 P.2d 354 (1940).

Establishment of prima facie case. Where the people's evidence establishes that a person knowingly applies a thing of value received through another's act of prostitution to his own benefit, whether it be a business or personal benefit, a prima facie case of proof of the crime of pimping has been made. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Evidence supporting inference of support by prostitution. Evidence that a prostitute has given all her earnings for a certain time period to the defendant, and that the defendant's other sources of income were insufficient to pay his living expenses, supports a reasonable inference that the defendant had knowingly lived on or been supported in whole or in part by money earned through prostitution. *People v. Barron*, 195 Colo. 390, 578 P.2d 649 (1978).

Despite defendant's argument that he merely received money for "room rent" and not from acts of prostitution, jury's finding that defendant was guilty of pimping was supported by evidence that purpose of businesses was to allow prostitution, that businesses were given 30% of the money the women received for acts of prostitution, and that defendant had full knowledge of how each business operated. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993); *aff'd* on other grounds, 900 P.2d 45 (Colo. 1995).

Applied in *People v. Stage*, 195 Colo. 110, 575 P.2d 423 (1978); *People v. Franklin*, 645 P.2d 1 (Colo. 1982).

18-7-207. Prostitute making display. Any person who by word, gesture, or action endeavors to further the practice of prostitution in any public place or within public view commits a class 1 petty offense.

Source: L. 71: R&RE, p. 452, § 1. C.R.S. 1963: § 40-7-207.

18-7-208. Promoting sexual immorality. (1) Any person who, for pecuniary gain, furnishes or makes available to another person any facility, knowing that the same is to be used for or in aid of sexual intercourse between persons who are not husband and wife, or for or in aid of deviate sexual intercourse, or who advertises in any manner that he furnishes or is willing to furnish or make available any such facility for such purposes, commits promoting sexual immorality.

(2) "Facility", as used in this section, means any place or thing which provides seclusion, privacy, opportunity, protection, comfort, or assistance to or for a person or persons engaging or intending to engage in sexual intercourse or deviate sexual intercourse.

(3) Promoting sexual immorality is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 452, § 1. C.R.S. 1963: § 40-7-208.

ANNOTATION

Constitutionality. This section does not violate one's due process, equal protection, or constitutional privacy rights, and is neither vague nor overbroad. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

There is no constitutionally protected right the exercise of which would be threatened by

the legislative prohibition of soliciting, pandering, and pimping. *People v. Mason*, 642 P.2d 8 (Colo. 1982).

Applied in *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

PART 3

PUBLIC INDECENCY

18-7-301. Public indecency. (1) Any person who performs any of the following in a public place or where the conduct may reasonably be expected to be viewed by members of the public commits public indecency:

(a) An act of sexual intercourse; or

(b) (Deleted by amendment, L. 2010, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11, 2010.)

(c) A lewd exposure of an intimate part as defined by section 18-3-401 (2) of the body, not including the genitals, done with intent to arouse or to satisfy the sexual desire of any person; or

(d) A lewd fondling or caress of the body of another person; or

(e) A knowing exposure of the person's genitals to the view of a person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2), public indecency is a class 1 petty offense.

(b) Public indecency as described in paragraph (e) of subsection (1) of this section is a class 1 misdemeanor if the violation is committed subsequent to a conviction for a violation of paragraph (e) of subsection (1) of this section or for a violation of a comparable offense in any other state or in the United States, or for a violation of a comparable municipal ordinance.

(3) (Deleted by amendment, L. 2010, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11, 2010.)

Source: L. 71: R&RE, p. 453, § 1. C.R.S. 1963: § 40-7-301. L. 2008: (1)(d) amended and (1)(e) and (3) added, p. 1716, §§ 1, 2, effective July 1. L. 2010: Entire section amended, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11.

ANNOTATION

The plain language of this offense reflects the general assembly's intent to make public

indecency a strict liability crime without a culpable mental state. Because this section

makes it a crime to perform any of the stated acts where the conduct may reasonably be expected to be viewed by members of the public, it does not matter whether the defendant knew he was in a public place. The objective standard depends on what a reasonable person in the

defendant's position should have known. Therefore, the trial court did not err in rejecting a jury instruction that would have required the jury to find the defendant knew he was in a public place. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

18-7-302. Indecent exposure. (1) A person commits indecent exposure:

(a) If he or she knowingly exposes his or her genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person;

(b) If he or she knowingly performs an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

(2) (a) (Deleted by amendment, L. 2003, p. 1435, § 31, effective July 1, 2003.)

(b) Indecent exposure is a class 1 misdemeanor.

(3) (Deleted by amendment, L. 2002, p. 1587, § 21, effective July 1, 2002.)

(4) Indecent exposure is a class 6 felony if the violation is committed subsequent to two prior convictions of a violation of this section or of a violation of a comparable offense in any other state or in the United States, or of a violation of a comparable municipal ordinance.

(5) For purposes of this section, "masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own genitals or pubic area for the purpose of sexual gratification or arousal of the person, regardless of whether the genitals or pubic area is exposed or covered.

Source: L. 72: p. 275, § 4. C.R.S. 1963: § 40-7-302. L. 77: (1) amended, p. 965, § 36, effective July 1. L. 94: (2) amended and (3) and (4) added, p. 1721, § 18, effective July 1. L. 95: (2) to (4) amended, p. 1254, § 15, effective June 3. L. 2002: (2)(b), (3), and (4) amended, p. 1587, § 21, effective July 1. L. 2003: (2) and (4) amended, p. 1435, § 31, effective July 1. L. 2010: (1) amended and (5) added, (HB 10-1334), ch. 359, p. 1708, § 2, effective August 11.

ANNOTATION

Subsection (1) provides a sufficiently clear standard of conduct, and application of the statute of the defendant's conduct did not deprive him of due process of law. *People v. Randall*, 711 P.2d 689 (Colo. 1985).

Elements of offense not satisfied simply by proof that defendant was naked. A person must do something that would make his or her

genitals visible to another person. *People v. Barrus*, 232 P.3d 264 (Colo. App. 2009).

Subsection (4) is a sentence enhancer, not a substantive offense. Therefore, the prosecution must prove the prior convictions to the court, not the jury. The burden of proof to the court is preponderance of the evidence. *People v. Schreiber*, 226 P.3d 1221 (Colo. App. 2009).

PART 4

CHILD PROSTITUTION

Editor's note: This part 4 was repealed in 1977 and was subsequently recreated and reenacted in 1979, resulting in the addition, relocation, and elimination of sections as well as subject matter. This part 4 was not amended prior to its repeal in 1977. For the text of this part 4 prior to 1977, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

18-7-401. Definitions. As used in this part 4, unless the context otherwise requires:

(1) "Anal intercourse" means contact between human beings of the genital organs of one and the anus of another.

(2) "Child" means a person under the age of eighteen years.

- (3) “Cunnilingus” means any act of oral stimulation of the vulva or clitoris.
- (4) “Fellatio” means any act of oral stimulation of the penis.
- (5) “Masturbation” means stimulation of the genital organs by manual or other bodily contact, or by any object, exclusive of sexual intercourse.
- (6) “Prostitution by a child” means either a child performing or offering or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child’s spouse in exchange for money or other thing of value or any person performing or offering or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any child not the person’s spouse in exchange for money or other thing of value.
- (7) “Prostitution of a child” means either inducing a child to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child’s spouse by coercion or by any threat or intimidation or inducing a child, by coercion or by any threat or intimidation or in exchange for money or other thing of value, to allow any person not the child’s spouse to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with or upon such child. Such coercion, threat, or intimidation need not constitute an independent criminal offense and shall be determined solely through its intended or its actual effect upon the child.

Source: L. 79: Entire part RC&RE, p. 740, § 1, effective May 31. L. 85: (6) and (7) amended, p. 623, § 8, effective July 1.

ANNOTATION

By enacting the definition of “prostitution of a child”, the general assembly sought to prohibit acts by individuals, commonly referred to as pimps, who, in exchange for

money or something of value, induce or force a child to perform sex acts. *People v. Madden*, 111 P.3d 452 (Colo. 2005).

18-7-402. Soliciting for child prostitution. (1) A person commits soliciting for child prostitution if he:

- (a) Solicits another for the purpose of prostitution of a child or by a child;
 - (b) Arranges or offers to arrange a meeting of persons for the purpose of prostitution of a child or by a child; or
 - (c) Directs another to a place knowing such direction is for the purpose of prostitution of a child or by a child.
- (2) Soliciting for child prostitution is a class 3 felony.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31.

ANNOTATION

The statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution. The offense of soliciting for child prostitution is an offense in and of itself with its own designated penalty level. *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

The person seeking the illicit act and the person who acts as the agent between the person seeking the illicit act and the child prostitute are both guilty of solicitation of prostitution under this section. *People v. Emerterio*,

819 P.2d 516 (Colo. App. 1991), rev’d on other grounds, 839 P.2d 1161 (Colo. 1992).

The necessary mens rea to prove solicitation of a child for prostitution is “knowingly”. *People v. Emerterio*, 819 P.2d 516 (Colo. App. 1991), rev’d on other grounds, 839 P.2d 1161 (Colo. 1992).

Abandonment and renunciation is not an affirmative defense to soliciting for child prostitution. *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003).

18-7-403. Pandering of a child. (1) Any person who does any of the following for money or other thing of value commits pandering of a child:

(a) Inducing a child by menacing or criminal intimidation to commit prostitution; or
(b) Knowingly arranging or offering to arrange a situation in which a child may practice prostitution.

(2) Pandering under paragraph (a) of subsection (1) of this section is a class 2 felony. Pandering under paragraph (b) of subsection (1) of this section is a class 3 felony.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31.

18-7-403.5. Procurement of a child. Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another person a child for the purpose of prostitution of the child commits procurement of a child, which is a class 3 felony.

Source: L. 83: Entire section added, p. 696, § 10, effective June 15.

18-7-404. Keeping a place of child prostitution. (1) Any person who has or exercises control over the use of any place which offers seclusion or shelter for the practice of prostitution and who performs any one or more of the following commits keeping a place of child prostitution if he:

(a) Knowingly grants or permits the use of such place for the purpose of prostitution of a child or by a child; or

(b) Permits the continued use of such place for the purpose of prostitution of a child or by a child after becoming aware of facts or circumstances from which he should reasonably know that the place is being used for purposes of such prostitution.

(2) Keeping a place of child prostitution is a class 3 felony.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31.

18-7-405. Pimping of a child. Any person who knowingly lives on or is supported or maintained in whole or in part by money or other thing of value earned, received, procured, or realized by a child through prostitution commits pimping of a child, which is a class 3 felony.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31.

18-7-405.5. Inducement of child prostitution. (1) Any person who by word or action, other than conduct specified in section 18-7-403 (1)(a), induces a child to engage in an act which is prostitution by a child, as defined in section 18-7-401 (6), commits inducement of child prostitution.

(2) Inducement of child prostitution is a class 3 felony.

Source: L. 81: Entire section added, p. 1003, § 1, effective May 28.

ANNOTATION

Defendant's conduct of offering a child money to masturbate in his presence constitutes one type of conduct intended to be punished by the general assembly, and, therefore statute is not unconstitutionally vague. *People v. Young*, 694 P.2d 841 (Colo. 1985).

Statute proscribes inducing a child to masturbate in presence of accused. *People v. Young*, 694 P.2d 841 (Colo. 1985).

Evidence insufficient to support verdict. If a defendant's attempts at persuasion do not induce the child to perform, or to agree to perform, a sexual act in exchange for money or other thing of value, he is not guilty of inducement of child prostitution. *People v. Hansen*, 708 P.2d 468 (Colo. App. 1985).

18-7-406. Patronizing a prostituted child. (1) Any person who performs any of the following with a child not his spouse commits patronizing a prostituted child:

- (a) Engages in an act which is prostitution of a child or by a child, as defined in section 18-7-401 (6) or (7); or
 - (b) Enters or remains in a place of prostitution with intent to engage in an act which is prostitution of a child or by a child, as defined in section 18-7-401 (6) or (7).
- (2) Patronizing a prostituted child is a class 3 felony.

Source: L. 79: Entire part RC&RE, p. 741, § 1, effective May 31.

ANNOTATION

The intent behind the crime of patronizing a prostituted child is to punish those people who either profit from or pay for sex with a child. People v. Madden, 111 P.3d 452 (Colo. 2005).

The crime of patronizing a prostituted child requires an exchange of something of

value, a commercial transaction. It is precisely this exchange that distinguishes this crime from that of sexual assault. People v. Madden, 111 P.3d 452 (Colo. 2005).

18-7-407. Criminality of conduct. In any criminal prosecution under sections 18-7-402 to 18-7-407, it shall be no defense that the defendant did not know the child's age or that he reasonably believed the child to be eighteen years of age or older.

Source: L. 79: Entire part RC&RE, p. 742, § 1, effective May 31.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

18-7-408. Severability. If any provision of this part 4 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this part 4 which may be given effect without the invalid provision or application, and, to this end, the provisions of this part 4 are declared to be severable.

Source: L. 79: Entire part RC&RE, p. 742, § 1, effective May 31.

18-7-409. Reports of convictions to department of education. When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this part 4 and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

Source: L. 90: Entire section added, p. 1026, § 11, effective July 1. **L. 2000:** Entire section amended, p. 1848, § 36, effective August 2.

PART 5

SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN

Editor's note: The Colorado Supreme Court held this entire part 5 unconstitutional because the display provision of section 18-7-502 (5) was overly broad and infringed upon free speech rights of

adults and the provision of section 18-7-503 which allowed an exemption to "accredited" museums, libraries, schools, and institutions of higher education was vague. See *Tattered Cover, Inc., v. Tooley*, 696 P.2d 780 (Colo. 1985).

18-7-501. Definitions. As used in this part 5, unless the context otherwise requires:

- (1) "Child" means a person under the age of eighteen years.
- (2) "Harmful to children" means that quality of any description or representation, in whatever form, of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
 - (a) Taken as a whole, predominantly appeals to the prurient interest in sex of children;
 - (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for children; and
 - (c) Is, when taken as a whole, lacking in serious literary, artistic, political, and scientific value for children.
- (3) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, or both, of:
 - (a) The character and content of any material described herein which is reasonably susceptible of examination; and
 - (b) The age of the child; however, an honest mistake shall constitute an excuse from liability hereunder if a reasonable bona fide attempt is made to ascertain the true age of such child.
- (4) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.
- (5) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, sodomy, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such be female, breast.
- (6) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
- (7) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the areola, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Source: L. 81: Entire part added, p. 1004, § 1, effective June 29.

ANNOTATION

Law reviews. For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 Den. L.J. 49 (1982).

18-7-502. Unlawful acts. (1) It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a child:

- (a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children; or
 - (b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of this subsection (1), or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children.
- (2) It shall be unlawful for any person knowingly to sell to a child an admission ticket or pass, or knowingly to admit a child to premises whereon there is exhibited a motion

picture, show, or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to children or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by children not admitted to any such premises.

(3) It shall be unlawful for any child falsely to represent to any person mentioned in subsection (1) or (2) of this section, or to his agent, that he is eighteen years of age or older, with the intent to procure any material set forth in subsection (1) of this section, or with the intent to procure his admission to any motion picture, show, or other presentation, as set forth in subsection (2) of this section.

(4) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (1) or (2) of this section, or to his agent, that he is the parent or guardian of any juvenile, or that any child is eighteen years of age or older, with the intent to procure any material set forth in subsection (1) of this section, or with the intent to procure any child's admission to any motion picture, show, or other presentation, as set forth in subsection (2) of this section.

(5) It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment frequented by children or where children are or may be invited as part of the general public:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to children; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of this subsection (5), or explicit verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to children.

(6) A violation of any provision of this section is a class 2 misdemeanor.

Source: L. 81: Entire part added, p. 1005, § 1, effective June 29.

ANNOTATION

Law reviews. For article, "Obscenity Law in Colorado: The Struggle to Pass a Constitutional Statute", see 60 Den. L.J. 49 (1982).

Display provisions in subsection (5) unconstitutional. Display provisions must be nar-

rowly drawn so as to only have an incidental effect on the bookseller's right to sell adult materials and an adult's ability to purchase them. *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985).

18-7-503. Applicability. (1) Nothing contained in this part 5 shall be construed to apply to:

(a) The purchase, distribution, exhibition, or loan of any work of art, book, magazine, or other printed or manuscript material by any accredited museum, library, school, or institution of higher education;

(b) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum, school, or institution of higher education, either supported by public appropriation or which is an accredited institution supported by private funds.

Source: L. 81: Entire part added, p. 1006, § 1, effective June 29.

ANNOTATION

Term "accredited" unconstitutionally vague. *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985).

Deletion of "accredited" from the exception provision creates a classification which is

not supported by an overriding justification thus exception violates equal protection. *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985).

18-7-504. Severability. If any provision of this part 5 or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this part 5 which may be given effect without the invalid provision or application, and, to this end, the provisions of this part 5 are declared to be severable.

Source: L. 81: Entire part added, p. 1006, § 1, effective June 29.

ANNOTATION

Severing of unconstitutional provisions under this section would frustrate clear legislative intent; therefore entire part is declared unconsti-

tutional. *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985).

PART 6

VISUAL REPRESENTATIONS CONTAINING ACTUAL VIOLENCE

18-7-601. Dispensing violent films to minors - misdemeanors. (1) No person shall sell, rent, or otherwise furnish to a minor any video tape, video disc, film representation, or other form of motion picture if:

(a) The average person, applying contemporary community standards, would find that the work, taken as a whole, predominantly appeals to the interest in violence; and

(b) The work depicts or describes, in a patently offensive way, repeated acts of actual, not simulated, violence resulting in serious bodily injury or death; and

(c) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(2) For the purposes of this section, "minor" means any person under eighteen years of age, and "serious bodily injury" shall be defined as provided in section 18-1-901 (3) (p).

(3) Any person who violates subsection (1) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of one thousand dollars; except that, for a second or subsequent offense, the fine shall be five thousand dollars.

Source: L. 88: Entire part added, p. 735, § 1, effective July 1.

PART 7

SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION

18-7-701. Sexual conduct in a correctional institution. (1) An employee, contract employee, or volunteer of a correctional institution or an individual who performs work or volunteer functions in a correctional institution who engages in sexual conduct with a person who is in lawful custody in a correctional institution commits the offense of sexual conduct in a correctional institution.

(2) For purposes of this section:

(a) "Correctional institution" means a correctional facility, as defined in section 17-1-102 (1.7), C.R.S., a local jail, as defined in section 17-1-102 (7), C.R.S., operated by or under contract with the department of corrections, a jail, a facility operated by or under contract with the department of human services in which juveniles are or may be lawfully held for detention or commitment for the commission of a crime, or a facility of a community corrections program as defined in section 17-27-102 (3), C.R.S.

(b) "Sexual conduct" means sexual contact as defined in section 18-3-401 (4), sexual intrusion as defined in section 18-3-401 (5), or sexual penetration as defined in section 18-3-401 (6). "Sexual conduct" does not include acts of an employee of a correctional institution or a person who has custody of another person that are performed to carry out the necessary duties of the employee or the person with custody.

(3) Sexual conduct in a correctional institution is a class 5 felony if the sexual conduct includes sexual intrusion or sexual penetration and is committed by an employee or contract employee of a correctional institution or by an employee, contract employee, or individual who performs work functions in a correctional institution or for the department of corrections, the department of human services, or a community corrections program.

(4) Sexual conduct in a correctional institution is a class 6 felony if:

(a) The sexual conduct consists solely of sexual contact and is committed by an employee or contract employee of a correctional institution or by an employee, contract employee, or individual who performs work functions in a correctional institution or for the department of corrections, the department of human services, or a community corrections program;

(b) The sexual conduct includes sexual intrusion or sexual penetration and is committed by a volunteer.

(5) Sexual conduct in a correctional institution is a class 1 misdemeanor if the sexual conduct consists solely of sexual contact and is committed by a volunteer.

Source: **L. 2000:** Entire part added, p. 920, § 7, effective July 1. **L. 2002:** Entire section amended, p. 488, § 1, effective July 1. **L. 2010:** Entire section amended, (HB 10-1277), ch. 262, p. 1189, § 1, effective July 1.

PART 8

CRIMINAL INVASION OF PRIVACY

18-7-801. Criminal invasion of privacy. (1) A person who knowingly observes or takes a photograph of another person's intimate parts, as defined in section 18-3-401 (2), without that person's consent, in a situation where the person observed or photographed has a reasonable expectation of privacy, commits criminal invasion of privacy.

(2) Criminal invasion of privacy is a class 2 misdemeanor.

(3) For the purposes of this section, "photograph" includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, digitally, or chemically reproduced visual material.

Source: **L. 2004:** Entire part added, p. 655, § 1, effective July 1. **L. 2010:** Entire section amended, (SB 10-128), ch. 415, p. 2046, § 3, effective July 1.

ARTICLE 8

Offenses - Governmental Operations

Editor's note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor's note following the title heading.

PART 1

OBSTRUCTION OF PUBLIC JUSTICE

18-8-101.	Definitions.	18-8-107.	Refusing to aid a peace officer.
18-8-102.	Obstructing government operations.	18-8-108.	Compounding.
18-8-103.	Resisting arrest.	18-8-109.	Concealing death.
18-8-104.	Obstructing a peace officer, firefighter, emergency medical services provider, rescue specialist, or volunteer.	18-8-110.	False report of explosives, weapons, or harmful substances.
18-8-105.	Accessory to crime.	18-8-111.	False reporting to authorities.
18-8-106.	Refusal to permit inspections.	18-8-112.	Impersonating a peace officer.
		18-8-113.	Impersonating a public servant.
		18-8-114.	Abuse of public records.
		18-8-115.	Duty to report a crime - liability for disclosure.
		18-8-116.	Disarming a peace officer.

PART 2

ESCAPE AND OFFENSES
RELATING TO CUSTODY

- 18-8-201. Aiding escape.
- 18-8-201.1. Aiding escape from an institution for the care and treatment of persons with mental illness.
- 18-8-202. Inducing prisoners to absent selves.
- 18-8-203. Introducing contraband in the first degree.
- 18-8-204. Introducing contraband in the second degree.
- 18-8-204.1. Possession of contraband in the first degree.
- 18-8-204.2. Possession of contraband in the second degree.
- 18-8-205. Aiding escape from civil process.
- 18-8-206. Assault during escape.
- 18-8-207. Holding hostages.
- 18-8-208. Escapes.
- 18-8-208.1. Attempt to escape.
- 18-8-209. Concurrent and consecutive sentences.
- 18-8-210. Persons in custody or confinement for unclassified offenses.
- 18-8-210.1. Persons in custody or confinement - juvenile offenders.
- 18-8-210.2. Persons in custody or confinement.
- 18-8-211. Riots in detention facilities.
- 18-8-212. Violation of bail bond conditions.
- 18-8-213. Unauthorized residency by an adult offender from another state.

PART 3

BRIBERY AND CORRUPT
INFLUENCES

- 18-8-301. Definitions.
- 18-8-302. Bribery.
- 18-8-303. Compensation for past official behavior.
- 18-8-304. Soliciting unlawful compensation.
- 18-8-305. Trading in public office.
- 18-8-306. Attempt to influence a public servant.
- 18-8-307. Designation of supplier prohibited.
- 18-8-308. Failing to disclose a conflict of interest.

PART 4

ABUSE OF PUBLIC OFFICE

- 18-8-401. Definitions.
- 18-8-402. Misuse of official information.
- 18-8-403. Official oppression.
- 18-8-404. First degree official misconduct.
- 18-8-405. Second degree official misconduct.
- 18-8-406. Issuing a false certificate.
- 18-8-407. Embezzlement of public property.
- 18-8-408. Designation of insurer prohibited.
- 18-8-409. Violation of rules and regulations of judicial nominating commissions not subject to criminal prosecution.

PART 5

PERJURY AND RELATED OFFENSES

- 18-8-501. Definitions.
- 18-8-502. Perjury in the first degree.
- 18-8-503. Perjury in the second degree.
- 18-8-503.5. Perjury on a motor vehicle registration application. (Repealed)
- 18-8-504. False swearing.
- 18-8-505. Perjury or false swearing - inconsistent statements.
- 18-8-506. Perjury and false swearing - proof.
- 18-8-507. Perjury and false swearing - previous criminal action.
- 18-8-508. Perjury - retraction.
- 18-8-509. Perjury and false swearing - irregularities no defense.

PART 6

OFFENSES RELATING TO JUDICIAL
AND OTHER PROCEEDINGS

- 18-8-601. Definitions.
- 18-8-602. Bribing a witness. (Repealed)
- 18-8-603. Bribe-receiving by a witness.
- 18-8-604. Intimidating a witness. (Repealed)
- 18-8-605. Tampering with a witness. (Repealed)
- 18-8-606. Bribing a juror.
- 18-8-607. Bribe-receiving by a juror.
- 18-8-608. Intimidating a juror.
- 18-8-609. Jury-tampering.
- 18-8-610. Tampering with physical evidence.
- 18-8-611. Simulating legal process.
- 18-8-612. Failure to obey a juror summons.
- 18-8-613. Willful misrepresentation of

	material fact on juror questionnaire.	18-8-706.	Retaliation against a witness or victim.
18-8-614.	Willful harassment of juror by employer.	18-8-706.5.	Retaliation against a juror.
18-8-615.	Retaliation against a judge.	18-8-707.	Tampering with a witness or victim.
		18-8-708.	Suit for damages by victim of intimidation or retaliation.

PART 7

VICTIMS AND WITNESSES
PROTECTION

18-8-701.	Short title.
18-8-702.	Definitions.
18-8-703.	Bribing a witness or victim.
18-8-704.	Intimidating a witness or victim.
18-8-705.	Aggravated intimidation of a witness or victim.

PART 8

OFFENSES RELATING TO USE OF
FORCE BY PEACE OFFICERS

18-8-801.	Definitions.
18-8-802.	Duty to report use of force by peace officers.
18-8-803.	Use of excessive force.
18-8-804.	Approved policy or guidelines.

PART 1

OBSTRUCTION OF PUBLIC JUSTICE

18-8-101. Definitions. As used in this article, unless the context otherwise requires:

- (1) "Government" has the same meaning as described in section 18-1-901 (3) (i).
- (2) "Governmental function" has the same meaning as described in section 18-1-901 (3) (j).
- (2.5) "Peace officer" has the same meaning as described in section 16-2.5-101, C.R.S.
- (3) "Public servant" has the same meaning as described in section 18-1-901 (3) (o).

Source: L. 71: R&RE, p. 453, § 1. C.R.S. 1963: § 40-8-101. L. 92: Entire section amended, p. 405, § 19, effective June 3. L. 2003: (2.5) added, p. 1628, § 63, effective August 6.

Editor's note: Subsection (2.5) was originally enacted as subsection (4) but was renumbered on revision for ease of location.

ANNOTATION

Corporation or a corporate body is not included in the definition of "government". Bailey v. People, 200 Colo. 549, 617 P.2d 549 (1980).

Employee of the Colorado Springs urban renewal effort is not a "public servant" per-

forming a "governmental function" on behalf of a "government" as defined in this section. Bailey v. People, 200 Colo. 549, 617 P.2d 549 (1980).

18-8-102. Obstructing government operations. (1) A person commits obstructing government operations if he intentionally obstructs, impairs, or hinders the performance of a governmental function by a public servant, by using or threatening to use violence, force, or physical interference or obstacle.

(2) It shall be an affirmative defense that:

- (a) The obstruction, impairment, or hindrance was of unlawful action by a public servant; or
 - (b) The obstruction, impairment, or hindrance was of the making of an arrest; or
 - (c) The obstruction, impairment, or hindrance of a governmental function was by lawful activities in connection with a labor dispute with the government.
- (3) Obstructing government operations is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 453, § 1. C.R.S. 1963: § 40-8-102. L. 73: p. 538, § 5.

Cross references: For impeding any public official in the lawful performance of his duties or activities, see § 18-9-110.

18-8-103. Resisting arrest. (1) A person commits resisting arrest if he knowingly prevents or attempts to prevent a peace officer, acting under color of his official authority, from effecting an arrest of the actor or another, by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means which creates a substantial risk of causing bodily injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the peace officer was attempting to make an arrest which in fact was unlawful, if he was acting under color of his official authority, and in attempting to make the arrest he was not resorting to unreasonable or excessive force giving rise to the right of self-defense. A peace officer acts "under color of his official authority" when, in the regular course of assigned duties, he is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him.

(3) The term "peace officer" as used in this section and section 18-8-104 means a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person whose arrest is attempted.

(4) Resisting arrest is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 454, § 1. C.R.S. 1963: § 40-8-103. L. 72: p. 593, § 69. L. 77: IP(1) amended, p. 965, § 37, effective July 1. L. 81: (1)(b) amended, p. 981, § 5, effective May 13.

ANNOTATION

Law reviews. For article, "Impeding Unlawful Arrest: A Question of Authority and Criminal Liability", see 61 Den. L.J. 655 (1984).

The general assembly is free to prescribe different punishments for conduct perceived to result in varying degrees of social consequences, and the distinction between this section and § 18-2-203 (1)(f) is not arbitrary or inadvertent. Therefore § 18-2-203 (1)(f) is not unconstitutional. *People v. Wieder*, 693 P.2d 1006 (Colo. App. 1984), *aff'd*, 722 P.2d 396 (Colo. 1986).

Section allows reasonable force. A citizen in resisting an unlawful arrest cannot act with any more force than could the officer in effecting a lawful arrest. This section does not broaden the long accepted rule that one may not act to protect himself or property, whether it be in self-defense or otherwise, with more force than is reasonably necessary. *McDaniel v. People*, 179 Colo. 153, 499 P.2d 613, cert. denied, 409 U.S. 1060, 93 S. Ct. 558, 34 L. Ed.2d 512 (1972) (decided under former § 40-7-57, C.R.S. 1963).

Use of force prohibited. A person may not use force to resist being placed under arrest or in protective custody by a police officer engaged in the performance of his duties, regardless of whether the police conduct is unlawful. *People v. Hess*, 687 P.2d 443 (Colo. 1984).

Where defendant was charged with both resisting arrest and second degree assault, one of the factors in determining whether the

defendant is guilty of one or both of the charges shall be whether the actions of the defendant, which caused injury to the officers, were continuous, stemming from his efforts to resist arrest, or whether there was a break between his actions to thwart the officers efforts to arrest him and the actions which lead to the injury of the officers. *People v. Armstrong*, 720 P.2d 165 (Colo. 1986).

A person using violence against a peace officer to avoid arrest commits the crime of resisting arrest up to the point of arrest. However, after the arrest is made, a person in custody who uses violence against a peace officer commits second degree assault under § 18-3-203. *People v. Stanley*, 56 P.3d 1241 (Colo. App. 2002).

Resisting arrest is distinguishable from second degree assault on a peace officer, as described in § 18-3-203, and third degree assault, as described in § 18-3-204, and therefore these sections do not violate equal protection. This section and § 18-3-204 require that the defendant act knowingly, whereas § 18-3-203 requires that the defendant act intentionally. Further, § 18-3-203 requires the defendant to intend to cause bodily harm, while this section requires only that the defendant use or threaten to use physical force. *People v. Whatley*, 10 P.3d 668 (Colo. App. 2000).

Self-defense instruction required for case involving unreasonable or excessive force during an arrest when defendant charged

with resisting arrest. Self-defense instruction is required when evidence has been presented that officers displayed weapons and were commanded to discharge them in course of effecting arrest and that their conduct was unreasonable or excessive under the circumstances. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

Resisting arrest applies only to arrests made by peace officers acting under color of official authority and not to an off-duty police officer privately employed as a security guard for a skating rink. *People In Interest of J.J.C.*, 835 P.2d 553 (Colo. App. 1992), *aff'd*, 854 P.2d 801 (Colo. 1993).

Defendant may not respond to an unreasonable search or seizure by a threat of violence against the officer and then rely on the exclusionary rule to suppress evidence pertaining to the criminal act of obstructing a peace officer and resisting arrest. *People v. Brown*, 217 P.3d 1252 (Colo. 2009).

Conviction sustained by evidence. *Feste v. People*, 93 Colo. 206, 25 P.2d 177 (1933) (decided under former C.L. § 6793); *People v. Mason*, 632 P.2d 616 (Colo. App. 1981).

Applied in *People v. Jackson*, 198 Colo. 193, 601 P.2d 622 (1979); *People v. Annan*, 665 P.2d 629 (Colo. App. 1983).

18-8-104. Obstructing a peace officer, firefighter, emergency medical services provider, rescue specialist, or volunteer. (1) (a) A person commits obstructing a peace officer, firefighter, emergency medical services provider, rescue specialist, or volunteer when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority; knowingly obstructs, impairs, or hinders the prevention, control, or abatement of fire by a firefighter, acting under color of his or her official authority; knowingly obstructs, impairs, or hinders the administration of medical treatment or emergency assistance by an emergency medical service provider or rescue specialist, acting under color of his or her official authority; or knowingly obstructs, impairs, or hinders the administration of emergency care or emergency assistance by a volunteer, acting in good faith to render such care or assistance without compensation at the place of an emergency or accident.

(b) To assure that animals used in law enforcement or fire prevention activities are protected from harm, a person commits obstructing a peace officer or firefighter when, by using or threatening to use violence, force, physical interference, or an obstacle, he or she knowingly obstructs, impairs, or hinders any such animal.

(2) It is not a defense to a prosecution under this section that the peace officer was acting in an illegal manner, if he or she was acting under color of his or her official authority. A peace officer acts “under color of his or her official authority” if, in the regular course of assigned duties, he or she makes a judgment in good faith based on surrounding facts and circumstances that he or she must act to enforce the law or preserve the peace.

(3) Repealed.

(4) Obstructing a peace officer, firefighter, emergency medical service provider, rescue specialist, or volunteer is a class 2 misdemeanor.

(5) For purposes of this section, unless the context otherwise requires:

(a) “Emergency medical service provider” means a member of a public or private emergency medical service agency, whether that person is a volunteer or receives compensation for services rendered as such emergency medical service provider.

(b) “Rescue specialist” means a member of a public or private rescue agency, whether that person is a volunteer or receives compensation for services rendered as such rescue specialist.

Source: **L. 71:** R&RE, p. 454, § 1. **C.R.S. 1963:** § 40-8-104. **L. 77:** (1) amended, p. 965, § 38, effective July 1. **L. 83:** (3) repealed, p. 671, § 23, effective July 1. **L. 90:** (1) amended, p. 1611, § 2, effective July 1. **L. 96:** (1) and (4) amended, p. 1477, § 41, effective June 1; (1)(a) and (4) amended and (5) added, p. 956, § 1, effective July 1. **L. 2012:** (2) amended, (HB 12-1310), ch. 268, p. 1398, § 15, effective June 7.

Editor’s note: Amendments to subsections (1) and (4) in House Bill 96-208 and Senate Bill 96-68 were harmonized.

ANNOTATION

Interference with peace officer is a matter of both local and statewide concern. City & County of Denver v. Howard, 622 P.2d 568 (Colo. 1981).

And Denver ordinance does not conflict with section. Denver revised municipal code 846.1-2 (interfering with a police officer) does not conflict with this section. City & County of Denver v. Howard, 622 P.2d 568 (Colo. 1981).

If violation of municipal ordinance may result in fine or imprisonment, then the ordinance is penal in nature within the meaning of this section. People v. Shockley, 41 Colo. App. 515, 591 P.2d 589 (1978).

Term "enforcement" as used in subsection (1) encompasses those activities which a peace officer is under a duty to perform in order to give effect to a penal law. People v. Shockley, 41 Colo. App. 515, 591 P.2d 589 (1978).

Obstruction of booking process is violation of this section. People v. Shockley, 41 Colo. App. 515, 591 P.2d 589 (1978).

While mere verbal opposition alone may not suffice to merit a conclusion of interference or obstruction, a combination of statements and acts, viewed in the totality of the circumstances, can form the crime of obstruction. Dempsey v. People, 117 P.3d 800 (Colo. 2005).

Obstruction of a peace officer under this section is a lesser included offense of second degree assault under § 18-3-203 (1)(c) and (1)(f) since all of the elements contained in the definition of obstruction of a peace officer would be necessarily established by the proof of the

elements of second degree assault under § 18-3-203 (1)(c). People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under this section was a lesser included offense of second degree assault under § 18-3-203 (1)(c) was error requiring a new trial where defendant acknowledged the officers sustained bodily injury but there was no admission that he intended to act in a manner that would cause the injury. People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under this section was a lesser included offense of second degree assault under § 18-3-203 (1)(f) was error requiring a new trial where defendant testified that the only action he volitionally took after the first officer entered the cell was to raise his arms. People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Self-defense is an available defense against a charge under this section when a defendant reasonably believes that unreasonable or excessive force is being used by a peace officer. People v. Barrus, 232 P.3d 264 (Colo. App. 2009).

Defendant may not respond to an unreasonable search or seizure by a threat of violence against the officer and then rely on the exclusionary rule to suppress evidence pertaining to the criminal act of obstructing a peace officer and resisting arrest. People v. Brown, 217 P.3d 1252 (Colo. 2009).

18-8-105. Accessory to crime. (1) A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person.

(2) "Render assistance" means to:

(a) Harbor or conceal the other; or

(a.5) Harbor or conceal the victim or a witness to the crime; or

(b) Warn such person of impending discovery or apprehension; except that this does not apply to a warning given in an effort to bring such person into compliance with the law; or

(c) Provide such person with money, transportation, weapon, disguise, or other thing to be used in avoiding discovery or apprehension; or

(d) By force, intimidation, or deception, obstruct anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person; or

(e) Conceal, destroy, or alter any physical or testimonial evidence that might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.

(3) Being an accessory to crime is a class 4 felony if the offender knows that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with a crime, and if that crime is designated by this code as a class 1 or class 2 felony.

(4) Being an accessory to crime is a class 5 felony if the offender knows that the person being assisted is suspected of or wanted for a crime, and if that crime is designated by this code as a class 1 or class 2 felony.

(5) Being an accessory to crime is a class 5 felony if the offender knows that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with a crime, or is suspected of or wanted for a crime, and if that crime is designated by this code as a felony other than a class 1 or class 2 felony; except that being an accessory to a class 6 felony is a class 6 felony.

(6) Being an accessory to crime is a class 1 petty offense if the offender knows that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with a crime, or is suspected of or wanted for a crime, and if that crime is designated by this code as a misdemeanor of any class.

Source: L. 71: R&RE, p. 454, § 1. C.R.S. 1963: § 40-8-105. L. 91: (5) amended, p. 406, § 13, effective June 6. L. 97: (2)(a.5) added and (2)(e) amended, p. 1547, § 20, effective July 1.

ANNOTATION

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 35 Dicta 26 (1958). For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982).

Annotator's note. Since § 18-8-105 is similar to former §§ 40-1-12 and 40-1-13, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Common-law rule. At common law the accused must have rendered some assistance to a felon, and that assistance must have been such as to shelter him to some extent from prosecution, such as concealing him in his house. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

The common-law rule that a person cannot be prosecuted as an accessory after the fact until after the principal has been convicted does not apply. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

Since the early days of the English common law, it has been generally held that any assistance whatever given to one known to be a felon in order to hinder his being apprehended, or tried, or suffering punishment makes the assistor an accessory after the fact. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

Constitutionality. Former section held not unconstitutionally vague since it gave fair warning of the conduct forbidden, and men of common intelligence can readily apprehend the statute's meaning and application. This is the accepted test in this jurisdiction. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

This section does not violate a defendant's constitutional privilege against self-incrimination. An accessory after the fact, by definition, does not assent to the commission of the principal's crime. And this section does not impose liability upon defendant for his failure to reveal his complicity, but rather for his affirmative acts which constituted the interdicted conduct. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

This section gives fair warning of the conduct forbidden. Men of common intelligence can

readily comprehend the statute's meaning and application. *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

The word "might" must be construed to mean a reasonable probability that the forbidden result would obtain and thus the statute is not unconstitutionally vague. *People v. Pratt*, 759 P.2d 676 (Colo. 1988).

Neither is this section unconstitutionally overbroad. *People v. Pratt*, 759 P.2d 676 (Colo. 1988).

Any assistance whatever given to one known to be a felon, including the harboring and protection of the wrongdoer, constitutes "rendering assistance" within the meaning of this section. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

Although the mere failure to inform public authorities of one's knowledge of a felon may not be sufficient to establish that an accused is an accessory to the crime, the offense can be established by proving the defendant was of personal help to, or aided, the offender in avoiding arrest and prosecution. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

The act of an accessory providing a felon with a secret hiding place in order that he would avoid detection and arrest constituted giving shelter or refuge and thus violated the statutory prohibition against harboring and/or concealing. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

The act of harboring or concealing a wanted person, coupled with the requisite intent under this section, forms the basis of the criminal offense. *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

For factors supporting the conclusion that accessory was harboring and/or concealing a felon, see *People v. Sandoval*, 791 P.2d 1211 (Colo. App. 1990).

Section applicable to noncriminal-code crimes. There is nothing in the statutory context of this section indicating a legislative intent to prohibit the application of its provisions on be-

ing an accessory to crime to noncriminal-code crimes. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

The relevant standard for knowledge in regard to the accessory statute is whether defendant knew the principal had committed a crime. *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

Knowledge that a theft has occurred is knowledge sufficient to sustain a conviction of accessory to theft of auto parts. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

It is not necessary for the defendant to have known that the crime committed was a particular class. *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

When such classification is relevant. The statutory classification of the crime committed by the principal (class one or two felony) is only relevant in determining the degree of the accessory charge (class four or five felony or class one petty offense). *People v. Young*, 192 Colo. 65, 555 P.2d 1160 (1976).

The phrase "charged with", as used in the former accessory after the fact statute, means more than a mere formal charge and includes responsibility for the crime. *Self v. People*, 167 Colo. 292, 448 P.2d 619 (1968).

Elements of offense. The offense may be committed by either concealing the commission of the crime from the magistrate, or by harboring or protecting the felon. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

To convict a defendant under this section it must be proved that a crime has been committed; that after full knowledge of the commission of such crime, the defendant concealed the same from the magistrate, or that defendant harbored and protected the criminal after he had full knowledge that the crime had been committed. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

Where defendant was prosecuted as an accessory to murder, it was necessary for the people to prove that the alleged killer had murdered his wife, and that defendant with knowledge of that fact concealed the commission of the crime, or that after full knowledge of the commission of the crime had harbored and protected the murderer. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

Whether one is an accessory depends on whether what he did was a personal help to the offender to elude punishment. He need only aid the criminal to escape arrest and prosecution. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

To establish that an accused is guilty of being an accessory under subsection (5), the following statutory elements must be proven: (1) A crime has been committed; (2) the accused rendered assistance to the actor; (3) the accused intended to hinder, delay, or prevent the discovery, detec-

tion, apprehension, prosecution, conviction, or punishment of the principal; (4) the accused knew that the person being assisted has committed, or has been convicted of, or is charged by pending information, indictment, or complaint with such crime, or is suspected of or wanted in connection with such crime; and, (5) the underlying crime is designated as a felony other than a class 1 or 2 felony. *Barreras v. People*, 636 P.2d 686 (Colo. 1981).

Mere silence is not enough. Mere silence as to one's knowledge of a felony, with no intent to aid the felon, or mere failure to inform the public authorities, does not establish such person as an accessory. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

Specific statutory definition of "render assistance" must be included in jury instructions, where failure to do so may lead jurors to conclude that the defendant's mere presence at scene of crime is "assistance". *People v. Broom*, 797 P.2d 754 (Colo. App. 1990).

Section does not retain full knowledge requirement of previous accessory after fact statutes. Prior to the adoption of subsection (1), proof that the defendant had full knowledge of the underlying crime actually committed was a condition precedent to conviction for the statutory offense of accessory after the fact. *People v. Barreras*, 44 Colo. App. 402, 618 P.2d 704 (1980), *aff'd*, 636 P.2d 686 (Colo. 1981).

This section has no application to one who was guilty of the principal offense as a complicitor, if the commission of both offenses is grounded upon the same act; a different specific intent is required for accessory offenses than for the crime of conspiracy. *People v. Broom*, 797 P.2d 754 (Colo. App. 1990).

Evidence that defendant rendered assistance to his companions' efforts to conceal or destroy evidence of murder for which defendant was convicted supported defendant's conviction of being an accessory, on the basis of complicity, to the conduct of his two companions. *People v. Ager*, 928 P.2d 784 (Colo. App. 1996).

This section has no application to one who was a principal in the commission of the crime. *Miller v. People*, 92 Colo. 481, 22 P.2d 626 (1933).

Guilt of principal, not legal status, is element of section. The guilt or innocence of an accessory after the fact depends as to one element on the factual status of the principal as to guilt or innocence; not on his legal status as regards liability or nonliability to suffer a penalty. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

Thus, the state must establish that the crime was in fact committed on the trial of the accessory, and the result of the trial of the principal, if there is a trial, is immaterial. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

Since this section creates a crime complete in itself, before a conviction may be had every necessary element must be established in the case in which the accessory is on trial, including the factual commission of the antecedent crime concealed or the perpetrator of which was harbored. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

On the trial of a criminal charge of accessory to a murder, the state is required to establish the killing, and this requirement is not satisfied by evidence of the prior conviction of the principal perpetrator of the crime. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

To successfully convict a defendant of being an accessory, there must be sufficient evidence presented to show that there was, in fact, a principal who was guilty of the crime charged, even though it is inconsequential whether or not the principal was ever charged with the criminal offense. *Britto v. People*, 178 Colo. 216, 497 P.2d 325 (1972).

But conviction of principal is not condition precedent. Under this article, being an accessory after the fact is a statutory offense, and a person may be convicted thereof although the principal had not been formally charged with, or convicted of the crime. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

The accessory statute is held to create a substantive statutory crime and, as construed, the conviction of the principal is not a condition precedent to the conviction of an accessory. *Roberts v. People*, 103 Colo. 250, 87 P.2d 251 (1938).

The conviction of the principal is not a condition precedent to the conviction of an accessory. *Lowe v. People*, 135 Colo. 209, 309 P.2d 601 (1957).

Accessory distinguished from one who aids or abets a crime. It is not true that one can be indicted as principal whose conduct is such as to make of him an accessory. The penalty provided for this crime is entirely different from that authorized for one who "aids, abets, or assists", or who has advised and encouraged the perpe-

tration of the crime, and the essential ingredients of the crimes under comparison are entirely different. *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968).

Accessory after the fact is not lesser included offense. As to accessories after the fact a specific charge raising that issue is necessary. Questions relating thereto are not included, upon the theory of a lesser included offense, within an information in which the persons accused are charged as principals. *Martinez v. People*, 166 Colo. 524, 444 P.2d 641 (1968); *Mingo v. People*, 171 Colo. 474, 468 P.2d 849 (1970).

The court's refusal to instruct the jury that the crime of accessory during the fact is also a lesser included offense when robbery is charged, which was the defendant's principal theory of the case, was not error because accessory during the fact is a separate and distinct offense which was not charged and which could not properly have been the subject of an instruction. *Maes v. People*, 178 Colo. 46, 494 P.2d 1290 (1972).

And acquittal of a criminal charge does not bar conviction as an accessory after the fact. *Howard v. People*, 97 Colo. 550, 51 P.2d 594 (1935).

This section requires only that a defendant obstruct anyone in the performance of any act which might aid in detection of the principal; this section does not require that the act be successful. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

This section is distinguishable from § 18-8-111. A deliberate attempt to thwart law enforcement is more destructive than conduct not designed to do so. As a result, the greater punishment for the offense of accessory to a crime is justified. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

Applied in *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979); *People v. McCall*, 43 Colo. App. 117, 603 P.2d 950 (1979); *People v. Archuleta*, 616 P.2d 977 (Colo. 1980); *People v. R.V.*, 635 P.2d 892 (Colo. 1981); *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People v. Simien*, 656 P.2d 698 (Colo. 1983).

18-8-106. Refusal to permit inspections. (1) A person commits a class 1 petty offense if, knowing that a public servant is legally authorized to inspect property:

(a) He refuses to produce or make available the property for inspection at a reasonable hour; or

(b) If the property is available for inspection he refuses to permit the inspection at a reasonable hour.

(2) For purposes of this section, "property" means any real or personal property, including books, records, and documents which are owned, possessed, or otherwise subject to the control of the defendant. A "legally authorized inspection" means any lawful search, sampling, testing, or other examination of property, in connection with the regulation of a business or occupation, that is authorized by statute or lawful regulatory provision.

18-8-107. Refusing to aid a peace officer. A person, eighteen years of age or older, commits a class 1 petty offense when, upon command by a person known to him to be a peace officer, he unreasonably refuses or fails to aid the peace officer in effecting or securing an arrest or preventing the commission by another of any offense.

Source: L. 71: R&RE, p. 456, § 1. C.R.S. 1963: § 40-8-107.

18-8-108. Compounding. (1) A person commits compounding if he accepts or agrees to accept any pecuniary benefit as consideration for:

- (a) Refraining from seeking prosecution of an offender; or
- (b) Refraining from reporting to law enforcement authorities the commission or suspected commission of any crime or information relating to a crime.
- (2) It is an affirmative defense to prosecution under this section that the benefit received by the defendant did not exceed an amount which the defendant reasonably believed to be due as restitution or indemnification for harm caused by the crime.
- (3) Compounding is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 456, § 1. C.R.S. 1963: § 40-8-108.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Annotator's note. Since § 18-8-108 is similar to former G.S. § 810, relevant cases construing that provision have been included in the annotations to this section.

A promise to compound any criminal offense is itself a crime and affords no valid consideration for a contract. *Lomax v. Colo. Nat'l Bank*, 46 Colo. 229, 104 P. 85 (1909).

Thief or third person may recompense owner for loss resulting from theft. A thief is

under a legal, as well as a moral, duty to repay the person whose property he has stolen, and it is not in itself an illegal contract for him to give his own obligation therefor, or for a third party to agree to recompense the owner for the loss. *Giles v. De Cow*, 30 Colo. 412, 70 P. 681 (1902); *Lomax v. Colo. Nat'l Bank*, 46 Colo. 229, 104 P. 85 (1909).

18-8-109. Concealing death. Any person who conceals the death of another person and thereby prevents a determination of the cause or circumstances of death commits a class 1 misdemeanor. For the purpose of this section only, "another person" includes a fetus born dead.

Source: L. 71: R&RE, p. 456, § 1. C.R.S. 1963: § 40-8-109.

ANNOTATION

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Elements of offense. A violation of this section requires proof that a defendant both conceal

a death and, by concealing the death, prevent a determination of the cause of the death. *People v. T & S Leasing, Inc.*, 763 P.2d 1049 (Colo. 1988).

18-8-110. False report of explosives, weapons, or harmful substances. Any person who reports to any other person that a bomb or other explosive, any chemical or biological agent, any poison or weapon, or any harmful radioactive substance has been placed in any public or private place or vehicle designed for the transportation of persons or property, knowing that the report is false, commits a class 6 felony.

Source: **L. 71:** R&RE, p. 456, § 1. **C.R.S. 1963:** § 40-8-110. **L. 79:** Entire section amended, p. 743, § 1, effective July 1. **L. 81:** Entire section amended, p. 975, § 14, effective July 1. **L. 89:** Entire section amended, p. 839, § 77, effective July 1.

18-8-111. False reporting to authorities. (1) A person commits false reporting to authorities, if:

(a) He or she knowingly:

(I) Causes by any means, including but not limited to activation, a false alarm of fire or other emergency or a false emergency exit alarm to sound or to be transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency which deals with emergencies involving danger to life or property; or

(II) Prevents by any means, including but not limited to deactivation, a legitimate fire alarm, emergency exit alarm, or other emergency alarm from sounding or from being transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency that deals with emergencies involving danger to life or property; or

(b) He makes a report or knowingly causes the transmission of a report to law enforcement authorities of a crime or other incident within their official concern when he knows that it did not occur; or

(c) He or she makes a report or knowingly causes the transmission of a report to law enforcement authorities pretending to furnish information relating to an offense or other incident within their official concern when he or she knows that he or she has no such information or knows that the information is false; or

(d) He or she knowingly provides false identifying information to law enforcement authorities.

(2) False reporting to authorities is a class 3 misdemeanor; except that if it is committed in violation of paragraph (a) of subsection (1) of this section and committed during the commission of another criminal offense, it is a class 2 misdemeanor.

(3) For purposes of this section, "identifying information" means a person's name, address, birth date, social security number, or driver's license or Colorado identification number.

Source: **L. 71:** R&RE, p. 456, § 1. **C.R.S. 1963:** § 40-8-111. **L. 77:** (1)(b) and (1)(c) amended, p. 965, § 39, effective July 1. **L. 86:** (2) amended, p. 771, § 9, effective July 1. **L. 96:** (1)(c) amended and (1)(d) and (3) added, pp. 1840, 1841, §§ 2, 3, effective July 1. **L. 97:** (3) amended, p. 1541, § 6, effective July 1. **L. 2012:** (1)(a) and (2) amended, (HB 12-1304), ch. 237, p. 1049, § 2, effective May 29.

Cross references: For the legislative declaration in the 2012 act amending subsections (1)(a) and (2), see section 1 of chapter 237, Session Laws of Colorado 2012.

ANNOTATION

Defendant was not entitled to jury instruction that offense of false reporting to authorities was a lesser included offense of criminal impersonation because false reporting has the additional element of making or transmission of a report to law enforcement authorities. *People v. Vasallo-Hernandez*, 939 P.2d 440 (Colo. App. 1995).

Nor did evidence support jury instruction on offense of false reporting to authorities as a lesser non-included offense of criminal impersonation absent the initiation of affirmative action intended to communicate information.

People v. Vasallo-Hernandez, 939 P.2d 440 (Colo. App. 1995).

This section is distinguishable from § 18-8-105. A deliberate attempt to thwart law enforcement is more destructive than conduct not designed to do so. As a result, the greater punishment for the offense of accessory to a crime is justified. *People v. Preciado-Flores*, 66 P.3d 155 (Colo. App. 2002).

False reporting to authorities is not a specific instance of attempt to influence a public servant. The crime of false reporting penalizes those who provide untruthful information to

public officials, regardless of an attempt to influence public officials. The attempted influence offense can occur without any false reporting at all. Thus, the attempted influence charge and the

false reporting charge do not differ solely by prohibiting general and specific conduct. *People v. Blue*, 253 P.3d 1273 (Colo. App. 2011).

18-8-112. Impersonating a peace officer. (1) A person who falsely pretends to be a peace officer and performs an act in that pretended capacity commits impersonating a peace officer.

(2) Impersonating a peace officer is a class 6 felony.

Source: L. 71: R&RE, p. 456, § 1. C.R.S. 1963: § 40-8-112. L. 2003: Entire section amended, p. 1383, § 1, effective May 1. L. 2004: Entire section amended, p. 1080, § 1, effective July 1.

ANNOTATION

Law reviews. For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981).

18-8-113. Impersonating a public servant. (1) A person commits impersonating a public servant if he falsely pretends to be a public servant other than a peace officer and performs any act in that pretended capacity.

(2) It is no defense to a prosecution under this section that the office the actor pretended to hold did not in fact exist.

(3) Impersonating a public servant is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 457, § 1. C.R.S. 1963: § 40-8-113.

18-8-114. Abuse of public records. (1) A person commits a class 1 misdemeanor if:

(a) The person knowingly makes a false entry in or falsely alters any public record; or

(b) Knowing the person lacks the authority to do so, the person knowingly destroys, mutilates, conceals, removes, or impairs the availability of any public record; or

(c) Knowing the person lacks the authority to retain the record, the person refuses to deliver up a public record in the person’s possession upon proper request of any person lawfully entitled to receive such record; or

(d) Knowing the person has not been authorized by the custodian of the public record to do so, the person knowingly alters any public record.

(2) As used in this section, the term “public record” includes all official books, papers, or records created, received, or used by or in any governmental office or agency.

Source: L. 71: R&RE, p. 457, § 1. C.R.S. 1963: § 40-8-114. L. 77: (1)(b) amended, p. 966, § 40, effective July 1. L. 96: (1) amended, p. 1561, § 15, effective July 1.

ANNOTATION

Applicability of section. This section applies only to records after they are created, received, or used by a public office. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46 (1975).

Records in custody or control of public agency. A violation of this section occurs only where a person falsifies or otherwise corrupts a record which is in, or is required by law to be in, the custody or control of a public agency at the time of falsification. *People v. Trujillo*, 185 Colo. 14, 521 P.2d 769 (1974).

Limitation imposed on section improper. Imposing limitation that criminal liability for a violation of this section hinges on whether the document in question is open to public inspection is not proper. *People v. Trujillo*, 185 Colo. 14, 521 P.2d 769 (1974).

Comparison with section 18-5-114. Abuse of public records under this section was not meant to cover the offense of offering a false instrument for recording under § 18-5-114. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46

(1975).

Term “record” includes civil service examination questions with answers. The word, “record”, in the sense in which the word is used in this section, includes examination questions of the state personnel system with the answers of applicants thereto, but does not include unused examination question. *Shimmel v. People*, 108 Colo. 592, 121 P.2d 491 (1942) (decided under former CSA, C. 48, § 151).

Personal book kept by probate judge for his own information and convenience which contained records not germane to his office was not a public record. *Downing v. Brown*, 3 Colo. 571 (1877) (decided under former R.S. p. 208, § 69).

Incorrect information on application for college admission was not included within the offense covered by this section. *People v. Trujillo*, 189 Colo. 23, 536 P.2d 46 (1975).

18-8-115. Duty to report a crime - liability for disclosure. It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law.

Source: L. 79: Entire section added, p. 729, § 9, effective July 1. **L. 81:** Entire section amended, p. 976, § 15, effective July 1.

ANNOTATION

The Tenth Circuit held no general duty exists under this section to stop or report a crime being committed, in context of defending a charge of conspiracy to commit fraud against the government. *U.S. v. Zimmermann*, 943 F.2d 1204 (10th Cir. 1991).

This section does not require the degree of certainty on the part of a citizen reporting the commission of a crime as does the probable cause standard that police officers are held to in making warrantless arrests. *Lunsford v. Western States Life Ins.*, 919 P.2d 899 (Colo. App. 1996).

18-8-116. Disarming a peace officer. (1) A person commits disarming a peace officer if he or she knowingly, without justification and without consent, removes the firearm or self-defense electronic control device, direct-contact stun device, or other similar device of a peace officer who is acting under color of his or her official authority.

(2) Disarming a peace officer is a class 5 felony.

(3) The term “peace officer” as used in this section means a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person.

Source: L. 85: Entire section added, p. 677, § 1, effective July 1. **L. 2009:** (1) amended, (HB 09-1120), ch. 305, p. 1651, § 3, effective July 1.

ANNOTATION

Self-defense instruction required for case involving unreasonable or excessive force during an arrest when defendant charged with attempting to disarm a peace officer. Self-defense instruction is required when evidence has been presented that officers displayed

weapons and were commanded to discharge them in course of effecting arrest and that their conduct was unreasonable or excessive under the circumstances. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).

PART 2

ESCAPE AND OFFENSES
RELATING TO CUSTODY

18-8-201. Aiding escape. (1) Any person who knowingly aids, abets, or assists another person to escape or attempt to escape from custody or confinement commits the offense of aiding escape.

(2) "Escape" is deemed to be a continuing activity commencing with the conception of the design to escape and continuing until the escapee is returned to custody or the attempt to escape is thwarted or abandoned.

(3) "Assist" includes any activity characterized as "rendering assistance" in section 18-8-105.

(4) Aiding escape is a class 2 felony if the person aided was in custody or confinement as a result of conviction of a class 1 or class 2 felony.

(5) Aiding escape is a class 3 felony if the person aided was in custody or confinement and charged with or held for any felony or convicted of any felony other than a class 1 or class 2 felony.

(6) Aiding escape is a class 1 misdemeanor if the person aided was in custody or confinement and charged with, held for, or convicted of a misdemeanor or a petty offense.

Source: L. 71: R&RE, p. 457, § 1. C.R.S. 1963: § 40-8-201. L. 77: (1) amended, p. 966, § 41, effective July 1.

ANNOTATION

Annotator's note. Since § 18-8-201 is similar to former C.L. § 6805, a relevant case construing that provision has been included in the annotations to this section.

Acceptance of tools to effect escape not necessary to constitute crime. Under this section acceptance by a prisoner of files and saws to effect his escape was not necessary to complete defendant's statutory crime of assisting in an escape by conveying to him such tools. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

Nor is the attempted escape of the prisoner. This section does not require that jail break, or attempted exodus of the prisoner or prisoners from jail, be shown in order to complete the crime. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

Defense of execution of public duty held not authorized. A penitentiary guard, accused of aiding an escape, whose theory of the case is

that he was attempting to apprehend an escaped criminal by using undercover techniques is not entitled to a jury instruction on the affirmative defense of execution of public duty when his authority to make an arrest is limited to penitentiary grounds and there is no evidence he had any authorization to engage in undercover activities. *People v. Roberts*, 43 Colo. App. 100, 601 P.2d 654 (1979).

Sufficiency of information. An information under this section which charged that defendant aided a prisoner to escape, though no attempt to escape was actually made, by conveying or causing to be delivered to the prisoner instruments to facilitate his escape, held to sufficiently inform defendant of the nature and cause of the accusation. *Compton v. People*, 84 Colo. 106, 268 P. 577 (1928).

Conviction under this section for aiding fugitive to flee warrants attorney disbarment despite lack of a prior disciplinary record. *People v. Bullock*, 882 P.2d 1390 (Colo. 1994).

18-8-201.1. Aiding escape from an institution for the care and treatment of persons with mental illness. Any person who knowingly aids the escape of a person who is an inmate of an institution for the care and treatment of persons with mental illness and who knows the person aided is confined in such institution pursuant to a commitment under article 8 of title 16, C.R.S., commits the offense of aiding escape from an institution for the care and treatment of persons with mental illness, which is a class 5 felony.

Source: L. 74: Entire section added, p. 255, § 1, effective February 13. C.R.S. 1963: 40-8-211. L. 77: Entire section amended, p. 966, § 42, effective July 1. L. 2006: Entire section amended, p. 1399, § 50, effective August 7.

ANNOTATION

This section was not intended to apply to the situation where a patient in a state mental institution aids the escape of another patient, as opposed to the situation where an employee of the institution aids the escape of a patient. *People v. Cornell*, 194 Colo. 211, 572 P.2d 137 (1977).

But the passage of section 18-8-208 (6) enabled this section to be applied to a patient of a state mental institution who aids another patient's escape. *People v. Cornell*, 194 Colo. 211, 572 P.2d 137 (1977).

18-8-202. Inducing prisoners to absent selves. Any person who invites, entices, solicits, or induces any prisoner in custody or confinement to absent himself from his work or who substantially delays or hinders a prisoner in his work commits a class 1 petty offense.

Source: L. 71: R&RE, p. 458, § 1. C.R.S. 1963: § 40-8-202.

ANNOTATION

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-203. Introducing contraband in the first degree. (1) A person commits introducing contraband in the first degree if he or she knowingly and unlawfully:

(a) Introduces or attempts to introduce a dangerous instrument, malt, vinous, or spirituous liquor, as defined in section 12-47-103, C.R.S., fermented malt beverage, as defined in section 12-46-103, C.R.S., controlled substance, as defined in section 18-18-102 (5), or marijuana or marijuana concentrate, as defined in section 27-80-203 (15) and (16), C.R.S., into a detention facility or at any location where an inmate is or is likely to be located, while the inmate is in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole; or

(b) Being a person confined in a detention facility, makes any dangerous instrument, controlled substance, marijuana or marijuana concentrate, or alcohol.

(2) Introducing contraband in the first degree is a class 4 felony.

(3) "Detention facility" means any building, structure, enclosure, vehicle, institution, worksite, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the jurisdiction of the department of corrections or under the authority of the United States, the state of Colorado, or any political subdivision of the state of Colorado.

(4) "Dangerous instrument" as used in this section and in section 18-8-204.1, means a firearm, explosive device or substance (including ammunition), knife or sharpened instrument, poison, acid, bludgeon, or projective device, or any other device, instrument, material, or substance which is readily capable of causing or inducing fear of death or bodily injury, the use of which is not specifically authorized.

Source: L. 71: R&RE, p. 458, § 1. C.R.S. 1963: § 40-8-203. L. 72: p. 275, § 5. L. 76, Ex. Sess.: (1)(a), (1)(b), and (2) amended and (4) added, p. 12, § 1, effective September 18. L. 77: (2) amended, p. 878, § 45, effective July 1, 1979. L. 81: (1)(a) and (1)(b) amended, p. 738, § 23, effective July 1. L. 82: (1)(a) and (1)(b) amended, p. 319, § 3, effective March 11. L. 2002: IP(1), (1)(a), and (3) amended, p. 810, § 1, effective July 1. L. 2010: (1) amended, (HB 10-1352), ch. 259, p. 1173, § 17, effective August 11. L. 2012: (1)(a) amended, (HB 12-1311), ch. 281, p. 1619, § 46, effective July 1.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Possession of cannabis not lesser included offense. Because proof of possession is not an essential element to the crime of introducing contraband, the crime of possession of cannabis cannot be a lesser included offense thereof. *People v. Etchells*, 646 P.2d 950 (Colo. App. 1982).

Defective bullet which will not explode does not constitute "ammunition". *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983).

Evidence sufficient to sustain conviction. Where the mixture of orange peels, orange, and bread floating in a mixture of milk and water which defendant concocted was capable of producing alcohol, and the surrounding circumstance did not reveal any legitimate purpose for such concoction, defendant's actions were sufficient to support a conviction for attempting to introduce contraband in the first degree despite flaws in the sampling and testing procedures of the mixture. *People v. Chavez*, 743 P.2d 53 (Colo. App. 1987).

Any amount of marihuana sufficient to ingest will support a conviction for possession of contraband in a detention facility, where statute fails to specify an amount. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Trial court's admission of expert testimony that defendant had been previously addicted to illegal drugs was harmless error in light of court of appeals holding that the lack of an amount of marijuana sufficient to produce a

psychoactive effect is not a defense to a charge of possession of contraband in the first degree. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Return by jury of verdict of guilty on charge brought pursuant to this section was not inconsistent with acquittal on remaining three charges under this section where the incidents occurred on different dates and different locations from the charge for which the defendant was convicted. *People v. Quinn*, 794 P.2d 1066 (Colo. App. 1990).

Statements made by defendant during booking process regarding possession of marijuana violated fifth amendment privilege and therefore were inadmissible. Because defendant made statements to booking officers denying possessing contraband without the benefit of Miranda warnings, the trial court erred in admitting those statements. The statements did not fall under the booking question exception because the questions were unrelated to basic identifying data, nor did the statements fall under the public safety exception because the officer's questions exceeded the scope by asking about items beyond weapons or dangerous instruments. *People v. Allen*, 199 P.3d 33 (Colo. App. 2007).

Applied in *People v. Scott*, 41 Colo. App. 66, 583 P.2d 939 (1978); *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979); *People v. Lepik*, 629 P.2d 1080 (Colo. 1981); *People v. Allen*, 636 P.2d 1329 (Colo. App. 1981); *Allen v. People*, 660 P.2d 896 (Colo. 1983).

18-8-204. Introducing contraband in the second degree. (1) A person commits introducing contraband in the second degree if he or she knowingly and unlawfully:

- (a) Introduces or attempts to introduce contraband into a detention facility; or
- (b) Being a person confined in a detention facility, makes any contraband, as defined in subsection (2) of this section.

(1.5) A person confined in a detention facility commits introducing contraband in the second degree if he or she knowingly and unlawfully introduces or attempts to introduce contraband into a detention facility or at any location where an inmate is likely to be located, while such inmate is in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole.

(2) "Contraband" as used in this section means any of the following, but does not include any article or thing referred to in section 18-8-203:

- (a) Any key, key pattern, key replica, or lock pick;
- (b) Any tool or instrument that could be used to cut fence or wire, dig, pry, or file;
- (c) Any money or coin of United States or foreign currency or any written instrument of value;
- (d) Any uncanceled postage stamp or implement of the United States postal service;
- (e) Any counterfeit or forged identification card;
- (f) Any combustible material other than safety matches;
- (g) Any drug, other than a controlled substance as defined in section 18-18-102 (5), in quantities other than those authorized by a physician;
- (h) Any mask, wig, disguise, or other means of altering normal physical appearance which could hinder ready identification;

- (i) Any drug paraphernalia as defined in section 18-18-426;
 - (j) Any material which is "obscene" as defined in section 18-7-101;
 - (k) Any chain, rope, or ladder;
 - (l) Any article or thing that poses or may pose a threat to the security of the detention facility as determined by the administrative head of the detention facility if reasonable notice is given that such article or thing is contraband;
 - (m) For purposes of a facility of the department of corrections or any private contract prison, any cigarettes or tobacco products, as defined in section 39-28.5-101 (5), C.R.S.; or
 - (n) Any portable electronic communication device, including but not limited to cellular telephones; cloned cellular telephones as defined in section 18-9-309; public, private, or family-style radios; pagers; personal digital assistants; any other device capable of transmitting or intercepting cellular or radio signals between providers and users of telecommunication and data services; and portable computers; except those devices authorized by the executive director of the department of corrections or his or her designee.
- (3) Introducing contraband in the second degree is a class 6 felony.

Source: L. 71: R&RE, p. 458, § 1. C.R.S. 1963: § 40-8-204. L. 76, Ex. Sess.: (3) amended, p. 13, § 2, effective September 18. L. 77: (3) amended, p. 878, § 46, effective July 1, 1979. L. 82: (1)(b) amended and (2) R&RE, p. 318, §§ 1, 2, effective March 11. L. 86: (2)(j) amended, p. 784, § 5, effective April 21. L. 89: (3) amended, p. 839, § 78, effective July 1. L. 92: (2)(i) amended, p. 392, § 21, effective July 1. L. 2000: (2)(m) added, p. 851, § 58, effective May 24; (2)(b) amended, p. 709, § 43, effective July 1. L. 2002: IP(1) and (2)(m) amended and (1.5) added, p. 810, § 2, effective July 1. L. 2005: (2)(m) amended and (2)(n) added, p. 609, § 1, effective July 1. L. 2012: (2)(g) amended, (HB 12-1311), ch. 281, p. 1620, § 47, effective July 1.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Section deemed unconstitutional delegation of power. Prior to the 1982 amendments, this section contained no standards to guide the administrative head of a detention facility in the exercise of his delegated discretion to declare certain items contraband and was, therefore, an unconstitutional delegation of the general assembly's power to declare an act to be a crime. *People v. Lepik*, 629 P.2d 1080 (Colo. 1981).

Section deemed constitutional delegation of power. The statute imposes adequate standards and procedural safeguards because it requires the administrative head of a detention facility to determine whether an item poses or may pose a risk prior to categorizing it as contraband, to find that there is a reasonable probability that an item would pose a threat, and to give notice of what is contraband. Allowing each detention facility to determine what is contraband based on the specific conditions present at each facility does not result in an unlawful delegation of authority. *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

The notice required in this section must be sufficient to inform a visitor that an item constitutes contraband under this section and that bringing the item into the facility therefore constitutes criminal activity. The notice requirement is not satisfied by simply informing the visitor that the item is prohibited. *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

"Contraband" as used in this section has a limited meaning. It refers only to the items specified in subsection (2)(a) through (k) and any item that the administrative head of the facility has determined to be a risk or probable risk to the security of the facility. *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

Any amount of marihuana sufficient to ingest will support a conviction for possession of contraband in a detention facility, where statute fails to specify an amount. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979); *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

18-8-204.1. Possession of contraband in the first degree. (1) A person being confined in a detention facility commits the crime of possession of contraband in the first degree if he knowingly obtains or has in his possession contraband as listed in section 18-8-203 (1) (a) or alcohol; except that this subsection (1) shall not apply to contraband specified in section 18-18-405.

(2) Possession of contraband in the first degree, other than a dangerous instrument, is a class 6 felony.

(3) Possession of contraband in the first degree involving a dangerous instrument is a class 4 felony.

Source: **L. 76 Ex. Sess.:** Entire section added, p. 13, § 3, effective September 18. **L. 77:** (2) and (3) amended, p. 878, § 47, effective July 1, 1979. **L. 82:** Entire section amended, p. 319, § 4, effective March 11. **L. 88:** (1) amended, p. 714, § 22, effective July 1. **L. 89:** (2) amended, p. 839, § 79, effective July 1. **L. 92:** (1) amended, p. 392, § 22, effective July 1.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

Purpose of this statute is to control contraband in penal institutions. *People v. West*, 43 Colo. App. 246, 603 P.2d 967 (1979).

The purpose of this section is to control contraband in penal institutions. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992); *People v. Wyles*, 873 P.2d 34 (Colo. App. 1994).

Any amount of contraband sufficient to ingest will support a conviction for possession of contraband under this section. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992).

Physical possession of contraband is not required in every instance in order to sustain a conviction under this section. Prosecution's burden is also sustained by proof that inmate exercised knowing dominion or control over the object. *People v. Wyles*, 873 P.2d 34 (Colo. App. 1994).

Marihuana is within the scope of this section as a class of prohibited contraband since it is specifically included in § 18-8-203 and ex-

cluded from § 18-18-405. *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Defendant need not have been lawfully confined. It is immaterial to the realization of the legislative purpose whether persons convicted under this section are or are not lawfully confined within a detention facility. The critical fact to be established is that the accused person was confined as a prisoner in a detention facility. *People v. West*, 43 Colo. App. 246, 603 P.2d 967 (1979); *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Fact that defendant had not yet been convicted of a crime and was not convicted of the crimes of which he was accused and which led to his incarceration, did not relieve defendant of prosecution under this statute. *People v. Higgins*, 874 P.2d 479 (Colo. App. 1994).

Defective bullet which will not explode does not constitute "ammunition". *People v. Hrapski*, 658 P.2d 1367 (Colo. 1983).

Applied in *People v. Smith*, 984 P.2d 50 (Colo. 1999); *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

18-8-204.2. Possession of contraband in the second degree. (1) A person being confined in a detention facility commits the crime of possession of contraband in the second degree if he knowingly obtains or has in his possession contraband as defined in section 18-8-204 (2) unless possession is authorized by rule or regulation promulgated by the administrative head of the detention facility.

(2) Possession of contraband in the second degree is a class 1 misdemeanor.

Source: **L. 82:** Entire section added, p. 319, § 5, effective March 11.

ANNOTATION

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

18-8-205. Aiding escape from civil process. Any person who aids, abets, or assists the escape of a person in legal custody under civil process commits a class 1 petty offense.

Source: L. 71: R&RE, p. 458, § 1. C.R.S. 1963: § 40-8-205.

ANNOTATION

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-206. Assault during escape. (1) Any person confined in any lawful place of confinement within the state who, while escaping or attempting to escape, commits an assault with intent to commit bodily injury upon the person of another with a deadly weapon, or by any means of force likely to produce serious bodily injury, commits:

- (a) A class 1 felony, if the person has been convicted of a class 1 felony; or
- (b) A class 2 felony, if the person has been convicted of a felony other than a class 1 felony; or
- (c) A class 3 felony, if the person was in custody or confinement and held for or charged with but not convicted of a felony; or
- (d) A class 3 felony, if the person was in custody or confinement and charged with, held for, or convicted of a misdemeanor or a petty offense.

Source: L. 71: R&RE, p. 458, § 1. C.R.S. 1963: § 40-8-206. L. 83: (1)(c) amended and (1)(d) added, p. 708, § 1, effective July 1.

ANNOTATION

Defendant's act of touching a knife to the officer's person was not sufficient to establish the elements of assault-during-escape. To hold, under the present criminal code, that a threat with a deadly weapon constitutes an assault with intent to commit bodily injury would eliminate any distinction between the crimes of menacing (under § 18-3-206) and assault with intent to commit bodily injury. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Where the defendant aided and abetted an escapee's assault on an officer with intent to

inflict bodily injury, there was also sufficient evidence for a jury to find the defendant guilty of assault-during-escape. *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Jury instructions adequately informed jury of the elements of assault-during-escape when read as a whole and which were not objected to and included definitions of "bodily injury", "deadly weapon," and "assault". *People v. Wilson*, 791 P.2d 1247 (Colo. App. 1990).

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-207. Holding hostages. Any person in lawful custody or confinement within the state who, while escaping or attempting to escape, holds as hostage any person or by force or threat of force holds any person against his will commits a class 2 felony.

Source: L. 71: R&RE, p. 458, § 1. C.R.S. 1963: § 40-8-207. L. 83: Entire section amended, p. 708, § 2, effective July 1.

ANNOTATION

Crime of "holding hostages" includes as essential element general intent crime of "es-

cape". *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Term “escape” is not specifically defined in the Colorado criminal code. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Term “escape” has same meaning for purposes of this section as section 18-8-208. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Crime one of general intent. No additional mental state is specified for the crime of “hold-

ing hostages”. That crime, as well as the crime of “escape”, is one of general rather than specific intent. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Applied in *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979).

18-8-208. Escapes. (1) A person commits a class 2 felony if, while being in custody or confinement following conviction of a class 1 or class 2 felony, he knowingly escapes from said custody or confinement.

(2) A person commits a class 3 felony if, while being in custody or confinement following conviction of a felony other than a class 1 or class 2 felony, he knowingly escapes from said custody or confinement.

(3) A person commits a class 4 felony if, while being in custody or confinement and held for or charged with but not convicted of a felony, he knowingly escapes from said custody or confinement.

(4) A person commits a class 3 misdemeanor if, while being in custody or confinement following conviction of a misdemeanor or petty offense or a violation of a municipal ordinance, he or she knowingly escapes from said place of custody or confinement.

(5) A person commits a class 1 petty offense if, while being in custody or confinement and held for or charged with but not convicted of a misdemeanor or petty offense or violation of a municipal ordinance, he or she knowingly escapes from said custody or confinement.

(6) A person who knowingly escapes confinement while being confined pursuant to a commitment under article 8 of title 16, C.R.S.:

(a) Commits a class 1 misdemeanor if the person had been charged with a misdemeanor at the proceeding in which the person was committed;

(b) Commits a class 1 misdemeanor if the person had been charged with a felony at the proceeding in which the person was committed, if in the escape the person does not travel from the state of Colorado;

(c) Commits a class 5 felony if the person had been charged with a felony at the proceeding in which the person was committed, if in the escape the person travels outside of the state of Colorado.

(7) In a prosecution for an offense under subsection (6) of this section, it shall be a defense for any person who, while being confined pursuant to a commitment under article 8 of title 16, C.R.S., escapes and who voluntarily returns to the place of confinement.

(8) A person commits a class 5 felony if he knowingly escapes while in custody or confinement pursuant to the provisions of article 19 of title 16, C.R.S.

(9) The minimum sentences provided by sections 18-1.3-401, 18-1.3-501, and 18-1.3-503, respectively, for violation of the provisions of this section shall be mandatory, and the court shall not grant probation or a suspended sentence, in whole or in part; except that the court may grant a suspended sentence if the court is sentencing a person to the youthful offender system pursuant to section 18-1.3-407.

(10) Any person held in a staff secure facility, as defined in section 19-1-103 (101.5), C.R.S., shall be deemed to be in custody or confinement for purposes of this section.

Source: **L. 71:** R&RE, p. 459, § 1. **C.R.S. 1963:** § 40-8-208. **L. 75:** (6) and (7) added, p. 638, § 1, effective May 22. **L. 77:** (8) added, p. 988, § 1, effective May 26; (1) to (5) and IP(6) amended, p. 966, § 43, effective July 1. **L. 78:** (8) amended, p. 263, § 50, effective May 23. **L. 81:** (1), (2), and (4) amended, p. 1008, § 1, effective June 12. **L. 95:** (9) added, p. 1255, § 16, effective July 1. **L. 96:** (9) amended, p. 1843, § 10, effective July 1; (10) added, p. 1682, § 7, effective January 1, 1997. **L. 2000:** (4) and (5) amended, p. 692, § 1, effective July 1. **L. 2002:** (9) amended, p. 1516, § 202, effective October 1.

Cross references: (1) For absence from supervision constituting escape by a defendant conditionally released after verdict of not guilty by reason of insanity or by reason of impaired mental condition, see § 16-8-115 (3) (c); for failure to remain at or return to a community correctional facility constituting escape, see § 17-27-106.

(2) For the legislative declaration contained in the 2002 act amending subsection (9), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Highlights of the 1955 Legislative Session — Criminal Law and Procedure", see 28 Rocky Mt. L. Rev. 69 (1955).

Annotator's note. Since § 18-8-208 is similar to former § 40-7-53, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

For a discussion of the legislative history of this section, see *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Purpose of statute. The fundamental purpose of the statute is to prevent the evasion of the due course of justice. *People v. Velarde*, 657 P.2d 953 (Colo. 1983).

The purpose of the felonious escape statute is to deter and punish an escape while a defendant is being held for another felony. *People v. Velarde*, 657 P.2d 953 (Colo. 1983).

Not constitutionally required that punishment based on nature of escape. There is no constitutional requirement that the classification of an escape and its punishment be based solely or even partially on the nature of the escape. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Classifications set forth in this section are not arbitrary or unreasonable but are founded on rational distinctions. It does not deny equal protection of the law. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Section 18-8-210.1 does not reclassify adjudicated delinquents as felons for purposes of this section. Rather, § 18-8-210.1 allows the prosecution to bring felony escape charges under this section against a sub-set of juveniles who commit an act that, if committed by an adult, would be a felony. Therefore, there is no conflict with art. XVIII, § 4, of the Colorado Constitution. *People v. M.B.*, 90 P.3d 880 (Colo. 2004).

Section 18-1-105 (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of the crime of escape under this section. *People v. Jackson*, 703 P.2d 618 (Colo. App. 1985); *People v. Russell*, 703 P.2d 620 (Colo. App. 1985).

Prosecution following administrative transfer not double jeopardy. Where the defendant, as a prisoner under sentence, was administratively transferred to the penitentiary after he failed to return to a minimum security facility, subsequent prosecution on the escape charge would not constitute double jeopardy. *People v. Martinez*, 656 P.2d 1317 (Colo. 1983).

Punishment for escape is not double jeopardy. Administrative disciplinary action imposed for breaking rules of the prison on prisoners who have escaped or attempted to escape does not constitute punishment for the substantive crime interdicted by this section. Double jeopardy or double punishment for the same crime is therefore not involved. *Silva v. People*, 158 Colo. 326, 407 P.2d 38 (1965).

Crime of "holding hostages" includes as essential element general intent crime of "escape". *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Escape definition. An escape is the voluntary departure from lawful custody by a prisoner with the intent to evade the due course of justice. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966); *Massey v. People*, 649 P.2d 1070 (Colo. 1982).

The very word "escape" connotes an attitude of mind as well as an act. One does not "escape" without desire and intent to avoid confinement. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

Under Colorado law, "escape" is defined as the voluntary departure from lawful custody by a prisoner with the intent to evade the due course of justice. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

Term "escape" has same meaning for purposes of § 18-8-207 as this section. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Defendant who broke out of a locked building but was apprehended prior to getting over two barbed wire fences could still be guilty of escape. *People v. Padilla*, 113 P.3d 1260 (Colo. App. 2005).

Term "escape" is not specifically defined in the Colorado criminal code. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

The general assembly added subsection (10) to clarify, rather than restrict, the circumstances under which a juvenile commits an escape. *People ex rel. J.A.C.*, 25 P.3d 1269 (Colo. App. 2001).

The term felony, wherever it may occur in the constitution, or the laws of the state, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, and none other. *People v. Austin*, 162 Colo. 10, 424 P.2d 113 (1967).

Escape is crime of general, not specific, intent, consisting of following essential ele-

ments: (1) A voluntary act; (2) which constitutes a departure from one of the forms of lawful custody or confinement specified in this section; (3) by a prisoner; and (4) committed "knowingly", i.e., with an awareness on the part of the prisoner that his or her conduct is of the nature proscribed. *People v. Williams*, 199 Colo. 515, 611 P.2d 973 (1980).

Mental state of "knowingly" applies only to defendant's conduct of escaping from custody or confinement. *People v. Benzor*, 100 P.3d 542 (Colo. App. 2004).

The intent of the accused to evade the due course of justice is a necessary element in the felony escape. If that was not present, there was no crime. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

Thus, a defendant is entitled to adduce evidence bearing upon his capacity to form the particular intent essential to constitute the crime of felonious escape, such as evidence to the effect that he was too drunk to form the state of mind required for the commission of the offense. *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

"Conviction", for purposes of this section, includes acceptance of a guilty plea. *People v. Garcia*, 720 P.2d 1003 (Colo. App. 1986).

Mandatory parolees are "in custody" for purposes of application of this section. *People v. Garcia*, 64 P.3d 857 (Colo. App. 2002).

For the purposes of this section, a person is not "in custody" until an arrest, in the sense of establishing physical control over the arrestee, has been effected. Physical control does not necessarily require physical restraint; the officer's presence and the suspect's submission in concert may be sufficient to establish the assurance, requisite to a determination of physical control, that the suspect will not leave. *People v. Thornton*, 929 P.2d 729 (Colo. 1996).

The definition of "custody" found in § 16-1-104 (9), does not apply to the offense of escape under this section. *People v. Thornton*, 929 P.2d 729 (Colo. 1996).

Subsection (10) was not intended to restrict the type of facilities from which a juvenile could escape to only staff secure facilities. *People ex rel. J.A.C.*, 25 P.3d 1269 (Colo. App. 2001).

Portions of this section require that the defendant must be shown to have been convicted of a felony. *Schwickrath v. People*, 159 Colo. 390, 411 P.2d 961 (1966).

Evidence of a prior conviction is an essential element of the crime of escape after conviction. *Ruark v. People*, 158 Colo. 287, 406 P.2d 91 (1965); *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

One of the essential elements of escape by a felon is that the defendant has either been convicted of a felony or that he has pled guilty to a

felony. *People v. Austin*, 162 Colo. 10, 424 P.2d 113 (1967).

A conviction under this section requires evidence that the defendant was convicted of and is being held for a felony. *Massey v. People*, 649 P.2d 1070 (Colo. 1982).

Evidence of prior conviction is an essential element of the offense of escape. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Evidence of prior conviction. If it be shown that an individual is the person held under a particular mittimus for the commission of a felony, the requirement of this section is necessarily fulfilled. *Schwickrath v. People*, 159 Colo. 390, 411 P.2d 961 (1966).

The criminal offense of larceny, to which the defendant pled guilty, was punishable by imprisonment in the penitentiary, and this statement in the mittimus, considered with the statement of sentence of not less than two and not more than five years, is prima facie evidence of the fact the defendant was being punished for a felony for purposes of defining the term felony in the crime of escape. *People v. Austin*, 162 Colo. 10, 424 P.2d 113 (1967).

The district attorney may introduce a minute order and other materials to establish the defendant's previous conviction. *People v. McKnight*, 626 P.2d 678 (Colo. 1981).

Specific underlying offense must be shown. In addition, since the classification of the offense of escape is determined by the nature of the underlying crime for which the defendant was held, it is essential that the specific offense upon which the confinement is premised be shown. *Massey v. People*, 649 P.2d 1070 (Colo. 1982).

Judicial notice of class of felony for which defendant confined. The trial court may take judicial notice that the mittimus under which the defendant is confined concerned crimes which were felonies other than class 1 or 2 felonies. *Massey v. People*, 649 P.2d 1070 (Colo. 1982).

Requirements for conviction under subsection (3). For a conviction under subsection (3) to be sustained, there must be evidence that a felony was committed and that defendant was being held for that felony when he escaped. *People v. Velarde*, 630 P.2d 100 (Colo. 1981), rev'd on other grounds, 657 P.2d 953 (Colo. 1983).

Plea of nolo contendere constitutes conviction within the meaning of this section. *People v. Wines*, 43 Colo. App. 8, 597 P.2d 1056 (1979).

Error in conviction no justification for escape. An alleged error or irregularity in judicial proceedings leading to conviction and confinement does not so invalidate the judgment and the confinement as to justify escape. The prisoner's remedy is to seek judicial relief from the claimed illegal incarceration. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

Nor reversal of conviction subsequent to escape. It was not a defense to an escape charge that the Colorado supreme court had reversed defendant's conviction, on the merits, regarding the charge for which he was confined, and that such reversal had occurred before defendant's trial on the escape charge. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

A parolee may be convicted of escape even if there is a legal defect in the process of confinement. Such defects are to be challenged through appropriate legal means rather than through unauthorized departure from a custodial facility. *People v. Lanzieri*, 25 P.3d 1170 (Colo. 2001).

Subsection (3) conviction upheld despite acquittal on underlying felony. Even where a defendant may later be found not guilty of the underlying felony, his conviction for escape under subsection (3) would be upheld. *People v. Velarde*, 657 P.2d 953 (Colo. 1983).

An escape by a prisoner being held for extradition does not constitute the crime of escape as that offense is defined in this section. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

The Colorado statute on escape does not apply to a prisoner held in custody for extradition pursuant to an out-of-state conviction or charge. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Failure to return to a work release facility upon the expiration of a 10-hour pass is punishable as escape under this section. *People v. Lucero*, 654 P.2d 835 (Colo. 1982).

Person who absconds from a non-residential community corrections placement commits the crime of escape in violation of this section and § 17-27-106. By its plain language, § 17-27-106 applies to all types of community corrections placements, including non-residential community corrections programs. *People v. Forester*, 1 P.3d 758 (Colo. App. 2000).

Section applicable to person committed as result of insanity adjudication in past criminal proceeding. There is nothing in the due process clause to prohibit the application of the escape statute or other criminal statutes to those committed to a state facility as a result of a prior insanity adjudication in relation to past criminal charges. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

Even though inapplicable to person committed civilly. Given the state's obvious interest in protecting the public from those who previously have engaged in overt criminal conduct but have been relieved of criminal responsibility by reason of legal insanity, there is no difficulty in finding a rational basis for legislation that proscribes as criminal a knowing escape by a person committed to an institution as a result of an insanity adjudication in a criminal case, but does not impose a similar sanction upon a per-

son who escapes from a facility to which he has been civilly committed. *People v. Giles*, 662 P.2d 1073 (Colo. 1983).

There is no section within the escape statute pertaining to out-of-state convictions or charges. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Degree of escape dependent on degree of original crime. This section establishes a standard whereby the seriousness of the crime of escape is determined by classification of the original crime for which the defendant was in custody or confinement. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Effect of subsection (6) on application of § 18-8-201.1. The passage of subsection (6) of this section enabled § 18-8-201.1 to be applied to a patient of a state mental institution who aids another patient's escape. *People v. Cornell*, 194 Colo. 211, 572 P.2d 137 (1977).

Applicability of § 18-8-210. Section 18-8-210 sets forth guidelines for the purpose of determining the grade and classification of an offense under this section where a person is in custody or confinement for an offense which is unclassified. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Does not broaden this section. Section 18-8-210 appears to be a "catchall" for unclassified crimes under Colorado statutes and does not broaden the scope of this section. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

Burden of proof of permission to leave. It is not necessary that the people call every employee of the penitentiary to testify that no permission was given the prisoner to leave. If the prisoner did receive permission, that information is peculiarly within the knowledge of the prisoner himself, and if he would raise the issue of permission he must go forward with some evidence of it. *Ruark v. People*, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L.Ed.2d 306 (1968).

Choice of evils and duress available as defenses. In certain cases, both choice of evils, § 18-1-702, and duress, § 18-1-708, may be relied upon as affirmative defenses to a charge of escape. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Escapee must immediately report duress, or choice of evils, which he faced to the proper authorities when a position of safety is reached. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Otherwise, defense not allowed. Where this requirement is not satisfied, the defenses of duress or choice of evils may be properly refused by the trial judge because they are insufficient as a matter of law. *People v. Handy*, 198 Colo. 556, 603 P.2d 941 (1979).

Prima facie evidence of punishment for felony. Sentence imposed on defendant as shown in a mittimus is prima facie evidence of

the fact that defendant was being punished for a felony. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

Evidence established prima facie case of escape. *People v. Rivera*, 37 Colo. App. 4, 542 P.2d 90 (1975).

Evidence of escape held sufficient. *People v. Cardwell*, 181 Colo. 421, 510 P.2d 317 (1973).

Proof that a regularly held prisoner was found miles outside the penitentiary walls, wearing civilian clothes, and when apprehended gave a false name, is certainly sufficient evidence from which the jury, without evidence of intent, could find that the prisoner had committed the statutory crime of escape. *Ruark v. People*, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L.Ed.2d 306 (1968).

Separate trial of escape and substantive charges necessary. Where evidence of a prior conviction was essential to the count of an information alleging the crime of escape after conviction, but would be prejudicial to defendant when applied to the other counts alleging robbery and assault, the court abused its discretion in failing to order a separate trial of the charge of escape after conviction. *Ruark v. People*, 158 Colo. 287, 406 P.2d 91 (1965).

A person 18 years of age or older who escapes while serving a sentence imposed by

the juvenile court may be convicted under this section. Until completing the sentence, the person continues under the jurisdiction of the juvenile court and is therefore considered a "juvenile", subject to the provisions of § 18-8-210.1 and, therefore, this section. *People v. Young*, 908 P.2d 1147 (Colo. App. 1995).

For purposes of escape, there is no conflict between the home detention statute and the intensive supervision program (ISP) statute. In an escape case, the court must make a factual determination whether a defendant was placed in home detention or ISP based on the different elements of home detention and ISP. Home detention and ISP are mutually exclusive, therefore once the court determines whether the defendant was in home detention or on ISP there is no conflict. *People v. Garcia*, 64 P.3d 857 (Colo. App. 2002).

The court did not err when it instructed the jury on ISP escape without including the "extended limits" language of § 17-27.5-104. *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004).

Applied in *Nieto v. People*, 160 Colo. 179, 415 P.2d 531 (1966); *People v. West*, 42 Colo. App. 217, 603 P.2d 967 (1979); *People v. Billips*, 652 P.2d 1060 (Colo. 1982); *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

18-8-208.1. Attempt to escape. (1) Except as otherwise provided in subsection (1.5) of this section, if a person, while in custody or confinement following conviction of a felony, knowingly attempts to escape from said custody or confinement, he or she commits a class 4 felony. The sentence imposed pursuant to this subsection (1) shall run consecutively with any sentences being served by the offender.

(1.5) If a person, while in custody or confinement following conviction of a felony and either serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or having been placed in an intensive supervision parole program pursuant to section 17-27.5-101, C.R.S., knowingly attempts to escape from his or her custody or confinement, he or she commits a class 5 felony. The sentence imposed pursuant to this subsection (1.5) may run concurrently or consecutively with any sentence being served by the offender.

(2) If a person, while in custody or confinement and held for or charged with but not convicted of a felony, knowingly attempts to escape from said custody or confinement, he commits a class 5 felony. If the person is convicted of the felony or other crime for which he was originally in custody or confinement, the sentence imposed pursuant to this subsection (2) shall run consecutively with any sentences being served by the offender.

(3) If a person, while in custody or confinement following conviction of a misdemeanor or petty offense, knowingly attempts to escape from said custody or confinement, he is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than two months nor more than four months. The sentence imposed pursuant to this subsection (3) shall run consecutively with any sentences being served by the offender.

(4) If a person, while in custody or confinement and held for or charged with but not convicted of a misdemeanor or petty offense, knowingly attempts to escape from said custody or confinement, he is guilty of a petty offense and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than two months nor more than four months. If the person is convicted of the misdemeanor or petty offense for which he was originally in custody or confinement, the sentence imposed pursuant to this subsection (4) shall run consecutively with any sentences being served by the offender.

(5) The sentences imposed by subsections (1), (1.5), and (2) of this section and the minimum sentences imposed by subsections (3) and (4) of this section shall be mandatory, and the court shall not grant probation or a suspended sentence, in whole or in part; except that the court may grant a suspended sentence if the court is sentencing a person to the youthful offender system pursuant to section 18-1.3-407.

(6) A person who participates in a work release program, a home detention program, as defined in section 18-1.3-106 (1.1), a furlough, an intensive supervision program, or any other similar authorized supervised or unsupervised absence from a detention facility, as defined in section 18-8-203 (3), and who is required to report back to the detention facility at a specified time shall be deemed to be in custody.

(7) Any person held in a staff secure facility, as defined in section 19-1-103 (101.5), C.R.S., shall be deemed to be in custody or confinement for purposes of this section.

Source: **L. 76, Ex. Sess.:** Entire section added, p. 10, § 3, effective September 18. **L. 77:** (1) and (2) amended, p. 878, § 48, effective July 1, 1979. **L. 79:** (5) amended, p. 671, § 22, effective March 29. **L. 81:** (1) and (3) amended, p. 1008, § 2, effective June 12. **L. 87:** (6) amended, p. 667, § 5, effective May 16. **L. 89:** (6) amended, p. 885, § 3, effective July 1. **L. 96:** (5) amended, p. 1844, § 11, effective July 1; (7) added, p. 1682, § 8, effective January 1, 1997. **L. 2002:** (5) and (6) amended, p. 1516, § 203, effective October 1. **L. 2010:** (1) and (5) amended and (1.5) added, (HB 10-1373), ch. 260, p. 1178, § 1, effective May 25.

Editor's note: The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

Cross references: For the legislative declaration contained in the 2002 act amending subsections (5) and (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Applicability to juvenile offender. Statute requiring the mandatory imposition of consecutive sentences for attempted escape, statute applying the statute on attempted escapes to juvenile offenders, and general children's code statute on commitment of persons to the department of institutions were construed to be in accord with each other, and the imposition of consecutive sentences was held to be an exception to the general children's code section limiting commitments of persons 18 years of age or older to a total of two years. *People in Interest of E.Z.L.*, 815 P.2d 987 (Colo. App. 1991).

Even though the trial court was correct in imposing a consecutive sentence, the sentence must be consecutive only with regard to the sentence the juvenile was then serving and not to sentences simultaneously imposed. *People in Interest of E.Z.L.*, 815 P.2d 987 (Colo. App. 1991).

Section 18-1-105 (9)(a)(V) does not require the imposition of a sentence beyond the presumptive range upon conviction of the crime of attempted escape under this section. *People v. Martinez*, 703 P.2d 619 (Colo. App. 1985).

Consecutive sentence in the aggravated range may be simultaneously imposed if the defendant escapes twice, once from custody

while serving the original sentence and again during processing for the first escape. *People v. Andrews*, 855 P.2d 3 (Colo. App. 1993), *aff'd*, 871 P.2d 1199 (Colo. 1994).

Sentence enhancement provision, § 18-1-105 (9)(a)(V), did not apply to the crime of escape and attempted escape where the general assembly had provided for enhanced punishment for the crimes of escape elsewhere, specifically in this section and § 18-8-209, and where the general assembly did not amend the enhancement provision to make it specifically applicable to escape crimes. *People v. Andrews*, 871 P.2d 1199 (Colo. 1994).

Imposition of consecutive sentence for attempted escape charge is consistent with state policy goal where facts underlying the two convictions had not changed even though the sentence for one had been vacated and replaced with another sentence. *People v. Spoto*, 865 P.2d 907 (Colo. App. 1993).

Consecutive sentence held proper. When a person is reincarcerated on a parole revocation, he is no longer serving his original sentence. Therefore, when a person is sentenced for the crime of escape during a period of mandatory parole for another offense, ordering such a sentence to run consecutive with the period of

incarceration for the parole revocation did not violate § 18-1.3-401 (1)(a)(V)(E). *People v. Luther*, 58 P.3d 1013 (Colo. 2002).

Applied in *People v. Hostetter*, 44 Colo. App. 44, 606 P.2d 80 (1980).

18-8-209. Concurrent and consecutive sentences. (1) Except as otherwise provided in subsection (2) of this section, any sentence imposed following conviction of an offense under sections 18-8-201 to 18-8-208 or section 18-8-211 shall run consecutively and not concurrently with any sentence which the offender was serving at the time of the conduct prohibited by those sections.

(2) If an offender was serving a direct sentence to a community corrections program pursuant to section 18-1.3-301 or was in an intensive supervision parole program pursuant to section 17-27.5-101, C.R.S., at the time he or she committed an offense specified in section 18-8-201 or 18-8-208, the sentence imposed following a conviction of said offense may run concurrently with any sentence the offender was serving at the time he or she committed said offense.

Source: L. 71: R&RE, p. 459, § 1. C.R.S. 1963: § 40-8-209. L. 76, Ex. Sess.: Entire section amended, p. 14, § 2, effective September 18. L. 2010: Entire section amended, (HB 10-1373), ch. 260, p. 1179, § 2, effective May 25.

ANNOTATION

Sentence enhancement provision, § 18-1-105 (9)(a)(V), did not apply to the crime of escape and attempted escape where the general assembly had provided for enhanced punishment for the crimes of escape elsewhere, specifically in this section and § 18-8-208.1, and where the general assembly did not amend the enhancement provision to make it specifically applicable to escape crimes. *People v. Andrews*, 871 P.2d 1199 (Colo. 1994).

This section clearly and unambiguously provides that the sentence imposed for an escape conviction must be consecutive only to any sentence the defendant was serving at the time of the escape and not to a sentence subsequently imposed. *People v. Eurioste*, 12 P.3d 847 (Colo. App. 2000); *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001).

Thus, where defendant escaped from police custody after being arrested for child abuse, but prior to being tried, the trial court was not required to impose consecutive sentences for defendant's child abuse and escape convictions. However, the court retained discretionary au-

thority to impose a consecutive sentence. *People v. Eurioste*, 12 P.3d 847 (Colo. App. 2000).

A defendant, who has pleaded guilty and is awaiting sentencing, is not serving a sentence for purposes of this section, and, therefore, the court is not required to impose a consecutive sentence. A defendant cannot be serving a sentence that has not yet been imposed. However, the court has discretion to impose a consecutive or concurrent sentence. *People v. Corral*, 179 P.3d 837 (Colo. App. 2007).

Section was applicable to defendant who escaped, because defendant was punished pursuant to § 18-8-208 and subject to provisions of this section since his sentence followed a conviction of an offense under several sections. *People v. Williams*, 33 P.3d 1187 (Colo. App. 2001).

Where at the time of escape the defendant was on mandatory parole, the court was required to impose a consecutive sentence for defendant's escape conviction. *People v. Garcia*, 64 P.3d 857 (Colo. App. 2002).

Applied in *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

18-8-210. Persons in custody or confinement for unclassified offenses. For the purpose of determining the grade and classification of an offense under sections 18-8-201, 18-8-206, and 18-8-208, a person in custody or confinement for an offense which is unclassified or was not classified under this code at the time the custody or confinement began is deemed to have been in custody or confinement for a class 2 misdemeanor if such custody or confinement was for a misdemeanor offense or a class 5 felony if such custody or confinement was for a felony offense.

Source: L. 72: p. 275, § 6. C.R.S. 1963: § 40-8-210.

ANNOTATION

Section not violative of ex post facto prohibition. This section does not violate the federal and state constitutional prohibitions against ex post facto laws. *People v. Billips*, 652 P.2d 1060 (Colo. 1982).

This section appears to be a "catchall" for unclassified crimes under Colorado statutes and does not broaden the scope of § 18-8-208. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

This section sets forth guidelines for the purpose of determining the grade and classification of an offense under § 18-8-208 where a person is in custody or confinement for an offense which is unclassified. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

There is no section within the escape statute pertaining to out-of-state convictions or charges. *People v. Bulmer*, 37 Colo. App. 82, 544 P.2d 993 (1975).

18-8-210.1. Persons in custody or confinement - juvenile offenders. For the purposes of this part 2, any reference to custody, confinement, charged with, held for, convicted of, a felony, misdemeanor, or petty offense shall be deemed to include a juvenile who is detained for the commission of an act which would constitute such a felony, misdemeanor, or petty offense if committed by an adult or who is the subject of a petition filed pursuant to article 2 of title 19, C.R.S., alleging the commission of such a delinquent act or a juvenile who has been adjudicated a juvenile delinquent as provided for in article 2 of title 19, C.R.S., for an act which would constitute a felony, misdemeanor, or petty offense if committed by an adult.

Source: L. 83: Entire section added, p. 708, § 3, effective July 1. **L. 87:** Entire section amended, p. 817, § 23, effective October 1.

ANNOTATION

The provisions of this section do not violate equal protection guarantees under the Fourteenth Amendment to the United States Constitution or under article II of section 25 of the Colorado Constitution. The section does not create two classes of similarly situated individuals. It applies to juveniles who have been adjudicated delinquents for conduct which, if committed by an adult, would constitute felonies. Allegedly similar class, adults convicted of conduct constituting misdemeanor offenses, are not similarly situated because their conduct is different. *People v. Young*, 859 P.2d 814 (Colo. 1993).

This section does not implicate a fundamental right under the due process clauses of the United States and Colorado Constitutions, it is therefore subject to rational basis analysis as applied to an adult convicted of escape. The fact that the adult was originally

incarcerated for an offense committed as a juvenile is not relevant. *People v. Young*, 859 P.2d 814 (Colo. 1993).

This section does not reclassify adjudicated delinquents as felons. Rather, the section allows the prosecution to bring felony escape charges against a sub-set of juveniles who commit an act that, if committed by an adult, would be a felony. Therefore, there is no conflict with art. XVIII, § 4, of the Colorado Constitution. *People v. M.B.*, 90 P.3d 880 (Colo. 2004).

A person 18 years of age or older who escapes while serving a sentence imposed by the juvenile court may, through this section, be convicted under § 18-8-208. Until completing the sentence, the person continues under the jurisdiction of the juvenile court and is therefore considered a "juvenile", subject to the provisions of this section and, therefore, § 18-8-208. *People v. Young*, 908 P.2d 1147 (Colo. App. 1995).

18-8-210.2. Persons in custody or confinement. For the purposes of this part 2, any reference to custody, confinement, charged with, held for, or convicted of, a felony, misdemeanor, or petty offense shall be deemed to include any felony, misdemeanor, or petty offense under the laws of this state and any felony, misdemeanor, or petty offense having similar elements under the laws of another state, the United States, or any territory subject to the jurisdiction of the United States.

Source: L. 99: Entire section added, p. 798, § 14, effective July 1.

18-8-211. Riots in detention facilities. (1) A person confined in any detention facility within the state commits active participation in a riot when he, with two or more other persons, actively participates in violent conduct that creates grave danger of, or does cause, damage to property or injury to persons and substantially obstructs the performance of institutional functions, or commands, induces, entreats, or otherwise attempts to persuade others to engage in such conduct.

(2) Active participation in a riot by any person while confined in any detention facility within the state:

(a) Is a class 3 felony if the participant employs in the course of such participation a deadly weapon, as defined in section 18-1-901 (3) (e), destructive device, as defined in section 18-9-101 (1), or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon, or if the participant, in the course of such participation, represents verbally or otherwise that he or she is armed with a deadly weapon; or

(b) Is a felony if the participant does not employ any such weapon or device in the course of such participation, and, upon conviction thereof, the punishment shall be imprisonment in a detention facility for not less than two years nor more than ten years.

(3) A person confined in any detention facility in this state commits a class 5 felony if, during a riot or when a riot is impending, he intentionally disobeys an order of a detention officer to move, disperse, or refrain from specified activities in the immediate vicinity of the riot or impending riot.

(4) "Detention facility", as used in this section, means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

Source: L. 76, Ex. Sess.: Entire section added, p. 14, § 1, effective September 18. L. 77: (4) amended, p. 949, § 12, effective July 13. L. 79: Entire section amended, p. 701, § 3, effective July 1; (1) amended, p. 725, § 2, effective October 1. L. 86: (1), IP(2), (2)(b), and (3) amended and (4) R&RE, p. 771, §§ 10, 11, effective July 1. L. 2000: (2)(a) amended, p. 696, § 9, effective July 1.

18-8-212. Violation of bail bond conditions. (1) A person who is released on bail bond of whatever kind, and either before, during, or after release is accused by complaint, information, indictment, or the filing of a delinquency petition of any felony arising from the conduct for which he was arrested, commits a class 6 felony if he knowingly fails to appear for trial or other proceedings in the case in which the bail bond was filed or if he knowingly violates the conditions of the bail bond.

(2) A person who is released on bail bond of whatever kind, and either before, during, or after release is accused by complaint, information, indictment, or the filing of a delinquency petition of any misdemeanor arising from the conduct for which he was arrested, commits a class 3 misdemeanor if he knowingly fails to appear for trial or other proceedings in the case in which the bail bond was filed or if he knowingly violates the conditions of the bail bond.

(3) A person convicted under this section shall not be eligible for probation or a suspended sentence and shall be sentenced to imprisonment of not less than one year for violation of subsection (1) of this section and not less than six months for violation of subsection (2) of this section. Any such sentence shall be served consecutively with any sentence for the offense on which the person is on bail.

(4) A criminal action charged pursuant to this section may be tried either in the county where the offense is committed or in the county in which the court that issued the bond is located, if such court is within this state.

Source: L. 79: Entire section added, p. 663, § 3, effective July 1. L. 82: (1) and (2) amended, p. 321, § 1, effective March 22. L. 85: (1) and (2) amended, p. 623, § 9,

effective July 1. **L. 89:** (1) amended, p. 839, § 80, effective July 1. **L. 91:** (1) and (2) amended, p. 407, § 14, effective June 6. **L. 2005:** (4) added, p. 427, § 7, effective April 29.

ANNOTATION

This section is not unconstitutional on the grounds that it violates the prohibition against double jeopardy. *People v. Garcia*, 698 P.2d 801 (Colo. 1985).

Nor is this section unconstitutionally vague and overbroad. *People v. Garcia*, 698 P.2d 801 (Colo. 1985).

This section, when read together with § 16-4-103 (2), is not unconstitutionally vague as applied. This section only applies to knowing violations of bail bond conditions, and the defendant was adequately apprised by the information of the manner in which he had violated those conditions. *People v. Baker*, 45 P.3d 753 (Colo. App. 2001).

Subsection (1) does not unconstitutionally delegate authority to the district court to define a criminal offense. *People v. Baker*, 45 P.3d 753 (Colo. App. 2001).

Subsection (3) is not unconstitutional as a denial of equal protection and due process of law. *People v. Garcia*, 698 P.2d 801 (Colo. 1985).

Evidence that the defendant intended to and attempted to flee the jurisdiction will support an inference that the defendant knowingly failed to appear in violation of this section. *People v. Williamson*, 839 P.2d 519 (Colo. App. 1992).

No requirement that defendant be advised that violation of a bond condition is a crime. Statute that imposes criminal liability for certain conduct requires only that defendant know what he is doing when he is doing the conduct. *People v. Rester*, 36 P.3d 98 (Colo. App. 2001).

18-8-213. Unauthorized residency by an adult offender from another state. (1) A person commits the crime of unauthorized residency by an adult offender if the person, in order to stay in the state, is required to have the permission of the compact administrator or a designated deputy of the compact administrator of the interstate compact for adult offender supervision established pursuant to part 28 of article 60 of title 24, C.R.S., and the person:

(a) Is not a resident of this state, has not been accepted by the compact administrator of the interstate compact for adult offender supervision established pursuant to part 28 of article 60 of title 24, C.R.S., and is found residing in this state; or

(b) Is a resident of this state, has not been accepted by the compact administrator of the interstate compact for adult offender supervision established pursuant to part 28 of article 60 of title 24, C.R.S., and is found residing in this state more than ninety days after his or her transfer from the receiving state.

(2) Unauthorized residency by a parolee or probationer is a class 5 felony.

Source: **L. 2000:** Entire section added, p. 234, § 2, effective July 1. **L. 2011:** (1) amended, (HB 11-1009), ch. 5, p. 10, § 2, effective March 1.

PART 3

BRIBERY AND CORRUPT INFLUENCES

18-8-301. Definitions. The definitions contained in section 18-8-101 are applicable to this part 3, unless the context otherwise requires, and, in addition to those definitions:

(1) “Benefit” means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(2) “Party officer” means a person who holds any position or office in a political party, whether by election, appointment, or otherwise.

(3) “Pecuniary benefit” is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

(4) “Public servant”, as used in sections 18-8-302 to 18-8-308, includes persons who

presently occupy the position of a public servant as defined in section 18-8-101 (3) or have been elected, appointed, or designated to become a public servant although not yet occupying that position.

Source: L. 71: R&RE, p. 459, § 1. C.R.S. 1963: § 40-8-301.

18-8-302. Bribery. (1) A person commits the crime of bribery, if:

(a) He offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his official capacity; or

(b) While a public servant, he solicits, accepts, or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.

(2) It is no defense to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not yet assumed office, lacked jurisdiction, or for any other reason.

(3) Bribery is a class 3 felony.

Source: L. 71: R&RE, p. 459, § 1. C.R.S. 1963: § 40-8-302.

Cross references: For bribery of persons other than a public servant, see § 18-5-401.

ANNOTATION

Legislative intent. The general assembly apparently intended to define bribery as the commission of any one of the following three acts: (1) offering to confer upon a public servant, (2) conferring upon a public servant, or (3) agreeing to confer upon a public servant. Although the statute does not specify the person with whom the agreement must be made to be guilty of the third act, under a strict construction, the agreement must be with the public servant, not a third party, while a defendant may be guilty of the first two acts even if the public official does not agree to be bribed. *People v. Bailey*, 41 Colo. App. 504, 595 P.2d 252 (1978), rev'd on other grounds, 200 Colo. 549, 617 P.2d 549 (1980).

The substantive offense of bribery of a judge can be committed by one person. *Peo-*

ple v. Incerto, 180 Colo. 366, 505 P.2d 1309 (1973) (decided under former § 40-7-5, C.R.S. 1963).

Corporation or a corporate body is not included in the definition of "government" in § 18-8-101. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

Definition of term "public servant" is question of law for court. *People v. Bailey*, 41 Colo. App. 504, 595 P.2d 252 (1978), rev'd on other grounds, 200 Colo. 549, 617 P.2d 549 (1980).

Employee of the Colorado Springs urban renewal effort is not a "public servant" performing a "governmental function" on behalf of a "government" as defined in § 18-8-101. *Bailey v. People*, 200 Colo. 549, 617 P.2d 549 (1980).

18-8-303. Compensation for past official behavior. (1) A person commits a class 6 felony, if he:

(a) Solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another or for having otherwise exercised a discretion in his favor, whether or not he has in so doing violated his duty; or

(b) Offers, confers, or agrees to confer compensation, acceptance of which is prohibited by this section.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-303. L. 89: IP(1) amended, p. 840, § 81, effective July 1.

18-8-304. Soliciting unlawful compensation. A public servant commits a class 2 misdemeanor if he requests a pecuniary benefit for the performance of an official action knowing that he was required to perform that action without compensation or at a level of compensation lower than that requested.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-304.

18-8-305. Trading in public office. (1) A person commits trading in public office if:

(a) He offers, confers, or agrees to confer any pecuniary benefit upon a public servant or party officer upon an agreement or understanding that he or a particular person will or may be appointed to a public office or designated or nominated as a candidate for public office; or

(b) While a public servant or party officer, he solicits, accepts, or agrees to accept any pecuniary benefit from another upon an agreement or understanding that a particular person will or may be appointed to a public office or designated or nominated as a candidate for public office.

(2) It shall be an affirmative defense that the pecuniary benefit was a customary contribution to political campaign funds solicited and received by lawfully constituted political parties.

(3) Trading in public office is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-305. L. 72: p. 275, § 7. L. 73: p. 539, § 6.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-8-306. Attempt to influence a public servant. Any person who attempts to influence any public servant by means of deceit or by threat of violence or economic reprisal against any person or property, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning any matter which is to be considered or performed by him or the agency or body of which he is a member, commits a class 4 felony.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-306.

Cross references: For interference with the legislative process, see part 4 of article 2 of title 2; for legislative witnesses, see § 8-2.5-101.

ANNOTATION

This statute was not unconstitutionally overbroad on its face where it was narrowly tailored to enable citizens to proscribe the type of conduct that rose to a level of criminal culpability and where defendant's letter to a district court judge went beyond a mere expression of criticism and did not lie within the area of protected speech. *People v. Janousek*, 871 P.2d 1189 (Colo. 1994).

This statute was not unconstitutionally overbroad as applied to defendant where the tone and language of a letter to a district court judge evinced a threatening manner and the language suggested conduct that was squarely within the statute's proscriptions and was there-

fore unprotected under the first amendment. *People v. Janousek*, 871 P.2d 1189 (Colo. 1994).

The words "deceit" and "economic reprisal" contained in this section were not unconstitutionally vague where the statute clearly portrayed the type of conduct that subjected a person to criminal prosecution, it defined the offense with particular words to limit the scope of the offense, and the language was plain and unambiguous. *People v. Janousek*, 871 P.2d 1189 (Colo. 1994).

First amendment does not require the people to prove that defendant subjectively intended to threaten public official. *People v. Stanley*, 170 P.3d 782 (Colo. App. 2007).

Criminal defendant has no first amendment privilege to threaten violence against a judge even if he does so in the context of a court proceeding. *People v. Stanley*, 170 P.3d 782 (Colo. App. 2007).

Requisite intent can exist in case where defendant used a false written instrument prepared by another. Prosecution is not obligated to prove defendant either mailed the false instrument or explicitly directed another to do so on defendant's behalf. *People v. Taylor*, 159 P.3d 730 (Colo. App. 2006).

Evidence supported a charge under statute where defendant gave a false name to a police officer during a traffic stop with intent to alter

officer's official actions toward defendant. *People v. Beck*, 187 P.3d 1125 (Colo. App. 2008).

False reporting to authorities is not a specific instance of attempt to influence a public servant. The crime of false reporting penalizes those who provide untruthful information to public officials, regardless of an attempt to influence public officials. The attempted influence offense can occur without any false reporting at all. Thus, the attempted influence charge and the false reporting charge do not differ solely by prohibiting general and specific conduct. *People v. Blue*, 253 P.3d 1273 (Colo. App. 2011).

Applied in *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

18-8-307. Designation of supplier prohibited. (1) No public servant shall require or direct a bidder or contractor to deal with a particular person in procuring any goods or service required in submitting a bid to or fulfilling a contract with any government.

(2) Any provision in invitations to bid or any contract documents prohibited by this section are against public policy and void.

(3) It shall be an affirmative defense that the defendant was a public servant acting within the scope of his authority exercising the right to reject any material, subcontractor, service, bond, or contract tendered by a bidder or contractor because it does not meet bona fide specifications or requirements relating to quality, availability, form, experience, or financial responsibility.

(4) Any public servant who violates the provisions of subsection (1) of this section commits a class 6 felony.

Source: L. 71: R&RE, p. 460, § 1. C.R.S. 1963: § 40-8-307. L. 73: p. 539, § 7. L. 89: (4) amended, p. 840, § 82, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

It is within the discretion of a public servant to accept or reject any or all bids submitted, once they have been opened and modification did not constitute a designation of supplier to fulfill a government contract, but an

exercise of the public servant's discretion in rejecting a particular subcontractor on the basis of experience. *Heritage Pools v. Foothills Metro. Recreation and Park Dist.*, 701 P.2d 1260 (Colo. App. 1985).

18-8-308. Failing to disclose a conflict of interest. (1) A public servant commits failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment, or other pecuniary transaction without having given seventy-two hours' actual advance written notice to the secretary of state and to the governing body of the government which employs the public servant of the existence of a known potential conflicting interest of the public servant in the transaction with reference to which he is about to act in his official capacity.

(2) A "potential conflicting interest" exists when the public servant is a director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.

(3) Failing to disclose a conflict of interest is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 461, § 1. C.R.S. 1963: § 40-8-308. L. 79: (1) amended, p. 744, § 1, effective July 1.

ANNOTATION

Law reviews. For article, "Director Conflicts: The Effect on Disclosure — Parts I and II", see 17 Colo. Law. 461 and 639 (1988). For article, "Conflicts of Interest in Government", see 18 Colo. Law. 595 (1989).

Section deals with formal, express contracts. Former section prohibiting interest in contract by officer had to do with such contracts

as the officer is charged with the duty of making, and with those in the awarding of which he has a voice, or vote, and clearly means formal, express contracts, which are in terms agreed upon, or awarded on bids. *People v. Brown*, 60 Colo. 276, 152 P. 1169 (1915) (decided under former R.S. 08, § 4994).

PART 4

ABUSE OF PUBLIC OFFICE

18-8-401. Definitions. The definitions contained in sections 18-8-101 and 18-8-301 are applicable to this part 4, unless a different meaning is plainly required.

Source: L. 71: R&RE, p. 461, § 1. C.R.S. 1963: § 40-8-401.

18-8-402. Misuse of official information. (1) Any public servant, in contemplation of official action by himself or by a governmental unit with which he is associated or in reliance on information to which he has access in his official capacity and which has not been made public, commits misuse of official information if he:

(a) Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or

(b) Speculates or wagers on the basis of such information or official action; or

(c) Aids, advises, or encourages another to do any of the foregoing with intent to confer on any person a special pecuniary benefit.

(2) Misuse of official information is a class 6 felony.

Source: L. 71: R&RE, p. 461, § 1. C.R.S. 1963: § 40-8-402. L. 89: (2) amended, p. 840, § 83, effective July 1.

ANNOTATION

Statute as basis for jurisdiction. See *People v. Heckers*, 37 Colo. App. 166, 543 P.2d 1311 (1975).

18-8-403. Official oppression. (1) A public servant, while acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity, commits official oppression if, with actual knowledge that his conduct is illegal, he:

(a) Subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, or lien; or

(b) Has legal authority and jurisdiction of any person legally restrained of his liberty and denies the person restrained the reasonable opportunity to consult in private with a licensed attorney-at-law, if there is no danger of imminent escape and the person in custody expresses a desire to consult with such attorney.

(2) Official oppression is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 461, § 1. C.R.S. 1963: § 40-8-403.

Cross references: For the duty of officers to admit an attorney, see § 16-3-404.

18-8-404. First degree official misconduct. (1) A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another

or maliciously to cause harm to another, he or she knowingly:

- (a) Commits an act relating to his office but constituting an unauthorized exercise of his official function; or
 - (b) Refrains from performing a duty imposed upon him by law; or
 - (c) Violates any statute or lawfully adopted rule or regulation relating to his office.
- (2) First degree official misconduct is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 462, § 1. C.R.S. 1963: § 40-8-404. L. 83: (1)(b) amended, p. 710, § 1, effective June 10. L. 2000: IP(1) amended, p. 709, § 41, effective July 1.

ANNOTATION

Annotator's note. Since § 18-8-404 is similar to former § 40-7-46, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Purpose of section. The remedy for corrupt discharge of a district attorney's duties is in the criminal statutes. *McDonald v. Lakewood Country Club*, 170 Colo. 355, 461 P.2d 437 (1969).

Section violated by district attorney's failure to prosecute personal friend for possession of marijuana. *People v. Larsen*, 808 P.2d 1265 (Colo. 1991).

Section applicable although term of office had expired when indictment was filed. Provisions of former section relating to malfeasance in office were applicable to an official violating the terms thereof, although his term of office had expired when the indictment was filed against him. *Whalen v. People*, 74 Colo. 417, 222 P. 398 (1924).

Definitions. Malfeasance consists of the doing of an act which is wholly wrongful and unlawful; it involves an act which the officer has no authority to do and it is readily distinguished from misfeasance or nonfeasance. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

18-8-405. Second degree official misconduct. (1) A public servant commits second degree official misconduct if he knowingly, arbitrarily, and capriciously:

- (a) Refrains from performing a duty imposed upon him by law; or
 - (b) Violates any statute or lawfully adopted rule or regulation relating to his office.
- (2) Second degree official misconduct is a class 1 petty offense.

Source: L. 71: R&RE, p. 462, § 1. C.R.S. 1963: § 40-8-405. L. 83: (1)(a) amended, p. 710, § 2, effective June 10.

ANNOTATION

The language "duty imposed upon him by law" is not unconstitutionally vague. *People v. Beruman*, 638 P.2d 789 (Colo. 1982).

But "clearly inherent" duty language in former provision was constitutionally vague. The language proscribing omissions of duty

Elements of offense. Malfeasance in office cannot be charged except for breach of a positive statutory duty or for the performance of a discretionary act with an improper or corrupt motive. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

Mere ownership of land by a county commissioner, which land was later subdivided, would not constitute malfeasance. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

Intent may be inferred. Intent to commit embezzlement of public property, official misconduct, and theft may be inferred from the defendants' conduct and the circumstances of the case. *People v. Luttrell*, 636 P.2d 712 (Colo. 1981).

There must be some direct allegation of facts which constitute malfeasance. To charge malfeasance without more is to state a conclusion which does not afford the defendant an opportunity to know the nature of or to meet the charge against him. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

Applied in *People v. Enlow*, 135 Colo. 249, 310 P.2d 539 (1957); *People v. Dilger*, 196 Colo. 414, 585 P.2d 918 (1978); *People v. Montera*, 198 Colo. 156, 596 P.2d 1198 (1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980).

"clearly inherent in the nature of his office" was unconstitutionally vague. The vagueness present in this statutory language impermissibly infringed the constitutional safeguards of fundamental fairness and due process, and created a danger of arbitrary enforcement. *People v.*

Beruman, 638 P.2d 789 (Colo. 1982).

Criminal responsibility based on legally imposed duty not invalidated. Since this section provides for alternative bases of liability, the first basis of criminal responsibility — refrains from performing a duty imposed by law — is not affected by the invalidity of the second basis — inherent in the nature of the office. *People v. Beruman*, 638 P.2d 789 (Colo. 1982).

Charge to be based on specific, mandatory duties. A charge of official misconduct must be based upon mandatory legal duties specific to a particular public office, not upon general allegations of duty. *People v. Beruman*, 638 P.2d 789 (Colo. 1982).

So that accused can prepare defense. An indictment under this section must set out the source of the duty imposed by law which the defendant failed to perform in addition to the specification of the facts alleged to constitute the failure of performance. It is essential that the defendant know what duties are imposed by law which have not been performed in order to allow him to prepare a defense, and further, to enable him to plead the resolution of the charge as a bar to further prosecution for the same offense. *People v. Beruman*, 638 P.2d 789 (Colo. 1982).

Applied in *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980).

18-8-406. Issuing a false certificate. A person commits a class 6 felony, if, being a public servant authorized by law to make and issue official certificates or other official written instruments, he makes and issues such an instrument containing a statement which he knows to be false.

Source: L. 71: R&RE, p. 462, § 1. **C.R.S. 1963:** § 40-8-406. **L. 89:** Entire section amended, p. 840, § 84, effective July 1.

ANNOTATION

The language “authorized by law” is not unconstitutionally vague. *People v. Buckallew*, 848 P.2d 904 (Colo. 1993).

The statute is not overbroad where defendant has failed to show that it infringes any fundamental freedom, and it is “self-evident” that the statute is reasonably related to the legitimate governmental interest in protecting the public from the issuance of false documents by public officials. *People v. Buckallew*, 848 P.2d 904 (Colo. 1993).

The county sheriff falls within the ambit of the statute where it is clear that a sheriff cannot

fully perform his functions without the implied power to make official certificates. *People v. Buckallew*, 848 P.2d 904 (Colo. 1993).

Indictment need not set forth the source of county sheriff’s authority to issue official certificates as long as the duty to refrain from engaging in the prohibited conduct is clear from the count. The indictment clearly stated defendant sheriff was alleged to have breached the duty not to make and issue false official certificates. *People v. Buckallew*, 848 P.2d 904 (Colo. 1993).

18-8-407. Embezzlement of public property. (1) Every public servant who lawfully or unlawfully comes into possession of any public moneys or public property of whatever description, being the property of the state or of any political subdivision of the state, and who knowingly converts any of such public moneys or property to his own use or to any use other than the public use authorized by law is guilty of embezzlement of public property. Every person convicted under the provisions of this section shall be forever thereafter ineligible and disqualified from being a member of the general assembly of this state or from holding any office of trust or profit in this state.

(2) Embezzlement of public property is a class 5 felony.

Source: L. 71: R&RE, p. 462, § 1. **C.R.S. 1963:** § 40-8-407. **L. 77:** (1) amended, p. 967, § 45, effective July 1. **L. 89:** (2) amended, p. 840, § 85, effective July 1.

ANNOTATION

Law reviews. For article, “One Year Review of Criminal Law”, see 34 *Dicta* 98 (1957).

Annotator’s note. Since § 18-8-407 is similar to former § 40-5-16, C.R.S. 1963, and laws antecedent thereto, relevant cases construing

those provisions have been included in the annotations to this section.

Intent of section is to prevent misapplication of public funds. The intention of the general assembly is to prevent the misapplication

and use of public funds for the benefit and profit of the officer and to strictly prohibit the use of the money by the officer for speculative purposes and for his own gain. This section is based upon and enacted for the purpose of carrying out the prohibition contained in § 13 of art. X, Colo. Const., and by reference to that, the intention becomes manifest and the limits of legislation defined. *Moulton v. McLean*, 5 Colo. App. 454, 39 P. 78 (1895); *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

It is the using of public money for the official's own gain that is intended to be reached by this section. *People v. Schneider*, 133 Colo. 173, 292 P.2d 982 (1956).

The purpose of this section is to prevent the intentional misapplication of public funds for private gain by those officers entrusted with the responsibility for the correct disposition of the moneys. *People v. Skrbek*, 42 Colo. App. 431, 599 P.2d 272 (1979).

"Public moneys" includes federal moneys. Federal moneys deposited into the state treasury are public moneys of the state within the meaning of this section. *People v. Skrbek*, 42 Colo. App. 431, 599 P.2d 272 (1979).

It was not the intention of the general assembly to prohibit the depositing of money in banks for convenience in safekeeping. *Davis v. Dunlevy*, 11 Colo. App. 344, 53 P. 250 (1898).

And bond covering money deposited in bank is valid. A bond given to indemnify the clerk of a county court on account of money deposited in a bank is not void as against public policy, nor in violation of this section. *Davis v. Dunlevy*, 27 Colo. 244, 60 P. 570 (1900).

An essential element of the crime of "embezzlement" or "criminal conversion" is that the property must be owned by another and the conversion thereof must be without the consent and against the will of the party to whom the property belongs, coupled with the fraudulent intent to deprive the owner of the property. *People v. Fielden*, 162 Colo. 574, 427 P.2d 880 (1967).

Proof of fraudulent intent not required. In order for public official to commit crime of embezzlement, no need for proof of a fraudulent intent. Only mens rea requirement is that actor knowingly convert the property. *People v. Morise*, 859 P.2d 247 (Colo. App. 1993).

This section has implicit within its language the requisite unlawful conversion and criminal intent. *People v. Fielden*, 162 Colo. 574, 427 P.2d 880 (1967).

Fraudulent intent is not an element of the offense under this section. *People v. McKnight*, 39 Colo. App. 280, 567 P.2d 811 (1977).

Intent may be inferred. Intent to commit embezzlement of public property, official misconduct, and theft may be inferred from the defendants' conduct and the circumstances of

the case. *People v. Luttrell*, 636 P.2d 712 (Colo. 1981).

It does not require that defendant be the custodian of the money in question or that he have exclusive control over it. *Rogers v. People*, 104 Colo. 594, 94 P.2d 453 (1939).

Qualified ownership of funds by state is sufficient to support a charge of embezzlement. *People v. Skrbek*, 42 Colo. App. 431, 599 P.2d 272 (1979).

Property was not misappropriated as a matter of law where it was used by the defendant as it was intended to be, on special order, with the knowledge of the hospital agent in charge that it was to be delivered to and used by the director himself, not for public use or at public expense. *People v. Fielden*, 162 Colo. 574, 427 P.2d 880 (1967).

Required particularity of description of property embezzled. The general rule is that the required particularity of description of property embezzled is the same as in case of property stolen. If, however, the court can determine from the indictment that the property therein mentioned is covered by the statute and the jury can determine that it is the property identified by the evidence, no more is mandatory. *People v. Warner*, 112 Colo. 565, 151 P.2d 975 (1944).

Indictment that sets forth multiple factual allegations, only some of which properly constitute a factual predicate for an embezzlement charge, is legally sufficient when it accurately recites the law and provides at least one factual basis to support the charge. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Purpose of indictment met where sheriff was given sufficient notice of the charged offenses and the facts to allow adequate trial preparation and protect himself from subsequent prosecution for the same offense. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Indictment sufficient in prosecution for embezzlement of public property. *People v. Donachy*, 196 Colo. 289, 586 P.2d 14 (1978).

Indictment sufficient where sheriff's use of county vehicles and personnel to transport inmates to construct addition to his home satisfied the public moneys or public property element of embezzlement. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Indictment sufficient where sheriff's use of county vehicles and personnel to transport inmates for work cutting firewood involved public moneys or public property because the vehicles were owned by the county and the personnel were county employees. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Indictment insufficient where sheriff's use of manual labor of inmates to construct an addition to his home and cut firewood did not involve public moneys or public property because inmates are not public property. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Although sheriff benefitted from an increase in the value of his home as a result of inmate labor, this increase did not involve coming into possession of public moneys or public property because inmates are not public property, their labor is not public property, and the increased value was to sheriff's private property, not to public property. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Sheriff's profit from the sale of firewood cut by inmates did not involve public moneys or public property because the wood never belonged to the county. *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

Indictment dismissed for failure to state sufficiently how embezzlement accomplished. *People v. Tucker*, 631 P.2d 162 (Colo. 1981).

Statute of limitations applicable. The act averred in the indictment must appear to have been committed within the period prescribed by the statute of limitations or an exception must be set forth. If the indictment avers two dates, one of which is so remote as to be barred by the statute of limitations, it is defective. *Bustamante v. District Court*, 138 Colo. 97, 329 P.2d 1013 (1958).

County commissioner held guilty of violating section. *Rogers v. People*, 104 Colo. 594, 94 P.2d 453 (1939).

Applied in *Moulton v. McLean*, 5 Colo. App. 454, 39 P. 78 (1895); *Bd. of Comm'rs v. Hall*, 9 Colo. App. 538, 49 P. 370 (1897); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980).

18-8-408. Designation of insurer prohibited. (1) No public servant shall, directly or indirectly, require or direct a bidder on any public building or construction contract which is about to be or has been competitively bid to obtain from a particular insurer, agent, or broker any surety bond or contract of insurance required in such bid or contract or required by any law, ordinance, or regulation.

(2) Any such public servant who violates any of the provisions of subsection (1) of this section commits a class 1 petty offense.

(3) Any provisions in invitations to bid or in any contract documents prohibited by this section are declared void as against the public policy of this state.

(4) Nothing in this section shall be construed to prevent any such public servant acting on behalf of the government from exercising the right to approve or reject a surety bond or contract of insurance as to its form or sufficiency or the lack of financial capability of an insurer selected by a bidder.

(5) This section shall apply only to contracts entered into on or after July 1, 1977.

Source: L. 77: Entire section added, p. 989, § 1, effective May 26.

18-8-409. Violation of rules and regulations of judicial nominating commissions not subject to criminal prosecution. A person who violates a rule or regulation promulgated by any judicial nominating commission shall not be subject to criminal prosecution.

Source: L. 87: Entire section added, p. 673, § 1, effective May 16.

PART 5

PERJURY AND RELATED OFFENSES

Cross references: For interference with the legislative process, see part 4 of article 2 of title 2; for legislative witnesses, see § 8-2.5-101.

Law reviews: For article, "Testimonial Consistency: The Hobgoblin of the Federal False Declaration Statute", see 66 Den. U.L. Rev. 135 (1989).

18-8-501. Definitions. The definitions in sections 18-8-101 and 18-8-301 are applicable to this part 5, and, in addition to those definitions:

(1) "Materially false statement" means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of an official proceeding, or the action or decision of a public servant, or the performance of a governmental function.

(2) (a) "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated. For the purposes of this section, written statements shall also be treated as if made under oath if:

(I) The statement was made on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable; or

(II) The statement recites that it was made under oath, the declarant was aware of such recitation at the time he made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto; or

(III) The statement is made, used, or offered with the intent that it be accepted as compliance with a statute, rule, or regulation which requires a statement under oath or other like form of attestation to the truth of the matter contained in the statement; or

(IV) The statement meets the requirements for an unsworn declaration under the "Uniform Unsworn Foreign Declarations Act", part 3 of article 55 of title 12, C.R.S.

(b) An oath is "required or authorized by law" when the use of the oath is specifically provided for by statute, court rule, or appropriate regulatory provision.

(3) "Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other government agency, or official authorized to hear evidence under oath, including any magistrate, hearing examiner, commissioner, notary, or other person taking testimony or depositions in any such proceedings.

Source: L. 71: R&RE, p. 462, § 1. C.R.S. 1963: § 40-8-501. L. 91: (3) amended, p. 360, § 23, effective April 9. L. 96: (1) amended, p. 738, § 11, effective July 1. L. 2009: (2) amended, (HB 09-1190), ch. 115, p. 485, § 2, effective August 5.

ANNOTATION

Law reviews. For article, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 Den. L.J. 75 (1981).

Not every false statement constitutes perjury. People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

To be perjurious, a false statement must also be "material". People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

Test of materiality is whether a witness's testimony, at the time his answers were given, could have affected the course or outcome of the investigation; where the subject of the grand jury's investigation was the heroin distribution ring operating in the Colorado Springs area, all leads were material which might have assisted the grand jury in identifying those who had at any time been members of the heroin ring. People v. Maestas, 199 Colo. 143, 606 P.2d 849 (1980).

To be material, a false declaration must have a tendency to influence, impede or hamper the grand jury from pursuing its investigation and it need not be material to the main issue or directed to the primary subject of the investigation. People v. Spomer, 631 P.2d 1156 (Colo. App. 1981).

Materiality. A false statement is material for purposes of § 18-8-502 (1) if it could have affected the outcome of the official proceeding. People v. Scott, 785 P.2d 931 (Colo. 1990); People v. Drake, 841 P.2d 364 (Colo. App. 1992); People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000).

Materiality properly question of law. This section does not improperly render the element of materiality in a first degree perjury charge a question for the judge and does not violate the constitutional right to a jury trial on every element of the offense. People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979), abrogated in People v. Vance, 933 P.2d 576 (Colo. 1997).

Materiality is an element of the offense of first-degree perjury entitling a defendant to have a jury determine whether his false statement is material. People v. Vance, 933 P.2d 576 (Colo. 1997)(abrogating People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979)).

A mistrial is an "official proceeding" within the meaning of this section. People v. Valdez, 39 Colo. App. 213, 568 P.2d 71 (1977).

Lawyer knowingly presenting perjuring witness commits subornation of perjury. A lawyer who presents a witness knowing that the witness intends to commit perjury thereby engages in the subornation of perjury. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Written as well as oral statements may be made under "oath". People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

"Official proceeding", which includes judicial proceedings in the course of which depositions are given under oath, must be read as including interrogatories. People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

As a matter of law, an application for court-appointed counsel constitutes part of an official proceeding under subsection (3). *People v. Schupper*, 140 P.3d 293 (Colo. App. 2006).

Applied in *People v. Frayer*, 661 P.2d 1189 (Colo. App. 1982), *aff'd*, 684 P.2d 927 (Colo. 1984).

18-8-502. Perjury in the first degree. (1) A person commits perjury in the first degree if in any official proceeding he knowingly makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense, although it may be considered by the court in imposing sentence.

(3) Perjury in the first degree is a class 4 felony.

Source: **L. 71:** R&RE, p. 463, § 1. **C.R.S. 1963:** § 40-8-502. **L. 77:** (1) amended, p. 967, § 46, effective July 1.

ANNOTATION

Annotator's note. Since § 18-8-502 is similar to former § 40-7-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Ruling of unconstitutionality disapproved. *People v. Loomis*, 698 P.2d 1320 (Colo. 1985).

The elements of perjury are the falsity of the testimony, its materiality to the issue in the contempt matter, that the oath was administered in a proper proceeding, and the criminal intent. *Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957).

To convict of the crime of perjury it must appear not only that the alleged false testimony was given, and that it was false, but also that it was material. It must be shown to have had a legitimate tendency to prove or disprove some fact material to the matter being investigated. *McClelland v. People*, 49 Colo. 538, 113 P. 640 (1911).

Not every false statement constitutes perjury. *People v. Onorato*, 36 Colo. App. 178, 538 P.2d 898 (1975).

To be perjurious, a false statement must also be "material". *People v. Onorato*, 36 Colo. App. 178, 538 P.2d 898 (1975).

Witness may be guilty of perjury in swearing falsely to any material circumstance. A witness may be guilty of perjury, not only by swearing corruptly and falsely to the fact which is immediately in issue, but also to any material circumstance which legitimately tends to prove or disprove such fact; or to any circumstance which has the effect to strengthen and corroborate the testimony upon the main fact. *Thompson v. People*, 26 Colo. 496, 59 P. 51 (1899); *Stonebraker v. People*, 89 Colo. 550, 4 P.2d 915 (1931); *Papas v. People*, 98 Colo. 306, 55 P.2d 1330 (1936).

It is not necessary to prove that each and all of the answers of the defendant were false, but if the jury believes beyond a reasonable

doubt that the defendant had wilfully sworn falsely to any of the material statements charged, it was their duty to find him guilty. *Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957).

Probable cause existed where the evidence, taken in a light most favorable to the prosecution, showed the defendant lied to the small claims court and showed a document to the small claims court that he allegedly forged, the referee stated that someone was being dishonest, and the document presented contained certain features consistent with a tracing attempt. *People v. Scott*, 785 P.2d 931 (Colo. 1990).

Materiality is question of law. The court must determine, as a matter of law, whether or not the alleged false testimony is material to the issue. *Treece v. People*, 96 Colo. 32, 40 P.2d 233 (1934).

In a prosecution for perjury the question of the materiality of the testimony alleged to be false is one of law for the court and not the jury. *Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957).

The people have the burden of proving "materiality" of a false statement and that element may not be presumed. *People v. Onorato*, 36 Colo. App. 178, 538 P.2d 898 (1975).

Materiality. A false statement is material for purposes of subsection (1) if it could have affected the outcome of the official proceeding. *People v. Scott*, 785 P.2d 931 (Colo. 1990); *People v. Drake*, 841 P.2d 364 (Colo. App. 1992); *People v. Ellsworth*, 15 P.3d 1111 (Colo. App. 2000).

Materiality must appear by facts or direct averment. It is not necessary that the information should set forth how or in what way the evidence alleged to be false was material to the issue. It is sufficient if its materiality appears either from the facts alleged or by direct averment. *Thompson v. People*, 26 Colo. 496, 59 P. 51 (1899); *Treece v. People*, 96 Colo. 32, 40 P.2d 233 (1934).

Issue of materiality must be submitted to jury. People v. Vance, 933 P.2d 576 (Colo. 1997).

Knowledge of materiality is not an element of the crime of first-degree perjury. People v. Vance, 933 P.2d 576 (Colo. 1997).

Failure to submit issue of materiality to jury is structural defect and not harmless error. People v. Vance, 933 P.2d 576 (Colo. 1997). (disapproved of by Supreme Court in Griego v. People, 19 P.3d 1 (Colo. 2001)).

An incorrect jury instruction in a criminal case is not a structural error; instead, such instruction is subject only to harmless or plain error review, following the U.S. supreme court precedent in Neder v. United States, 527 U.S. 1 (1999). Therefore, if a conviction is not attributable to the incorrect instruction, a conviction shall not be overturned and all contrary precedent is disapproved of. Griego v. People, 19 P.3d 1 (Colo. 2001) (disapproving on this point Cooper v. People, 973 P.2d 1234 (Colo. 1999), Bogdanov v. People, 941 P.2d 247 (Colo. 1997), People v. Vance, 933 P.2d 576 (Colo. 1997), People v. Villa-Villa, 983 P.2d 181 (Colo. App. 1999)).

A perjury conviction may be predicated upon false statements made before a grand jury. People v. Onorato, 36 Colo. App. 178, 538 P.2d 898 (1975).

Statements made during a mistrial may be grounds for perjury under this section. People v. Valdez, 39 Colo. App. 213, 568 P.2d 71 (1977).

The defendant's attempted retraction in a retrial having the same case number as the mistrial does not afford him protection from conviction of first degree perjury under this section. People v. Valdez, 39 Colo. App. 213, 568 P.2d 71 (1977).

Defendant must be informed of issue against him. When tried on an indictment alleging that perjury was committed before a grand jury, the defendant is entitled to be advised by the indictment what the issue is, or as to the nature of the point in question, so that he may prepare himself to show, if he can, that though the testimony be false, it was not material. Treece v. People, 96 Colo. 32, 40 P.2d 233 (1934).

Absence of warning as to privilege against self-incrimination does not protect perjury. The required warning concerning one's privilege against self-incrimination in grand jury appearance relates to admissions concerning past acts, and its absence does not grant witnesses the right to commit perjury before the grand jury. People v. Spencer, 182 Colo. 189, 512 P.2d 260 (1973).

And testimony not to be suppressed in later perjury prosecution. Defendants who were not advised of their rights against self-incrimination prior to their grand jury appearance are not entitled to have their testimony before the grand

jury suppressed in later perjury prosecution. People v. Spencer, 182 Colo. 189, 512 P.2d 260 (1973).

Inconsistent answer relating to credibility is material. If a witness, in answering a question asked for the purpose of laying a foundation for impeachment by a showing of former inconsistent statements, testifies under oath that he did not at a designated time and place make certain statements to officers concerning the whereabouts of the defendant on a certain day, which answers are inconsistent with his testimony on the trial, such testimony is material on the question of his credibility, and if knowingly false, constitutes perjury. Papas v. People, 98 Colo. 306, 55 P.2d 1330 (1936).

Necessity for record of testimony. The record of the case in which perjury is alleged to have been committed must be produced, and the people must display so much of the testimony given in that hearing as shows clearly the materiality of the testimony alleged to have been falsified. McClelland v. People, 49 Colo. 538 (1911).

Sufficiency of information. An information for perjury under this section which charges that it was committed in the "district court of San Miguel county, Colorado", charged with sufficient certainty before what court the alleged false oath was taken; it is not necessary to state the name of the clerk of the court by whom the oath was administered. Smith v. People, 32 Colo. 251, 75 P. 914 (1904).

An information charging perjury in a grand jury investigation should set forth the subject matter of the investigation in which the alleged false testimony was given, and facts, not conclusions, must be averred. If the information is defective in this particular, the prosecution must fail. Treece v. People, 96 Colo. 32, 40 P.2d 233 (1934).

An information that in substance alleges that before a certain district court, properly describing the court, upon the trial of a certain criminal case, the defendant was duly sworn as a witness by the deputy clerk who had authority to administer the oath, sufficiently conforms to this section and by necessary implication states that the proceeding in which the oath was administered was one over which the court had jurisdiction. Thompson v. People, 26 Colo. 496, 59 P. 51 (1899); Papas v. People, 98 Colo. 306, 55 P.2d 1330 (1936).

The information charged that the defendant "feloniously, wilfully, corruptly, and falsely" swore that he did not make the statement and then charged that he did make the statement, and concludes with the further allegation "all of which he, the said A, well knew". With these allegations in the information, it is not conceivable that the defendant was not advised that he was charged with swearing falsely that a certain fact was true, with knowledge of its falsity. To

hold otherwise requires so "skillful an elimination of the obvious" that it would not be attempted except by one versed in the technicalities and evasions of the criminal law. *Papas v. People*, 98 Colo. 306, 55 P.2d 1330 (1936).

Sufficiency of indictment. Indictment for perjury was not fatally defective where the indictment, by implication, indicated that the converse of defendant's testimony was the truth, and the indictment was sufficiently definite to inform the defendant of the charges against him so as to enable him to prepare a defense and to plead the judgment in bar of any further prosecutions for the same offense. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Insufficiency of indictment. The perjury charge failed to set forth with sufficient specificity the falsity of the defendant's statements before the grand jury so as to enable him to prepare his defense, where the device by which the defendant was charged with perjury in the indictment was a verbatim partial transcript of the defendant's actual testimony before the grand jury, but there was no averment of fact to demonstrate the falsity of the testimony on which the charge was based. *People v. Broncucia*, 189 Colo. 334, 540 P.2d 1101 (1975), cert. denied, 431 U.S. 937, 97 S. Ct. 2647, 53 L. Ed.2d 254 (1977).

Joinder of counts in indictment. Two separate counts charging perjury, the first under this section and the second under the following section, were properly joined in one indictment where the two counts were admittedly based upon the same facts, and such facts would render defendants guilty under both sections. *People v. Swanson*, 109 Colo. 371, 125 P.2d 637 (1942).

Proof required to support conviction. To support a conviction for perjury, the offense must be proved by the testimony of two wit-

nesses or the testimony of one witness and independent, corroborating evidence which is deemed of equal weight to the testimony of another witness. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Evidence of defendant's familiarity with crime about which he perjured himself. Evidence in prosecution for perjury which, if believed by the jury, demonstrated defendant's familiarity with the alleged crime about which defendant was being interrogated by the grand jury, was relevant and material to show defendant's knowledge of the perjurious nature of his testimony and his motive for falsifying his testimony. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Jury instruction. Where jury instruction failed to include an essential part of the two-witness rule in prosecution for perjury, i.e., that the corroborating evidence must be deemed of equal weight to the testimony of another witness, this omission was harmless error inasmuch as there was direct testimony by three witnesses contradicting the defendant's grand jury testimony. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973).

Evidence sufficient to establish guilt beyond reasonable doubt. *People v. Concialdi*, 191 Colo. 561, 554 P.2d 1094 (1976).

Written versus oral statements. The difference between first- and second-degree perjury does not turn on whether a statement is written versus oral, but rather upon whether a false statement made under oath occurs in an "official proceeding." *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

Applied in *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979); *People v. Maestas*, 199 Colo. 143, 606 P.2d 849 (1980).

18-8-503. Perjury in the second degree. (1) A person commits perjury in the second degree if, other than in an official proceeding, with an intent to mislead a public servant in the performance of his duty, he makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law.

(2) Perjury in the second degree is a class 1 misdemeanor.

Source: L. 71: R&RE, p. 463, § 1. C.R.S. 1963: § 40-8-503.

ANNOTATION

Annotator's note. Since § 18-8-503 is similar to former § 40-7-1, C.R.S. 1963, a relevant case construing that provision has been included in the annotations to this section.

To make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the

obligation of an oath. *Rogers v. People*, 161 Colo. 317, 422 P.2d 377 (1966).

No presumption of oath-taking is held to apply where the notary's testimony was equivocal on the issue of whether the oath was taken. *Rogers v. People*, 161 Colo. 317, 422 P.2d 377 (1966).

Independent proof required where presumption fails. Although in some cases a crim-

inal conviction may be had upon a bare presumption, the presumption so allowed must fall where there is some evidence to counter the notion that the oath was actually taken. The courts then require independent proof of the actual oath-taking. *Rogers v. People*, 161 Colo. 317, 422 P.2d 377 (1966).

Written versus oral statements. The difference between first- and second-degree perjury

does not turn on whether a statement is written versus oral, but rather upon whether a false statement made under oath occurs in an "official proceeding." *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), *aff'd in part and rev'd in part* on other grounds, *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

Applied in *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

18-8-503.5. Perjury on a motor vehicle registration application. (Repealed)

Source: **L. 90:** Entire section added, p. 1801, § 5, effective July 1. **L. 94:** Entire section repealed, p. 2541, § 5, effective January 1, 1995.

18-8-504. False swearing. (1) A person commits false swearing if he knowingly makes a materially false statement, other than those prohibited by sections 18-8-502 and 18-8-503, which he does not believe to be true, under an oath required or authorized by law.

(2) False swearing is a class 1 petty offense.

Source: **L. 71:** R&RE, p. 463, § 1. **C.R.S. 1963:** § 40-8-504. **L. 77:** (1) amended, p. 968, § 47, effective July 1.

ANNOTATION

Applied in *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

18-8-505. Perjury or false swearing - inconsistent statements. (1) Where a person charged with perjury or false swearing has made inconsistent material statements under oath, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other statement was false and not believed by the defendant to be true.

(2) The highest offense of which a person may be convicted in such an instance shall be determined by hypothetically assuming each statement to be false. If the assumption establishes perjury of different degrees, the person may be convicted of the lesser degree at most. If perjury or false swearing is established by the making of the two statements, the person may be convicted of false swearing at the most.

Source: **L. 71:** R&RE, p. 464, § 1. **C.R.S. 1963:** § 40-8-505. **L. 73:** p. 535, § 4.

18-8-506. Perjury and false swearing - proof. In any prosecution for perjury or false swearing, except a prosecution based upon inconsistent statements pursuant to section 18-8-505, falsity of a statement may not be established solely through contradiction by the uncorroborated testimony of a single witness.

Source: **L. 71:** R&RE, p. 464, § 1. **C.R.S. 1963:** § 40-8-506.

ANNOTATION

Section requires testimony of two witnesses or witness plus corroboration of equal weight. In face of the positiveness of § 16-5-204, requiring at least two witnesses to the same fact to find an indictment for perjury, it would

seem incongruous to prosecute and convict on less direct proof than is required to indict, and, therefore, if a conviction is to stand on the testimony of one witness and corroborating circumstances, such corroboratory proof must

meet the strict requirement of quality equal to the weight of another witness. *Lindsay v. People*, 119 Colo. 438, 204 P.2d 878 (1949) (decided under former CSA, C. 48, § 448).

To convict one of the crime of perjury the offense must be proved by the testimony of two witnesses, or the testimony of one witness and by other independent and corroborating circumstances which are deemed of equal weight of the testimony of another witness. *Marrs v. People*,

135 Colo. 458, 312 P.2d 505 (1957) (decided under former § 39-3-2, CRS 53); *People v. Losinki*, 710 P.2d 1163 (Colo. App. 1985).

Requirements of "two-witness" rule can be satisfied by independent documentary evidence if that evidence is of sufficient weight. *People v. Fueston*, 717 P.2d 978 (Colo. App. 1985), *aff'd* in part and *rev'd* in part on other grounds, 749 P.2d 952 (Colo. 1988); *People v. Ellsworth*, 15 P.3d 1111 (Colo. App. 2000).

18-8-507. Perjury and false swearing - previous criminal action. No prosecution may be brought under section 18-8-502, 18-8-503, or 18-8-504 if the substance of the defendant's false statement is the entry of a plea of not guilty in a previous criminal action in which he or she was accused of an offense.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-507. L. 2000: Entire section amended, p. 28, § 1, effective July 1.

18-8-508. Perjury - retraction. No person shall be convicted of perjury in the first degree if he retracted his false statement in the course of the same proceeding in which it was made. Statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be deemed to have been made in the course of the same proceeding. Retraction is an affirmative defense.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-508.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

The only requirement under the section is that the witness recant during the course of a single continuous trial, which may include various hearings and stages which are a part thereof. *People v. Valdez*, 39 Colo. App. 213, 568 P.2d 71 (1977).

A trial which ends in a mistrial and a retrial are "separate proceedings", rather than "separate hearings at separate stages of the same trial". *People v. Valdez*, 39 Colo. App. 213, 568 P.2d 71 (1977).

18-8-509. Perjury and false swearing - irregularities no defense. (1) It is no defense to a prosecution under sections 18-8-502 to 18-8-504 that:

- (a) The defendant was not competent, for reasons other than mental disability or immaturity, to make the false statement alleged;
- (b) The statement was inadmissible under the law of evidence;
- (c) The oath was administered or taken in an irregular manner; or
- (d) The person administering the oath lacked authority to do so, if the taking of the oath was required by law.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-509.

PART 6

OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

18-8-601. Definitions. The definitions contained in sections 18-8-101, 18-8-301, and 18-8-501 are applicable to the provisions of this part 6, and, in addition to those definitions:

- (1) "Juror" means any person who is a member of any jury or grand jury impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term

“juror” also includes any person who has been drawn or summoned to attend as a prospective juror.

(2) “Testimony” includes oral or written statements, documents, or any other evidence that may be offered by or through a witness in an official proceeding.

Source: L. 71: R&RE, p. 464, § 1. C.R.S. 1963: § 40-8-601.

18-8-602. Bribing a witness. (Repealed)

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-602. L. 84: Entire section repealed, p. 503, § 7, effective July 1.

Cross references: For present provision on bribing a witness or victim, see § 18-8-703.

18-8-603. Bribe-receiving by a witness. (1) A witness or a person believing he is to be called as a witness in any official proceeding commits a class 4 felony if he intentionally solicits, accepts, or agrees to accept any benefit upon an agreement or understanding that:

- (a) He will testify falsely or unlawfully withhold testimony; or
- (b) He will attempt to avoid legal process summoning him to testify; or
- (c) He will attempt to absent himself from an official proceeding to which he has been legally summoned.

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-603. L. 77: IP(1) amended, p. 968, § 48, effective July 1.

18-8-604. Intimidating a witness. (Repealed)

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-604. L. 77: (1) amended, p. 968, § 49, effective July 1; IP(1) and (1)(c) amended and (1)(d) added, p. 991, § 1, effective July 1. L. 84: Entire section repealed, p. 503, § 7, effective July 1.

Cross references: For present provision on intimidating a witness or victim, see §§ 18-8-704 and 18-8-705.

18-8-605. Tampering with a witness. (Repealed)

Source: L. 71: R&RE, p. 465, § 1. C.R.S. 1963: § 40-8-605. L. 77: IP(1) amended, p. 968, § 50, effective July 1. L. 84: Entire section repealed, p. 503, § 7, effective July 1.

Cross references: For present provision on tampering with a witness or victim, see § 18-8-707.

18-8-606. Bribing a juror. (1) A person commits bribing a juror if he offers, confers, or agrees to confer any benefit upon a juror with intent to influence the juror’s vote, opinion, decision, or other action as a juror.

- (2) Bribing a juror is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-606.

18-8-607. Bribe-receiving by a juror. (1) A person commits bribe-receiving by a juror if he intentionally solicits, accepts, or agrees to accept any benefit upon an agreement or understanding that his vote, opinion, decision, or other action as a juror will thereby be influenced.

- (2) Bribe-receiving by a juror is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-607. L. 77: (1) amended, p. 968, § 51, effective July 1.

18-8-608. Intimidating a juror. (1) A person commits intimidating a juror if he intentionally attempts by use of a threat of harm or injury to any person or property to influence a juror's vote, opinion, decision, or other action as a juror.

(2) Intimidating a juror is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-608. L. 77: (1) amended, p. 968, § 52, effective July 1.

18-8-609. Jury-tampering. (1) A person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case.

(1.5) A person commits jury-tampering if he knowingly participates in the fraudulent processing or selection of jurors or prospective jurors.

(2) Jury-tampering is a class 5 felony; except that jury-tampering in any class 1 felony trial is a class 4 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-609. L. 89: (1.5) added and (2) amended, pp. 776, 840, §§ 10, 86, effective July 1.

ANNOTATION

Acts constituting crime must be set forth specifically. Where the acts constituting the offense are not described by the statute, as in this section, the acts which constitute the crime must be set forth with enough specificity to give notice to the defendant. *People v. Zupancic*, 192 Colo. 231, 557 P.2d 1195 (1976).

Insufficient indictment. Where the prosecution contends in an indictment that the defendant

attempted to induce "a grand juror" to disclose the names of the witnesses who appeared before the grand jury and their testimony, the indictment failed to disclose the prohibited conduct. *People v. Zupancic*, 192 Colo. 231, 557 P.2d 1195 (1976).

Applied in *People v. Donachy*, 196 Colo. 289, 586 P.2d 14 (1978).

18-8-610. Tampering with physical evidence. (1) A person commits tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding; or

(b) Knowingly makes, presents, or offers any false or altered physical evidence with intent that it be introduced in the pending or prospective official proceeding.

(2) "Physical evidence", as used in this section, includes any article, object, document, record, or other thing of physical substance.

(3) Tampering with physical evidence is a class 6 felony.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-8-610. L. 89: (3) amended, p. 840, § 87, effective July 1.

ANNOTATION

Law reviews. For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "The Search for Truth Continued: More Disclosure, Less Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued,

The Privilege Retained: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982).

The tampering statute is intended to criminalize behavior that interferes with an official proceeding even if that behavior occurs before the proceeding is instituted. In this

case, the defendant knew proceedings were “about to be instituted”, because the defendant was about to be taken into custody and had a controlled substance that would have been discovered upon a search incident to arrest. *People v. Atencio*, 140 P.3d 73 (Colo. App. 2005).

“Physical evidence” includes false affidavit presented to a grand jury. *People v. Board*, 656 P.2d 712 (Colo. App. 1982).

Evidence sufficient for jury to infer that defendant believed official proceeding was about to be instituted against her. *People v. Frayer*, 661 P.2d 1189 (Colo. App. 1982), *aff’d*, 684 P.2d 927 (Colo. 1984).

18-8-611. Simulating legal process. (1) A person commits simulating legal process if he knowingly delivers or causes to be delivered to another a request for the payment of money on behalf of any creditor including himself which in form and substance simulates any legal process issued by any court of this state.

(2) Simulating legal process is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 466, § 1. **C.R.S. 1963:** § 40-8-611.

18-8-612. Failure to obey a juror summons. (1) A juror commits failure to obey a juror summons if he receives a summons to serve as a trial or grand juror as provided in section 13-71-110, C.R.S., and knowingly fails to obey the summons without justifiable excuse.

(2) Failure to obey a juror summons is a class 3 misdemeanor.

Source: L. 89: Entire section added, p. 776, § 11, effective July 1.

18-8-613. Willful misrepresentation of material fact on juror questionnaire. (1) A juror commits willful misrepresentation of a material fact if he willfully makes a misrepresentation of a material fact when he provides information on the juror questionnaire as provided in section 13-71-115, C.R.S.

(2) Willful misrepresentation of a material fact on a juror questionnaire is a class 3 misdemeanor.

Source: L. 89: Entire section added, p. 776, § 11, effective July 1.

18-8-614. Willful harassment of juror by employer. (1) An employer commits willful harassment of a juror if he willfully deprives an employed juror of employment or any incidents or benefits thereof or willfully harasses, threatens, or coerces an employee because the employee receives a juror summons, responds thereto, performs any obligation or election of juror service as a trial or grand juror, or exercises any right under the “Colorado Uniform Jury Selection and Service Act”, article 71 of title 13, C.R.S.

(2) Willful harassment of a juror is a class 2 misdemeanor.

Source: L. 89: Entire section added, p. 776, § 11, effective July 1.

18-8-615. Retaliation against a judge. (1) (a) An individual commits retaliation against a judge if the individual makes a credible threat, as defined in section 18-3-602 (2) (b), or commits an act of harassment, as defined in section 18-9-111 (1), or an act of harm or injury upon a person or property as retaliation or retribution against a judge, which action is directed against or committed upon:

(I) A judge who has served or is serving in a legal matter assigned to the judge involving the individual or a person on whose behalf the individual is acting;

(II) A member of the judge’s family;

(III) A person in close relationship to the judge; or

(IV) A person residing in the same household with the judge.

(b) An individual commits retaliation against a judge by means of a credible threat as described in paragraph (a) of this subsection (1) if the individual knowingly makes the credible threat:

- (I) Directly to the judge; or
- (II) To another person:
 - (A) If the individual intended that the communication would be relayed to the judge; or
 - (B) If the other person is required by statute or ethical rule to report the communication to the judge.

(2) Retaliation against a judge is a class 4 felony.

(3) As used in this section, unless the context otherwise requires, “judge” means any justice of the supreme court, judge of the court of appeals, district court judge, juvenile court judge, probate court judge, water court judge, county court judge, district court magistrate, county court magistrate, municipal judge, administrative law judge, or unemployment insurance hearing officer.

Source: L. 2008: Entire section added, p. 1028, § 1, effective July 1. **L. 2010:** IP(1)(a) amended, (HB 10-1233), ch. 88, p. 296, § 6, effective August 11.

ANNOTATION

To violate subsection (1)(b)(II)(B), a person must know that the person to whom the threat is made has a duty to report the threat. The general assembly did not intend to limit the

application of the mens rea of “knowingly” to any particular element of subsection (1)(b). *People v. Berry*, __ P.3d __ (Colo. App. 2011).

PART 7

VICTIMS AND WITNESSES PROTECTION

Cross references: For compensation to crime victims, see parts 1 and 2 of article 4.1 of title 24; for rights of victims of and witnesses to crimes, see part 3 of article 4.1 of title 24; for assistance to victims of and witnesses to crimes, see article 4.2 of title 24; for restitution to victims of crime, see article 28 of title 17; for protection orders to protect witnesses and victims, see §§ 18-1-1001 and 19-2-707.

18-8-701. Short title. This part 7 shall be known and may be cited as the “Colorado Victim and Witness Protection Act of 1984”.

Source: L. 84: Entire part added, p. 501, § 4, effective July 1.

18-8-702. Definitions. The definitions contained in sections 18-8-301, 18-8-501, and 18-8-601 are applicable to the provisions of this part 7, and in addition to those definitions:

- (1) “Victim” means any natural person against whom any crime has been perpetrated or attempted, as crime is defined under the laws of this state or of the United States.
- (2) “Witness” means any natural person:
 - (a) Having knowledge of the existence or nonexistence of facts relating to any crime;
 - (b) Whose declaration under oath is received or has been received as evidence for any purpose;
 - (c) Who has reported any crime to any peace officer, correctional officer, or judicial officer;
 - (d) Who has been served with a subpoena issued under the authority of any court in this state, of any other state, or of the United States; or
 - (e) Who would be believed by any reasonable person to be an individual described in paragraph (a), (b), (c), or (d) of this subsection (2).

Source: L. 84: Entire part added, p. 501, § 4, effective July 1.

18-8-703. Bribing a witness or victim. (1) A person commits bribing a witness or victim if he or she offers, confers, or agrees to confer any benefit upon a witness, or a victim, or a person he or she believes is to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim with intent to:

- (a) Influence the witness or victim to testify falsely or unlawfully withhold any testimony; or
 - (b) Induce the witness or victim to avoid legal process summoning him to testify; or
 - (c) Induce the witness or victim to absent himself or herself from an official proceeding.
- (2) Bribing a witness or victim is a class 4 felony.

Source: L. 84: Entire part added, p. 501, § 4, effective July 1. L. 2004: IP(1) and (1)(c) amended, p. 435, § 1, effective July 1.

Editor's note: This section is similar to former § 18-8-602 as it existed prior to 1984.

ANNOTATION

An attorney found guilty of subornation of perjury under this section will be disbarred.
People ex rel. Colo. Bar Ass'n v. McCann, 80

Colo. 220, 249 P. 1093 (1926) (decided under former C.L. § 6777).

18-8-704. Intimidating a witness or victim. (1) A person commits intimidating a witness or victim if, by use of a threat, act of harassment as defined in section 18-9-111, or act of harm or injury to any person or property directed to or committed upon a witness or a victim to any crime, a person he or she believes has been or is to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who has reported a crime or who may be called to testify as a witness to or victim of any crime, he or she intentionally attempts to or does:

- (a) Influence the witness or victim to testify falsely or unlawfully withhold any testimony; or
 - (b) Induce the witness or victim to avoid legal process summoning him to testify; or
 - (c) Induce the witness or victim to absent himself or herself from an official proceeding;
- or
- (d) Inflict such harm or injury prior to such testimony or expected testimony.
- (2) Intimidating a witness or victim is a class 4 felony.

Source: L. 84: Entire part added, p. 501, § 4, effective July 1. L. 88: IP(1) amended, p. 714, § 23, effective July 1. L. 90: IP(1) amended, p. 987, § 11, effective April 24. L. 91: IP(1) amended, p. 407, § 15, effective June 6. L. 2003: IP(1) amended, p. 1433, § 27, effective July 1. L. 2004: (1)(c) amended, p. 435, § 2, effective July 1.

Editor's note: This section is similar to former § 18-8-604 as it existed prior to 1984.

ANNOTATION

Annotator's note. Since § 18-8-704 is similar to former § 18-8-604, relevant cases construing that provision have been included in the annotations to this section.

All that is necessary to complete the crime under this section is to presently attempt, by threat of harm or injury, to influence someone to

withhold testimony at a future time. People v. Proctor, 194 Colo. 172, 570 P.2d 540 (1977).

"Unlawfully" refers to the time when the testimony is to be actually withheld, not to the time of the contract. People v. Proctor, 194 Colo. 172, 570 P.2d 540 (1977).

Threats of future harm delivered before a

subpoena arrives may be just as effective as those delivered after the subpoena arrives. *People v. Proctor*, 194 Colo. 172, 570 P.2d 540 (1977).

Person intimidated must have witnessed something concerning which his testimony is probative. One of the elements of intimidating a witness is that the person intimidated must have witnessed something concerning which his testimony would be probative. *People v. Gonzales*, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

The language of the statutes regarding retaliation against a witness and intimidation of a witness are similar, however, § 18-8-706 and this section are factually distinguishable and reasonable grounds exist to support differences in punishment provided for each. Therefore they do not violate equal protection. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

The general assembly may prescribe more severe penalties for conduct it perceives to have more severe consequences, even if the differences are only a matter of degree, so long as the classifications of criminal behavior are based on

differences reasonably related to the general purpose of the legislation. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

Use of the term "victim" as defined in § 18-8-702 does not require that the person being intimidated be the victim of a predicate crime resulting in a conviction; intimidation of a victim charge is unrelated to and independent of any underlying charge. *People v. Rester*, 36 P.3d 98 (Colo. App. 2001).

Jury was required to find only that the victim was the victim of any crime. Defendant who was acquitted on assault and harassment charges could still be convicted of intimidating a witness, since defendant had been found guilty of violating a restraining order and of violating bond conditions. *People v. Rester*, 36 P.3d 98 (Colo. App. 2001).

Jury instruction defining "unlawfully" conformed with Proctor annotated above, and was necessary to clarify that the victim did not have to be under legal subpoena at the time defendant threatened her. *People v. Rester*, 36 P.3d 98 (Colo. App. 2001).

Applied in *People v. Jones*, 140 P.3d 325 (Colo. App. 2006).

18-8-705. Aggravated intimidation of a witness or victim. (1) A person who commits intimidating a witness or victim commits aggravated intimidation of a witness or victim if, during the act of intimidating, he:

(a) Is armed with a deadly weapon with the intent, if resisted, to kill, maim, or wound the person being intimidated or any other person; or

(b) Knowingly wounds the person being intimidated or any other person with a deadly weapon, or by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person being intimidated or any other person in reasonable fear of death or bodily injury.

(2) For purposes of subsection (1) of this section, possession of any article used or fashioned in a manner to lead any person reasonably to believe it to be a deadly weapon, or any verbal or other representation by the person that he is so armed, is prima facie evidence that the person is armed with a deadly weapon.

(3) Aggravated intimidation of a witness or victim is a class 3 felony.

Source: L. 84: Entire part added, p. 502, § 4, effective July 1.

18-8-706. Retaliation against a witness or victim. (1) An individual commits retaliation against a witness or victim if such person uses a threat, act of harassment as defined in section 18-9-111, or act of harm or injury upon any person or property, which action is directed to or committed upon a witness or a victim to any crime, an individual whom the person believes has been or would have been called to testify as a witness or victim, a member of the witness' family, a member of the victim's family, an individual in close relationship to the witness or victim, an individual residing in the same household with the witness or victim, as retaliation or retribution against such witness or victim.

(2) Retaliation against a witness or victim is a class 3 felony.

Source: L. 84: Entire part added, p. 502, § 4, effective July 1. **L. 92:** (1) amended, p. 405, § 20, effective June 3. **L. 2003:** (1) amended, p. 1434, § 28, effective July 1.

ANNOTATION

Phrase “act of harassment” is **unconstitutionally overbroad**, and it is stricken from the statute. But the term “threat” is not overbroad. After partial invalidation, this section is not unconstitutionally vague or overbroad. *People v. Hickman*, 988 P.2d 628 (Colo. 1999).

Although the statute does not expressly prohibit threats delivered to third-party recipients, a person of ordinary intelligence would understand that such conduct is proscribed under the statute. Therefore, the statute is not unconstitutionally vague as applied to defendant. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The language of the statutes regarding retaliation against a witness and intimidation of a witness are similar however, this section and § 18-8-704 are factually distinguishable and reasonable grounds exist to support differences in punishment provided for each. One is intimidation of a witness prior to testimony, the other is retaliation in response to testimony given. Therefore they do not violate equal protection. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

The general assembly may prescribe more severe penalties for conduct it perceives to have more severe consequences, even if the differences are only a matter of degree, so long as the classifications of criminal behavior are based on differences reasonably related to the general purpose of the legislation. *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995).

Threats to kill or injure a witness in retaliation for the witness's testimony are not protected speech. Threats to injure a potential witness's family, made with the intent of discouraging testimony, are not protected speech. *People v. Hickman*, 988 P.2d 628 (Colo. 1999); *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

18-8-706.5. Retaliation against a juror. (1) An individual commits retaliation against a juror if such individual uses a threat, act of harassment as defined in section 18-9-111, or act of harm or injury upon any person or property, which action is directed to or committed upon a juror who has served for a criminal or civil trial involving the individual or a person or persons on whose behalf the individual is acting, a member of the juror's family, an individual in close relationship to the juror, or an individual residing in the same household with the juror, as retaliation or retribution against such juror.

(2) Retaliation against a juror is a class 3 felony.

Source: **L. 95:** Entire section added, p. 1255, § 17, effective July 1. **L. 2003:** (1) amended, p. 1434, § 29, effective July 1.

18-8-707. Tampering with a witness or victim. (1) A person commits tampering with a witness or victim if he intentionally attempts without bribery or threats to induce a witness or victim or a person he believes is to be called to testify as a witness or victim in any official proceeding or who may be called to testify as a witness to or victim of any crime to:

Whether a statement is a “true threat” or “political speech” is a question for the finder of fact. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

A threat is a statement of purpose or intent to cause injury or harm to the person, property, or rights of another by the commission of an unlawful act. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The critical inquiry is whether the statements, viewed in the context in which they were spoken or written, constitute a true threat. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

A “true threat” is not merely talk or jest and is evaluated by whether those who hear or read the threat reasonably consider that an actual threat has been made. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The threat need not be direct. A threat may be contingent or conditional if the contingency itself remains in the control of the person making the threat. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The phrase “directed to” means that a threat must be directed toward or made against a person protected by the statute, but nothing in the language of the statute requires that the threat must be directly communicated to or received by the protected person. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

This statute is a specific intent offense. *People v. Hickman*, 988 P.2d 628 (Colo. 1999); *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

The statute does not require proof that defendant intentionally communicated the threat to the witness but only that he made the threat with the specific intent to retaliate or to seek retribution for the witness's involvement in the prior criminal proceedings. *People v. McIntier*, 134 P.3d 467 (Colo. App. 2005).

- (a) Testify falsely or unlawfully withhold any testimony; or
 - (b) Absent himself from any official proceeding to which he has been legally summoned; or
 - (c) Avoid legal process summoning him to testify.
- (2) Tampering with a witness or victim is a class 4 felony.

Source: L. 84: Entire part added, p. 502, § 4, effective July 1.

Editor's note: This section is similar to former § 18-8-605 as it existed prior to 1984.

ANNOTATION

Annotator's note. Since § 18-8-707 is similar to former § 18-8-605, relevant cases construing that provision have been included with the annotations to this section.

History of statute. The tampering-with-a-witness statute defines a new statutory crime and does not have its genesis in subornation of perjury. *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

The drafters of the model penal code from which former § 18-8-605 derived considered subornation of perjury to be a superfluous restatement of accomplice liability and proposed that persons accused of conduct amounting to subornation of perjury be prosecuted under the accomplice and solicitation statutes. *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

Success not element of crime. Under former § 18-8-605, it was not necessary that the defendant succeed in his attempt or actually induce the witness to do anything. *People v. Moyer*, 670 P.2d 785 (Colo. 1983).

The plain language of subsection (1)(a) does not require the people to prove an attempt to interfere with actual testimony anticipated to be offered at a trial, hearing, or other sworn proceeding but only that the defendant attempted to influence a witness or victim to testify falsely or to unlawfully withhold testimony that may be offered in the future, and the witness or victim need not be under subpoena or legal summons at the time of the contact. *People v. Cunefare*, 102 P.3d 302 (Colo. 2004).

Witness or victim must be legally summoned to be a witness under subsection (1)(b). To find a defendant guilty under subsection (1)(b), the jury must have received evidence that the de-

fendant attempted to have the victim absent herself or himself from a proceeding to which she or he had been legally summoned. The mere presence of the victim at trial does not permit the jury to conclude that she or he was legally summoned to appear at trial. *People v. Yascavage*, 80 P.3d 899 (Colo. App. 2003), *aff'd*, 101 P.3d 1090 (Colo. 2004).

Defendant could not have abandoned the crime of tampering with a witness once he attempted to influence the victim, because the crime was completed when the attempt was made. *People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002).

Materiality not element of offense. A trial court's instruction injecting the element of materiality into the tampering-with-a-witness statute was improper. *People v. Francois*, 198 Colo. 249, 598 P.2d 144 (1979).

Probable cause established. Where the evidence and the reasonable inferences which could be drawn from it established that the defendant told the witness that if she or 10 people testified before the grant jury, the defendant would sue the witness or any of the 10 persons for perjury and that the defendant was aware that the witness had talked with the district attorney at the time his statements were made, this evidence established probable cause to believe that the defendant committed the crime of tampering with a witness. *People v. Moyer*, 670 P.2d 785 (Colo. 1983).

Portions of written communications between the defendant and his wife were for the purpose of aiding the crime of witness tampering and were held to be admissible and not confidential. *People v. Fox*, 862 P.2d 1000 (Colo. App. 1993).

18-8-708. Suit for damages by victim of intimidation or retaliation. (1) The following persons are eligible for relief pursuant to this section:

- (a) Any person who testifies as a witness or victim in any official proceeding;
 - (b) Any person who may be called to testify as a witness to or victim of any crime;
 - (c) Any person who is a member of the witness' or victim's family;
 - (d) Any person who is in a close relationship to the witness or victim;
 - (e) Any person who is residing in the same household with the witness or victim.
- (2) Any person who is eligible pursuant to subsection (1) of this section who suffers any physical injury or property damage as the result of the commission of intimidating a witness

or victim pursuant to section 18-8-704, aggravated intimidation of a witness or victim pursuant to section 18-8-705, or retaliation against a witness or victim pursuant to section 18-8-706 shall, in a civil proceeding to recover for such injury or property damage, be eligible for the award of treble damages and attorney fees.

(3) Nothing in this section shall limit the amount of recovery which a person specified in subsection (1) of this section may receive in a civil proceeding or in any other proceeding.

Source: L. 84: Entire part added, p. 503, § 4, effective July 1.

Cross references: For awarding of attorney fees in civil actions generally, see § 13-17-102.

ANNOTATION

To be eligible for civil damages pursuant to this section, an individual must be the victim of or a witness to a crime. *Grynberg v. Ark. Okla. Gas Corp.*, 116 P.3d 1260 (Colo. App. 2005).

Although section provides that the amount of recovery a person may receive in a civil or

other proceeding is not limited by the recovery set forth in subsection (2), it does not authorize an amount of recovery that exceeds the exemplary damages limitation set forth in § 13-21-102. *Palmer v. Diaz*, 214 P.3d 546 (Colo. App. 2009).

PART 8

OFFENSES RELATING TO USE OF FORCE BY PEACE OFFICERS

18-8-801. Definitions. As used in this part 8, unless the context otherwise requires:

- (1) "Materially false statement" has the meaning set out in section 18-8-501 (1).
- (2) "Peace officer" has the meaning set out in section 16-2.5-101, C.R.S.

Source: L. 91: Entire part added, p. 396, § 1, effective June 5. **L. 2003:** (2) amended, p. 1615, § 12, effective August 6.

18-8-802. Duty to report use of force by peace officers. (1) (a) A peace officer who, in pursuance of such officer's law enforcement duties, witnesses another peace officer, in pursuance of such other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control, use physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707 must report such use of force to such officer's immediate supervisor.

(b) At a minimum, the report required by this section shall include the date, time, and place of the occurrence, the identity, if known, and description of the participants, and a description of the events and the force used. A copy of an arrest report or other similar report required as a part of a peace officer's duties can be substituted for the report required by this section, so long as it includes such information. The report shall be made in writing within ten days of the occurrence of the use of such force.

(c) Any peace officer who fails to report such use of force in the manner prescribed in this subsection (1) commits a class 1 misdemeanor.

(2) Any peace officer who knowingly makes a materially false statement, which the officer does not believe to be true, in any report made pursuant to subsection (1) of this section commits false reporting to authorities pursuant to section 18-8-111 (1) (c).

(3) No report filed pursuant to subsection (1) of this section shall be used as evidence against a peace officer in a criminal proceeding unless there is other credible evidence which corroborates such report or in a civil action over a claim of executive or statutory privilege without a valid court order.

Source: L. 91: Entire part added, p. 396, § 1, effective June 5.

ANNOTATION

Law reviews. For article, “Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers”, see 33 Colo. Law. 55 (March 2004).

18-8-803. Use of excessive force. (1) Subject to the provisions of section 18-1-707, a peace officer who uses excessive force in pursuance of such officer’s law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen, including the provisions of part 1 of article 3 of this title concerning homicide and related offenses and the provisions of part 2 of said article 3 concerning assaults.

(2) As used in this section, “excessive force” means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.

Source: L. 91: Entire part added, p. 397, § 1, effective June 5.

ANNOTATION

Law reviews. For article, “Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers”, see 33 Colo. Law. 55 (March 2004).

18-8-804. Approved policy or guidelines. Each public entity which employs any peace officer shall adopt policies or guidelines concerning the use of force by peace officers which shall be complied with by peace officers in carrying out the duties of such officers within the jurisdiction of the public entity.

Source: L. 91: Entire part added, p. 397, § 1, effective June 5.

ARTICLE 9

Offenses Against Public Peace,
Order, and Decency

Editor’s note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor’s note following the title heading.

PART 1		18-9-111.	Harassment.
PUBLIC PEACE AND ORDER		18-9-112.	Loitering - definition - legislative declaration.
18-9-101.	Definitions.	18-9-113.	Desecration of venerated objects.
18-9-102.	Inciting riot.	18-9-114.	Hindering transportation.
18-9-103.	Arming rioters.	18-9-115.	Endangering public transportation.
18-9-104.	Engaging in a riot.	18-9-115.5.	Violation of a restraining order related to public conveyances.
18-9-105.	Disobedience of public safety orders under riot conditions.	18-9-116.	Throwing missiles at vehicles - harassment of bicyclists.
18-9-106.	Disorderly conduct.	18-9-116.5.	Vehicular eluding.
18-9-107.	Obstructing highway or other passageway.	18-9-117.	Unlawful conduct on public property.
18-9-108.	Disrupting lawful assembly.	18-9-118.	Firearms, explosives, or incendiary devices in facilities of public transportation.
18-9-108.5.	Residential picketing - legislative declaration.	18-9-119.	Failure or refusal to leave
18-9-109.	Interference with staff, faculty, or students of educational institutions.		
18-9-110.	Public buildings - trespass, interference - penalty.		

	premises or property upon request of a peace officer - penalties - payment of costs.	18-9-207.	Tampering or drugging of live-stock.
18-9-120.	Terrorist training activities - penalties - exemptions.	18-9-208.	Forfeiture of animals.
18-9-121.	Bias-motivated crimes.	18-9-209.	Immunity for reporting animal cruelty - false report - penalty.
18-9-122.	Preventing passage to and from a health care facility - engaging in prohibited activities near facility.		
18-9-123.	Bringing alcoholic beverages, bottles, or cans into the major league baseball stadium.		
18-9-124.	Hazing - penalties - legislative declaration.		
18-9-125.	Interference with a funeral.		

PART 2

CRUELTY TO ANIMALS

18-9-201.	Definitions.	18-9-301.	Definitions.
18-9-201.5.	Scope of part 2.	18-9-302.	Wiretapping and eavesdropping devices prohibited - penalty.
18-9-201.7.	Animal cruelty prevention fund - control of fund - repeal. (Repealed)	18-9-303.	Wiretapping prohibited - penalty.
18-9-202.	Cruelty to animals - aggravated cruelty to animals - cruelty to a service animal - restitution.	18-9-304.	Eavesdropping prohibited - penalty.
18-9-202.5.	Impounded animals - costs of impoundment, provision, and care - disposition - procedures - application - definition.	18-9-305.	Exceptions.
18-9-203.	Shepherd abandoning sheep without notice. (Repealed)	18-9-306.	Abuse of telephone and telegraph service.
18-9-204.	Animal fighting - penalty.	18-9-306.5.	Obstruction of telephone or telegraph service.
18-9-204.5.	Unlawful ownership of dangerous dog - legislative declaration - definitions.	18-9-307.	Refusal to yield party line.
18-9-205.	Disposition of fines.	18-9-308.	Telephone directories to contain notice.
18-9-206.	Unauthorized release of an animal - penalty - restitution.	18-9-309.	Telecommunications crime.
		18-9-309.5.	Civil remedies - injunctions - forfeiture.
		18-9-310.	Unlawful use of information - penalty.
		18-9-311.	Automated dialing systems prohibited.
		18-9-312.	Hostages or armed person in geographical area - telephone, electronic, cellular, or digital communications.
		18-9-313.	Personal information on the internet - law enforcement official.

PART 3
OFFENSES INVOLVING
COMMUNICATIONS

PART 1

PUBLIC PEACE AND ORDER

18-9-101. Definitions. As used in this part 1, unless the context otherwise requires:

(1) "Destructive device" means any material, substance, or mechanism capable of being used, either by itself or in combination with any other substance, material, or mechanism, to cause sudden and violent injury, damage, destruction, or death.

(1.4) "Funeral" means the ceremonies, rituals, and memorial services held in connection with the burial, cremation, or memorial of a deceased person, including the assembly and dispersal of the mourners.

(1.5) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place where a funeral is conducted.

(2) "Riot" means a public disturbance involving an assemblage of three or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the performance of any governmental function.

Source: L. 71: R&RE, p. 466, § 1. C.R.S. 1963: § 40-9-101. L. 95: (2) amended, p. 1255, § 18, effective July 1. L. 2006: (1.4) and (1.5) added, p. 1198, § 2, effective May 26.

Cross references: In 2006, subsections (1.4) and (1.5) were added by the “Right to Rest in Peace Act”. For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Provisions give clear warning that participation in riot forbidden. Subsection (2) of this section and § 18-9-104 give clear warning that knowing participation in the defined conduct is forbidden and provide explicit standards to guide persons charged with their enforcement. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Engaging in a riot was a crime at common law requiring mens rea, or guilty mind, to be criminally actionable. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Mental state “knowingly” is required for the offense of engaging in a riot. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

18-9-102. Inciting riot. (1) A person commits inciting riot if he:

(a) Incites or urges a group of five or more persons to engage in a current or impending riot; or

(b) Gives commands, instructions, or signals to a group of five or more persons in furtherance of a riot.

(2) A person may be convicted under section 18-2-101, 18-2-201, or 18-2-301 of attempt, conspiracy, or solicitation to incite a riot only if he engages in the prohibited conduct with respect to a current or impending riot.

(3) Inciting riot is a class 1 misdemeanor, but, if injury to a person or damage to property results therefrom, it is a class 5 felony.

Source: L. 71: R&RE, p. 467, § 1. C.R.S. 1963: § 40-9-102.

ANNOTATION

Law reviews. For note, “Comment: Constitutional Law—Symbolic Speech—Colorado

Flag Desecration Statute”, see 48 Den. L. J. 451 (1971).

18-9-103. Arming rioters. (1) A person commits arming rioters if he:

(a) Knowingly supplies a deadly weapon or destructive device for use in a riot; or

(b) Teaches another to prepare or use a deadly weapon or destructive device with intent that any such thing be used in a riot.

(2) Arming rioters is a class 4 felony.

Source: L. 71: R&RE, p. 467, § 1. C.R.S. 1963: § 40-9-103.

18-9-104. Engaging in a riot. (1) A person commits an offense if he or she engages in a riot. The offense is a class 4 felony if in the course of rioting the actor employs a deadly weapon, a destructive device, or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon, or if in the course of rioting the actor represents verbally or otherwise that he or she is armed with a deadly weapon; otherwise, it is a class 2 misdemeanor.

(2) The provisions of section 18-9-102 (2) are applicable to attempt, solicitation, and conspiracy to commit an offense under this section.

Source: L. 71: R&RE, p. 467, § 1. C.R.S. 1963: § 40-9-104. L. 2000: (1) amended, p. 696, § 10, effective July 1.

ANNOTATION

Law reviews. For article, "Mass Picketing and the Constitutional Guarantee of Freedom of Speech", see 22 Rocky Mt. L. Rev. 28 (1949).

Annotator's note. Since § 18-9-104 is similar to former CSA, C. 48, § 196, a relevant case construing that provision has been included in the annotations to this section.

Concert of action is not essential to the offense of riot, and a previous agreement or conspiracy need not be shown. *Trujillo v. People*, 116 Colo. 157, 178 P.2d 942 (1946); *People v. Martinez*, 705 P.2d 9 (Colo. App. 1985).

All persons participating in a riot are guilty as principals. *Trujillo v. People*, 116 Colo. 157, 178 P.2d 942 (1946).

Instruction on self-defense. It was not error to insert the words "and not participating in any riot" in an instruction to the effect that defendant would not be guilty of riot if he acted in self-defense upon being attacked "while engaged in the lawful pursuit of his own business and not participating in any riot". *Trujillo v. People*, 116 Colo. 157, 178 P.2d 942 (1946).

Self-defense is an affirmative defense to inciting or engaging in a riot. *People v. Mullins*, 209 P.3d 1147 (Colo. App. 2008).

Provisions give clear warning that participation in riot forbidden. Section 18-9-101 (2) and this section give clear warning that knowing participation in the defined conduct is forbidden and provide explicit standards to guide persons charged with their enforcement. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Engaging in a riot was a crime at common law requiring mens rea, or guilty mind, to be criminally actionable. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Mental state "knowingly" is required for the offense of engaging in a riot. *People v. Bridges*, 620 P.2d 1 (Colo. 1980).

Employing a deadly weapon is a sentence enhancing factor, not an element of the crime of engaging in a riot. The culpable mental state does not apply to sentencing enhancing factors, so the court did not need to instruct the jury that the mental state also applied to employing a deadly weapon. *People v. Rivas*, 77 P.3d 882 (Colo. App. 2003).

Applied in *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Mattas*, 645 P.2d 254 (Colo. 1982).

18-9-105. Disobedience of public safety orders under riot conditions. A person commits a class 3 misdemeanor if, during a riot or when one is impending, he knowingly disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot. A public safety order is an order designed to prevent or control disorder or promote the safety of persons or property issued by an authorized member of the police, fire, military, or other forces concerned with the riot. No such order shall apply to a news reporter or other person observing or recording the events on behalf of the public press or other news media, unless he is physically obstructing efforts by such forces to cope with the riot or impending riot. Inapplicability of the order is an affirmative defense.

Source: L. 71: R&RE, p. 467, § 1. C.R.S. 1963: § 40-9-105. L. 77: Entire section amended, p. 968, § 53, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

18-9-106. Disorderly conduct. (1) A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly:

(a) Makes a coarse and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace; or

(b) (Deleted by amendment, L. 2000, p. 708, § 39, effective July 1, 2000.)

(c) Makes unreasonable noise in a public place or near a private residence that he has no right to occupy; or

(d) Fights with another in a public place except in an amateur or professional contest of athletic skill; or

(e) Not being a peace officer, discharges a firearm in a public place except when engaged in lawful target practice or hunting; or

(f) Not being a peace officer, displays a deadly weapon, displays any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly

weapon, or represents verbally or otherwise that he or she is armed with a deadly weapon in a public place in a manner calculated to alarm.

(2) Repealed.

(3) (a) An offense under paragraph (a) or (c) of subsection (1) of this section is a class 1 petty offense; except that, if the offense is committed with intent to disrupt, impair, or interfere with a funeral, or with intent to cause severe emotional distress to a person attending a funeral, it is a class 2 misdemeanor.

(b) An offense under paragraph (d) of subsection (1) of this section is a class 3 misdemeanor.

(c) An offense under paragraph (e) or (f) of subsection (1) of this section is a class 2 misdemeanor.

Source: **L. 71:** R&RE, p. 467, § 1. **C.R.S. 1963:** § 40-9-106. **L. 72:** p. 275, § 8. **L. 81:** (1)(a) amended, p. 1010, § 1, effective April 24. **L. 2000:** IP(1), (1)(b), and (1)(f) amended, pp. 696, 708, §§ 11, 39, effective July 1. **L. 2006:** (3) amended, p. 1198, § 3, effective May 26; (2) repealed, p. 1493, § 21, effective June 1.

Editor's note: In *Snyder v. Phelps*, ___ U.S. ___ (2011), the United States Supreme Court held that the first amendment shielded military funeral protesters from tort liability for their picketing because the picketing constituted speech on matters of public concern and because the father of the deceased was not a member of a captive audience.

Cross references: (1) For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

(2) In 2006, subsection (3) was amended by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Annotator's note. Since § 18-9-106 is similar to former § 40-8-1, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Former subsection (1)(a) was unconstitutional because it was facially overbroad and could not be restrictively construed. *Hansen v. People*, 190 Colo. 457, 548 P.2d 1278 (1976).

Subsection (1)(b) held unconstitutional. Statute facially overbroad because it may prohibit constitutionally protected speech as well as unprotected speech. *Aguilar v. People*, 886 P.2d 725 (Colo. 1994).

Subsection (1)(a) applicable to speech. Subsection (1)(a) prohibits certain types of utterances, gestures, and displays in a public place. It is clear that the statute's proscription applies to speech and "expression closely akin to speech". *Hansen v. People*, 190 Colo. 457, 548 P.2d 1278 (1976).

The term "public place" does not include a public building covered by the specific provisions of § 18-9-110. The court found that the Colorado legislature has excluded from the term "public place" those areas mentioned in other statutes. Therefore, the court dismissed disorderly conduct charges arising out of alleged threats made to the staff of a veteran's administrative hospital within one of the hospital buildings. *U.S. v. Wright*, 864 F. Supp. 1013 (D. Colo. 1994).

For sufficiency of evidence, see *Flores v. City & County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950).

State statute as to disturbing the peace not superseded by nonconflicting home-rule ordinance. *Vela v. People*, 174 Colo. 465, 484 P.2d 1204 (1971).

The actus reus of felony menacing is "placing another person in fear of imminent serious bodily injury by the use of a deadly weapon", an act more specific than the actus reus of disorderly conduct with a deadly weapon, which is displaying a deadly weapon in an alarming manner in a public place. Therefore, it does not violate the equal protection clause of article II, section 25, of the Colorado constitution to subject defendants to potential criminal liability under both statutes. *People v. Torres*, 848 P.2d 911 (Colo. 1993).

No equal protection violation was found in defendant's claim that the conduct proscribed by § 18-3-206 (felony menacing), a class 5 felony, was indistinguishable from the conduct proscribed in subsection (1)(f) of this section, a class 2 misdemeanor, in which the actus reus is less specific than the actus reus in § 18-3-206. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

It is only when the same conduct is proscribed in two statutes and different criminal sanctions apply, that problems arise under equal protection. *People v. Ibarra*, 849 P.2d 33 (Colo. 1993).

18-9-107. Obstructing highway or other passageway. (1) An individual or corporation commits an offense if without legal privilege such individual or corporation intentionally, knowingly, or recklessly:

(a) Obstructs a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public has access or any other place used for the passage of persons, vehicles, or conveyances, whether the obstruction arises from his acts alone or from his acts and the acts of others; or

(b) Disobeys a reasonable request or order to move issued by a person the individual or corporation knows to be a peace officer, a firefighter, or a person with authority to control the use of the premises, to prevent obstruction of a highway or passageway or to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

(2) For purposes of this section, “obstruct” means to render impassable or to render passage unreasonably inconvenient or hazardous.

(3) An offense under this section is a class 3 misdemeanor; except that knowingly obstructing the entrance into, or exit from, a funeral or funeral site, or knowingly obstructing a highway or other passageway where a funeral procession is taking place is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 468, § 1. C.R.S. 1963: § 40-9-107. L. 97: IP(1) and (1)(b) amended, p. 1012, § 17, effective August 6. L. 2006: (3) amended, p. 1198, § 4, effective May 26.

Cross references: (1) For obstructing highways, see § 43-5-301.

(2) In 2006, subsection (3) was amended by the “Right to Rest in Peace Act”. For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Law reviews. For article, “Mass Picketing and the Constitutional Guarantee of Freedom of Speech”, see 22 Rocky Mt. L. Rev. 28 (1949).

18-9-108. Disrupting lawful assembly. (1) A person commits disrupting lawful assembly if, intending to prevent or disrupt any lawful meeting, procession, or gathering, he significantly obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means.

(2) Disrupting lawful assembly is a class 3 misdemeanor; except that, if the actor knows the meeting, procession, or gathering is a funeral, it is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 468, § 1. C.R.S. 1963: § 40-9-108. L. 2006: (2) amended, p. 1199, § 5, effective May 26.

Cross references: In 2006, subsection (2) was amended by the “Right to Rest in Peace Act”. For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

ANNOTATION

Statute is constitutional as applied. By adopting an actual disruption standard that focuses on punishment for actual disruption of an assembly, this section is constitutionally based on conduct, not content. *Dempsey v. People*, 117 P.3d 800 (Colo. 2005).

Under the terms of this section, a defendant must intend to disrupt a meeting. That element of the offense subsumes two notions.

First, the nature of the assembly or meeting defines the bounds of appropriate protest. The standard is drawn from the implicit customs and usages or explicit rules germane to a given meeting. Once the nature of the event is clear, the second question becomes whether the defendant intended to disrupt that event or, stated otherwise, whether the defendant was aware that his or her conduct was inconsistent with the

customs of the assembly and whether he or she thereby intended his or her conduct to disrupt the assembly significantly. *Dempsey v. People*, 117 P.3d 800 (Colo. 2005).

18-9-108.5. Residential picketing - legislative declaration. (1) (a) The general assembly hereby finds that:

- (I) The protection and preservation of the home is a compelling state interest;
- (II) Residents of Colorado are entitled to enjoy a feeling of well-being, tranquility, and privacy in their homes and dwellings;
- (III) The practice of targeted residential picketing causes emotional disturbances and distress to the occupants and has the potential to incite breaches of the peace; and
- (IV) The practice of targeted residential picketing does not seek to disseminate a message to the general public but, instead, seeks to harass and intrude on the privacy of the targeted resident.

(b) The general assembly further finds that ample alternative means of communication are available to those who would choose to engage in picketing outside a person's residence.

(2) As used in this section, unless the context otherwise requires:

(a) "Residence" means any single-family or multi-family dwelling unit that is not being used as a targeted occupant's sole place of business or as a place of public meeting.

(b) "Targeted picketing" means picketing, with or without signs, that is specifically directed toward a residence, or one or more occupants of the residence, and that takes place on that portion of a sidewalk or street in front of the residence, in front of an adjoining residence, or on either side of the residence.

(3) (a) It shall be unlawful for a person to engage in targeted picketing except when the person is engaging in picketing while marching, without stopping in front or on either side of a residence, over a route that proceeds a distance that extends beyond three adjacent structures to one side of the targeted residence along the one-way length and three adjacent structures to the other side of the targeted residence along the one-way length or three hundred feet to one side of the targeted residence along the one-way length and three hundred feet to the other side of the targeted residence along the one-way length, whichever distance is shorter.

(b) (I) It shall be unlawful for a person while engaged in targeted picketing to hold, carry, or otherwise display on his or her person a sign or placard while he or she is on a street or sidewalk in a residential area if the person does not comply with the following restrictions:

(A) All signs or placards shall be no greater in size than six square feet;

(B) Each person may carry, hold, or otherwise display no more than one sign or placard.

(II) The restrictions specified pursuant to subparagraph (I) of this paragraph (b) shall not apply to a person while engaged in targeted picketing carrying a sign or placard temporarily while transporting the sign or placard from the person's residence or business to a vehicle.

(4) Vehicles or trailers used in targeted picketing shall not park within three residences or three hundred feet of a residence that is the subject of targeted picketing. There is a presumption that a vehicle or trailer is used in targeted picketing when signage is affixed to the vehicle containing content related to the targeted picketing.

(5) It shall not be a violation of subsection (3) of this section unless a person has previously been ordered by a peace officer or other law enforcement official to move, disperse, or take other appropriate action to comply with this section and the person has failed to promptly comply with the warning. The warning issued by the peace officer or other law enforcement official shall indicate the required distances the person engaging in picketing must march or other conditions necessary to comply with this section. In order to ensure that an appropriate warning has been given, the local law enforcement agency shall maintain a written record indicating the name of each warned individual, the address or addresses of the targeted residence or residences, and the date and time of the warning.

(6) A person who violates subsection (3) of this section commits an unclassified misdemeanor. The court may impose a fine of no more than five thousand dollars.

(7) The provisions of this section shall not prohibit a local government from adopting more restrictive provisions concerning targeted picketing or carrying in a residential area more than one sign of a certain size.

Source: L. 2008: Entire section added, p. 1509, § 1, effective August 5.

18-9-109. Interference with staff, faculty, or students of educational institutions.

(1) No person shall, on or near the premises or facilities of any educational institution, willfully deny to students, school officials, employees, and invitees:

- (a) Lawful freedom of movement on the premises;
- (b) Lawful use of the property or facilities of the institution;
- (c) The right of lawful ingress and egress to the institution's physical facilities.

(2) No person shall, on the premises of any educational institution or at or in any building or other facility being used by any educational institution, willfully impede the staff or faculty of such institution in the lawful performance of their duties or willfully impede a student of the institution in the lawful pursuit of his educational activities through the use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened.

(3) No person shall willfully refuse or fail to leave the property of or any building or other facility used by any educational institution upon being requested to do so by the chief administrative officer, his designee charged with maintaining order on the school premises and in its facilities, or a dean of such educational institution, if such person is committing, threatens to commit, or incites others to commit any act which would disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions of the institution.

(4) It shall be an affirmative defense that the defendant was exercising his right to lawful assembly and peaceful and orderly petition for the redress of grievances, including any labor dispute between an educational institution and its employees, any contractor or subcontractor, or any employee thereof.

(5) Any person who violates any of the provisions of this section, except subsection (6) of this section, commits a class 3 misdemeanor.

(6) (a) A person shall not knowingly make or convey to another person a credible threat to cause death or to cause bodily injury with a deadly weapon against:

(I) A person the actor knows or believes to be a student, school official, or employee of an educational institution; or

(II) An invitee who is on the premises of an educational institution.

(b) For purposes of this subsection (6), "credible threat" means a threat or physical action that would cause a reasonable person to be in fear of bodily injury with a deadly weapon or death.

(c) A person who violates this subsection (6) commits a class 1 misdemeanor.

Source: L. 71: R&RE, p. 468, § 1. C.R.S. 1963: § 40-9-109. L. 73: p. 539, § 8. L. 2005: (5) amended and (6) added, p. 1499, § 4, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Subsection (2) is not unconstitutionally vague since it gives fair notice of a reasonably narrow range of prohibited conduct, in terms sufficiently precise so that persons of ordinary intelligence need not speculate as to the conduct that is proscribed. People ex rel. J.P.L., 49 P.3d 1209 (Colo. App. 2002).

The plain language of subsection (2) makes clear that the language requiring proof that the

impeding was accomplished "through the use of restraint, abduction, coercion, or intimidation", or that "force and violence [were] present or threatened", applies to both the staff-faculty clause and the student clause. People ex rel. C.A.J., 148 P.3d 436 (Colo. App. 2006).

18-9-110. Public buildings - trespass, interference - penalty. (1) No person shall so conduct himself at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state or at any building owned, operated, or controlled by the federal government as to willfully deny to any public official, public employee, or invitee on such premises the lawful rights of such official, employee, or invitee to enter, to use the facilities of, or to leave any such public building.

(2) No person shall, at or in any such public building, willfully impede any public official or employee in the lawful performance of duties or activities through the use of restraint, abduction, coercion, or intimidation or by force and violence or threat thereof.

(3) No person shall willfully refuse or fail to leave any such public building upon being requested to do so by the chief administrative officer or his designee charged with maintaining order in such public building, if the person has committed, is committing, threatens to commit, or incites others to commit any act which did, or would if completed, disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions being carried on in the public building.

(4) No person shall, at any meeting or session conducted by any judicial, legislative, or administrative body or official at or in any public building, willfully impede, disrupt, or hinder the normal proceedings of such meeting or session by any act of intrusion into the chamber or other areas designated for the use of the body or official conducting the meeting or session or by any act designed to intimidate, coerce, or hinder any member of such body or official engaged in the performance of duties at such meeting or session.

(5) No person shall, by any act of intrusion into the chamber or other areas designated for the use of any executive body or official at or in any public building, willfully impede, disrupt, or hinder the normal proceedings of such body or official.

(6) No person, alone or in concert with another, shall picket inside any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, are located, or in which the legislative office of any member of the general assembly is located, or in which a legislative hearing or meeting is being or is to be conducted.

(7) The term "public building", as used in this section, includes any premises being temporarily used by a public officer or employee in the discharge of his official duties.

(8) Any person who violates any of the provisions of this section commits a class 2 misdemeanor.

Source: L. 71: R&RE, p. 469, § 1. **C.R.S. 1963:** § 40-9-110. **L. 73:** p. 683, § 2. **L. 86:** (1) amended, p. 771, § 12, effective July 1.

Cross references: For obstructing government operations, see § 18-8-102.

18-9-111. Harassment. (1) A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she:

(a) Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact; or

(b) In a public place directs obscene language or makes an obscene gesture to or at another person; or

(c) Follows a person in or about a public place; or

(d) Repealed.

(e) Initiates communication with a person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene; or

(f) Makes a telephone call or causes a telephone to ring repeatedly, whether or not a conversation ensues, with no purpose of legitimate conversation; or

(g) Makes repeated communications at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another's home or private residence or other private property; or

(h) Repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to, another in a manner likely to provoke a violent or disorderly response.

(1.5) As used in this section, unless the context otherwise requires, “obscene” means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts, whether or not said ultimate sexual acts are normal or perverted, actual or simulated, including masturbation, cunnilingus, fellatio, anilingus, or excretory functions.

(2) Harassment pursuant to subsection (1) of this section is a class 3 misdemeanor; except that harassment is a class 1 misdemeanor if the offender commits harassment pursuant to subsection (1) of this section with the intent to intimidate or harass another person because of that person’s actual or perceived race, color, religion, ancestry, or national origin.

(3) Any act prohibited by paragraph (e) of subsection (1) of this section may be deemed to have occurred or to have been committed at the place at which the telephone call, electronic mail, or other electronic communication was either made or received.

(4) to (6) Repealed.

Source: L. 71: R&RE, p. 469, § 1. C.R.S. 1963: § 40-9-111. L. 76: (1)(e) R&RE and (1.5) added, p. 561, §§ 1, 2, effective May 21. L. 81: (1)(e) amended, p. 981, § 6, effective May 13. L. 90: (1)(d) repealed, p. 926, § 11, effective March 27. L. 92: (2) amended and (4) to (6) added, p. 413, § 1, effective July 1. L. 93: (5)(a) amended and (5)(a.5) added, p. 1703, § 1, effective July 1. L. 94: IP(1), (1)(g), and (1)(h) amended, p. 1463, § 3, effective July 1; (4) and (5) amended, p. 2018, § 1, effective July 1; (5)(b) amended, p. 1719, § 14, effective July 1. L. 95: (5) amended, p. 1258, § 26, effective July 1. L. 97: (4)(b)(I) amended, p. 1540, § 4, effective July 1. L. 99: (2), (4), and (5) amended, pp. 795, 792, §§ 4, 1, effective July 1. L. 2000: (1)(e) and (3) amended, p. 693, § 4, effective July 1. L. 2003: (5)(b) amended, p. 1014, § 23, effective July 1. L. 2004: (5)(a.7) added, p. 636, § 11, effective August 4. L. 2009: (1)(e) amended, (HB 09-1132), ch. 341, p. 1793, § 4, effective July 1. L. 2010: (4), (5), and (6) repealed, (HB 10-1233), ch. 88, p. 295, § 2, effective August 11.

Editor’s note: (1) Amendments to subsection (5) in House Bill 94-1045 and House Bill 94-1126 were harmonized.

(2) Subsections (4), (5), and (6) were relocated to part 6 of article 3 of this title in 2010.

Cross references: For provisions concerning harassment by debt collectors or collection agencies, see § 12-14-106.

ANNOTATION

Gravamen of this offense is the thrusting of an offensive and unwanted communication on one who is unable to ignore it. *People v. Weeks*, 197 Colo. 175, 591 P.2d 91 (1979).

Defendant’s spitting on the tenant constituted “physical contact” within the meaning of subsection (1)(a). *People v. Peay*, 5 P.3d 398 (Colo. App. 2000).

Subsection (1)(d) held unconstitutionally vague. This subsection violates the due process clause because it contains no limiting standards to define what conduct is prohibited and, conversely, what conduct is permitted. *People v. Norman*, 703 P.2d 1261 (Colo. 1985).

Former subsection (1)(e) was facially overbroad and therefore unconstitutional. *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975).

Subsection (1)(e) held not to be unconstitutionally vague because the statute defined the offense with particularized standards to limit the scope of the offense and the presence in the

statute of the words “annoy” and “alarm”, by themselves, were not sufficient to render the statute unconstitutionally vague. *People v. McBurney*, 750 P.2d 916 (Colo. 1988).

Subsection (1)(g) is facially overbroad and unconstitutionally vague and there are no limiting constructions that will render it constitutional. *People v. Smith*, 862 P.2d 939 (Colo. 1993).

A defendant lacks standing to challenge the constitutionality of a statute as facially overbroad when the defendants alleged speech is precisely the type of activity which the telephone harassment statute was designed to regulate. *People v. McBurney*, 750 P.2d 916 (Colo. 1988).

This section and § 18-3-207, which classifies criminal extortion as a felony, address separate and distinct crimes and the classification of such offenses have a rational basis in fact and are reasonably related to legitimate

government interests. *People v. Czemyrnski*, 786 P.2d 1100 (Colo. 1990).

Subsection (1)(h) is not unconstitutionally vague on its face. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

The limited scope of the statute brings it within permissible limitations on free expression. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

What subsection (1)(h) prohibits. Subsection (1)(h) prohibits (1) "fighting words", as heretofore defined, addressed to another person, (2) consisting of insults, taunts, or challenges, (3) repeatedly made, and (4) with intent to harass, annoy, or alarm another person. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

Subsection (1)(h) requires an objective determination: Whether the words when directed to an average person would tend to induce an immediate breach of the peace. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

"Annoy" in this section means "to irritate with a nettling or exasperating effect". *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975).

"Alarm" in this section means "to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm". *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975).

18-9-112. Loitering - definition - legislative declaration. (1) The word "loiter" means to be dilatory, to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public place.

(2) A person commits a class 1 petty offense if he or she, with intent to interfere with or disrupt the school program or with intent to interfere with or endanger schoolchildren, loiters in a school building or on school grounds or within one hundred feet of school grounds when persons under the age of eighteen are present in the building or on the grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific, legitimate reason for being there, and having been asked to leave by a school administrator or his representative or by a peace officer.

(3) It shall be an affirmative defense that the defendant's acts were lawful and he was exercising his rights of lawful assembly as a part of peaceful and orderly petition for the redress of grievances, either in the course of labor disputes or otherwise.

(4) The general assembly hereby finds and declares that the state has a special interest in the protection of children and, particularly, in protecting children who attend schools because required to do so by the "School Attendance Law of 1963", article 33 of title 22, C.R.S., and the prohibition of loitering in subsection (2) of this section is enacted in furtherance of these interests.

Source: L. 71: R&RE, p. 470, § 1. C.R.S. 1963: § 40-9-113. L. 73: p. 539, § 9. L. 81: (2)(e) amended, p. 738, § 24, effective July 1. L. 82: (2)(d) amended and (4) added, p. 322, § 1, effective March 5. L. 97: (2) amended, p. 1547, § 22, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

"Repeatedly" is a word of such common understanding that its meaning is not vague. It simply means in the context of subsection (1)(h) that the defendant uses insulting, taunting, or challenging language more than one time. *People ex rel. VanMeveren v. County Court*, 191 Colo. 201, 551 P.2d 716 (1976).

Use of "obscene" in subsection (1)(e). Although subsection (1)(e) uses the word "obscene" to describe the speech which is prohibited, that subsection is clearly not designed to regulate the purveyance of "obscenity" as that word is used in *Miller v. California* (413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419, reh'g denied, 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128 (1973)). Whatever the requirements of *Miller v. California* may be in a prosecution for alleged violations of law prohibiting published obscenity, those requirements are inapposite when the question is whether the state may prohibit unwanted verbal assaults on a person within the privacy of his own home. *People v. Weeks*, 197 Colo. 175, 591 P.2d 91 (1979).

Evidence sufficient to establish the conviction under subsection (1)(c). Although the evidence could be viewed in two ways, there was sufficient evidence to support the jury's inferences that the defendant did follow the victim in a public place. *People v. Cross*, 114 P.3d 1 (Colo. App. 2004), rev'd on other grounds, 127 P.3d 71 (Colo. 2006).

Applied in *Verner v. Colo.*, 533 F. Supp. 1109 (D. Colo. 1982).

ANNOTATION

Law reviews. For article, "Mass Picketing and the Constitutional Guarantee of Freedom of Speech", see 22 Rocky Mt. L. Rev. 28 (1949). For article, "Vagrants, Criminals and the Constitution", see 40 Den. L. Ctr. J. 314 (1963). For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law, 2148 (1982).

Annotator's note. Since § 18-9-112 is similar to former § 40-8-19, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Purpose of section. Measures to cope with vagrancy have as their purpose the safety and good order of the community, by seeking to nip crime in one of its formative settings. Thus, vagrancy laws find sanction in the exercise of the police power. *Dominguez v. City & County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961), overruled on other grounds, *Arnold v. City & County of Denver*, 171 Colo. 1, 464 P.2d 517 (1970).

The term "begging" is sufficiently clear. *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969).

Subsection (2)(c) does not satisfy constitutional due process requirements. *People v. Gibson*, 184 Colo. 444, 521 P.2d 774 (1974).

Because it does not require loitering coupled with other overt conduct. Subsection (2)(c) violates constitutional due process because it fails to require that loitering be coupled with any other overt conduct, but rather provides the loitering need only be coupled with state of mind having "the purpose of . . . deviate sexual intercourse". *People v. Gibson*, 184 Colo. 444, 521 P.2d 774 (1974).

Former subsection (2)(d) was unconstitutionally vague in violation of due process of

law under § 25 of art. II, Colo. Const. *People in Interest of C.M.*, 630 P.2d 593 (Colo. 1981).

Right of personal liberty protects travel and safe conduct. In interpreting constitutional provisions providing for the right to enjoy life and liberty, the right of personal liberty consists in the power of locomotion — to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places, and while conducting themselves in a decent and orderly manner, disturbing no other and interfering with the rights of no other citizens, there they will be protected under the law, not only in their persons, but in their safe conduct. *Dominguez v. City & County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961), overruled on other grounds, *Arnold v. City & County of Denver*, 171 Colo. 1, 464 P.2d 517 (1970).

Former vagrancy provision held unconstitutional under the equal protection clause of the federal constitution. The former section declaring idleness or indigency coupled with being able-bodied must be held beyond the power of the state legislative body. The statute did not require either act or behavior; it dealt with condition. Insofar as the statutory prescription seeks to legislate against status, it is in conflict with the substantive due process limitation of the fourteenth amendment of the federal constitution. Furthermore, a statute which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969).

18-9-113. Desecration of venerated objects. (1) (a) A person commits a class 3 misdemeanor if he knowingly desecrates any public monument or structure or desecrates in a public place any other object of veneration by the public.

(b) Except as otherwise provided in section 24-80-1305, C.R.S., with respect to the disturbance of an unmarked human burial, a person commits a class 1 misdemeanor if he knowingly desecrates any place of worship or burial of human remains.

(c) The court shall order that any person convicted pursuant to this section make restitution to cover the costs of repairing any damages to any monument, headstone, memorial marker, structure, or place that are the result of such person's conduct. Such restitution shall be paid to any person or entity that repairs such damages, as required in article 18.5 of title 16, C.R.S.

(2) The term "desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover his action or its result.

Source: L. 71: R&RE, p. 470, § 1. C.R.S. 1963: § 40-9-114. L. 77: (1) amended, p. 969, § 54, effective July 1. L. 82: (1) amended, p. 324, § 1, effective March 25. L. 90: (1)(b) amended, p. 1282, § 7, effective May 9. L. 91: (1)(c) added, p. 407, § 16, effective June 6. L. 2000: (1)(c) amended, p. 1051, § 19, effective September 1.

18-9-114. Hindering transportation. A person commits a class 2 misdemeanor if he knowingly and without lawful authority forcibly stops and hinders the operation of any vehicle used in providing transportation services of any kind to the public or to any person, association, or corporation.

Source: L. 71: R&RE, p. 471, § 1. C.R.S. 1963: § 40-9-115. L. 77: Entire section amended, p. 969, § 55, effective July 1.

18-9-115. Endangering public transportation. (1) A person commits endangering public transportation if such person:

(a) Tamper with a facility of public transportation with intent to cause any damage, malfunction, or nonfunction which would result in the creation of a substantial risk of death or serious bodily injury to anyone; or

(b) Stops or boards a public conveyance with the intent of committing a crime thereon; or

(c) On a public conveyance, knowingly threatens any operator, crew member, attendant, or passenger:

(I) With death or imminent serious bodily injury; or

(II) With a deadly weapon or with words or actions intended to induce belief that such person is armed with a deadly weapon; or

(d) On a public conveyance:

(I) Knowingly or recklessly causes bodily injury to another person; or

(II) With criminal negligence causes bodily injury to another person by means of a deadly weapon.

(2) "Public" means offered or available to the public generally, either free or upon payment of a fare, fee, rate, or tariff, or offered or made available by a school or school district to pupils regularly enrolled in public or nonpublic schools in preschool through grade twelve.

(3) "Public conveyance" includes a train, airplane, bus, truck, car, boat, tramway, gondola, lift, elevator, escalator, or other device intended, designed, adapted, and used for the public carriage of persons or property.

(4) "Facility of public transportation" includes a public conveyance and any area, structure, or device which is designed, adapted, and used to support, guide, control, permit, or facilitate the movement, starting, stopping, takeoff, landing, or servicing of a public conveyance or the loading or unloading of passengers or goods.

(5) Endangering public transportation is a class 3 felony.

Source: L. 71: R&RE, p. 471, § 1. C.R.S. 1963: § 40-9-116. L. 77: (1)(c) amended, p. 969, § 56, effective July 1. L. 94: (1) amended, p. 1344, § 1, effective July 1. L. 96: (2) amended, p. 1335, § 1, effective July 1.

18-9-115.5. Violation of a restraining order related to public conveyances. Any violation of an order of court obtained pursuant to rule 65 of the Colorado rules of civil procedure, which order has specifically restrained a person from traveling in or on a particular public conveyance, shall be a class 3 misdemeanor.

Source: L. 95: Entire section added, p. 1258, § 25, effective July 1.

18-9-116. Throwing missiles at vehicles - harassment of bicyclists. (1) Any person who knowingly projects any missile at or against any vehicle or equipment designed for the transportation of persons or property, other than a bicycle, commits a class 1 petty offense.

(2) Any person who knowingly projects any missile at or against a bicyclist commits a class 2 misdemeanor.

(3) As used in this section, "missile" means any object or substance.

Source: **L. 71:** R&RE, p. 471, § 1. **C.R.S. 1963:** § 40-9-117. **L. 77:** Entire section amended, p. 969, § 57, effective July 1. **L. 2009:** Entire section amended, (SB 09-148), ch. 239, p. 1090, § 7, effective August 5.

18-9-116.5. Vehicular eluding. (1) Any person who, while operating a motor vehicle, knowingly eludes or attempts to elude a peace officer also operating a motor vehicle, and who knows or reasonably should know that he or she is being pursued by said peace officer, and who operates his or her vehicle in a reckless manner, commits vehicular eluding.

(2) (a) Vehicular eluding is a class 5 felony; except that vehicular eluding that results in bodily injury to another person is a class 4 felony and vehicular eluding that results in death to another person is a class 3 felony.

(b) Notwithstanding section 18-1.3-401, the minimum sentence within the presumptive range for a violation of this section shall be increased as follows:

- (I) For a class 5 felony, the minimum fine shall be two thousand dollars;
- (II) For a class 4 felony, the minimum fine shall be four thousand dollars; and
- (III) For a class 3 felony, the minimum fine shall be six thousand dollars.

Source: **L. 75:** Entire section added, p. 620, § 16, effective July 21. **L. 86:** Entire section amended, p. 786, § 1, effective July 1. **L. 89:** Entire section amended, p. 840, § 88, effective July 1. **L. 2000:** Entire section amended, p. 698, § 17, effective July 1. **L. 2008:** Entire section amended, p. 2084, § 1, effective July 1.

Cross references: For driving a motor vehicle with a wanton or a willful disregard for the safety of others, see reckless driving as contained in § 42-4-1401.

ANNOTATION

Eluding a police officer, as defined in § 42-4-1512, is not a lesser-included offense of vehicular eluding. *People v. Fury*, 872 P.2d 1280 (Colo. App. 1993) (decided prior to 1994 amendment relocating former § 42-4-1512 to § 42-4-1413); *People v. Pena*, 962 P.2d 285 (Colo. App. 1997); *People v. Esparza-Treto*, ___ P.3d ___ (Colo. App. 2011).

Reckless driving is a lesser included offense of vehicular eluding. *People v. Pena*, 962 P.2d 285 (Colo. App. 1997); *People v. Esparza-Treto*, ___ P.3d ___ (Colo. App. 2011).

“Wanton or willful disregard” for safety under § 42-4-1401 is essentially the same element as the “reckless” state of mind specified in this section. *People v. Pena*, 962 P.2d 285 (Colo. App. 1997).

The portion of the statute requiring proof that eluding resulted in the death of another person is a sentence enhancing provision, not an essential element of the offense of vehicular eluding for purposes of merger. *People v. Avila*, 944 P.2d 673 (Colo. App. 1997).

Therefore, vehicular eluding is not a lesser included offense of vehicular homicide be-

cause vehicular homicide does require proof of death. *People v. Avila*, 944 P.2d 673 (Colo. App. 1997).

A child who is in utero at the time of the vehicular eluding offense who is subsequently born alive and dies from injuries sustained due to the offense can be a victim by virtue of the plain meaning of the statute. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009).

Vehicular eluding requires only proof that the driver both eluded or attempted to elude a police officer and operated a car recklessly, but not necessarily at the same time. *People v. Sherwood*, 5 P.3d 956 (Colo. App. 2000).

The intent of the vehicular eluding statute is to protect members of the public from the dangers created by a driver attempting to elude a police officer. There is therefore no need for a prosecutor to identify a particular victim in charging a defendant. *People v. Fury*, 872 P.2d 1280 (Colo. App. 1993).

Applied in *Brutcher v. District Court*, 195 Colo. 579, 580 P.2d 396 (1978); *People v. Mascarenas*, 632 P.2d 1028 (Colo. 1981).

18-9-117. Unlawful conduct on public property. (1) It is unlawful for any person to enter or remain in any public building or on any public property or to conduct himself or herself in or on the same in violation of any order, rule, or regulation concerning any matter prescribed in this subsection (1), limiting or prohibiting the use or activities or conduct in such public building or on such public property, issued by any officer or agency having the power of control, management, or supervision of the building or property. In addition to any

authority granted by any other law, each such officer or agency may adopt such orders, rules, or regulations as are reasonably necessary for the administration, protection, and maintenance of such public buildings and property, specifically, orders, rules, and regulations upon the following matters:

(a) Preservation of property, vegetation, wildlife, signs, markers, statues, buildings and grounds, and other structures, and any object of scientific, historical, or scenic interest;

(b) Restriction or limitation of the use of such public buildings or property as to time, manner, or permitted activities;

(c) Prohibition of activities or conduct within public buildings or on public property which may be reasonably expected to substantially interfere with the use and enjoyment of such places by others or which may constitute a general nuisance or which may interfere with, impair, or disrupt a funeral or funeral procession;

(d) Necessary sanitation, health, and safety measures, consistent with section 25-13-113, C.R.S.;

(e) Camping and picnicking, public meetings and assemblages, and other individual or group usages, including the place, time, and manner in which such activities may be permitted;

(f) Use of all vehicles as to place, time, and manner of use;

(g) Control and limitation of fires, including but not limited to the prohibition, restriction, or ban on fires or other regulation of fires to avert the start of or lessen the likelihood of wildfire, and the designation of places where fires are permitted, restricted, prohibited, or banned.

(2) No conviction may be obtained under this section unless notice of such limitations or prohibitions is prominently posted at all public entrances to such building or property or unless such notice is actually first given the person by the officer or agency, including any agent thereof, or by any law enforcement officer having jurisdiction or authority to enforce this section.

(3) (a) Except as otherwise provided in paragraphs (b) and (c) of this subsection (3), any person who violates subsection (1) of this section is guilty of a class 3 misdemeanor.

(b) Any person who violates any order, rule, or regulation adopted pursuant to paragraph (g) of subsection (1) of this section is guilty of a class 2 misdemeanor and shall be assessed a fine of not less than two hundred fifty dollars and not greater than one thousand dollars. The fine imposed by this paragraph (b) shall be mandatory and not subject to suspension. Nothing in this paragraph (b) shall be construed to limit the court's discretion in exercising other available sentencing alternatives in addition to the mandatory fine.

(c) Any person who violates any order, rule, or regulation adopted pursuant to paragraph (c) of subsection (1) of this section concerning funerals or funeral processions is guilty of a class 2 misdemeanor.

Source: L. 72: p. 287, § 2. C.R.S. 1963: § 40-9-118. L. 2002, 3rd Ex. Sess.: IP(1), (1)(g), and (3) amended, p. 36, § 1, effective July 17. L. 2006: (1)(c) and (3)(a) amended and (3)(c) added, p. 1199, § 6, effective May 26.

Cross references: In 2006, subsections (1)(c) and (3)(a) were amended and subsection (3)(c) was added by the "Right to Rest in Peace Act". For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

18-9-118. Firearms, explosives, or incendiary devices in facilities of public transportation. A person commits a class 6 felony if, without legal authority, he has any loaded firearm or explosive or incendiary device, as defined in section 9-7-103, C.R.S., in his possession in, or carries, brings, or causes to be carried or brought any of such items into, any facility of public transportation, as defined in section 18-9-115 (4).

Source: L. 77: Entire section added, p. 976, § 7, effective June 29. L. 89: Entire section amended, p. 841, § 89, effective July 1.

18-9-119. Failure or refusal to leave premises or property upon request of a peace officer - penalties - payment of costs. (1) The general assembly hereby finds and declares that any individual who violates any provision of this section presents a significant threat to life and property in this state; that such violations require the use of highly trained personnel and sophisticated equipment; and that any such individual, if guilty, shall be convicted of committing a crime and be required to pay for any extraordinary expenses which are a result of said violation.

(2) Any person who barricades or refuses police entry to any premises or property through use of or threatened use of force and who knowingly refuses or fails to leave any premises or property upon being requested to do so by a peace officer who has probable cause to believe a crime is occurring and that such person constitutes a danger to himself or others commits a class 3 misdemeanor.

(3) Any person who violates subsection (2) of this section and who, in the same criminal episode, knowingly holds another person hostage or who confines or detains such other person without his consent, without proper legal authority, and without the use of a deadly weapon commits a class 2 misdemeanor.

(4) Any person who violates subsection (2) or (3) of this section and who, in the same criminal episode, recklessly or knowingly causes a peace officer to believe that he possesses a deadly weapon commits a class 1 misdemeanor.

(5) Any person who violates subsection (2) of this section and who, in the same criminal episode, knowingly holds another person hostage or who confines or detains such other person through the possession, use, or threatened use of a deadly weapon, without the other person's consent, and without proper legal authority commits a class 4 felony.

(6) (a) Any person convicted of a violation of this section or any person who enters a plea of guilty or nolo contendere to a violation of this section or is placed on deferred judgment and sentence for a violation of this section shall be responsible for the payment of up to a maximum of two thousand dollars for any extraordinary expenses incurred by a law enforcement agency as a result of such violation.

(b) As used in paragraph (a) of this subsection (6), "extraordinary expenses" means any cost relating to a violation of the provisions of this section, including, but not limited to, overtime wages for officers and operating expenses of any equipment utilized as a result of such violation or any damage to property occurring as a result of any violation of this section.

(7) Any person who violates subsection (2) of this section and who, in the same criminal episode, knowingly holds another person hostage or confines or detains such other person by knowingly causing such other person to reasonably believe that he possesses a deadly weapon commits a class 5 felony.

(8) As used in this section, to "hold hostage" means to seize, imprison, entice, detain, confine, or persuade another person to remain in any premises or on any property during a violation of any provision of this section in order to seek concessions from law enforcement personnel or their representatives, or to prevent their entry to property or premises. The term includes imprisoning, enticing, detaining, confining, or persuading any child to remain in said premises or on said property in an attempt to secure said concessions.

Source: L. 83: Entire section added, p. 666, § 10, effective July 1. **L. 85:** (2) amended, p. 624, § 10, effective July 1.

18-9-120. Terrorist training activities - penalties - exemptions. (1) As used in this section, unless the context otherwise requires:

(a) "Civil disorder" means any planned public disturbance involving acts of violence by an assemblage of two or more persons that causes an immediate danger of, or results in, damage or injury to property or to another person.

(b) "Explosive or incendiary device" means:

(I) Dynamite and all other forms of high explosives;

(II) Any explosive bomb, grenade, missile, or similar device;

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which:

(A) Consists of or includes a breakable receptacle containing a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound; and

(B) Can be carried or thrown by one person acting alone.

(c) "Firearm" means any weapon which is designed to expel or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon.

(d) "Law enforcement officer" means any peace officer of this state, as described in section 16-2.5-101, C.R.S., including a member of the Colorado National Guard or any peace officer of the United States, any state, any political subdivision of a state, or the District of Columbia. "Law enforcement officer" includes, but is not limited to, any member of the National Guard, as defined in 10 U.S.C. sec. 101 (9), any member of the organized militia of any state or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia who is not included within the definition of National Guard, and any member of the armed forces of the United States.

(2) Any person who teaches or demonstrates to any person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to any person and who knows that the same will be unlawfully used in furtherance of a civil disorder and any person who assembles with one or more other persons for the purpose of training or practicing with, or being instructed in the use of, any firearm, explosive or incendiary device, or technique capable of causing injury or death to any person with the intent to unlawfully use the same in furtherance of a civil disorder commits a class 5 felony.

(3) (a) Nothing in this section makes unlawful any activity pursuant to section 13 of article II of the state constitution or activity of the parks and wildlife commission, any law enforcement agency, any hunting club, or any rifle club, any activity engaged in on a rifle range, pistol range, or shooting range, or any activity undertaken pursuant to any shooting school or other program or instruction, any of which activities is intended to teach the safe handling or use of firearms, archery equipment, or other weapons or techniques and is employed in connection with lawful sports or teach the use of arms for the defense of home, person, or property, or the lawful use of force as defined in part 7 of article 1 of this title, or other lawful activities.

(b) Nothing in this section shall make unlawful any act of a law enforcement officer which is performed as a part of his official duties.

Source: L. 84: Entire section added, p. 555, § 1, effective July 1. L. 95: (1)(a) amended, p. 1255, § 19, effective July 1. L. 2003: (1)(d) amended, p. 1615, § 13, effective August 6. L. 2012: (3)(a) amended, (HB 12-1317), ch. 248, p. 1203, § 4, effective June 4.

18-9-121. Bias-motivated crimes. (1) The general assembly hereby finds and declares that it is the right of every person, regardless of race, color, ancestry, religion, national origin, physical or mental disability, or sexual orientation to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of individuals and groups. The general assembly further finds that the advocacy of unlawful acts against persons or groups because of a person's or group's race, color, ancestry, religion, national origin, physical or mental disability, or sexual orientation for the purpose of inciting and provoking bodily injury or damage to property poses a threat to public order and safety and should be subject to criminal sanctions.

(2) A person commits a bias-motivated crime if, with the intent to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation, he or she:

(a) Knowingly causes bodily injury to another person; or

(b) By words or conduct, knowingly places another person in fear of imminent lawless action directed at that person or that person's property and such words or conduct are likely to produce bodily injury to that person or damage to that person's property; or

(c) Knowingly causes damage to or destruction of the property of another person.

(3) Commission of a bias-motivated crime as described in paragraph (b) or (c) of subsection (2) of this section is a class 1 misdemeanor. Commission of a bias-motivated crime as described in paragraph (a) of subsection (2) of this section is a class 5 felony; except that commission of a bias-motivated crime as described in said paragraph (a) is a class 4 felony if the offender is physically aided or abetted by one or more other persons during the commission of the offense.

(3.5) (a) In determining the sentence for a first-time offender convicted of a bias-motivated crime, the court shall consider the following alternatives, which shall be in addition to and not in lieu of any other sentence received by the offender:

(I) Sentencing the offender to pay for and complete a period of useful community service intended to benefit the public and enhance the offender's understanding of the impact of the offense upon the victim;

(II) At the request of the victim, referring the case to a restorative justice or other suitable alternative dispute resolution program established in the judicial district pursuant to section 13-22-313, C.R.S.

(b) In considering whether to impose the alternatives described in paragraph (a) of this subsection (3.5), the court shall consider the criminal history of the offender, the impact of the offense on the victim, the availability of the alternatives, and the nature of the offense. Nothing in this section shall be construed to require the court to impose the alternatives specified in paragraph (a) of this subsection (3.5).

(4) The criminal penalty provided in this section for commission of a bias-motivated crime does not preclude the victim of such action from seeking any other remedies otherwise available under law.

(5) For purposes of this section:

(a) "Physical or mental disability" refers to a disability as used in the definition of the term "person with a disability" in section 18-6.5-102 (3).

(b) "Sexual orientation" means a person's actual or perceived orientation toward heterosexuality, homosexuality, bisexuality, or transgender status.

Source: L. 88: Entire section added, p. 737, § 1, effective July 1. L. 99: IP(2) and (3) amended, p. 795, § 5, effective July 1. L. 2005: Entire section amended, p. 1499, § 5, effective July 1.

18-9-122. Preventing passage to and from a health care facility - engaging in prohibited activities near facility. (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

Source: L. 93: Entire section added, p. 400, § 1, effective April 19.

ANNOTATION

Law reviews. For article, "The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand", see 79 Den. U.L. Rev. 91 (2002).

Constitutionality in light of U.S. supreme court decision. Based upon the holding of the U.S. supreme court in *Schenck v. Pro-Choice Network* (519 U.S. 357, 117 S. Ct. 855, 137 L.Ed.2d 1 (1997)), this section is a content-neutral, generally applicable statute supported by a valid governmental interest in public safety issues and is narrowly tailored to serve that interest and thus does not violate the first amendment to the federal constitution. *Hill v. City of Lakewood*, 949 P.2d 107 (Colo. App. 1997).

Section is constitutional as a reasonable time, place, and manner restriction on free speech. This provision is sufficiently narrowly drawn to further a significant government interest. *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999), *aff'd sub nom. Hill v. Colo.*, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

The eight-foot zone set forth in subsection (3) allows a speaker to communicate at a "normal conversational distance." Additionally, the statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute. Finally, there is a "knowing" requirement that protects speakers who thought they were keeping pace with the targeted individual at the proscribed distance from inadvertently violating the statute. *Hill v. Colo.*, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) does not violate the right to free speech because it applies to areas protected by the first amendment, such as streets and public sidewalks. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995), *cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of Western New York* (519 U.S. 357, 117 S. Ct. 855, 137 L.Ed.2d 1(1997)), 519 U.S. 1145, 117 S. Ct. 1077, 137 L.Ed.2d 213 (1997), *aff'd on other grounds*, 949 P.2d 107 (Colo. App. 1997), *aff'd*, 973 P.2d 1246 (Colo. 1999), *aff'd sub nom. Hill v. Colo.*, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) is not improper "content based" regulation because it imposes the same restrictions on protestors, whether they be in favor of or against abortion. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995), *cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of Western New York* (519 U.S. 357, 117 S. Ct. 855, 137 L.Ed.2d 1(1997)), 519 U.S. 1145, 117 S. Ct. 1077, 137 L.Ed.2d 213 (1997), *aff'd on other grounds*, 949 P.2d 107 (Colo. App. 1997), *aff'd*, 973 P.2d 1246 (Colo. 1999), *aff'd sub nom. Hill v. Colo.*, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) is content neutral. First, it is not a regulation of speech. Rather, it is a regulation of the places where some speech may occur. *Hill v. Colo.*, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Second, it was not adopted because of disagreement with the message being conveyed. This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the state supreme court's holding that the statute's restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech. *Hill v. Colo.*, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Third, the state's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. Government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech. *Hill v. Colo.*, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) is not unconstitutional because: It advances a significant governmental interest; it does not burden speech more than is reasonably necessary; and reasonable alternatives to oral communication are available. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995), *cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of Western New York* (519 U.S. 357, 117 S. Ct. 855, 137 L.Ed.2d 1(1997)),

519 U.S. 1145, 117 S. Ct. 1077, 137 L.Ed.2d 213 (1997), aff'd on other grounds, 949 P.2d 107 (Colo. App. 1997), aff'd, 973 P.2d 1246 (Colo. 1999), aff'd sub nom. Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) does not constitute a prior restraint on free speech. There is no authority to extend the doctrine so that a private citizen is limited with respect to her right to determine whether to permit others to confront her concerning medical care. Hill v. City of Lakewood, 911 P.2d 670 (Colo. App. 1995), cert. granted, judgment vacated, and case remanded to Colorado court of appeals for further consideration in light of Schenck v. Pro-Choice Network of Western New York (519 U.S. 357, 117 S. Ct. 855, 137 L.Ed.2d 1 (1997)), 519 U.S. 1145, 117 S. Ct. 1077, 137 L.Ed.2d 213 (1997), aff'd on other grounds, 949 P.2d 107 (Colo. App. 1997), aff'd, 973 P.2d 1246 (Colo. 1999), aff'd sub nom. Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow place requirement imbedded within the approach restriction. Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

The regulations of subsection (3) only apply if the pedestrian does not consent to the approach. Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider. This statute simply em-

powers private citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear. Further, the statute does not authorize the pedestrian to affect any other activity at any other location or relating to any other person. These restrictions thus do not constitute an unlawful prior restraint. Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) is not overbroad. The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute. Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

In addition, subsection (3) does not ban any messages, nor does it ban any signs, literature, or oral statements. It merely regulates the places where communications may occur. Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

Subsection (3) is not unconstitutionally vague. Subsection (3) contains a scienter requirement. The statute only applies to a person who "knowingly" approaches within eight feet of another, without that person's consent, for the purpose of engaging in oral protest, education, or counseling. The likelihood that anyone would not understand any of those common words seemed quite remote to the court. Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000).

18-9-123. Bringing alcohol beverages, bottles, or cans into the major league baseball stadium. (1) (a) It shall be unlawful for any person to carry or bring into the Denver metropolitan major league baseball stadium district stadium, as defined in section 32-14-103 (5) and (10), C.R.S., and referred to in this section as the "stadium", the following:

- (I) Any alcohol beverage as defined in section 12-47-103 (2), C.R.S.; or
- (II) Any bottle or can except as provided in subsection (2) of this section.

(b) As used in this section:

(I) "Bottle" means a container that is made of nonporous material including but not limited to glass or ceramic, typically with a comparatively narrow neck or mouth, but excluding:

- (A) Containers made of cardboard, paper, or plastic; or
- (B) Thermos bottles.

(II) "Can" means a container of cylindrical shape that is made of metal or metallic alloys.

(2) Nothing in this section shall be construed to prohibit a person from bringing or carrying into the stadium a beverage, bottle, or can required in connection with the person's practice of religion, the person's medical or physical condition, or food or formula for the person's infant.

(3) Any person who violates subsection (1) of this section commits a class 1 petty offense.

(4) Nothing in this section shall be construed to prohibit a home rule municipality from enacting an ordinance that is at least as restrictive as or more restrictive than this section that prohibits a person from bringing any alcoholic beverage or alcoholic liquor, any bottle, or any can into the stadium.

Source: L. 95: Entire section added, p. 737, § 1, effective May 23. **L. 97:** (1)(a)(I) amended, p. 302, § 13, effective July 1. **L. 2001:** (1)(a)(I) amended, p. 1271, § 22, effective June 5.

18-9-124. Hazing - penalties - legislative declaration. (1) (a) The general assembly finds that, while some forms of initiation constitute acceptable behavior, hazing sometimes degenerates into a dangerous form of intimidation and degradation. The general assembly also recognizes that although certain criminal statutes cover the more egregious hazing activities, other activities that may not be covered by existing criminal statutes may threaten the health of students or, if not stopped early enough, may escalate into serious injury.

(b) In enacting this section, it is not the intent of the general assembly to change the penalty for any activity that is covered by any other criminal statute. It is rather the intent of the general assembly to define hazing activities not covered by any other criminal statute.

(2) As used in this section, unless the context otherwise requires:

(a) “Hazing” means any activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual for purposes of initiation or admission into or affiliation with any student organization; except that “hazing” does not include customary athletic events or other similar contests or competitions, or authorized training activities conducted by members of the armed forces of the state of Colorado or the United States.

(b) “Hazing” includes but is not limited to:

(I) Forced and prolonged physical activity;

(II) Forced consumption of any food, beverage, medication or controlled substance, whether or not prescribed, in excess of the usual amounts for human consumption or forced consumption of any substance not generally intended for human consumption;

(III) Prolonged deprivation of sleep, food, or drink.

(3) It shall be unlawful for any person to engage in hazing.

(4) Any person who violates subsection (3) of this section commits a class 3 misdemeanor.

Source: L. 99: Entire section added, p. 352, § 1, effective July 1.

18-9-125. Interference with a funeral. (1) A person commits interference with a funeral if he or she, knowing a funeral is being conducted:

(a) Refuses to leave any private property within one hundred feet of the funeral site upon the request of the owner of the private property or the owner’s agent; or

(b) Refuses to leave any public property within one hundred feet of the funeral site upon the request of a public official with authority over the property or upon the request of a peace officer, and the public official or peace officer making the request has reasonable grounds to believe the person has violated a rule or regulation applicable to that property or a statute or local ordinance.

(2) Interference with a funeral is a class 2 misdemeanor. The minimum fine prescribed by section 18-1.3-501 (1) for the offense shall be mandatory and may not be suspended in whole or in part.

(3) Each violation of subsection (1) of this section shall constitute a separate offense for which an offender may be separately convicted and sentenced.

(4) Any person who violates any provision of this section may also be proceeded against for violation of any other provision of law.

Source: L. 2006: Entire section added, p. 1199, § 7, effective May 26.

Cross references: In 2006, this section was added by the “Right to Rest in Peace Act”. For the title and legislative declaration, see section 1 of chapter 262, Session Laws of Colorado 2006.

PART 2

CRUELTY TO ANIMALS

18-9-201. Definitions. As used in this section and sections 18-9-201.5, 18-9-202, 18-9-202.5, and 18-9-204.5, unless the context otherwise requires:

(1) “Abandon” means the leaving of an animal without adequate provisions for the animal’s proper care by its owner, the person responsible for the animal’s care or custody, or any other person having possession of such animal.

(2) “Animal” means any living dumb creature, including a service animal as defined in section 18-1.3-602 (3.5).

(2.5) “Disposal” or “disposition” means adoption of an animal; return of an animal to the owner; sale of an animal under section 18-9-202.5 (4); release of an animal to a rescue group licensed pursuant to article 80 of title 35, C.R.S.; release of an animal to another pet animal facility licensed pursuant to article 80 of title 35, C.R.S.; or release of an animal to a rehabilitator licensed by the parks and wildlife division or the United States fish and wildlife service; or euthanasia.

(2.7) “Euthanasia” means to produce a humane death by techniques accepted by the American veterinary medical association.

(2.9) “Livestock” means bovine, camelids, caprine, equine, ovine, porcine, and poultry.

(3) “Mistreatment” means every act or omission that causes or unreasonably permits the continuation of unnecessary or unjustifiable pain or suffering.

(4) “Neglect” means failure to provide food, water, protection from the elements, or other care generally considered to be normal, usual, and accepted for an animal’s health and well-being consistent with the species, breed, and type of animal.

(5) “Sexual act with an animal” means an act between a person and an animal involving direct physical contact between the genitals of one and the mouth, anus, or genitals of the other. A sexual act with an animal may be proven without allegation or proof of penetration. Nothing in this subsection (5) shall be construed to prohibit accepted animal husbandry practices.

Source: **L. 71:** R&RE, p. 471, § 1. **C.R.S. 1963:** § 40-9-201. **L. 90:** (1), (3), and (4) amended, p. 1611, § 3, effective July 1. **L. 99:** Entire section amended, p. 357, § 3, effective August 4. **L. 2006:** (2.5) amended, p. 893, § 1, effective August 7. **L. 2007:** IP amended and (2.9) and (5) added, p. 725, § 4, effective July 1. **L. 2011:** IP and (2) amended, (HB 11-1151), ch. 81, p. 219, § 1, effective August 10. **L. 2012:** (2.5) amended, (HB 12-1125), ch. 102, p. 345, § 2, effective September 1.

Editor’s note: Section 5 of chapter 102, Session Laws of Colorado 2012, provides that the act amending subsection (2.5) applies to animals impounded on or after September 1, 2012.

ANNOTATION

Applied in *McCausland v. People*, 58 Colo. 303, 145 P. 685 (1914) (decided under former R.S. 08, § 1910); *People v. Allen*, 657 P.2d 447 (Colo. 1983).

18-9-201.5. Scope of part 2. (1) Nothing in this part 2 shall affect accepted animal husbandry practices utilized by any person in the care of companion or livestock animals or in the extermination of undesirable pests as defined in articles 7, 10, and 43 of title 35, C.R.S.

(2) In case of any conflict between this part 2 or section 35-43-126, C.R.S., and the wildlife statutes of the state, said wildlife statutes shall control.

(3) Nothing in this part 2 shall affect animal care otherwise authorized by law.

(4) Nothing in this part 2 shall affect facilities licensed under the provisions of the federal "Animal Welfare Act of 1970", 7 U.S.C. sec. 2131 et seq., as amended.

Source: L. 90: Entire section added, p. 1612, § 4, effective July 1.

18-9-201.7. Animal cruelty prevention fund - control of fund - repeal. (Repealed)

Source: L. 97: Entire section added, p. 1568, § 1, effective July 1. **L. 2000:** (4) and (6) amended, p. 1375, § 1, effective September 1. **L. 2003:** (1) and (4) amended, p. 2093, § 1, effective July 1.

Editor's note: Subsection (6) provided for the repeal of this section, effective July 1, 2005. (See L. 2000, p. 1375.)

18-9-202. Cruelty to animals - aggravated cruelty to animals - cruelty to a service animal - restitution. (1) (a) A person commits cruelty to animals if he or she knowingly, recklessly, or with criminal negligence overdrives, overloads, overworks, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, allows to be housed in a manner that results in chronic or repeated serious physical harm, carries or confines in or upon any vehicles in a cruel or reckless manner, engages in a sexual act with an animal, or otherwise mistreats or neglects any animal, or causes or procures it to be done, or, having the charge or custody of any animal, fails to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandons an animal.

(b) Any person who intentionally abandons a dog or cat commits the offense of cruelty to animals.

(1.5) (a) A person commits cruelty to animals if he or she recklessly or with criminal negligence tortures, needlessly mutilates, or needlessly kills an animal.

(b) A person commits aggravated cruelty to animals if he or she knowingly tortures, needlessly mutilates, or needlessly kills an animal.

(c) A person commits cruelty to a service animal if he or she violates the provisions of subsection (1) of this section with respect to a service animal as defined in section 18-1.3-602 (3.5), whether the service animal is on duty or not on duty.

(1.6) As used in this section, unless the context otherwise requires:

(a) "Serious physical harm" means any of the following:

(I) Any physical harm that carries a substantial risk of death;

(II) Any physical harm that causes permanent maiming or that involves some temporary, substantial maiming; or

(III) Any physical harm that causes acute pain of a duration that results in substantial suffering.

(1.8) A peace officer having authority to act under this section may take possession of and impound an animal that the peace officer has probable cause to believe is a victim of a violation of subsection (1) or (1.5) of this section or is a victim of a violation of section 18-9-204 and as a result of the violation is endangered if it remains with the owner or custodian. If, in the opinion of a licensed veterinarian, an animal impounded pursuant to this subsection (1.8) is experiencing extreme pain or suffering, or is severely injured past recovery, severely disabled past recovery, or severely diseased past recovery, the animal may be euthanized without a court order.

(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2), cruelty to animals is a class 1 misdemeanor.

(a.5) (I) Repealed.

(II) In addition to any other sentence imposed for a violation of this section, the court may order an offender to complete an anger management treatment program or any other appropriate treatment program.

(III) The court shall order an evaluation to be conducted prior to sentencing to assist the court in determining an appropriate sentence. The person ordered to undergo an evaluation

shall be required to pay the cost of the evaluation, unless the person qualifies for a public defender, then the cost will be paid by the judicial district. If the evaluation results in a recommendation of treatment and if the court so finds, the person shall be ordered to complete an anger management treatment program or any other treatment program that the court may deem appropriate.

(IV) Upon successful completion of an anger management treatment program or any other treatment program deemed appropriate by the court, the court may suspend any fine imposed, except for a five hundred dollar mandatory minimum fine which shall be imposed at the time of sentencing.

(V) In addition to any other sentence imposed upon a person for a violation of any criminal law under this title, any person convicted of a second or subsequent conviction for any crime, the underlying factual basis of which has been found by the court to include an act of cruelty to animals, shall be required to pay a mandatory minimum fine of one thousand dollars and shall be required to complete an anger management treatment program or any other appropriate treatment program.

(VI) Nothing in this paragraph (a.5) shall preclude the court from ordering treatment in any appropriate case.

(VII) This paragraph (a.5) does not apply to the treatment of pack or draft animals by negligently overdriving, overloading, or overworking them, or the treatment of livestock and other animals used in the farm or ranch production of food, fiber, or other agricultural products when such treatment is in accordance with accepted agricultural animal husbandry practices, the treatment of animals involved in activities regulated pursuant to article 60 of title 12, C.R.S., the treatment of animals involved in research if such research facility is operating under rules set forth by the state or federal government, the treatment of animals involved in rodeos, the treatment of dogs used for legal hunting activities, wildlife nuisances, or to statutes regulating activities concerning wildlife and predator control in the state, including trapping.

(b) (I) A second or subsequent conviction under the provisions of paragraph (a) of subsection (1) of this section is a class 6 felony. A plea of nolo contendere accepted by the court shall be considered a conviction for the purposes of this section.

(II) In any case where the court sentences a person convicted of a class 6 felony under the provisions of this paragraph (b) to probation, the court shall, in addition to any other condition of probation imposed, order that:

(A) The offender, pursuant to section 18-1.3-202 (1), be committed to the county jail for ninety days; or

(B) The offender, pursuant to section 18-1.3-105 (3), be subject to home detention for no fewer than ninety days.

(III) In any case where an offender is committed to the county jail or placed in home detention pursuant to subparagraph (II) of this paragraph (b), the court shall enter judgment against the offender for all costs assessed pursuant to section 18-1.3-701, including, but not limited to, the cost of care.

(c) Aggravated cruelty to animals is a class 6 felony; except that a second or subsequent conviction for the offense of aggravated cruelty to animals is a class 5 felony. A plea of nolo contendere accepted by the court shall be considered a conviction for purposes of this section.

(d) If a person is convicted of cruelty to a service animal pursuant to paragraph (c) of subsection (1.5) of this section, he or she shall be ordered to make restitution to the agency or individual owning the animal for any veterinary bills and replacement costs of the animal if it is disabled or killed as a result of the cruelty to animals incident.

(2.5) It shall be an affirmative defense to a charge brought under this section involving injury or death to a dog that the dog was found running, worrying, or injuring sheep, cattle, or other livestock.

(3) Nothing in this part 2 modifies in any manner the authority of the parks and wildlife commission, as established in title 33, C.R.S., or prohibits any conduct authorized or permitted under title 33, C.R.S.

Source: L. 71: R&RE, p. 472, § 1. C.R.S. 1963: § 40-9-202. L. 73: p. 381, § 5. L. 77: (1) amended, p. 969, § 58, effective July 1. L. 90: (1) amended, p. 1612, § 5, effective July 1. L. 92: (1) amended, p. 412, § 1, effective April 29. L. 97: (2)(a.5) added, p. 1569, § 2, effective July 1. L. 2000: (2) amended, p. 1509, § 1, effective September 1; (2)(a.5)(I) amended, p. 1375, § 2, effective September 1. L. 2002: (1.5) and (2)(c) added and (2)(a), (2)(a.5)(I)(A), (2)(a.5)(II), and (2)(b) amended, pp. 1589, 1588, 1587, §§ 26, 25, 22, effective July 1; (2)(b) amended, p. 1517, § 204, effective October 1. L. 2003: (2)(b)(I) amended, p. 974, § 9, effective April 17; (1)(a) amended and (1.6) and (1.8) added, p. 2093, § 2, effective July 1; (1)(a), (1.5), (2)(a.5)(I)(A), (2)(a.5)(II), (2)(b)(II), and (2)(b)(III) amended, p. 1434, § 30, effective July 1. L. 2004: (2.5) added, p. 509, § 2, effective April 21. L. 2007: (1)(a) and (1.8) amended, p. 725, § 5, effective July 1. L. 2011: (1.5)(c) and (2)(d) added, (HB 11-1151), ch. 81, p. 219, §§ 2, 3, effective August 10. L. 2012: (3) amended, (HB 12-1317), ch. 248, p. 1203, § 5, effective June 4.

Editor's note: (1) Amendments to subsection (2)(a.5)(I) by House Bill 00-1330 and House Bill 00-1422 were harmonized. Amendments to subsection (2)(b) by House Bill 02-1237 and House Bill 02-1046 were harmonized. Amendments to subsection (1)(a) by House Bill 03-1236 and Senate Bill 03-065 were harmonized.

(2) Subsection (2)(a.5)(I)(B) provided for the repeal of subsection (2)(a.5)(I), effective July 1, 2005. (See L. 2000, p. 1375.)

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 18-9-202 is similar to former § CSA, C. 48, § 404, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Object of section is protection of animals and conservation of public morals. The aim of this section is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

This section and preceding similar legislation was enacted to prevent cruelty to animals. It was not the legislative intent that the prohibition in this section against needlessly killing animals should apply where the undisputed facts show authorization. *Failing v. People*, 105 Colo. 399, 98 P.2d 865 (1940).

It changes the common law. At common law the acts prohibited in this section would not be a crime or misdemeanor. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

Section comes within police power. In the exercise of the police power, the general assembly may enact laws for the prevention of cruelty to animals and designate officers charged with the execution thereof. *Jenks v. Stump*, 41 Colo. 281, 93 P. 17 (1907).

This section is not unconstitutionally vague. *People v. Allen*, 657 P.2d 447 (Colo. 1983).

Nor unconstitutional on equal protection grounds. *People v. Wilhelm*, 676 P.2d 702 (Colo. 1984).

Not every act that causes pain and suffering to animals is prohibited by this section.

Where the end or object is reasonable and adequate, the act resulting in pain is, in the sense of the statute, necessary or justifiable, as where a surgical operation is performed to save life, or where the act is done to protect life or property, or to minister to some of the necessities of man. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

It applies to killing doves released from traps and shot for sport. The killing of doves as they are released from a trap merely to improve skill in marksmanship or for sport and amusement, though without specific intent to inflict pain or torture, is within the inhibition of this section and punishable. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

But the shooting of wild animals in the forest and fishing in the streams do not come within this section. *Waters v. People*, 23 Colo. 33, 46 P. 112 (1896).

Malice is not an essential ingredient. This section embraces separate and distinct offenses. The offense denounced was not a crime or misdemeanor at common law, and therefore malice is not a necessary ingredient since not expressly made so by statute. *McCausland v. People*, 58 Colo. 303, 145 P. 685 (1914).

Test was whether acts done intentionally. It was immaterial where the poisoning took place or what other means were used, in addition to the poison, to bring about the injurious result. Neither invitation nor trespass was essential. The important test was that the acts were done intentionally, and that the cattle were killed or injured as a result thereof. *Holt v. Mundell*, 107 Colo. 373, 112 P.2d 1039 (1941).

Maliciously, as used in former provision, means a wrongful act done intentionally, without just cause or excuse. *Richards v. Sanderson*, 39 Colo. 270, 89 P. 769 (1907); *Holt v. Mundell*, 107 Colo. 373, 112 P.2d 1039 (1941).

Sufficiency of information. An information charging that the accused did "unnecessarily and cruelly beat and needlessly mutilate an animal" is sufficient under this section. *McCausland v. People*, 58 Colo. 303, 145 P. 685 (1914).

Admissibility of evidence. In an action under this section for the poisoning of cattle, it was

held that no error was committed in the refusal to admit in evidence an unsigned form used by the government in the distribution of grasshopper poison. By signing the form the recipient of poison assumed all responsibility for any damage resulting from its use. It had no evidentiary value in the determination of the issues involved. *Holt v. Mundell*, 107 Colo. 373, 112 P.2d 1039 (1941).

Sufficiency of evidence of required criminal intent to warrant its submission to the jury. *Holt v. Mundell*, 107 Colo. 373, 112 P.2d 1039 (1941).

18-9-202.5. Impounded animals - costs of impoundment, provision, and care - disposition - procedures - application - definition. (1) (a) (I) The owner or custodian of an animal that has been impounded by an impound agency because of alleged neglect or abuse or because of investigation of charges of cruelty to animals pursuant to section 18-9-202; animal fighting pursuant to section 18-9-204; mistreatment, neglect, or abandonment under article 42 of title 35, C.R.S.; or unlawful ownership of a dangerous dog as described in section 18-9-204.5, may prevent disposition of the animal by an impound agency by filing a payment for impoundment, care, and provision costs with the court in an amount determined by the impound agency to be sufficient to provide for the animal's care and provision at the impound agency for at least thirty days, including the day on which the animal was taken into custody.

(II) To the extent practicable, within seventy-two hours after an impoundment described under subparagraph (I) of this paragraph (a), upon request from the owner or custodian of the impounded animal, the impound agency shall allow a licensed veterinarian of the owner's or custodian's choosing and at his or her expense to examine the animal at a time and place selected by the impound agency, which examination may include taking photographs of the animal and taking biological samples for the purpose of diagnostic testing.

(b) The owner or custodian must file the payment:

(I) Within ten days after the animal is impounded; or

(II) If the owner or custodian requests a hearing pursuant to subparagraph (I) of paragraph (c) of this subsection (1), in accordance with subparagraph (IV) of paragraph (c) of this subsection (1).

(c) (I) Within ten days after the date of impoundment, the owner or custodian may request a hearing in a criminal court of competent jurisdiction. The owner or custodian must provide notice to the district attorney of his or her request for a hearing. If the owner or custodian requests a hearing, the court shall hold the hearing within ten days after the request is made.

(II) At the hearing, the court shall determine, as appropriate:

(A) Whether costs associated with the impoundment, care, and provision, as determined by the impound agency, are fair and reasonable and necessary, which costs shall be specifically itemized by the impound agency prior to the date of the hearing and shall include, at a minimum, an accounting of the costs of upkeep and veterinary services;

(B) Whether there was sufficient probable cause for the impoundment; and

(C) If the court finds probable cause for impoundment existed and the owner or custodian elects not to pay the reasonable impoundment, care, or provision costs to prevent disposition, release of the animal to the impound agency for disposition.

(III) A warrant issued in accordance with C.R.C.P. 41 (b) authorizing seizure of the impounded animal constitutes prima facie evidence of sufficient cause for impoundment.

(IV) If probable cause is found at a hearing conducted under this paragraph (c), the owner or custodian shall file payment for costs at the hearing.

(d) At the end of the time for which expenses are covered by an initial or any subsequent impoundment, care, and provision payment:

(I) If the owner or custodian desires to prevent disposition of the animal, the owner or custodian must file a new payment with the court within ten days prior to the previous payment's expiration.

(II) If the owner or custodian has not timely filed an additional payment for impoundment, care, and provision costs, the impound agency may determine disposition of the animal unless there is a court order prohibiting disposition. Unless subsection (4) of this section applies, the owner or custodian is liable for any additional costs for the care of, provision for, or disposal of the animal.

(2) (a) Failure to pay the impoundment, care, and provision costs pursuant to subsection (1) of this section results in the forfeiture of the right to contest those costs and any ownership rights to the animal in question.

(b) A dog that is not claimed by its owner within five days after being eligible for release from impoundment for investigation of a charge of unlawful ownership of a dangerous dog as described in section 18-9-204.5 is deemed abandoned and may be disposed of as the impound agency deems proper.

(c) If, in the opinion of a licensed veterinarian, an impounded animal is experiencing extreme pain or suffering or is severely injured past recovery, severely disabled past recovery, or severely diseased past recovery, the animal may be euthanized without a court order.

(3) The court shall order an impound agency to refund to the owner or custodian all impoundment, care, and provision payments made for the animal if, after trial, a judge or jury enters or returns in favor of the owner or custodian a verdict of not guilty for all charges related to the original impoundment of the animal.

(4) (a) With respect to the sale of an animal, the proceeds are first applied to the costs of the sale and then to the expenses for the care of and provision for the animal during impoundment and the pendency of the sale, including expenses incurred by the impound agency that have not been paid by the owner or custodian. If the owner of the animal is convicted of cruelty to animals under section 18-9-202, animal fighting under section 18-9-204, or unlawful ownership of a dangerous dog under section 18-9-204.5 or is found by court order to have mistreated, neglected, or abandoned the animal under article 42 of title 35, C.R.S., the remaining proceeds, if any, are paid to the impound agency. If the owner of the animal is not convicted of such charges or is not found by court order to have mistreated, neglected, or abandoned the animal, the impound agency shall pay over the remaining proceeds, if any, to the owner of the animal.

(b) If the impound agency is the department of agriculture, the department shall transmit the moneys credited for expenses to the state treasurer, who shall credit them to the animal protection fund created in section 35-42-113, C.R.S.

(c) If the owner of the animal cannot be found, the court shall pay any remaining proceeds after all other expenses have been paid to the impound agency into the animal protection fund or, if the impound agency is not the department of agriculture, to such other impound agency as the court orders. An owner claiming the remaining proceeds must make the claim within one year after the payment of the proceeds to the impound agency. A claim not so presented to the court is forever barred unless the court, by proper order made in any case, otherwise decrees. An impound agency shall pay to the claimant any refund ordered by court decree.

(d) At least six days prior to sale of the animal, the impound agency shall provide written notice to the owner, at the owner's last-known address, of the time and place of the sale of the animal.

(e) If the owner of the animal is unknown, the impound agency shall publish for one week, in a newspaper of general circulation in the jurisdiction in which the animal was found, notice of sale of the animal and shall further post notice of the sale of the animal at a place provided for public notices in the jurisdiction in which the sale will take place, at least five days prior to the sale.

(f) This subsection (4) does not apply to the disposition of an animal for a fee by:

(I) Adoption of an animal;

(II) Release of an animal to a rescue group licensed pursuant to article 80 of title 35, C.R.S.;

(III) Release of an animal to another pet animal facility licensed pursuant to article 80 of title 35, C.R.S.; or

(IV) Release of an animal to a rehabilitator licensed by the parks and wildlife division or the United States fish and wildlife service.

(5) For purposes of this section, "impound agency" means an animal shelter as defined in section 35-80-102 (1), C.R.S., the department of agriculture, created in section 24-1-123, C.R.S., or any other agency that impounds an animal pursuant to paragraph (a) of subsection (1) of this section or section 18-9-202 (1.8).

(6) This section does not apply to animals impounded solely under article 42 of title 35, C.R.S.

Source: **L. 99:** Entire section added, p. 358, § 4, effective August 4. **L. 2001:** Entire section amended, p. 87, § 1, effective July 1. **L. 2003:** Entire section amended, p. 2094, § 3, effective July 1. **L. 2004:** (1) amended, p. 1760, § 1, effective July 1; (2) amended, p. 1198, § 51, effective August 4. **L. 2006:** (1)(a) and (2) amended and (1)(c) added, p. 893, § 2, effective August 7. **L. 2007:** (1)(a) amended, p. 723, § 1, effective July 1. **L. 2012:** Entire section amended, (HB 12-1125), ch. 102, p. 342, § 1, effective September 1.

Editor's note: Section 5 of chapter 102, Session Laws of Colorado 2012, provides that the act amending this section applies to animals impounded on or after September 1, 2012.

18-9-203. Shepherd abandoning sheep without notice. (Repealed)

Source: **L. 71:** R&RE, p. 472, § 1. **C.R.S. 1963:** § 40-9-203. **L. 95:** Entire section repealed, p. 199, § 12, effective April 13.

18-9-204. Animal fighting - penalty. (1) (a) No person shall cause, sponsor, arrange, hold, or encourage a fight between animals for the purpose of monetary gain or entertainment.

(b) For the purposes of this section, a person encourages a fight between animals for the purpose of monetary gain or entertainment if he or she:

(I) Is knowingly present at or wagers on such a fight;

(II) Owns, trains, transports, possesses, breeds, sells, transfers, or equips an animal with the intent that such animal will be engaged in such a fight;

(III) Knowingly allows any such fight to occur on any property owned or controlled by him;

(IV) Knowingly allows any animal used for such a fight to be kept, boarded, housed, or trained on, or transported in, any property owned or controlled by him;

(V) Knowingly uses any means of communication for the purpose of promoting such a fight; or

(VI) Knowingly possesses any animal used for such a fight or any device intended to enhance the animal's fighting ability.

(2) Any person who violates the provisions of this section commits a class 5 felony and, in addition to the punishment provided in section 18-1.3-401, may be punished by a fine of up to one thousand dollars. Any person committing a second or subsequent violation of this section commits a class 4 felony and, in addition to the punishment provided in section 18-1.3-401, may be punished by a fine of up to five thousand dollars.

(3) Nothing in this section shall prohibit normal hunting practices as approved by the division of parks and wildlife.

(4) Nothing in this section shall be construed to prohibit the training of animals or the use of equipment in the training of animals for any purpose not prohibited by law.

Source: **L. 71:** R&RE, p. 472, § 1. **C.R.S. 1963:** § 40-9-204. **L. 79:** Entire section repealed, p. 1223, § 29, effective June 21. **L. 81:** Entire section RC&RE, p. 972, § 16, effective July 1. **L. 85:** Entire section R&RE, p. 678, § 1, effective July 1. **L. 90:** (1)(a),

IP(1)(b), (1)(b)(I), (1)(b)(II), and (4) amended and (1)(b)(IV) to (1)(b)(VI) added, p. 1612, § 6, effective July 1. **L. 2002:** (2) amended, p. 1517, § 205, effective October 1. **L. 2003:** IP(1)(b) and (1)(b)(II) amended, p. 2095, § 4, effective July 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

The press has no right to engage in activities that are otherwise illegal for the purpose of reporting the news. People v. Bergen, 883 P.2d 532 (Colo. App. 1994).

Dogfight “for the purpose” of entertainment or monetary gain is distinguished from the type of confrontation that happens unintentionally because of a chance encounter between two or more uncontrolled dogs. People v. Bergen, 883 P.2d 532 (Colo. App. 1994) (decided under section as it existed prior to 1990 amendment).

Term “knowingly” in subsection (1)(b)(I) distinguishes guilty parties from those who inadvertently find themselves at a dogfight and those who are at the scene but unaware that a dogfight is taking place. There is no requirement

that the attendee be at the scene for the purpose of fun or profit. People v. Bergen, 883 P.2d 532 (Colo. App. 1994) (decided under section as it existed prior to 1990 amendment).

“Knowing presence” mental state requirement for spectators is constitutional. No more specific mental state need be required, given legislative purpose to discourage dogfights by prohibiting attendance by spectators regardless of whether the spectators are enthusiastic, neutral, or disgusted observers. People v. Bergen, 883 P.2d 532 (Colo. App. 1994) (decided under section as it existed prior to 1990 amendment).

Muzzling of dogs is irrelevant under this section. People v. Bergen, 883 P.2d 532 (Colo. App. 1994) (decided under section as it existed prior to 1990 amendment).

18-9-204.5. Unlawful ownership of dangerous dog - legislative declaration - definitions. (1) The general assembly hereby finds, determines, and declares that:

(a) Dangerous dogs are a serious and widespread threat to the safety and welfare of citizens throughout the state because of the number and serious nature of attacks by such dogs; and

(b) The regulation and control of dangerous dogs is a matter of statewide concern.

(2) As used in this section, unless the context otherwise requires:

(a) “Bodily injury” means any physical injury that results in severe bruising, muscle tears, or skin lacerations requiring professional medical treatment or any physical injury that requires corrective or cosmetic surgery.

(a.5) “Bureau” means the bureau of animal protection in the department of agriculture, division of animal industry, created pursuant to section 35-42-105, C.R.S.

(b) “Dangerous dog” means any dog that:

(I) Inflicts bodily or serious bodily injury upon or causes the death of a person or domestic animal; or

(II) Demonstrates tendencies that would cause a reasonable person to believe that the dog may inflict bodily or serious bodily injury upon or cause the death of any person or domestic animal; or

(III) Engages in or is trained for animal fighting as described and prohibited in section 18-9-204.

(c) “Dog” means any domesticated animal related to the fox, wolf, coyote, or jackal.

(d) “Domestic animal” means any dog, cat, any animal kept as a household pet, or livestock.

(e) “Owner” or “owns” means any person, firm, corporation, or organization owning, possessing, harboring, keeping, having financial or property interest in, or having control or custody of a domestic animal, as the term is defined in paragraph (d) of this subsection (2), including a dangerous dog as the term is defined in paragraph (b) of this subsection (2).

(f) “Serious bodily injury” has the same meaning as such term is defined in section 18-1-901 (3) (p).

(3) (a) A person commits ownership of a dangerous dog if such person owns, possesses, harbors, keeps, has a financial or property interest in, or has custody or control over a dangerous dog.

(b) Any owner who violates paragraph (a) of this subsection (3) whose dog inflicts bodily injury upon any person commits a class 3 misdemeanor. Any owner involved in a second or subsequent violation under this paragraph (b) commits a class 2 misdemeanor.

(c) Any owner who violates paragraph (a) of this subsection (3) whose dog inflicts serious bodily injury to a person commits a class 1 misdemeanor. Any owner involved in a second or subsequent violation under this paragraph (c) commits a class 6 felony.

(d) Any owner who violates paragraph (a) of this subsection (3) whose dog causes the death of a person commits a class 5 felony.

(e) (I) Any owner who violates paragraph (a) of this subsection (3) whose dog injures or causes the death of any domestic animal commits a class 3 misdemeanor.

(II) Any owner of a dog that is involved in a second or subsequent violation under this paragraph (e) commits a class 2 misdemeanor. The minimum fine specified in section 18-1.3-501 for a class 2 misdemeanor shall be mandatory.

(III) (A) The court shall order the convicted owner and any owner who enters into a deferred judgment or deferred prosecution to make restitution to the injured or dead domestic animal's owner pursuant to applicable provisions of title 16, C.R.S., governing restitution.

(B) Restitution shall be equal to the greater of the fair market value or the replacement cost of the domestic animal on the date, but before the time, the animal was injured or destroyed plus any reasonable and necessary medical expenses incurred in treating the animal and any actual costs incurred in replacing the injured or destroyed animal.

(B.5) An owner who violates paragraph (a) of this subsection (3) and whose dog damages or destroys the property of another person commits a class 1 petty offense.

(C) Any owner whose dog damages or destroys property shall make restitution to the owner of such property in an amount equal to the greater of the fair market value or the replacement cost of such property before its destruction plus any actual costs incurred in replacing such property.

(e.5) The court shall order any owner of a dangerous dog who has been convicted of a violation of this section to:

(I) Confine the dangerous dog in a building or enclosure designed to be escape-proof and, whenever the dog is outside of the building or enclosure, keep the dog under the owner's control by use of a leash. The owner shall post a conspicuous warning sign on the building or enclosure notifying others that a dangerous dog is housed in the building or enclosure. In addition, if the conviction is for a second or subsequent offense, the dangerous dog shall also be muzzled whenever it is outside of the building or enclosure.

(II) Immediately report to the bureau in writing any material change in the dangerous dog's situation, including but not limited to a change, transfer, or termination of ownership, change of address, escape, or death;

(III) At the owner's expense, permanently identify the dangerous dog through the implantation of a microchip by a licensed veterinarian or a licensed shelter. A veterinarian or licensed shelter that implants a microchip in a dangerous dog shall report the microchipping information to the bureau within ten days after implantation of the microchip, pursuant to section 35-42-115 (2), C.R.S.

(IV) Prior to the implantation of the microchip, pay a nonrefundable dangerous dog microchip license fee of fifty dollars to the bureau;

(V) Prior to the dangerous dog receiving any service or treatment, disclose in writing to any provider of the service or treatment, including but not limited to a veterinary health care worker, dog groomer, humane agency staff person, pet animal care facility staff person, professional dog handler, or dog trainer, each acting in the performance of his or her respective duties, that the dangerous dog has been the subject of a conviction of a violation of this section;

(VI) Prior to a change, transfer, or termination of ownership of a dangerous dog, disclose in writing to the prospective owner that the dangerous dog has been the subject of a conviction of a violation of this section.

(f) In addition to any other penalty set forth in this subsection (3), upon an owner's entry of a guilty plea or the return of a verdict of guilty by a judge or jury or a deferred judgment or deferred prosecution for a violation that results in bodily injury, serious bodily

injury, or death to a person, the court, pursuant to applicable provisions of title 16, C.R.S., governing restitution, shall order the defendant to make restitution in accordance with said provisions.

(g) (I) In addition to the penalties set forth in paragraphs (b) to (e) of this subsection (3), upon an owner's entry of a guilty plea or the return of a verdict of guilty by a judge or jury or a deferred judgment or deferred prosecution for a violation that results in serious bodily injury to a person or death to a person or domestic animal or for a second or subsequent violation of paragraph (b) or (e) of this subsection (3) resulting in a conviction or a deferred judgment or a deferred prosecution involving the same dog of the same owner, the court shall order that the dangerous dog be immediately confiscated and placed in a public animal shelter and shall order that, upon exhaustion of any right an owner has to appeal a conviction based on a violation of this subsection (3), the owner's dangerous dog be destroyed by euthanasia administered by a licensed veterinarian.

(II) In addition to any penalty set forth in paragraphs (b) to (e) of this subsection (3), for a second or subsequent violation of paragraph (b) or (e) of this subsection (3) resulting in a conviction or a deferred judgment or a deferred prosecution involving the same dog of a different owner, the court may order that the dangerous dog be immediately confiscated and placed in a public animal shelter and that, upon exhaustion of any right an owner has to appeal a conviction based on a violation of this subsection (3), the owner's dangerous dog be destroyed by euthanasia administered by a licensed veterinarian.

(h) (I) An affirmative defense to the violation of this subsection (3) shall be:

(A) That, at the time of the attack by the dangerous dog which causes injury to or the death of a domestic animal, the domestic animal was at large, was an estray, and entered upon the property of the owner and the attack began, but did not necessarily end, upon such property;

(B) That, at the time of the attack by the dangerous dog which causes injury to or the death of a domestic animal, said animal was biting or otherwise attacking the dangerous dog or its owner;

(C) That, at the time of the attack by the dangerous dog which causes injury to or the death of a person, the victim of the attack was committing or attempting to commit a criminal offense, other than a petty offense, against the dog's owner, and the attack did not occur on the owner's property;

(D) That, at the time of the attack by the dangerous dog which causes injury to or the death of a person, the victim of the attack was committing or attempting to commit a criminal offense, other than a petty offense, against a person on the owner's property or the property itself and the attack began, but did not necessarily end, upon such property; or

(E) That the person who was the victim of the attack by the dangerous dog tormented, provoked, abused, or inflicted injury upon the dog in such an extreme manner which resulted in the attack.

(II) The affirmative defenses set forth in subparagraph (I) of this paragraph (h) shall not apply to any dog that has engaged in or been trained for animal fighting as said term is described in section 18-9-204.

(4) Upon taking an owner into custody for an alleged violation of this section or the issuing of a summons and complaint to the owner, pursuant to the Colorado rules of criminal procedure and part 1 of article 4 of title 16, C.R.S., the owner's dangerous dog may be taken into custody and placed in a public animal shelter, at the owner's expense, pending final disposition of the charge against the owner. In addition, in the event the court, pursuant to the Colorado rules of criminal procedure and part 1 of article 4 of title 16, C.R.S., sets bail for an owner's release from custody pending final disposition, the court may require, as a condition of bond, that the owner's dangerous dog be placed by an impound agency, as defined in section 18-9-202.5 (5), at the owner's expense in a location selected by the impound agency including a public animal shelter, licensed boarding facility, or veterinarian's clinic, pending final disposition of the alleged violation of this section. The owner is liable for the total cost of board and care for a dog placed pursuant to this subsection (4).

(5) (a) Nothing in this section shall be construed to prohibit a municipality from adopting any rule or law for the control of dangerous dogs; except that any such rule or law shall not regulate dangerous dogs in a manner that is specific to breed.

(b) Nothing in this section shall be construed to abrogate a county's authority under part 1 of article 15 of title 30, C.R.S., to adopt dog control and licensing resolutions and to impose the penalties set forth in section 30-15-102, C.R.S.; except that any such resolution shall not regulate dangerous dogs in a manner that is specific to breed.

(c) No municipality or county may destroy or dispose of a dog that is awaiting destruction or disposition as of April 21, 2004, in connection with a violation or charged violation of a municipal or county ban on one or more specific dog breeds.

(6) The provisions of this section shall not apply to the following:

(a) To any dog that is used by a peace officer while the officer is engaged in the performance of peace officer duties;

(b) To any dog that inflicts bodily or serious bodily injury to any veterinary health care worker, dog groomer, humane agency personnel, professional dog handler, or trainer each acting in the performance of his or her respective duties, unless the owner is subject to a court order issued pursuant to paragraph (e.5) of subsection (3) of this section and the owner has failed to comply with the provisions of subparagraph (V) of paragraph (e.5) of subsection (3) of this section; or

(c) To any dog that inflicts injury upon or causes the death of a domestic animal while the dog was working as a hunting dog, herding dog, or predator control dog on the property of or under the control of the dog's owner and the injury or death was to a domestic animal naturally associated with the work of such dog.

Source: **L. 91:** Entire section added, p. 413, § 1, effective July 1. **L. 99:** (2)(a) amended, p. 797, § 10, effective July 1; (3)(e) amended and (3)(e.5) added, p. 274, § 1, effective July 1. **L. 2002:** (3)(e)(II) amended, p. 1517, § 206, effective October 1. **L. 2004:** (1) and (5) amended, p. 509, § 3, effective April 21; (2)(a.5) added and (3)(e.5) and (4) amended, p. 1761, §§ 2, 3, effective July 1. **L. 2006:** (2)(b), (3)(e)(II), (3)(e.5), (3)(g), (4), and (6)(b) amended, p. 717, § 1, effective July 1. **L. 2007:** (2)(d), (3)(e)(I), (3)(e)(III)(C), and (3)(g) amended and (3)(e)(III)(B.5) added, p. 724, § 2, effective July 1. **L. 2012:** (4) amended, (HB 12-1125), ch. 102, p. 346, § 3, effective September 1.

Editor's note: Section 5 of chapter 102, Session Laws of Colorado 2012, provides that the act amending subsection (4) applies to animals impounded on or after September 1, 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3)(e)(II), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-9-205. Disposition of fines. Any fines collected pursuant to section 18-9-204 shall be transmitted to the state treasurer, who shall then transmit the same to the county where the offense occurred for deposit in the general fund to be used for the care of the animals involved in the offense, if required, or, if not required, for any other lawful purpose.

Source: **L. 85:** Entire section added, p. 679, § 2, effective July 1. **L. 90:** Entire section amended, p. 1613, § 7, effective July 1.

18-9-206. Unauthorized release of an animal - penalty - restitution. (1) Any person who intentionally releases any animal which is lawfully confined for scientific, research, commercial, legal sporting, or educational purposes or for public safety purposes because the animal has been determined to be dangerous to people, has an infectious disease, or is quarantined to determine whether or not it has an infectious disease without the consent of the owner or custodian of such animal commits the offense of unauthorized release of an animal.

(2) Unauthorized release of an animal is a class 2 misdemeanor.

(3) Any person who is convicted of unauthorized release of an animal shall be ordered to pay restitution for any damages resulting from such release, including the cost of restoring any animal to confinement, the cost of restoring the health of any animal which is released, the cost of any damage to real or personal property which is caused by a released

animal, or any cost which results if the release causes the failure of an experiment, including the costs of repeating the experiment, replacement of any animal released, and the cost of labor and materials associated with such experiment.

Source: L. 92: Entire section added, p. 319, § 1, effective July 1.

18-9-207. Tampering or drugging of livestock. (1) As used in this section, unless the context otherwise requires:

(a) "Exhibition" means a show or sale of livestock at a fair or elsewhere in this state that is sponsored by or under the authority of the state or any unit of local government or any agricultural, horticultural, or livestock society, association, or corporation.

(b) "Livestock" means any domestic animal generally used for food or in the production of food, including, but not limited to, cattle, sheep, goats, poultry, swine, or llamas.

(c) "Sabotage" means intentionally tampering with an animal belonging to or owned by another person that has been registered, entered, or exhibited in any exhibition or raised for the apparent purpose of being entered in an exhibition.

(d) (I) "Tamper" means any of the following:

(A) Treatment of livestock in such a manner that food derived from the livestock would be considered adulterated under the "Colorado Food and Drug Act", part 4 of article 5 of title 25, C.R.S.;

(B) The injection, use, or administration of any drug that is prohibited by any federal, state, or local law or any drug that is used in a manner prohibited by federal law or the law of this state or any locality thereof;

(C) The injection or other internal or external administration of any product or material, whether gas, solid, or liquid, to an animal for the purposes of deception, including concealing, enhancing, or transforming the true conformation, configuration, color, breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise;

(D) The use or administration for cosmetic purposes of steroids, growth stimulants, or internal artificial filling, including paraffin, silicone injection, or any other substance;

(E) The use or application of any drug or feed additive affecting the central nervous system of the animal;

(F) The use or administration of diuretics for cosmetic purposes;

(G) The manipulation or removal of tissue, by surgery or otherwise, so as to change, transform, or enhance the true conformation or configuration of the animal;

(H) Subjecting the animal to inhumane conditions or procedures for the purpose of concealing, enhancing, or transforming the true conformation, configuration, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise;

(I) Attaching to the animal's hide foreign objects, including hair or hair substitutes, cloth, and fibers, for the purpose of deception, including concealing, enhancing, or transforming the true conformation, configuration, color, breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise;

(J) Substituting a different animal for the animal registered or entered in the exhibition without the permission of a responsible official of the exhibition.

(II) "Tamper" does not include any action taken or activity performed or administered by a licensed veterinarian or in accordance with instructions of a licensed veterinarian if the action or activity was undertaken for accepted medical purposes during the course of a valid veterinarian-client-patient relationship or any action taken as part of accepted grooming, ranching, commercial, or medical practices. "Tampering" shall not be construed to include normal ranching practices.

(2) (a) No person shall commit any act in this state that would constitute tampering with or sabotaging any livestock that has been registered, entered, or exhibited in any exhibition in this state.

(b) No person shall administer, dispense, distribute, manufacture, possess, sell, or use any drug to or for livestock unless such drug is approved by the United States food and drug administration or the United States department of agriculture; except that, if either agency

has approved an application submitted for investigational use in accordance with the "Federal Food, Drug, and Cosmetic Act", the drug may be used only for the approved investigational use.

(c) No person shall administer, distribute, possess, sell, or use any dangerous drug to or for livestock unless the drug is accompanied by a prescription issued by a licensed veterinarian entitled to practice in this state.

(3) Any person who violates the provisions of this section commits a class 1 misdemeanor. However, in lieu of the fine provided in section 18-1.3-501, the court may impose a fine of not less than one thousand dollars or more than one hundred thousand dollars.

(4) The name and photograph of any person convicted of violating the provisions of this section shall be made available for publication in newspapers of general circulation and trade journals.

Source: L. 95: Entire section added, p. 1196, § 1, effective May 31. L. 2002: (3) amended, p. 1517, § 207, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-9-208. Forfeiture of animals. (1) Upon the motion of the prosecuting attorney or upon the court's own motion, after the conviction of a defendant for cruelty to animals as described in section 18-9-202, or for animal fighting as described in section 18-9-204, the court may order the forfeiture of any animal owned by or in the custody of the defendant that:

(a) Was abused, neglected, mistreated, injured, or used by the defendant during the course of the criminal episode that gave rise to such conviction;

(b) Participated in or was affected by any act set forth in section 18-9-204 (1).

(2) (a) If an animal is the subject of a motion made under subsection (1) of this section and is not owned by the defendant, the court may nevertheless enter an order of forfeiture of the animal if the court finds that:

(I) The animal was abandoned prior to the criminal episode described in subsection (1) of this section;

(II) The owner of the animal is unknown; or

(III) The owner of the animal is known but cannot be located.

(b) Any person who contests a motion brought under this section shall establish such person's standing as a true owner of the animal. The factors to be considered by the court in determining whether such person is a true owner shall include, but shall not be limited to, the following:

(I) Whether the person was the primary user, custodian, or possessor of the animal;

(II) Whether there is evidence that ownership of the animal is vested in the person;

(III) Whether consideration was paid for the purchase of the animal, and, if so, how much of the consideration was furnished by the person.

(c) If the court determines that a person other than the defendant is the true owner of the animal, the court may not enter an order forfeiting the animal under this section unless the court finds:

(I) The true owner was involved in the criminal episode described in subsection (1) of this section;

(II) The true owner knew or reasonably should have known of the criminal episode described in subsection (1) of this section and failed to take all reasonable steps available to him or her to prevent it; or

(III) Ownership of the animal was conveyed to the true owner in order to avoid a forfeiture.

(3) An order of forfeiture entered pursuant to this section shall provide for the immediate disposition of the forfeited animal by any means described in section 18-9-201 (2.5) other than return to the owner. If, in the opinion of a licensed veterinarian, the animal is experiencing extreme pain or suffering, or is severely injured past recovery, severely

disabled past recovery, or severely diseased past recovery, the animal may be euthanized without a court order.

(4) The owner or custodian of an animal that is the subject of a motion brought under this section shall be liable for the cost of the care, keeping, transport, or disposal of the animal. In no event shall the prosecuting attorney or the office of the prosecuting attorney be liable for such cost.

(5) The court in its discretion may order a forfeiture authorized by this section as an element of sentencing, as a condition of probation, or as a condition of a deferred sentence.

Source: L. 2001: Entire section added, p. 87, § 2, effective July 1. **L. 2007:** (3) amended, p. 724, § 3, effective July 1.

18-9-209. Immunity for reporting animal cruelty - false report - penalty. (1) Except as otherwise provided in subsection (2) of this section, a person who, in good faith, reports a suspected incident of animal cruelty, as described in section 18-9-202, to a local law enforcement agency or to the state bureau of animal protection shall be immune from civil liability for reporting the incident.

(2) The provisions of subsection (1) of this section shall not apply to a person who knowingly makes a false report of animal cruelty.

(3) A person who knowingly makes a false report of animal cruelty to a local law enforcement agency or to the state bureau of animal protection commits a class 3 misdemeanor and shall be punished as provided in section 18-1.3-501.

Source: L. 2005: Entire section added, p. 355, § 2, effective July 1.

Cross references: For the legislative declaration contained in the 2005 act enacting this section, see section 1 of chapter 102, Session Laws of Colorado 2005.

PART 3

OFFENSES INVOLVING COMMUNICATIONS

18-9-301. Definitions. As used in sections 18-9-301 to 18-9-305, unless the context otherwise requires:

(1) “Aggrieved person” means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

(1.5) “Aural transfer” means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(2) “Common carrier” means any person engaged as a common carrier for hire in intrastate, interstate, or foreign communication by wire or radio or in intrastate, interstate, or foreign radio transmission of energy.

(3) “Contents”, when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.

(3.3) “Electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce but does not include:

(a) (Deleted by amendment, L. 97, p. 602, § 2, effective August 6, 1997.)

(b) Any wire or oral communication;

(c) Any communication made through a tone-only paging device; or

(d) Any communication from a tracking device.

(3.5) “Electronic communication service” means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(3.7) “Electronic communications system” means any wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of electronic communications

and any computer facilities or related electronic equipment for the electronic storage of such communications.

(4) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication, other than:

(a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or furnished by such subscriber or user for connection to the facilities of such service and being used in the ordinary course of its business, or being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal hearing.

(4.5) "Electronic storage" means:

(a) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(b) Any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

(5) "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(6) "Investigative or law enforcement officer" means any officer of the United States or of the state of Colorado or a political subdivision thereof who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in this part 3, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

(7) "Judge of competent jurisdiction" means any justice of the supreme court or a judge of any district court of the state of Colorado.

(8) "Oral communication" means any oral communication uttered by any person believing that such communication is not subject to interception, under circumstances justifying such belief, but does not include any electronic communication.

(8.3) "Pen register" means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached but shall not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(8.5) "Readily accessible to the general public" means, with respect to a radio communication, that such communication is not:

(a) Scrambled or encrypted;

(b) Transmitted using modulation techniques having essential parameters withheld from the public with the intention of preserving the privacy of such communication;

(c) Carried on a subcarrier or other signal subsidiary to a radio transmission;

(d) Transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or

(e) Transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the rules of the federal communications commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

(8.7) "Trap and trace device" means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

(8.9) "User" means any person or entity which uses an electronic communication service and is duly authorized by the provider of such service to engage in such use.

(9) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection, including the use of such connection in a switching station, between the point of origin and the point of reception, furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications and includes any electronic storage of such communication.

Source: L. 71: R&RE, p. 472, § 1. C.R.S. 1963: § 40-9-301. L. 88: (1), (3), IP(4), (4)(a), (5), (8), and (9) amended and (1.5), (3.3), (3.5), (3.7), (4.5), (8.3), (8.5), (8.7), and (8.9) added, p. 691, § 5, effective May 29. L. 97: (3.3) and (9) amended, p. 602, § 2, effective August 6.

ANNOTATION

Terms "conversation or discussion" in § 18-9-304 are synonymous with term "oral communication" as defined in subsection (8). *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

Terms "telephone or telegraph communication" in § 18-9-303 are synonymous with "wire communication" as defined in subsection (9). *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

Monitoring conversations between husband and wife in jail not wiretapping or eavesdropping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not wiretapping or eavesdropping because such conversations are not within the statutory definitions of "wire communication" and "oral communication". *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

18-9-302. Wiretapping and eavesdropping devices prohibited - penalty. Any person who manufactures, buys, sells, or knowingly has in his possession any instrument, device, contrivance, machine, or apparatus designed or commonly used for wiretapping or eavesdropping, as prohibited in sections 18-9-303 and 18-9-304, with the intent to unlawfully use or employ or allow the same to be so used or employed, or who knowingly aids, authorizes, agrees with, employs, permits, or conspires with any person to unlawfully manufacture, buy, sell, or have the same in his possession is guilty of a class 2 misdemeanor. Upon commission of a second or subsequent offense, any person committing the same commits a class 5 felony.

Source: L. 71: R&RE, p. 473, § 1. C.R.S. 1963: § 40-9-302.

18-9-303. Wiretapping prohibited - penalty. (1) Any person not a sender or intended receiver of a telephone or telegraph communication commits wiretapping if he:

(a) Knowingly overhears, reads, takes, copies, or records a telephone, telegraph, or electronic communication without the consent of either a sender or a receiver thereof or attempts to do so; or

(b) Intentionally overhears, reads, takes, copies, or records a telephone, telegraph, or electronic communication for the purpose of committing or aiding or abetting the commission of an unlawful act; or

(c) Knowingly uses for any purpose or discloses to any person the contents of any such communication, or attempts to do so, while knowing or having reason to know the information was obtained in violation of this section; or

(d) Knowingly taps or makes any connection with any telephone or telegraph line, wire, cable, or instrument belonging to another or with any electronic, mechanical, or other device belonging to another or installs any device whether connected or not which permits the interception of messages; or

(e) Repealed.

(f) Knowingly uses any apparatus to unlawfully do, or cause to be done, any act prohibited by this section or aids, authorizes, agrees with, employs, permits, or intentionally conspires with any person to violate the provisions of this section.

(2) Wiretapping is a class 6 felony; except that, if the wiretapping involves a cordless telephone, it is a class 1 misdemeanor.

Source: **L. 71:** R&RE, p. 473, § 1. **C.R.S. 1963:** § 40-9-303. **L. 77:** (1)(a), (1)(c), (1)(d), (1)(e), and (1)(f) amended, p. 969, § 59, effective July 1. **L. 88:** (1)(a), (1)(b), (1)(d), and (1)(e) amended, p. 693, § 6, effective May 29. **L. 89:** (2) amended, p. 841, § 90, effective July 1. **L. 97:** (2) amended, p. 602, § 3, effective August 6. **L. 2002:** (1)(e) repealed, p. 1588, § 23, effective July 1.

ANNOTATION

Law reviews. For article, "Interspousal Wiretapping and Eavesdropping: An Update - Part I", see 24 Colo. Law. 2343 (1995). For article, "Interspousal Wiretapping and Eavesdropping: An Update - Part II", see Colo. Law. 2569 (1995).

Paragraph (1)(e) is not unconstitutionally overbroad as infringing on fundamental or express rights. Although the paragraph might prohibit a parent from hanging up or disconnecting a child's telephone call, such a proscription is not real and substantial when compared to the statute's prohibition of a whole range of easily identifiable and constitutionally proscribable conduct. *People v. Shepard*, 983 P.2d 1 (Colo. 1999).

Subsection (2) does not violate the equal protection clause. Because there is less of a privacy expectation when using a cordless telephone and because such calls may be more easily intercepted, the general assembly may impose a lesser penalty for wiretapping involving a cordless telephone. *People v. Richardson*, 983 P.2d 5 (Colo. 1999).

Section 16-15-102 (10) inapplicable. Since § 18-9-304 and this section do not prohibit or make unlawful consensual recorded eavesdropping, where one party to the conversation agrees to the recording, there is no "unlawful interception" within the meaning of § 16-15-102 (10). That section is, therefore, not applicable, and the

evidence should not be suppressed. *People v. Morton*, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied, 423 U.S. 1053, 96 S. Ct. 783, 46 L. Ed.2d 642 (1976).

Terms "telephone or telegraph communication" in this section are synonymous with "wire communication" as defined in § 18-9-301 (9). *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

And monitoring conversations between husband and wife in jail not wiretapping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not wiretapping because such conversations are not within the statutory definition of "wire communication". *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

Recording played on telephone handset before every telephone call placed by a prisoner using that telephone stating that the call would be recorded, and the short jail orientation at which prisoners agreed to read and abide by rules contained in a handbook, which stated that outgoing telephone calls would be recorded, provided notice to the defendant that his calls would be recorded. When a prison inmate is required to permit monitoring of telephone calls as a condition of using prison telephones, the prisoner impliedly consents if he or she has notice of monitoring and still places calls on prison telephones. *People v. Mares*, 263 P.3d 699 (Colo. App. 2011).

18-9-304. Eavesdropping prohibited - penalty. (1) Any person not visibly present during a conversation or discussion commits eavesdropping if he:

(a) Knowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto, or attempts to do so; or

(b) Intentionally overhears or records such conversation or discussion for the purpose of committing, aiding, or abetting the commission of an unlawful act; or

(c) Knowingly uses for any purpose, discloses, or attempts to use or disclose to any other person the contents of any such conversation or discussion while knowing or having reason to know the information was obtained in violation of this section; or

(d) Knowingly aids, authorizes, agrees with, employs, permits, or intentionally conspires with any person to violate the provisions of this section.

(2) Eavesdropping is a class 1 misdemeanor.

Source: **L. 71:** R&RE, p. 474, § 1. **C.R.S. 1963:** § 40-9-304. **L. 77:** (1)(a), (1)(c), and (1)(d) amended, p. 970, § 60, effective July 1. **L. 89:** (2) amended, p. 841, § 91, effective July 1. **L. 2010:** (2) amended, (SB 10-128), ch. 415, p. 2046, § 4, effective July 1.

ANNOTATION

Law reviews. For note, "Legislation: The Statutory Right of Privacy in Colorado — Section 33 of the Eavesdropping Act: Should It be Narrowly Construed?", see 41 U. Colo. L. Rev. 174 (1969). For article, "Discovery and Admissibility of Sound Recordings and Their Transcripts", see 14 Colo. Law. 999 (1985).

Section recognizes right of privacy. The supreme court specifically recognizes the theory of tortious conduct designated as the invasion of the right of privacy, noting that the general assembly gave legislative recognition of the right of privacy by the enactment of this section. *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970) (decided under former § 40-4-33, C.R.S.).

Eavesdropping statutes require use of subjective and objective tests to determine whether a person's conversation qualifies as protected oral communications. *People v. Hart*, 787 P.2d 186 (Colo. App. 1989).

Section 16-15-102 (10) inapplicable. Since § 18-9-303 and this section do not prohibit or make unlawful consensual recorded eavesdropping, where one party to the conversation agrees to the recording, there is no "unlawful interception" within the meaning of § 16-15-102 (10). That section is, therefore, not applicable, and the evidence should not be suppressed. *People v. Morton*, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied, 423 U.S. 1053, 96 S. Ct. 783, 46 L. Ed.2d 642 (1976).

Terms "conversation or discussion" in this section are synonymous with term "oral communication" as defined in § 18-9-301 (8). *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

And monitoring conversations between husband and wife in jail not eavesdropping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not

eavesdropping because such conversations are not within the statutory definition of "oral communication". *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

Consensually overheard conversation not eavesdropping. By the terms of subsection (1)(a), a consensually overheard conversation is not eavesdropping. *People v. Palmer*, 652 P.2d 1092 (Colo. App. 1982).

Consent of one party to recording supports summary judgment. Where plaintiff claimed that certain telephone conversations were illegally recorded, but admitted that the other party to the conversations had consented, there was no genuine issue of fact and summary judgment was proper. *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972) (decided under former § 40-4-28, C.R.S.).

For "consent" to be valid, it must be voluntary and uncoerced. Generally, it is sufficient for the prosecution, who has the burden of proving consent, to show that an informant had knowledge of the monitoring setup; however, when coercion is alleged, the prosecution must show that there was no undue pressure, threats or improper inducements. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

Whether the circumstances of a communication justify a belief that it is not subject to interception is analyzed in the same manner as the question of whether an investigative activity amounts to a search: whether there is a justifiable expectation of privacy at the time and place of the communication. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

Occupants of bar restroom had an objectively reasonable expectation of privacy from surveillance with a police transmitter despite the fact that police or others might hear a conversation unaided. *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996).

18-9-305. Exceptions. (1) Nothing in sections 18-9-302 to 18-9-304 shall be interpreted to prevent a news agency, or an employee thereof, from using the accepted tools and equipment of that news medium in the course of reporting or investigating a public and newsworthy event; nor shall said sections prevent any person from using wiretapping or eavesdropping devices on his own premises for security or business purposes if reasonable notice of the use of such devices is given to the public.

(2) No part of sections 18-9-302 to 18-9-304 shall apply to the normal use of services, facilities, and equipment provided by a provider of wire or electronic communication service pursuant to its tariffs on file with the public utilities commission of the state of Colorado and with the federal communications commission; and said sections shall not apply to the normal functions of any operator of a switchboard nor to any officer, agent, or employee of a provider of wire or electronic communication service or other person engaged in the business of providing service, equipment, and facilities for communication who performs an otherwise prohibited act if such act is necessary to provide the communication services, equipment, or facilities or is necessary in the construction, maintenance, repair, operations, or use of the same, including the obtaining of billing and accounting information, the protecting of the communication services, equipment, and facilities from

illegal use in violation of the tariffs referred to in this subsection (2), the protecting of the provider of wire or electronic communication service from the commission of fraud against it, and the providing of requested information in response to a subpoena or court order issued by a court of competent jurisdiction or on demand of other lawful authority.

(3) It shall not be unlawful under sections 18-9-302 to 18-9-304 for an officer, employee, or agent of any provider of wire or electronic communication service or other person to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to section 16-15-102, C.R.S., is authorized to intercept a wire, oral, or electronic communication for that purpose.

(4) A good faith reliance on a court order or the provisions of article 15 of title 16, C.R.S., shall constitute a complete defense to any criminal action brought under provision of sections 18-9-302 to 18-9-304 or any civil action brought under any other law of the state of Colorado. This section shall not be construed in any manner which would allow an investigative or law enforcement officer of the state of Colorado to engage in any wiretapping or eavesdropping without prior authorization by a court of competent jurisdiction under the provisions of article 15 of title 16, C.R.S., except as provided in section 16-15-102 (18), C.R.S.

(4.3) It shall not be unlawful under sections 18-9-302 to 18-9-304 for any person:

(a) To intercept or access an electronic communication made through an electronic communications system that is configured so that such electronic communication is readily accessible to the general public;

(b) To intercept any radio communication which is transmitted by:

(I) Any station for the use of the general public or that relates to ships, aircraft, vehicles, or persons in distress;

(II) Any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) A station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) Any marine or aeronautical communications system;

(c) To engage in any conduct which is:

(I) Prohibited by section 633 of the federal "Communications Act of 1934", as amended; or

(II) Excepted from the application of section 705 (a) of the federal "Communications Act of 1934", as amended, by section 705 (b) of said act;

(d) To intercept any wire or electronic communication, the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(e) For other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(4.5) It shall not be unlawful under sections 18-9-302 to 18-9-304:

(a) To use a pen register or a trap and trace device; or

(b) For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service from fraudulent, unlawful, or abusive use of such service.

(4.7) A person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication other than a communication to such person or entity, or an agent thereof, while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient; except that a person or entity providing electronic communication service to the public may divulge the contents of any such communication:

(a) As otherwise authorized in section 16-15-102 (12), (13), (14), and (16), C.R.S., and subsections (2) and (3) of this section;

(b) With the lawful consent of the originator or any addressee or intended recipient of such communication;

(c) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(d) Which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4.9) It shall not be unlawful for a district attorney or law enforcement officer to listen to a recording of or to read a transcription of the contents of an electronic communication involving a cordless telephone when the district attorney or law enforcement officer has come into possession of such materials from a third party. In order to use such materials as evidence in a prosecution for a crime other than wiretapping or eavesdropping, the district attorney or law enforcement officer shall have a reasonable basis for believing that the recording or transcription is reliable and shall also have separate probable cause based on corroborating evidence to support a reasonable belief that the crime was committed. Nothing in this subsection (4.9) shall preclude a district attorney from prosecuting a person for a violation of section 18-9-303 or 18-9-304.

(5) The exceptions in this section shall be affirmative defenses.

Source: L. 71: R&RE, p. 474, § 1. C.R.S. 1963: § 40-9-305. L. 72: p. 272, § 4. L. 73: p. 539, § 10. L. 88: (2) and (3) amended and (4.3), (4.5), and (4.7) added, p. 693, § 7, effective May 29. L. 91: (4) amended, p. 435, § 2, effective May 18. L. 97: (4.9) added, p. 602, § 4, effective August 6.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

This section is not unconstitutionally vague in that it fails to delineate who has the responsibility of giving notice and does not state "how notice is to be given". *People v. McCauley*, 192 Colo. 545, 561 P.2d 335 (1977).

The affirmative "security or business purpose" defense does not take effect until reasonable notice is given to the public by the agent, the owner, or some third party. *People v. McCauley*, 192 Colo. 545, 561 P.2d 335 (1977).

The burden of giving "reasonable notice" to the public can be placed upon the party who

installed the wiretap. *People v. McCauley*, 192 Colo. 545, 561 P.2d 335 (1977).

Monitoring conversations between husband and wife in jail not wiretapping or eavesdropping. Monitoring the conversations between a husband and wife in the visiting room of a jail is not wiretapping or eavesdropping because such conversations are not within § 18-9-301's definitions of "wire communication" and "oral communication". *People v. Blehm*, 44 Colo. App. 472, 623 P.2d 411 (1980).

18-9-306. Abuse of telephone and telegraph service. (1) A person commits a class 3 misdemeanor, if:

(a) As an employee of a telegraph or telephone company he knowingly divulges the contents or the purport of any message or part thereof sent or intended to be sent to any person other than one to whom said message is sent or person authorized to receive the same; or

(b) He knowingly sends or delivers a false message or furnishes or conspires to furnish such message to an operator to be sent or delivered with intent to injure, deceive, or defraud any person, corporation, or the public; or

(c) He knowingly and without authorization opens any sealed envelope enclosing a message with the purpose of learning the contents; or

(d) He impersonates another, and thereby procures the delivery to himself of the message directed to such person, with the intent to use, destroy, or detain the same; or

(e) He knowingly and without authorization reads or learns the contents or meaning of a message on its transit and uses or communicates to another any information so obtained; or

(f) He knowingly bribes a telegraph or telephone operator or employee of a telegraph

or telephone company to disclose any private message or the purport of the same received by him by reason of his trust as agent of the company or uses such information when thus obtained.

Source: L. 71: R&RE, p. 475, § 1. C.R.S. 1963: § 40-9-306. L. 77: (1)(a), (1)(c), (1)(e), and (1)(f) amended, p. 970, § 61, effective July 1.

18-9-306.5. Obstruction of telephone or telegraph service. (1) A person commits obstruction of telephone or telegraph service if the person knowingly prevents, obstructs, or delays, by any means whatsoever, the sending, transmission, conveyance, or delivery in this state of any message, communication, or report by or through any telegraph or telephone line, wire, cable, or other facility or any cordless, wireless, electronic, mechanical, or other device.

(2) Obstruction of telephone or telegraph service is a class 1 misdemeanor.

Source: L. 2002: Entire section added, p. 1588, § 24, effective July 1.

18-9-307. Refusal to yield party line. (1) The following definitions are applicable to this section:

(a) "Party line" means a subscribers' line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

(b) "Emergency" means a situation in which property or human safety is in jeopardy and the prompt summoning of aid is essential.

(2) Any person who willfully refuses to immediately yield or surrender the use of a party line when informed that the line is needed for an emergency call to a fire department, or police department, or sheriff's office or for medical aid or ambulance service commits a class 1 petty offense. This section shall not apply to persons using a party line for such an emergency call.

(3) Any person who requests the use of a party line on the pretext that an emergency exists, knowing that no emergency in fact exists, commits a class 1 petty offense, punishable by a fine of one hundred dollars.

Source: L. 71: R&RE, p. 475, § 1. C.R.S. 1963: § 40-9-307.

18-9-308. Telephone directories to contain notice. Every telephone directory published for distribution to the members of the general public shall contain a notice which explains the provisions of section 18-9-307. Such notice shall be printed in type which is no smaller than ten-point type and shall be preceded by the word "WARNING". The provisions of this section shall not apply to those directories distributed solely for business advertising purposes, commonly known as classified directories. Any person, firm, or corporation providing telephone service which distributes or causes to be distributed in this state telephone directories which are subject to the provisions of this section and which do not contain the notice provided for in this section commits a class 1 petty offense.

Source: L. 71: R&RE, p. 476, § 1. C.R.S. 1963: § 40-9-308.

18-9-309. Telecommunications crime. (1) As used in this section and section 18-9-309.5:

(a) "Access device" means any card, plate, code, account number, or other means of access that can be used, alone or in conjunction with another access device, to obtain telecommunications service.

(a.5) "Cellular phone" means a radio telecommunications device that may be used to obtain telecommunications services and that is programmed with an electronic serial number by or with the consent of the cellular phone manufacturer.

(a.7) “Cloned cellular phone” means a cellular phone, the electronic serial number of which has been altered without the consent of the cellular phone’s manufacturer.

(a.8) “Cloning equipment” means any instrument, apparatus, equipment, computer hardware, computer software, operating procedure or code, or device, whether used separately or in combination, that is designed or adapted and is used, is intended to be used, or is capable of being used:

(I) To intercept signals, including signals transmitted to or from cellular phones, between a telecommunications provider and persons using telecommunications services or between persons using telecommunications services; or

(II) To create cloned cellular phones.

(b) “Credit card number” means the card number appearing on a credit card which is an identification card or plate issued to a person by any supplier of telecommunications service which permits the person to whom the card has been issued to obtain telecommunications service on credit. The term includes the number or description of the card or plate even if the card or plate itself is not produced at the time of obtaining telecommunications service.

(b.7) “Electronic serial number” means an electronic number that is programmed into a cellular phone by or with the consent of the manufacturer, transmitted by the cellular phone, and used by cellular phone telecommunications providers to validate radio transmissions as having been made by cellular phones authorized or approved by telecommunications providers.

(c) “Illegal telecommunications equipment” means any instrument, apparatus, equipment, computer hardware, computer software, mechanism, operating procedure or code, or device, whether used separately or in combination, that is designed or adapted and is used or is intended to be used to evade the lawful charges for any telecommunications service or for concealing from any telecommunications provider or lawful authority the existence, place of origin, or destination of any telecommunication. Illegal telecommunications equipment includes cloned cellular phones.

(c.5) To “intercept signals” means to electronically capture, record, reveal, or otherwise access signals, including data, electronic serial numbers, and mobile identification numbers, that are emitted, transmitted, or received by a telecommunications provider without consent of the telecommunications provider or the person receiving or initiating the signal.

(c.7) “Mobile identification number” means the cellular phone number assigned to a cellular phone by the cellular phone telecommunications provider.

(d) “Telecommunications device” means any instrument, apparatus, method, system, or equipment which controls, measures, directs, or facilitates telecommunications service. The term includes, but is not limited to, computer hardware, software, programs, electronic mail systems, voice mail systems, identification validation systems, and private branch exchanges.

(e) “Telecommunications provider” means any person, firm, association, or any corporation, private or municipal, owning, operating, or managing any facilities used to provide telecommunications service.

(f) “Telecommunications service” means a service which, in exchange for a pecuniary consideration, provides or offers to provide transmission of messages, signals, facsimiles, or other communication between persons who are physically separated from each other by means of telephone, telegraph, cable, wire, or the projection of energy without physical connection.

(g) “Telephone company” means any telecommunications provider which provides local exchange telecommunications service.

(2) A person commits a class 3 misdemeanor if he or she knowingly:

(a) Accesses, uses, manipulates, or damages any telecommunications device without the authority of the owner or person who has the lawful possession or use thereof;

(b) Makes, possesses, or uses illegal telecommunications equipment; except that a person who knowingly uses cloning equipment to create a cloned cellular phone commits a class 4 felony as provided in subsection (4) of this section;

(c) Sells, gives, or furnishes to another or advertises or offer for sale illegal telecommunications equipment;

(d) Sells, gives, or furnishes to another or advertises or offers for sale any plans or instructions for making, assembling, or using illegal telecommunications equipment; or

(e) Sells, rents, lends, gives, publishes, or otherwise transfers or discloses to another or offers or advertises for sale or rental the number or code of a counterfeited, cancelled, expired, revoked, or nonexistent telephone number or credit card number or method of numbering or coding which is employed in the issuance of telephone numbers access devices or credit card numbers or an existing number or code or method of numbering or coding without the authority of the owner or person who has the lawful possession or use thereof.

(2.5) A person commits a class 6 felony if, within five years after a previous violation of subsection (2) of this section, the person commits a second or subsequent violation of subsection (2) of this section; except that a second or subsequent violation of subsection (2) of this section involving knowingly using cloning equipment to create a cloned cellular phone, as described in paragraph (b) of subsection (2) of this section, is a class 4 felony.

(3) A person commits theft as defined in section 18-4-401 and shall be subject to the penalties as set forth in that section if he knowingly:

(a) Obtains any telecommunications service by charging such service to or causing such service to be charged to an existing telephone number, access device, or credit card number without the authority of the person to whom issued or of the subscriber thereto or of the lawful holder thereof or to a nonexistent, counterfeit, expired, revoked, or cancelled credit card number, or by any method of code calling, or by installing, rearranging, or tampering with any equipment, physically or electronically, or by the use of any other fraudulent means, method, trick, or device or scheme;

(b) Obtains telecommunications service with fraudulent intent through the use of a false or fictitious name, telephone number, address, or credit information or through the unauthorized use of the name, telephone number, address, or credit information of another.

(4) (a) A person commits a class 4 felony if he or she knowingly uses cloning equipment to:

(I) Intercept signals, including signals transmitted to or from cellular phones, between a telecommunications provider and persons using telecommunications services or between persons using telecommunications services; or

(II) Create a cloned cellular phone.

(b) A person commits a class 4 felony if he or she aids, abets, advises, or encourages one or more persons who engage in the activities described in paragraph (a) of this subsection (4).

(c) Each violation of this subsection (4), including each instance of intercepting signals or of creating a cloned cellular phone, shall be a separate offense.

(5) The provisions of this section do not apply to:

(a) Officers, employees, or agents of telecommunications providers who engage in conduct prohibited by this section for the purpose of constructing, maintaining, or conducting telecommunications services or for law enforcement purposes;

(b) Law enforcement officers and public officials in charge of jails, police premises, sheriffs' offices, department of corrections' institutions, or other penal or correctional institutions or any other person under the color of law who engages in conduct prohibited by this section for the purpose of law enforcement or in the normal course of the officer's or official's employment activities or duties; or

(c) Officers, employees, or agents of federal or state agencies who are authorized to monitor or intercept cellular telephone service in the normal course of the officer's, employee's, or agent's employment.

(6) Prosecution under this section does not preclude civil liability under any applicable provision of law.

Source: L. 71: R&RE, p. 476, § 1. C.R.S. 1963: § 40-9-309. L. 89: (3) amended, p. 841, § 92, effective July 1. L. 90: Entire section R&RE, p. 993, § 1, effective April 3. L. 97: (1)(a.5), (1)(a.7), (1)(a.8), (1)(b.7), (1)(c.5), (1)(c.7), (2.5), and (4) to (6) added and (1)(c), IP(2), and (2)(b) amended, pp. 989, 990, §§ 1, 2, effective July 1.

ANNOTATION

An intent to steal a communications service is a necessary element of the criminal offense proscribed by this section. Am. Television &

Commc'ns Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982).

18-9-309.5. Civil remedies - injunctions - forfeiture. (1) Whenever it appears that any person is engaged in or about to engage in any act which constitutes or will constitute a violation of section 18-9-309 (2) or (3), the attorney general, the district attorney, a representative of a telecommunications provider, or any person or company harmed by such alleged violation may initiate a civil proceeding in a district court to enjoin such violation and may petition the court to issue an order for the discontinuance of telecommunications service, used in violation of section 18-9-309 (2) or (3).

(2) An action under this section shall be brought in the county in which the subject matter of the action, or some part thereof, is located or found and shall be commenced by the filing of a complaint, which shall be verified by affidavit.

(3) If it is shown to the satisfaction of the court, either by verified complaint or affidavit, that a person is engaged in or about to engage in any act which constitutes a violation of section 18-9-309 (2) or (3), the court shall issue a temporary restraining order to abate and prevent the continuance or recurrence of such act. The court shall direct the sheriff to seize and retain until further order of the court any device which is being used in violation of section 18-9-309 (2) or (3). While the temporary restraining order remains in effect, all property seized pursuant to the order of the court shall remain in the custody of the court. Within fourteen days following the filing of a motion of any person adversely affected by a temporary restraining order, the court shall conduct a hearing and determine whether such temporary restraining order shall be continued pending final determination of the action. Until such hearing takes place, the temporary restraining order shall remain in full force and effect.

(4) The court may issue a permanent injunction to restrain, abate, or prevent the continuance or recurrence of the violation of section 18-9-309 (2) or (3). The court may grant declaratory relief, mandatory orders, or any other relief deemed necessary to accomplish the purposes of the injunction. The court may retain jurisdiction of the case for the purpose of enforcing its orders.

(5) If it is shown to the satisfaction of the court, either by verified complaint or affidavit, that a person is engaged in or is about to engage in any act which constitutes a violation of section 18-9-309 (2) or (3), the court may issue an order which shall be promptly served upon the person in whose name the illegal telecommunications equipment is listed, requiring the party, within a reasonable time to be fixed by the court but not exceeding forty-eight hours from the time of service of the petition on said party, to show cause before the judge why telecommunications service should not promptly be discontinued. At the hearing the burden of proof shall be on the complainant.

(6) Upon a finding by the court that the illegal telecommunications equipment is being used or has been used in violation of section 18-9-309 (2) or (3), the court shall issue an order requiring the telephone company which is rendering service over the device to disconnect such service. Upon receipt of such order, which shall be served upon an officer of the telephone company by the sheriff of the county in which the illegal telecommunications equipment is installed or by a duly authorized deputy, the telephone company shall proceed promptly to disconnect and remove such device and discontinue all telecommunications service until further order of the court.

(7) The telecommunications provider who petitions the court for the removal of any illegal telecommunications equipment under this section shall be a necessary party to any proceeding or action arising out of or under section 18-9-309 (2) or (3).

(8) No telephone company shall be liable for any damages, penalty, or forfeiture, whether civil or criminal, for any act performed in good faith and in compliance with any order issued by the court.

(9) Property seized pursuant to the direction of the court which the court has determined to have been used in violation of section 18-9-309 (2) or (3) shall be forfeited to the

state. Prior to the disposition of the seized property, a petition for the remission or mitigation of forfeiture may be filed. The court may remit or mitigate the forfeiture upon terms and conditions as the court deems reasonable if it finds that such forfeiture was incurred without willful negligence or without any intention on the petitioner to violate the law or finds the existence of such mitigating circumstances as to justify the remission or the mitigation of the forfeiture. In determining whether to remit or mitigate forfeiture, the court shall consider losses which may have been suffered by victims as the result of the use of the forfeited property.

Source: **L. 90:** Entire section added, p. 995, § 2, effective April 3. **L. 2012:** (3) amended, (SB 12-175), ch. 208, p. 873, § 131, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (3) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

18-9-310. Unlawful use of information - penalty. Any person who, having obtained information pursuant to a court order for wiretapping or eavesdropping, knowingly uses, publishes, or divulges the information to any person or in any manner not authorized by this part 3 commits a class 6 felony.

Source: **L. 72:** p. 272, § 5. **C.R.S. 1963:** § 40-9-310. **L. 89:** Entire section amended, p. 841, § 93, effective July 1.

Cross references: For court orders for wiretapping or eavesdropping, see § 16-15-102.

18-9-311. Automated dialing systems prohibited. (1) No person shall utilize an automated dialing system with a prerecorded message for the purpose of soliciting another person to purchase goods or services, whether such solicitation occurs or is intended to occur during the prerecorded message or during some further communication initiated by or resulting from the prerecorded message, unless there is an existing business relationship between such persons and the person being called then consents to hear the prerecorded message.

(2) Any person who violates this section commits a class 1 petty offense.

Source: **L. 79:** Entire section added, p. 745, § 1, effective July 1. **L. 88:** (1) amended, p. 348, § 15, effective July 1.

18-9-312. Hostages or armed person in geographical area - telephone, electronic, cellular, or digital communications. (1) (a) Notwithstanding the provisions of sections 18-9-302 to 18-9-311, any supervising representative of a law enforcement agency shall have the authority to order a previously designated security employee of a communications or internet access provider to arrange, to the extent the necessary technology is reasonably available to the provider, to cut, reroute, or divert telephone lines or cellular or digital communications signals if the supervising representative has probable cause to believe that:

(I) A person has taken one or more other persons hostage and is holding the hostages in the geographical area in which the supervising representative has jurisdiction; or

(II) A person has barricaded himself or herself in a structure or a motor vehicle within the geographical area in which the supervising representative has jurisdiction and the supervising representative has a reasonable belief that the person is armed with a deadly weapon or explosive device and poses a danger to himself or herself or others.

(b) The supervising representative of a law enforcement agency may order the cutting, rerouting, or diverting of telephone lines or cellular or digital communications signals pursuant to paragraph (a) of this subsection (1) only for the purpose of preventing telephone or other electronic, cellular, or digital communication by the hostage holder or the armed person with any person other than a peace officer or a person authorized by the peace officer.

The communications or internet access provider shall restore the normal operations of the telephone lines or cellular or digital communications signals as soon as practicable following resolution of the exigent circumstances.

(2) The serving communications or internet access provider within the geographical area of a law enforcement agency shall designate a security official employed by the provider and an alternate to provide all required assistance to law enforcement officials to carry out the purposes of this section.

(3) Good faith reliance on an order by any supervising representative of a law enforcement agency shall constitute a complete defense to any action brought against a communications or internet access provider or any of its employees or agents in connection with actions taken under this section. A communications or internet access provider and its employees or agents shall not be liable in any civil action to any person or entity for injuries, death, or loss to any person or property incurred as a result of any act or omission resulting from, connected with, or incidental to compliance with this section.

Source: **L. 81:** Entire section added, p. 976, § 17, effective July 1. **L. 2009:** Entire section amended, (SB 09-284), ch. 337, p. 1781, § 1, effective June 1.

18-9-313. Personal information on the internet - law enforcement official. (1) As used in this section:

(a) “Immediate family” means a law enforcement official’s spouse, child, or parent or any other blood relative who lives in the same residence as the law enforcement official.

(a.5) “Law enforcement official” means a peace officer as described in section 16-2.5-101, C.R.S., a judge as defined by section 18-8-615 (3), or a prosecutor.

(b) “Personal information” means a law enforcement official’s home address, home telephone number, personal mobile telephone number, pager number, personal e-mail address, personal photograph, directions to the law enforcement official’s home, or photographs of the law enforcement official’s or the official’s immediate family member’s home or vehicle.

(2) It is unlawful for a person to knowingly make available on the internet personal information about a law enforcement official or the official’s immediate family member, if the dissemination of the personal information poses an imminent and serious threat to the law enforcement official’s safety or the safety of the law enforcement official’s immediate family and the person making the information available on the internet knows or reasonably should know of the imminent and serious threat.

(3) A violation of subsection (2) of this section is a class 1 misdemeanor.

Source: **L. 2002:** Entire section added, p. 1139, § 1, effective July 1. **L. 2003:** (2) amended, p. 1616, § 14, effective August 6. **L. 2009:** (1) and (2) amended, (HB 09-1316), ch. 313, p. 1696, § 1, effective May 21.

ARTICLE 10

Gambling

Editor’s note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor’s note following the title heading.

Cross references: For the power of municipalities to regulate gambling, see § 31-15-401 (1)(o).

18-10-101.	Legislative declaration - construction.	18-10-105.	ceeds. Possession of a gambling device or record.
18-10-102.	Definitions.	18-10-106.	Gambling information.
18-10-103.	Gambling - professional gambling - offenses.	18-10-107.	Gambling premises.
18-10-104.	Gambling devices - gambling records - gambling pro-	18-10-108.	Exceptions.

18-10-101. Legislative declaration - construction. (1) It is declared to be the policy of the general assembly, recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from seeking profit from gambling activities in this state; to restrain all persons from patronizing such activities when conducted for the profit of any person; to safeguard the public against the evils induced by common gamblers and common gambling houses; and at the same time to preserve the freedom of the press and to avoid restricting participation by individuals in sport and social pastimes which are not for profit, do not affect the public, and do not breach the peace.

(2) All the provisions of this article shall be liberally construed to achieve these ends and administered and enforced with a view to carrying out the declaration of policy stated in subsection (1) of this section.

Source: L. 71: R&RE, p. 477, § 1. C.R.S. 1963: § 40-10-101.

ANNOTATION

Annotator's note. Since § 18-10-101 is similar to former § 40-10-3, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This article prohibits gambling, the keeping of a place where gambling is commonly carried on, the keeping at such place, and exhibiting of gambling devices, and the betting of money or other property upon the results of any game. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

The legislative intent of this section is to prevent public gambling, and includes the risking of money or anything of value between two or more persons, on a contest of either chance, skill, or hazard, where one must be the loser and the other the gainer. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

The declaration of this section evidences a continuation of the policy against gambling for profit in Colorado. *Condado Aruba Caribbean Hotel, N.V. v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977).

Golf match not "gambling". A golf match, participated in and bet on by four golfers, in which each of the four, by his playing, had control over the outcome did not constitute "gambling" as defined in § 18-10-102 (2). *Berckefeldt v. Hammer*, 44 Colo. App. 320, 616 P.2d 183 (1980).

"Social gambling" specifically allowed. This section changed the common law and specifically exempted "social gambling" from the ambit of forbidden conduct. *Houston v. Youngmans*, 196 Colo. 53, 580 P.2d 801 (1978).

"Social gambling" is game incidental to bona fide social relationship, participated in by natural persons in no way connected to professional gambling. *Houston v. Youngmans*, 196 Colo. 53, 580 P.2d 801 (1978).

Gambling debts owed to a for-profit gambling business are still unenforceable in this state, despite the repeal of former C.R.S. 1963, section 40-10-13. *Condado Aruba Caribbean Hotel, N.V. v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977).

The declaration of this section does not support the contention that, although gambling is illegal and against public policy when it occurs in Colorado, it would not be contrary to public policy to enforce gambling debts incurred where gambling is legal. To the contrary, in the above legislative declaration there is a policy restraining any activities related to gambling conducted for profit, when not specifically sanctioned by statute, including collection of any gambling debts. *Condado Aruba Caribbean Hotel, N.V. v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977).

This section commands that the act be liberally construed. *Bridge v. People*, 63 Colo. 319, 165 P. 778 (1917).

Because of this section, care need be exercised that neither by illogical construction nor by loose language this article be so circumscribed as to defeat its purpose and usefulness. *McBride v. People*, 126 Colo. 277, 248 P.2d 725 (1952); *Patterson v. People*, 138 Colo. 368, 333 P.2d 1047 (1959).

This section declares that the definitive statute shall be liberally construed for the detection and punishment of offenders. *Fischer v. People*, 138 Colo. 559, 335 P.2d 871 (1959); *Patterson v. People*, 138 Colo. 368, 333 P.2d 1047 (1959).

State gambling legislation did not preempt municipal ordinance. *Woolverton v. City & County of Denver*, 146 Colo. 247, 361 P.2d 982 (1961), overruled insofar as it invalidated the theory of mutual exclusion where it related to matters of both state-wide and local interest in *Vela v. People*, 174 Colo. 465, 484 P.2d 1204 (1971), which held that in strictly local and municipal matters ordinances of home rule cities apply to the exclusion of state statutes.

18-10-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Gain" means the direct realization of winnings; "profit" means any other realized or unrealized benefit, direct or indirect, including without limitation benefits from proprietorship, management, or unequal advantage in a series of transactions.

(2) "Gambling" means risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event, including a sporting event, over which the person taking a risk has no control, but does not include:

(a) Bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries;

(b) Bona fide business transactions which are valid under the law of contracts;

(c) Other acts or transactions now or hereafter expressly authorized by law;

(d) Any game, wager, or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling; or

(e) Repealed.

(f) Any use of or transaction involving a crane game, as defined in section 12-47.1-103 (5.5), C.R.S.

(3) "Gambling device" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any professional gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine; except that the term does not include a crane game, as defined in section 12-47.1-103 (5.5), C.R.S.

(4) "Gambling information" means a communication with respect to any wager made in the course of, and any information intended to be used for, professional gambling. In the application of this definition the following shall be presumed to be intended for use in professional gambling: Information as to wagers, betting odds, or changes in betting odds. Legitimate news reporting of an event for public dissemination is not gambling information within the meaning of this article.

(5) "Gambling premises" means any building, room, enclosure, vehicle, vessel, or other place, whether open or enclosed, used or intended to be used for professional gambling. In the application of this definition, any place where a gambling device is found is presumed to be intended to be used for professional gambling.

(6) "Gambling proceeds" means all money or other things of value at stake or displayed in or in connection with professional gambling.

(7) "Gambling record" means any record, receipt, ticket, certificate, token, slip, or notation given, made, used, or intended to be used in connection with professional gambling.

(8) "Professional gambling" means:

(a) Aiding or inducing another to engage in gambling, with the intent to derive a profit therefrom; or

(b) Participating in gambling and having, other than by virtue of skill or luck, a lesser chance of losing or a greater chance of winning than one or more of the other participants.

(9) "Repeating gambling offender" means any person who is convicted of an offense under section 18-10-103 (2) or sections 18-10-105 to 18-10-107 or sections 12-47.1-809 to 12-47.1-811 or 12-47.1-818 to 12-47.1-832 or 12-47.1-839, C.R.S., or sections 18-20-103 to 18-20-114 within five years after a previous misdemeanor conviction under these sections or a former statute prohibiting gambling activities, or at any time after a previous felony conviction under any of the mentioned sections. A conviction in any jurisdiction of the United States of an offense which, if committed in this state, would be professional gambling shall warrant a prosecution in this state as a repeating gambling offender.

(10) "Vintage slot machine" means any model slot machine, as defined in section 12-47.1-103 (26), C.R.S., that was introduced on the market prior to January 1, 1984.

Source: L. 71: R&RE, p. 477, § 1. C.R.S. 1963: § 40-10-102. L. 79: (2)(e) added, p. 557, § 3, effective July 1. L. 84: (2)(e) repealed, p. 437, § 2, effective April 30. L. 91: (9)

amended, p. 1582, § 8, effective June 4. **L. 92:** (9) amended, p. 2174, § 26, effective June 2. **L. 94:** (10) added, p. 19, § 1, effective March 2. **L. 95:** (2) and (3) amended, p. 44, § 1, effective March 17.

ANNOTATION

Annotator's note. Since § 18-10-102 is similar to former CSA, C. 48, § 234, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

The language of this section is plain and unambiguous. The statute does not prohibit the playing of games. It is only when they are made instruments of winning or losing money or property that a criminal character attaches to them. There being no enumeration of specific games, subjects or things, the general words used must be ascribed their ordinary meaning. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

Gambling defined. Gambling includes physical contests whether of man or beast, when practiced for the purpose of deciding wagers, as well as games of hazard or skill by means of instruments or devices. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

Golf match not "gambling". A golf match, participated in and bet on by four golfers, in which each of the four, by his playing, had control over the outcome did not constitute "gambling" as defined in subsection (2). *Berkefeldt v. Hammer*, 44 Colo. App. 320, 616 P.2d 183 (1980).

Definition of gambling devices pertains to use. The words "gambling device or apparatus" do not mean literally instrumentalities with appliances adapted and essential to particular games, but include any species of device or apparatus kept and used for gambling, winning, betting, or gaining money or other property. It is the use to which the article or thing is appropriated which renders the keeping or exhibition thereof unlawful within the meaning of the sections here involved. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

"Pinball" machines held gambling devices. Approximately Fifty-Nine Gambling Devices v. *People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

Paper tickets that contain a coupon on one side and a cash prize game on the other and the machine that dispenses them are gambling devices. The coupon is merely incidental to the game portion of the ticket, and it does not eliminate the element of risk. *Snizek v. Dept. of Rev.*, 113 P.3d 1280 (Colo. App. 2005).

Video games that had been used in gambling by liquor licensee were "usable in professional gambling activities" so that the games were subject to destruction and the proceeds of such games were subject to forfeiture pursuant to statute, even if the owner did not have actual

or constructive knowledge of the use of the games for gambling. *State Dept. of Rev. v. Grooms Music Co.*, 721 P.2d 1225 (Colo. App. 1986).

Nonprofit corporation's fundraising which involved casino-type gambling with play money did not qualify for the permissible social gambling exemption of this section because participants were risking a thing of value for gain contingent in whole or in part upon chance and the gambling, although incidental to a social relationship, was participated in by persons other than natural persons and was conducted under circumstances in which persons participated in professional gambling as intended by the statute. *Charnes v. Central City Opera House*, 773 P.2d 546 (Colo. 1989).

To determine whether a game is incidental to a bona fide social relationship and thus excluded from the definition of gambling, the critical inquiry is whether the participants came together for any shared purpose other than gambling; where a basketball pool was entered into only by devoted patrons of a neighborhood bar and liquor authority inspectors, it was incidental to a bona fide social relationship. *Leichliter v. State Liquor Licensing Auth.*, 9 P.3d 1153 (Colo. 1999).

Cheating is not an essential element of the offense. Previous legislation was directed against games and bets thereon in which an element of cheating, trickery, or fraud entered, and to places wherein such games and bets continuously occurred; whereas this act, being the law as it now is, is directed against all places used or occupied for gambling, the keeping or exhibiting of gaming tables, establishments, devices, etc., to win or gain money or other property, the practice of gambling for a sum of money or other thing of value, and betting and wagering upon the result thereof. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

Nor is payment of winnings. While a gaming device may "pay nothing", it nevertheless may be used or kept for the purpose of gambling. *Walker v. Begole*, 99 Colo. 471, 63 P.2d 1224 (1936); *MacArthur v. Wycaver*, 120 Colo. 525, 211 P.2d 556 (1949).

The activity reached by this section could not be characterized as free expression or involving any right to privacy as that right has previously been defined. *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

The definition of "profit" in subsection (1) is not unconstitutionally vague. *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

Nor is phrase “aiding or inducing”. The phrase “aiding or inducing” as employed in subsection (8)(a) is not unconstitutionally vague. *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

The general definition of “to aid” in § 18-1-901 (3)(a) is applicable to the definition of professional gambling in subsection (8). *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

The term “to induce”, while not statutorily defined, may be ascribed its ordinary dictionary

definition. *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

Active participation in gambling process not required. It is not necessary in this state that someone actively participate in the gambling process in order to be engaged in professional gambling. *People v. Wheatridge Poker Club*, 194 Colo. 15, 569 P.2d 324 (1977).

Applied in *Houston v. Youngmans*, 196 Colo. 53, 580 P.2d 801 (1978); *People v. Miller*, 199 Colo. 32, 604 P.2d 36 (1979); *United States v. McNulty*, 729 F.2d 1243 (10th Cir. 1983).

18-10-103. Gambling - professional gambling - offenses. (1) A person who engages in gambling commits a class 1 petty offense.

(2) A person who engages in professional gambling commits a class 1 misdemeanor. If he is a repeating gambling offender, it is a class 5 felony.

Source: L. 71: R&RE, p. 478, § 1. C.R.S. 1963: § 40-10-103.

ANNOTATION

Annotator’s note. Since § 18-10-103 is similar to former § 40-10-8, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Construction of section. The offense punished by this section was not a crime at common law, and under ordinary circumstances the statute would be subjected to strict construction. The general assembly, however, specifically provided to the contrary in § 18-10-101. Care, therefore, need be exercised that neither by illogical construction nor by loose language be it so circumscribed as to defeat its purpose and usefulness. *McBride v. People*, 126 Colo. 277, 248 P.2d 725 (1952).

Constitutionality of section. The fact that certain types of gambling were allowed by statute did not deny the petitioner, who was charged with gambling violations, equal protection of the law, especially where § 18-10-107 and this section, under which charges of gambling were issued against the petitioner, applied equally to all persons and made no classifications or distinctions. *Smaldone v. People*, 173 Colo. 385, 479 P.2d 973 (1971).

Playing for purpose of gain violates section. Under a charge of gambling, whether defendants played at a game for a wager with each other or with others is immaterial. If they played for the purpose of gain, whether against each other or with others, they violated the statute. *Wilson v. People*, 103 Colo. 150, 84 P.2d 463 (1938).

Question of residence not material under section. An information which charges in the language of the statute that defendants engaged in gambling for a livelihood is not insufficient because it does not further allege that they were

without any fixed residence, gambling for a livelihood being a violation of the statute irrespective of the question of residence. *Wilson v. People*, 103 Colo. 150, 84 P.2d 463 (1938).

Two persons may be tried jointly for gambling for a livelihood although the intent of each to secure a livelihood was personal to himself. *Wilson v. People*, 103 Colo. 150, 84 P.2d 463 (1938).

Introduction of reputation evidence not reversible error. Where evidence of the defendant’s reputation of gambling for a livelihood is corroborative of other evidence, which is sufficient in itself to support the conviction, the introduction of reputation evidence does not constitute reversible error and the holding is limited to the offense of gambling for a livelihood. *McNulty v. People*, 180 Colo. 246, 504 P.2d 335 (1972).

For purposes of determining the legality of an ex parte order for wiretapping under section 16-15-102, the proposed intervention must involve a person who has previously been convicted of professional gambling twice within 5 years, so that a felony is authorized upon conviction. *United States v. McNulty*, 729 F.2d 1243 (10th Cir. 1983).

Nonprofit corporation’s fundraising which involved casino-type gambling with play money violated this section because participants were risking a thing of value for gain contingent in whole or in part upon chance and the gambling, although incidental to a social relationship, was participated in by persons other than natural persons and was conducted under circumstances in which persons participated in professional gambling as intended by the statute. *Charnes v. Central City Opera House*, 773 P.2d 546 (Colo. 1989).

Applied in *People ex rel. Brown v. District Court*, 196 Colo. 359, 585 P.2d 593 (1978);

People v. Miller, 199 Colo. 32, 604 P.2d 36 (1979).

18-10-104. Gambling devices - gambling records - gambling proceeds. (1) Except as provided in subsection (2) of this section, all gambling devices, gambling records, and gambling proceeds are subject to seizure by any peace officer and may be confiscated and destroyed by order of a court acquiring jurisdiction. Gambling proceeds shall be forfeited to the state and shall be transmitted by court order to the general fund of the state.

(2) If a gambling device is a vintage slot machine and is not operated for gambling purposes for profit or for business purposes, it shall not be confiscated or destroyed pursuant to subsection (1) of this section. If a gambling device is confiscated and the owner shows that such gambling device is a vintage slot machine and is not used for gambling purposes, the court acquiring jurisdiction shall order such vintage slot machine returned to the person from whom it was confiscated.

Source: L. 71: R&RE, p. 478, § 1. C.R.S. 1963: § 40-10-104. L. 79: Entire section amended, p. 746, § 1, effective May 25. L. 88: (2) amended, p. 739, § 1, effective April 29. L. 94: (2) amended, p. 19, § 2, effective March 2.

ANNOTATION

Annotator's note. Since § 18-10-104 is similar to former §§ 40-10-13, CRS 53, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section does not deny due process. *Walker v. Begole*, 99 Colo. 471, 63 P.2d 1224 (1936).

This section is not in violation of § 25 of art. II, Colo. Const., providing that no person shall be deprived of life, liberty, or property without due process of law in the respect that no provision is made for jury trial. *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903); *Stanley-Thompson Liquor Co. v. People*, 63 Colo. 456, 168 P. 750 (1917).

And right to jury trial does not exist. A proceeding under this section is a proceeding in rem, and the constitutional right of trial by jury does not apply to such proceeding. *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903); Approximately Fifty-Nine Gambling Devices v. *People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

Gambling apparatus and implements are treated by this section as noxious per se, and they are ordered destroyed to remove a danger imminent from their very existence, not merely to punish the owner for an unlawful use. This section strikes at the thing itself, and not at any act or intent of its owner. *Newman v. People*, 23 Colo. 300, 47 P. 278 (1896); *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903); *Walker v. Begole*, 99 Colo. 471, 63 P.2d 1224 (1936); *MacArthur v. Wycaver*, 120 Colo. 525, 211 P.2d 556 (1949).

They may be lawfully destroyed by the officers authorized thereunto, even though not used nor kept for use by the one having them in possession. *Stanley-Thompson Liquor Co. v. People*, 63 Colo. 456, 168 P. 750 (1917).

Gambling devices may legally be destroyed whether they are actually used for gambling or not. Approximately Fifty-Nine Gambling Devices v. *People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

If done pursuant to court order. This section provides a means for the destruction of gambling paraphernalia, but even in such case it is to be accomplished in an orderly manner and upon the order of a court of competent jurisdiction. *Houston v. Walton*, 23 Colo. App. 282, 129 P. 263 (1913).

Whether machines were kept for gambling is question for court. In a proceeding to procure the destruction of gambling devices, the issue of whether the machines were kept for gambling purposes was a question of fact to be determined by the trial court. Approximately Fifty-Nine Gambling Devices v. *People ex rel. Burke*, 110 Colo. 82, 130 P.2d 920 (1942).

Statute providing that gambling devices are subject to seizure and may be confiscated and destroyed by court order does not require that the owner of the machine have knowledge, actual or constructive, that such machines are being used for gambling. *State Dept. of Rev. v. Grooms Music Co.*, 721 P.2d 1225 (Colo. App. 1986).

Destruction of devices is not illegal as to person holding mortgage thereon. The destruction of gambling devices on which there was a chattel mortgage under this section is not illegal as to the mortgagee where the devices were left in the possession of the mortgagor to be used as he saw fit, the mortgagee knowing that the only reasonable use they could be put to was for gambling purposes, although the mortgagee did not actually give his consent to or know of such use by the mortgagor. *Kite v. People*, 32 Colo. 5, 74 P. 886 (1903).

Injunction probably does not lie to restrain seizing gaming devices used for gambling. Walker v. Begole, 99 Colo. 471, 63 P.2d 1224 (1936).

And they cannot be recovered in replevin nor damages given for injury to them. Gambling devices are things capable of no lawful use

and are not the subject of property. They cannot be recovered in replevin, nor will damages be given for their loss or injury. Stanley-Thompson Liquor Co. v. People, 63 Colo. 456, 168 P. 750 (1917).

Applied in Sullivan v. Modern Music Co., 137 Colo. 292, 324 P.2d 374 (1958).

18-10-105. Possession of a gambling device or record. (1) Except as provided in subsection (1.5) of this section, a person who owns, manufactures, sells, transports, possesses, or engages in any transaction designed to affect the ownership, custody, or use of a gambling device or gambling record, knowing that it is to be used in professional gambling, commits possession of a gambling device or record.

(1.5) The sale, transportation, manufacture, and remanufacture of gambling devices, including the acquisition of essential parts therefor and the assembly of such parts, is permitted if such devices are sold, transported, manufactured, and remanufactured only for transportation in interstate or foreign commerce when such transportation is not prohibited by any applicable foreign, state, or federal law. Storage of gambling devices is also permitted but only for purposes of manufacturing, remanufacturing, and transporting such devices in interstate or foreign commerce when their transportation is not prohibited. Such activities may be conducted only by persons who have registered with the United States government pursuant to the provisions of chapter 24 of Title XV of the United States Code, as amended. Such gambling devices shall not be openly displayed, except to legal buyers, or sold for use in Colorado regardless of where purchased, nor manufactured, remanufactured, or stored for purposes of manufacture, remanufacture, and transportation in violation of any applicable state or federal law. For purposes of this subsection (1.5), "legal buyer" means a buyer who resides in another state or country which does not restrict the possession of the specific gambling device in question.

(2) Possession of a gambling device or record or violation of subsection (1.5) of this section is a class 2 misdemeanor. If the offender is a repeating gambling offender, it is a class 6 felony.

Source: L. 71: R&RE, p. 478, § 1. C.R.S. 1963: § 40-10-105. L. 88: Entire section amended, p. 739, § 2, effective April 29. L. 89: (2) amended, p. 841, § 94, effective July 1.

ANNOTATION

The offenses described in this section and section 18-10-107 each require proof of a different element and are not duplicitous. McNulty v. People, 180 Colo. 246, 504 P.2d 335 (1972) (decided under former § 40-10-8, C.R.S. 1963).

Applied in Paulino v. People, 113 Colo. 180, 155 P.2d 609 (1945) (decided under former CSA, C. 48, § 230).

18-10-106. Gambling information. (1) Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, or other means or knowingly installs or maintains equipment for the transmission or receipt of gambling information commits a class 3 misdemeanor. If the offender is a repeating gambling offender, it is a class 6 felony.

(2) Facilities and equipment furnished by a public utility in the regular course of business, and which remain the property of the utility while so furnished, shall not be seized except in connection with an alleged violation of this article by the public utility and shall be forfeited only upon conviction of the public utility therefor.

Source: L. 71: R&RE, p. 478, § 1. C.R.S. 1963: § 40-10-106. L. 89: (1) amended, p. 841, § 95, effective July 1.

ANNOTATION

Subsection (1) held constitutional. U.S. v. Pinelli, 890 F.2d 1461 (10th Cir. 1989), cert. denied, 495 U.S. 960, 110 S. Ct. 2568, 109 L. Ed.2d 750 (1989).

18-10-107. Gambling premises. (1) Whoever as owner, lessee, agent, employee, operator, or occupant knowingly maintains, aids, or permits the maintaining of gambling premises commits maintaining gambling premises.

(2) All gambling premises are common nuisances which shall be subject to abatement as provided by law.

(3) Maintaining gambling premises is a class 3 misdemeanor. If the offender is a repeating gambling offender, it is a class 6 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-10-107. L. 89: (3) amended, p. 842, § 96, effective July 1.

ANNOTATION

Annotator's note. Since § 18-10-107 is similar to former § 40-10-7, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Section does not deny equal protection. The fact that certain types of gambling were allowed pursuant to statute did not deny the petitioner, who was charged with gambling violations, equal protection of the law, especially where this section and § 18-10-103, under which charges of gambling were issued against the petitioner, applied equally to all persons and made no classifications or distinctions. *Smaldone v. People*, 173 Colo. 385, 479 P.2d 973 (1971).

The offenses described in section 18-10-105 and this section each require proof of a different element and are not duplicitous. *McNulty v. People*, 180 Colo. 246, 504 P.2d 335 (1972).

Intent is to prohibit all gambling places. It is clear that the law intends to, and does, prohibit every place commonly used or occupied for gambling of any character whatsoever, and the keeping and exhibiting of any instrumentalities to be used for gambling and winning, betting, or gaining money or other property upon the result of any game, and likewise the practice of

gambling. *Everhart v. People*, 54 Colo. 272, 130 P. 1076 (1913).

And section includes pool halls. The keeper of a pool hall licensed by a city who knowingly permitted several games for money to be played in his hall was held liable to conviction under this section. *Koucles v. People*, 64 Colo. 595, 173 P. 400 (1918).

Information need not name persons who played. In an information under this section for keeping a room to be used and occupied for gambling, it is not necessary to set forth the names of persons who played at games in such room. *Chase v. People*, 2 Colo. 509 (1875).

Evidence held sufficient. *Paulino v. People*, 113 Colo. 180, 155 P.2d 609 (1945).

In a prosecution for keeping a gambling house and gaming devices, evidence of a room and desk, of posted odds on athletic contests, and betting in the establishment occupied by a corporation in the business of which defendant was active was held sufficient to go to the jury and to sustain a verdict of guilty, such facts being uncontradicted. *Wolfe v. People*, 90 Colo. 102, 6 P.2d 927 (1932).

Ordinance licensing casino not valid city ordinance. *Vick v. People*, 166 Colo. 565, 445 P.2d 220 (1968), cert. denied, 394 U.S. 945, 89 S. Ct. 1273, 22 L. Ed.2d 477 (1969).

18-10-108. Exceptions. Nothing contained in this article shall be construed to modify, amend, or otherwise affect the validity of any provisions contained in articles 9, 47.1, and 60 of title 12, C.R.S.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-10-108. L. 91: Entire section amended, p. 1582, § 9, effective June 4.

ARTICLE 11

Offenses Involving Disloyalty

Editor's note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor's note following the title heading.

PART 1			ernment.
TREASON AND RELATED OFFENSES		18-11-202.	Inciting destruction of life or property.
18-11-101.	Treason.	18-11-203.	Membership in anarchistic and seditious associations.
18-11-102.	Insurrection.	18-11-204.	Mutilation - contempt of flag - penalty.
PART 2		18-11-205.	Unlawful to display flag - ex-ceptions.
ANARCHY - SEDITION			
18-11-201.	Advocating overthrow of gov-		

PART 1

TREASON AND RELATED OFFENSES

18-11-101. Treason. (1) A person commits treason if he levies war against the state of Colorado or adheres to its enemies, giving them aid and comfort. No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act or upon confession in open court.

(2) Treason is a class 1 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-101.

18-11-102. Insurrection. (1) Any person who, with the intent by force of arms to obstruct, retard, or resist the execution of any law of this state, engages, cooperates, or participates with any armed force or with an armed force invades any portion of this state commits insurrection.

(2) Insurrection is a class 5 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-102. L. 89: (2) amended, p. 842, § 97, effective July 1.

PART 2

ANARCHY - SEDITION

18-11-201. Advocating overthrow of government. (1) Every person who, in this state, either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures, or otherwise, shall advocate, teach, incite, propose, aid, abet, encourage, or advise resistance by physical force to, or the destruction or overthrow by physical force of, constituted government in general, or of the government or laws of the United States, or of this state, under circumstances constituting a clear and present danger that violent action will result therefrom, commits sedition.

(2) Sedition is a class 5 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-201. L. 89: (2) amended, p. 842, § 98, effective July 1.

18-11-202. Inciting destruction of life or property. Every person who, in this state, either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures, shall advocate, teach, incite, propose, aid, abet, encourage, or advise the unlawful injury or destruction of private or public property by the use of physical force, violence, or bodily injury, or the unlawful injury by the use of physical force or violence of any person, or the unlawful taking of human life, as a policy or course of conduct, under circumstances constituting a clear and present danger that violent action will result therefrom, commits a class 6 felony.

Source: L. 71: R&RE, p. 479, § 1. C.R.S. 1963: § 40-11-202. L. 81: Entire section amended, p. 981, § 7, effective May 13. L. 89: Entire section amended, p. 842, § 99, effective July 1.

18-11-203. Membership in anarchistic and seditious associations. (1) Any association, organization, society, or corporation, one of whose purposes or professed purposes is to bring about any governmental, social, industrial, or economic change in this state or in the United States by the use of sabotage, terrorism, physical force, violence, or bodily injury, or which teaches, advocates, advises, or defends the use of sabotage, terrorism, physical force, violence, or bodily injury to person or property, or threats of such injury, to accomplish such change, and which shall, by any such means, prosecute or pursue such purpose or professed purpose is declared to be anarchistic and seditious in character and to be an unlawful association.

(2) Any person who, in this state, shall act or profess to act as an officer of any such unlawful association, or shall speak, write, or publish as a representative or professed representative of any such unlawful association, or, knowing the purpose, teachings, and doctrine of such association, shall become or continue to be a member thereof or contribute dues, money, or other things of value to it or to anyone for it commits a class 5 felony.

Source: L. 71: R&RE, p. 480, § 1. C.R.S. 1963: § 40-11-203. L. 81: (1) amended, p. 981, § 8, effective May 13. L. 89: (2) amended, p. 842, § 100, effective July 1.

18-11-204. Mutilation - contempt of flag - penalty. (1) It is unlawful for any person to mutilate, deface, defile, trample upon, burn, cut, or tear any flag in public:

- (a) With intent to cast contempt or ridicule upon the flag; or
- (b) With intent to outrage the sensibilities of persons liable to observe or discover the action or its results; or
- (c) With intent to cause a breach of the peace or incitement to riot; or
- (d) Under such circumstances that it may cause a breach of the peace or incitement to riot.

(2) "Flag", as used in this section, means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States of America or the state of Colorado.

(3) Any person violating the provisions of this section commits a class 3 misdemeanor.

Source: L. 71: R&RE, p. 480, § 1. C.R.S. 1963: § 40-11-204.

ANNOTATION

Law reviews. For note, "Comment: Constitutional Law — Symbolic Speech — Colorado Flag Desecration Statute", see 48 Den. L. J. 451 (1971). For article, "The Flag-Burning Episode: An Essay on the Constitution", see 61 U. Colo. L. Rev. 39 (1990).

Subsection (1)(a) unconstitutional. Provision of this section making it unlawful to mutilate, deface, and defile a flag of the United States with intent to cast contempt thereupon is unconstitutional upon its face because the interests it seeks to promote are contrary to the fundamental values protected by the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Statute was not designed to proscribe mutilating or misusing flag per se. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Specific intent required. A violation of this section occurs only when the surrounding circumstances manifest the exercise of the intellect in such a manner that inferences may be drawn therefrom that the acts or conduct were done with the specific intent of casting contempt on the flag. There is no violation of this section where the proscribed acts are the result of thoughtlessness, inadvertence, accident, or the like. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Symbolic speech protected. Conduct, which

consisted of wearing a pair of blue jeans on the seat of which a portion of the American flag had been sewn, manifested an expressive intent and a communicative content such as to be consid-

ered “symbolic speech” and consequently was protected “speech” under the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

18-11-205. Unlawful to display flag - exceptions. (1) Any person who displays any flag other than the flag of the United States of America or the state of Colorado or any of its subdivisions, agencies, or institutions on a permanent flagstaff located on a state, county, municipal, or other public building or on its grounds within this state commits a class 1 petty offense.

(2) (Deleted by amendment, L. 2007, p. 423, § 1, effective August 3, 2007.)

(3) “Flag”, as used in this section, means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of a particular nation, state, movement, cause, or organization.

(4) (a) This section does not apply to:

(I) The display of the flag of the United Nations or the flag of a foreign nation displayed to identify persons officially representing such foreign nation or the property or premises of the person or nation;

(II) The display of an appropriate flag upon ceremonial or commemorative occasions proclaimed by the president of the United States, the governor of the state of Colorado, the board of county commissioners of any county, or the mayor or other chief executive officer of a city or town within this state;

(III) The display of the flag of any adjacent state with the flag of the state of Colorado at the ports of entry weigh stations, in recognition of the joint state port operation; or

(IV) (Deleted by amendment, L. 2007, p. 423, § 1, effective August 3, 2007.)

(V) The display of a prisoners of war and missing in action flag or other appropriate veteran commemorative, United States or state armed forces, or military commemorative flag when displayed in accordance with 4 U.S.C. sec. 7;

(VI) The display of flags of foreign nations for special, occasional, ceremonial purposes when displayed in accordance with 4 U.S.C. sec. 7; or

(VII) The display of a flag for educational, cultural, or historical purposes with the prior permission of the chief administrative officer of the state, county, municipal, or other public building or grounds.

(b) This subsection (4) shall be an affirmative defense.

Source: **L. 71:** R&RE, p. 480, § 1. **C.R.S. 1963:** § 40-11-205. **L. 73:** p. 540, § 11. **L. 93:** (4) amended, p. 39, § 3, effective July 1. **L. 2002:** (4) amended, p. 317, § 2, effective August 7. **L. 2007:** (1), (2), and (4)(a)(IV) amended and (4)(a)(V), (4)(a)(VI), and (4)(a)(VII) added, p. 423, § 1, effective August 3.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for requirement that the flag be displayed in certain state institutions, see § 27-91-108.

ANNOTATION

Law reviews. For article, “Red Flags and the Flag”, see 13 Rocky Mt. L. Rev. 47 (1940).

ARTICLE 12

Offenses Relating to Firearms and Weapons

Editor’s note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor’s note following the title heading.

PART 1

18-12-109.

Possession, use, or removal of explosives or incendiary devices - possession of components thereof - chemical, biological, and nuclear weapons - persons exempt - hoaxes.

FIREARMS AND WEAPONS - GENERAL

18-12-101. Definitions - peace officer affirmative defense.

18-12-102. Possessing a dangerous or illegal weapon - affirmative defense.

18-12-110.

Forfeiture of firearms.

18-12-111.

Unlawful purchase of firearms.

18-12-103. Possession of a defaced firearm.

PART 2

18-12-103.5. Defaced firearms - contraband - destruction.

PERMITS TO CARRY CONCEALED HANDGUNS

18-12-104. Defacing a firearm.

18-12-105. Unlawfully carrying a concealed weapon - unlawful possession of weapons.

18-12-201.

Legislative declaration.

18-12-202.

Definitions.

18-12-203.

Criteria for obtaining a permit.

18-12-105.1. Permits for concealed weapons - liability. (Repealed)

18-12-204.

Permit contents - validity - carrying requirements.

18-12-105.5. Unlawfully carrying a weapon - unlawful possession of weapons - school, college, or university grounds.

18-12-205.

Sheriff - application - procedure - background check.

18-12-206.

Sheriff - issuance or denial of permits - report.

18-12-105.6. Limitation on local ordinances regarding firearms in private vehicles.

18-12-207.

Judicial review - permit denial - permit suspension - permit revocation.

18-12-106. Prohibited use of weapons.

18-12-208.

Colorado bureau of investigation - duties.

18-12-106.5. Use of stun guns.

18-12-209.

Issuance by sheriffs of temporary emergency permits.

18-12-107. Penalty for second offense.

18-12-210.

Maintenance of permit - address change - invalidity of permit.

18-12-108. Possession of weapons by previous offenders.

18-12-211.

Renewal of permits.

18-12-108.5. Possession of handguns by juveniles - prohibited - exceptions - penalty.

18-12-212.

Exemption.

18-12-108.7. Unlawfully providing or permitting a juvenile to possess a handgun - penalty - unlawfully providing a firearm other than a handgun to a juvenile - penalty.

18-12-213.

Reciprocity.

18-12-214.

Authority granted by permit - carrying restrictions.

18-12-215.

Immunity.

18-12-216.

Permits issued prior to May 17, 2003.

PART 1

FIREARMS AND WEAPONS - GENERAL

18-12-101. Definitions - peace officer affirmative defense. (1) As used in this article, unless the context otherwise requires:

(a) "Adult" means any person eighteen years of age or older.

(a.3) "Ballistic knife" means any knife that has a blade which is forcefully projected from the handle by means of a spring-loaded device or explosive charge.

(a.5) "Blackjack" includes any billy, sand club, sandbag, or other hand-operated striking weapon consisting, at the striking end, of an encased piece of lead or other heavy substance and, at the handle end, a strap or springy shaft which increases the force of impact.

(b) "Bomb" means any explosive or incendiary device or molotov cocktail as defined in section 9-7-103, C.R.S., or any chemical device which causes or can cause an explosion, which is not specifically designed for lawful and legitimate use in the hands of its possessor.

(c) "Firearm silencer" means any instrument, attachment, weapon, or appliance for causing the firing of any gun, revolver, pistol, or other firearm to be silent or intended to lessen or muffle the noise of the firing of any such weapon.

(d) “Gas gun” means a device designed for projecting gas-filled projectiles which release their contents after having been projected from the device and includes projectiles designed for use in such a device.

(e) “Gravity knife” means any knife that has a blade released from the handle or sheath thereof by the force of gravity or the application of centrifugal force.

(e.5) “Handgun” means a pistol, revolver, or other firearm of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged, the length of the barrel of which, not including any revolving, detachable, or magazine breech, does not exceed twelve inches.

(e.7) “Juvenile” means any person under the age of eighteen years.

(f) “Knife” means any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length, or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds, but does not include a hunting or fishing knife carried for sports use. The issue that a knife is a hunting or fishing knife must be raised as an affirmative defense.

(g) “Machine gun” means any firearm, whatever its size and usual designation, that shoots automatically more than one shot, without manual reloading, by a single function of the trigger.

(h) “Short rifle” means a rifle having a barrel less than sixteen inches long or an overall length of less than twenty-six inches.

(i) “Short shotgun” means a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches.

(i.5) “Stun gun” means a device capable of temporarily immobilizing a person by the infliction of an electrical charge.

(j) “Switchblade knife” means any knife, the blade of which opens automatically by hand pressure applied to a button, spring, or other device in its handle.

(2) It shall be an affirmative defense to any provision of this article that the act was committed by a peace officer in the lawful discharge of his duties.

Source: L. 71: R&RE, p. 481, § 1. C.R.S. 1963: § 40-12-101. L. 73: p. 540, § 12. L. 87: (1)(a) R&RE and (1)(a.5) and (1)(i.5) added, p. 674, §§ 1, 2, effective May 16. L. 91: (1)(b) amended, p. 407, § 17, effective June 6. L. 93, 1st Ex. Sess.: (1)(a) amended and (1)(a.3), (1)(e.5), and (1)(e.7) added, p. 1, § 1, effective September 13. L. 2007: (1)(e) amended, p. 1688, § 6, effective July 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Definition of “knife” in subsection (1)(f) is not void for vagueness or overbreadth. Where defendant possessed a screwdriver with specific intent to use it as a weapon, elements of crime defined in § 18-12-108 were present. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

Defendant’s intent to use an object as a weapon is not established by the object’s appearance alone, even if the appearance demonstrates that its primary use is as a weapon; this test does not follow *Gross* and is contrary to the plain language of the concealed weapons statute. *A.P.E. v. People*, 20 P.3d 1179 (Colo. 2001).

The definition of “knife” in subsection (1)(f) is sufficiently specific to give fair warning of the proscribed conduct and is therefore

constitutional. In applying the definition under § 18-12-108, the prosecution must prove that one of the intended uses of the instrument by the defendant was as a weapon. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

As the term “knife” is not specifically defined in the deadly weapons statute, the meaning of “knife” anywhere it is used in this article is specifically limited by the definition contained in subsection (1)(f) regardless of cross reference to the broader deadly weapons statute. *People ex rel. J.W.T.*, 93 P.3d 580 (Colo. App. 2004).

Applied in *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977).

18-12-102. Possessing a dangerous or illegal weapon - affirmative defense. (1) As used in this section, the term “dangerous weapon” means a firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife.

(2) As used in this section, the term “illegal weapon” means a blackjack, gas gun, metallic knuckles, gravity knife, or switchblade knife.

(3) A person who knowingly possesses a dangerous weapon commits a class 5 felony. Each subsequent violation of this subsection (3) by the same person shall be a class 4 felony.

(4) A person who knowingly possesses an illegal weapon commits a class 1 misdemeanor.

(5) It shall be an affirmative defense to the charge of possessing a dangerous weapon, or to the charge of possessing an illegal weapon, that the person so accused was a peace officer or member of the armed forces of the United States or Colorado National Guard acting in the lawful discharge of his duties, or that said person has a valid permit and license for possession of such weapon.

Source: L. 71: R&RE, p. 482, § 1. C.R.S. 1963: § 40-12-102. L. 72: p. 276, § 9. L. 73: p. 540, § 13. L. 79: Entire section R&RE, p. 729, § 10, effective July 1. L. 87: (1) amended, p. 674, § 3, effective May 16.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Law reviews. For article, “Mens Rea and the Colorado Criminal Code”, see 52 U. Colo. L. Rev. 167 (1981). For article, “Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986”, which discusses a case relating to unloaded guns as dangerous weapons, see 15 Colo. Law. 1612 (1986).

The prohibition against possession of illegal weapons in subsection (4) is neither facially void for vagueness as to the prohibition of possession of “metallic knuckles”, nor unconstitutionally vague as applied to the defendant. *People ex rel. A.P.E.*, 988 P.2d 172 (Colo. App. 1999), rev’d on other grounds, 20 P.3d 1179 (Colo. 2001).

Possession of an illegal weapon under subsection (4) is a lesser included offense of possession of weapon by a previous offender under § 18-12-108 (1) when the same weapon is alleged in each charge. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Whether inoperable weapon is a dangerous one is question of fact. When a prosecution under this section involves a weapon that is inoperable for some reason, whether the weapon

is a dangerous one is a question of fact. In considering this question, the trier of fact must weigh a variety of factors, including the time required, the changes that have to be made in the weapon, the parts which have to be inserted, and all the other attendant factors and circumstances. *People v. Vigil*, 758 P.2d 670 (Colo. 1988).

“A firecracker in a beer bottle” could constitute a molotov cocktail, ergo a bomb, which under former section was an illegal weapon. *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977).

Defendant could not be convicted of carrying a concealed weapon without the prosecution proving that defendant intended to use this short-bladed knife as a weapon. While the characteristics of an instrument may be an important factor in determining the intended purpose of an instrument, the language of the concealed weapons statute and established precedent establishes that a knife’s design does not, by itself, prove that the person carrying it intended to use it as a weapon. *A.P.E. v. People*, 20 P.3d 1179 (Colo. 2001).

Applied in *People v. Taylor*, 647 P.2d 682 (Colo. 1982).

18-12-103. Possession of a defaced firearm. A person commits a class 1 misdemeanor if he knowingly and unlawfully possesses a firearm, the manufacturer’s serial number of which, or other distinguishing number or identification mark, has been removed, defaced, altered, or destroyed, except by normal wear and tear.

Source: L. 71: R&RE, p. 482, § 1. C.R.S. 1963: § 40-12-103. L. 81: Entire section amended, p. 976, § 18, effective July 1.

ANNOTATION

Statute as basis for jurisdiction. See People v. Ford, 193 Colo. 459, 568 P.2d 26 (1977).

18-12-103.5. Defaced firearms - contraband - destruction. (1) After a judgment of conviction under section 18-12-103 or 18-12-104 has become final, any defaced firearm upon which the judgment was based shall be deemed to be contraband, the possession of which is contrary to the public peace, health, and safety.

(2) Defaced firearms which are deemed to be contraband shall be placed in the possession of the Colorado bureau of investigation or of a local law enforcement agency designated by the Colorado bureau of investigation and shall be destroyed or rendered permanently inoperable.

Source: L. 81: Entire section added, p. 977, § 19, effective July 1.

18-12-104. Defacing a firearm. A person commits a class 1 misdemeanor if such person knowingly removes, defaces, covers, alters, or destroys the manufacturer's serial number or any other distinguishing number or identification mark of a firearm.

Source: L. 71: R&RE, p. 482, § 1. **C.R.S. 1963:** § 40-12-104. **L. 77:** Entire section amended, p. 970, § 62, effective July 1. **L. 81:** Entire section amended, p. 977, § 20, effective July 1. **L. 89:** Entire section amended, p. 842, § 101, effective July 1. **L. 93:** Entire section amended, p. 968, § 2, effective July 1.

18-12-105. Unlawfully carrying a concealed weapon - unlawful possession of weapons. (1) A person commits a class 2 misdemeanor if such person knowingly and unlawfully:

(a) Carries a knife concealed on or about his or her person; or
(b) Carries a firearm concealed on or about his or her person; or
(c) Without legal authority, carries, brings, or has in such person's possession a firearm or any explosive, incendiary, or other dangerous device on the property of or within any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, are located, or in which a legislative hearing or meeting is being or is to be conducted, or in which the official office of any member, officer, or employee of the general assembly is located.

(d) (Deleted by amendment, L. 93, p. 964, § 1, effective July 1, 1993.)

(2) It shall not be an offense if the defendant was:

(a) A person in his or her own dwelling or place of business or on property owned or under his or her control at the time of the act of carrying; or

(b) A person in a private automobile or other private means of conveyance who carries a weapon for lawful protection of such person's or another's person or property while traveling; or

(c) A person who, at the time of carrying a concealed weapon, held a valid written permit to carry a concealed weapon issued pursuant to section 18-12-105.1, as it existed prior to its repeal, or, if the weapon involved was a handgun, held a valid permit to carry a concealed handgun or a temporary emergency permit issued pursuant to part 2 of this article; except that it shall be an offense under this section if the person was carrying a concealed handgun in violation of the provisions of section 18-12-214; or

(d) A peace officer, as described in section 16-2.5-101, C.R.S., when carrying a weapon in conformance with the policy of the employing agency as provided in section 16-2.5-101 (2), C.R.S.; or

(e) (Deleted by amendment, L. 2003, p. 1624, § 46, effective August 6, 2003.)

(f) A United States probation officer or a United States pretrial services officer while on duty and serving in the state of Colorado under the authority of rules and regulations promulgated by the judicial conference of the United States.

Source: L. 71: R&RE, p. 482, § 1. C.R.S. 1963: § 40-12-105. L. 73: p. 683, § 3. L. 77: (2)(c) amended and (2)(d) added, p. 976, § 8, effective July 1. L. 81: (2)(c) amended, p. 1437, § 3, effective June 8. L. 86: (2)(d) amended and (2)(e) added, p. 774, § 2, effective July 1. L. 89: (1)(d) added, p. 911, § 1, effective April 15. L. 93: Entire section amended, p. 964, § 1, effective July 1. L. 94: (2)(e) amended and (2)(f) added, p. 647, § 1, effective July 1. L. 2000: IP(2) amended, p. 1009, § 1, effective August 2. L. 2003: (2)(c) amended, p. 648, § 3, effective May 17; (2)(d) and (2)(e) amended, p. 1624, § 46, effective August 6.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805.

ANNOTATION

Recognition of § 13 of art. II, Colo. Const. Section 13 of art. II, Colo. Const., has limiting language dealing with defense of home, person, and property. These limitations have been recognized by the general assembly in the enactment of this section, which restricts the right to bear arms in certain circumstances, while permitting in other circumstances the carrying of a concealed weapon in defense of home, person, and property, and also when specifically authorized by written permit. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The words "about the person" means sufficiently close to the person to be readily accessible for immediate use. *People in Interest of R.J.A.*, 38 Colo. App. 346, 556 P.2d 491 (1976).

"Concealed" means placed out of sight so as not to be discernible or apparent by ordinary observation. *People ex rel. O.R.*, 220 P.3d 949 (Colo. App. 2008).

The scope of subsection (2)(b) is clarified in § 18-12-105.6, which indicates the general assembly's intent that local ordinances on carrying weapons in private vehicles be preempted only insofar as they conflict with the provisions of § 18-12-105.6. *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002).

The local ordinance concerning carrying a weapon in a private vehicle is not preempted since it can be harmonized with subsection (2)(b). *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002).

Pistol tucked under edge of car seat. Where uncontested evidence established that pistol was tucked under the edge of a car seat on which petitioner was sitting, where it was within his

easy reach, these circumstances constitute carrying a "firearm concealed on or about his person". *People in Interest of R.J.A.*, 38 Colo. App. 346, 556 P.2d 491 (1976).

Question of whether weapon is concealed is question of fact for the jury which should not be summarily determined by the trial judge at the time that he rules on the defendant's motion to suppress. *People v. Vincent*, 628 P.2d 107 (Colo. 1981).

Former subsection (2)(c) did not confer power to issue permits for carrying concealed weapons to police chiefs and sheriffs. *Douglass v. Kelton*, 199 Colo. 446, 610 P.2d 1067 (1980).

Person receiving permit to carry concealed weapon cannot be convicted. Once a person receives a permit to carry a concealed weapon in a county or city, he may not be convicted under subsection (2)(c). *Douglass v. Kelton*, 199 Colo. 446, 610 P.2d 1067 (1980).

Statute as basis for jurisdiction. See *People v. Pickett*, 194 Colo. 178, 571 P.2d 1078 (1977).

Defendant could not be convicted of carrying a concealed weapon without the prosecution proving that defendant intended to use this short-bladed knife as a weapon. While the characteristics of an instrument may be an important factor in determining the intended purpose of an instrument, the language of the concealed weapons statute and established precedent establishes that a knife's design does not, by itself, prove that the person carrying it intended to use it as a weapon. *A.P.E. v. People*, 20 P.3d 1179 (Colo. 2001).

Applied in *People v. Velasquez*, 641 P.2d 943 (Colo. 1982); *People v. Deschamp*, 662 P.2d 171 (Colo. 1983).

18-12-105.1. Permits for concealed weapons - liability. (Repealed)

Source: L. 81: Entire section added, p. 1437, § 4, effective June 8. L. 83: Entire section amended, p. 711, § 1, effective July 1. L. 96: (2) amended, p. 1024, § 1, effective May 23. L. 98: (2) amended, p. 949, § 12, effective May 27. L. 2003: Entire section repealed, p. 648, § 2, effective May 17.

18-12-105.5. Unlawfully carrying a weapon - unlawful possession of weapons - school, college, or university grounds. (1) A person commits a class 6 felony if such person knowingly and unlawfully and without legal authority carries, brings, or has in such

person's possession a deadly weapon as defined in section 18-1-901 (3) (e) in or on the real estate and all improvements erected thereon of any public or private elementary, middle, junior high, high, or vocational school or any public or private college, university, or seminary, except for the purpose of presenting an authorized public demonstration or exhibition pursuant to instruction in conjunction with an organized school or class, for the purpose of carrying out the necessary duties and functions of an employee of an educational institution that require the use of a deadly weapon, or for the purpose of participation in an authorized extracurricular activity or on an athletic team.

(2) (Deleted by amendment, L. 2000, p. 709, § 45, effective July 1, 2000.)

(3) It shall not be an offense under this section if:

(a) The weapon is unloaded and remains inside a motor vehicle while upon the real estate of any public or private college, university, or seminary; or

(b) The person is in that person's own dwelling or place of business or on property owned or under that person's control at the time of the act of carrying; or

(c) The person is in a private automobile or other private means of conveyance and is carrying a weapon for lawful protection of that person's or another's person or property while traveling; or

(d) The person, at the time of carrying a concealed weapon, held a valid written permit to carry a concealed weapon issued pursuant to section 18-12-105.1, as said section existed prior to its repeal; except that it shall be an offense under this section if the person was carrying a concealed handgun in violation of the provisions of section 18-12-214 (3); or

(d.5) The weapon involved was a handgun and the person held a valid permit to carry a concealed handgun or a temporary emergency permit issued pursuant to part 2 of this article; except that it shall be an offense under this section if the person was carrying a concealed handgun in violation of the provisions of section 18-12-214 (3); or

(e) The person is a peace officer, as described in section 16-2.5-101, C.R.S., when carrying a weapon in conformance with the policy of the employing agency as provided in section 16-2.5-101 (2), C.R.S.; or

(f) and (g) (Deleted by amendment, L. 2003, p. 1626, § 51, effective August 6, 2003.)

(h) The person has possession of the weapon for use in an educational program approved by a school which program includes, but shall not be limited to, any course designed for the repair or maintenance of weapons.

Source: L. 93: Entire section added, p. 965, § 2, effective July 1. L. 94: (1) and (2) amended, p. 1721, § 19, effective July 1. L. 2000: Entire section amended, p. 709, § 45, effective July 1. L. 2003: (3)(d) amended and (3)(d.5) added, p. 649, § 4, effective May 17; (3)(e), (3)(f), and (3)(g) amended, p. 1626, § 51, effective August 6.

ANNOTATION

Unless the prosecution can also establish that the person used or intended to use the knife as a weapon, a person cannot be prosecuted under subsection (1) for carrying a knife with a blade less than three and one-half inches in length on school grounds. Even though subsection (1) references the deadly weapons statute, that statute does not specifically define "knife". The term "knife" is, however, specifically limited to a weapon with a

blade longer than three and one-half inches in length by § 18-12-101 (1), as applicable to this article. Thus, reading and harmonizing these provisions together, the plain language of both provisions establishes that, for purposes of this section, where the deadly weapon is a knife, it must qualify as a knife under § 18-12-101 (1)(f). People ex rel. J.W.T., 93 P.3d 580 (Colo. App. 2004).

18-12-105.6. Limitation on local ordinances regarding firearms in private vehicles.

(1) The general assembly hereby finds that:

(a) A person carrying a weapon in a private automobile or other private means of conveyance for hunting or for lawful protection of such person's or another's person or property, as permitted in sections 18-12-105 (2) (b) and 18-12-105.5 (3) (c), may tend to

travel within a county, city and county, or municipal jurisdiction or in or through different county, city and county, and municipal jurisdictions, en route to the person's destination;

(b) Inconsistent laws exist in local jurisdictions with regard to the circumstances under which weapons may be carried in automobiles and other private means of conveyance;

(c) This inconsistency creates a confusing patchwork of laws that unfairly subjects a person who lawfully travels with a weapon to criminal penalties because he or she travels within a jurisdiction or into or through another jurisdiction;

(d) This inconsistency places citizens in the position of not knowing when they may be violating local laws while traveling within a jurisdiction or in, through, or between different jurisdictions, and therefore being unable to avoid committing a crime.

(2) (a) Based on the findings specified in subsection (1) of this section, the general assembly concludes that the carrying of weapons in private automobiles or other private means of conveyance for hunting or for lawful protection of a person's or another's person or property while traveling into, through, or within, a municipal, county, or city and county jurisdiction, regardless of the number of times the person stops in a jurisdiction, is a matter of statewide concern and is not an offense.

(b) Notwithstanding any other provision of law, no municipality, county, or city and county shall have the authority to enact or enforce any ordinance or resolution that would restrict a person's ability to travel with a weapon in a private automobile or other private means of conveyance for hunting or for lawful protection of a person's or another's person or property while traveling into, through, or within, a municipal, county, or city and county jurisdiction, regardless of the number of times the person stops in a jurisdiction.

Source: **L. 2000:** Entire section added, p. 1009, § 2, effective August 2. **L. 2003:** Entire section amended, p. 651, § 1, effective March 18.

ANNOTATION

Law reviews: For article, "In the Crosshairs: Colorado's New Gun Laws", see 33 Colo. Law. 11 (January 2004).

This section clarifies the scope of § 18-12-105 (2)(b) and indicates the general assembly's intent that local ordinances on carrying weapons in private vehicles be preempted only insofar as they conflict with the provisions of this section. *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002).

The use of the limiting language "into or through" in subsection (2) reflects the general assembly's intent not to restrict local weapons ordinances insofar as they apply to travel wholly within local jurisdictions. *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002). (Decided under law as it existed prior to the 2003 amendments to subsection (2)).

18-12-106. Prohibited use of weapons. (1) A person commits a class 2 misdemeanor if:

(a) He knowingly and unlawfully aims a firearm at another person; or

(b) Recklessly or with criminal negligence he discharges a firearm or shoots a bow and arrow; or

(c) He knowingly sets a loaded gun, trap, or device designed to cause an explosion upon being tripped or approached, and leaves it unattended by a competent person immediately present; or

(d) The person has in his or her possession a firearm while the person is under the influence of intoxicating liquor or of a controlled substance, as defined in section 18-18-102 (5). Possession of a permit issued under section 18-12-105.1, as it existed prior to its repeal, or possession of a permit or a temporary emergency permit issued pursuant to part 2 of this article is no defense to a violation of this subsection (1).

(e) He knowingly aims, swings, or throws a throwing star or nunchaku as defined in this paragraph (e) at another person, or he knowingly possesses a throwing star or nunchaku in a public place except for the purpose of presenting an authorized public demonstration or exhibition or pursuant to instruction in conjunction with an organized school or class. When transporting throwing stars or nunchaku for a public demonstration or exhibition or for a

school or class, they shall be transported in a closed, nonaccessible container. For purposes of this paragraph (e), “nunchaku” means an instrument consisting of two sticks, clubs, bars, or rods to be used as handles, connected by a rope, cord, wire, or chain, which is in the design of a weapon used in connection with the practice of a system of self-defense, and “throwing star” means a disk having sharp radiating points or any disk-shaped bladed object which is hand-held and thrown and which is in the design of a weapon used in connection with the practice of a system of self-defense.

Source: L. 71: R&RE, p. 482, § 1. C.R.S. 1963: § 40-12-106. L. 77: (1)(a) and (1)(c) amended, p. 971, § 63, effective July 1. L. 81: (1)(d) amended, p. 738, § 25, effective July 1. L. 82: (1)(d) amended, p. 623, § 18, effective April 2. L. 84: (1)(e) added, p. 539, § 17, effective July 1. L. 2003: (1)(d) amended, p. 649, § 5, effective May 17. L. 2012: (1)(d) amended, (HB 12-1311), ch. 281, p. 1620, § 48, effective July 1.

ANNOTATION

This section is neither unconstitutionally overbroad nor unconstitutionally vague. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

Right to bear arms is not absolute, and it can be restricted by the state’s valid exercise of its police power. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

Common sense definition of “possession”, as it is used in subsection (1)(d) is the actual or physical control of a firearm. People v. Garcia, 197 Colo. 550, 595 P.2d 228 (1979).

Failure to define “under the influence of intoxicating liquor”, if error, was harmless, where defendant, charged with violation of this

section, testified that he was too drunk to drive. People v. Beckett, 782 P.2d 812 (Colo. App. 1989), aff’d, 800 P.2d 74 (Colo. 1990).

Possession of a firearm while intoxicated is a strict liability offense, therefore, the trial court did not err in refusing to instruct the jury that “knowingly” was an element of the offense. People v. Wilson, 972 P.2d 701 (Colo. App. 1998).

Self-defense is not a valid defense to the crime of prohibited use of weapons. People v. Beckett, 782 P.2d 812 (Colo. App. 1989), aff’d, 800 P.2d 74 (Colo. 1990).

Applied in People v. McPherson, 200 Colo. 429, 619 P.2d 38 (1980).

18-12-106.5. Use of stun guns. A person commits a class 5 felony if he knowingly and unlawfully uses a stun gun in the commission of a criminal offense.

Source: L. 87: Entire section added, p. 675, § 4, effective May 16.

ANNOTATION

Section unambiguously creates a separate crime whenever a stun gun facilitates commission of the predicate offense, regardless of whether it is discharged. People v. Wheeler, 170 P.3d 817 (Colo. App. 2007).

Attempted robbery is not a lesser included offense of use of a stun gun. People v. Bass, 155 P.3d 547 (Colo. App. 2006).

Misdemeanor menacing is not a lesser included offense of use of a stun gun. People v. Wheeler, 170 P.3d 817 (Colo. App. 2007).

18-12-107. Penalty for second offense. Any person who has within five years previously been convicted of a violation under section 18-12-103, 18-12-105, or 18-12-106 shall, upon conviction for a second or subsequent offense under the same section, be guilty of a class 5 felony.

Source: L. 71: R&RE, p. 483, § 1. C.R.S. 1963: § 40-12-107. L. 87: Entire section amended, p. 616, § 7, effective July 1.

18-12-107.5. Illegal discharge of a firearm - penalty. (1) Any person who knowingly or recklessly discharges a firearm into any dwelling or any other building or occupied

structure, or into any motor vehicle occupied by any person, commits the offense of illegal discharge of a firearm.

(2) It shall not be an offense under this section if the person who discharges a firearm in violation of subsection (1) of this section is a peace officer as described in section 16-2.5-101, C.R.S., acting within the scope of such officer's authority and in the performance of such officer's duties.

(3) Illegal discharge of a firearm is a class 5 felony.

Source: L. 93: Entire section added, p. 968, § 1, effective July 1. L. 2003: (2) amended, p. 1616, § 15, effective August 6.

ANNOTATION

This section was intended to punish random drive-by and walk-by gunfire directed at occupied structures or vehicles from outside such premises or vehicles. People v. Simpson, 93 P.3d 551 (Colo. App. 2003).

The plain language of this section does not require that a bullet actually end up inside a house. The court of appeals held that firing a bullet into materials of which the house is built, in this case the shingles on the roof, violates this section. There is no requirement in the section that the bullet pierce the exterior of the building and enter the interior of the house. People v. Serpa, 992 P.2d 682 (Colo. App. 1999).

The second clause of subsection (1) does not require proof that a bullet actually entered the passenger compartment of the vehicle and the absence of such a requirement is consistent with the general assembly's clear in-

tention to criminalize the discharge of a firearm into an occupied vehicle irrespective of whether an occupant is endangered. People v. White, 55 P.3d 220 (Colo. App. 2002).

Illegal discharge of a firearm is not a lesser included offense of attempted first degree murder after deliberation. Discharge of a firearm is not an element of attempted first degree murder after deliberation. People v. Beatty, 80 P.3d 847 (Colo. App. 2003).

Court erred by failing to instruct on self-defense. Illegal discharge of a firearm is a general intent offense to the extent that it involves a defendant who acts "knowingly", and self-defense is an affirmative defense to a general intent crime. People v. Taylor, 230 P.3d 1227 (Colo. App. 2009), overruled on other grounds in People v. Pickering, __ P.3d __ (Colo. 2011).

18-12-108. Possession of weapons by previous offenders. (1) A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901 (3) (h) or any other weapon that is subject to the provisions of this article subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, under Colorado or any other state's law or under federal law.

(2) (a) Except as otherwise provided by paragraphs (b) and (c) of this subsection (2), a person commits a class 6 felony if the person violates subsection (1) of this section.

(b) A person commits a class 5 felony, as provided by section 18-12-102, if the person violates subsection (1) of this section and the weapon is a dangerous weapon, as defined in section 18-12-102 (1).

(c) A person commits a class 5 felony if the person violates subsection (1) of this section and the person's previous conviction was for burglary, arson, or any felony involving the use of force or the use of a deadly weapon and the violation of subsection (1) of this section occurs as follows:

(I) From the date of conviction to ten years after the date of conviction, if the person was not incarcerated; or

(II) From the date of conviction to ten years after the date of release from confinement, if such person was incarcerated or, if subject to supervision imposed as a result of conviction, ten years after the date of release from supervision.

(d) Any sentence imposed pursuant to this subsection (2) shall run consecutively with any prior sentences being served by the offender.

(3) A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901 (3) (h) or any other weapon that is subject to the provisions of this

article subsequent to the person's adjudication for an act which, if committed by an adult, would constitute a felony, or subsequent to the person's adjudication for attempt or conspiracy to commit a felony, under Colorado or any other state's law or under federal law.

(4) (a) Except as otherwise provided by paragraphs (b) and (c) of this subsection (4), a person commits a class 6 felony if the person violates subsection (3) of this section.

(b) A person commits a class 5 felony, as provided by section 18-12-102, if the person violates subsection (3) of this section and the weapon is a dangerous weapon, as defined in section 18-12-102 (1).

(c) A person commits a class 5 felony if the person commits the conduct described in subsection (3) of this section and the person's previous adjudication was based on an act that, if committed by an adult, would constitute burglary, arson, or any felony involving the use of force or the use of a deadly weapon and the violation of subsection (3) of this section occurs as follows:

(I) From the date of adjudication to ten years after the date of adjudication, if the person was not committed to the department of institutions, or on or after July 1, 1994, to the department of human services; or

(II) From the date of adjudication to ten years after the date of release from commitment, if such person was committed to the department of institutions, or on or after July 1, 1994, to the department of human services or, if subject to supervision imposed as a result of an adjudication, ten years after the date of release from supervision.

(d) Any sentence imposed pursuant to this subsection (4) shall run consecutively with any prior sentences being served by the offender.

(5) A second or subsequent offense under paragraphs (b) and (c) of subsection (2) and paragraphs (b) and (c) of subsection (4) of this section is a class 4 felony.

(6) (a) Upon the discharge of any inmate from the custody of the department of corrections, the department shall provide a written advisement to such inmate of the prohibited acts and penalties specified in this section. The written advisement, at a minimum, shall include the written statement specified in paragraph (c) of this subsection (6).

(b) Any written stipulation for deferred judgment and sentence entered into by a defendant pursuant to section 18-1.3-102 shall contain a written advisement of the prohibited acts and penalties specified in this section. The written advisement, at a minimum, shall include the written statement specified in paragraph (c) of this subsection (6).

(c) The written statement shall provide that:

(I) (A) A person commits the crime of possession of a weapon by a previous offender in violation of this section if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901 (3) (h), or any other weapon that is subject to the provisions of this title subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, or subsequent to the person's conviction for a misdemeanor crime of domestic violence as defined in 18 U.S.C. sec. 921 (a) (33) (A), or subsequent to the person's conviction for attempt or conspiracy to commit such misdemeanor crime of domestic violence; and

(B) For the purposes of this paragraph (c), "felony" means any felony under Colorado law, federal law, or the laws of any other state; and

(II) A violation of this section may result in a sentence of imprisonment or fine, or both.

(d) The act of providing the written advisement described in this subsection (6) or the failure to provide such advisement may not be used as a defense to any crime charged and may not provide any basis for collateral attack on, or for appellate relief concerning, any conviction.

Source: L. 71: R&RE, p. 483, § 1. C.R.S. 1963: § 40-12-108. L. 73: p. 542, § 1. L. 75: Entire section amended, p. 621, § 17, effective July 21. L. 93, 1st Ex. Sess.: Entire section added, p. 4, § 3, effective September 13. L. 94: Entire section R&RE, p. 1464, § 6, effective July 1. L. 2000: (2)(a) and (4)(a) amended and (2)(d), (4)(d), and (6) added, pp. 632, 633, §§ 1, 2, 3, effective July 1. L. 2002: (6)(b) amended, p. 1517, § 208, effective October 1. L. 2003: (4)(b) amended, p. 1432, § 19, effective April 29.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (6)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

The purpose of this section is to limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities. *People v. Gallegos*, 193 Colo. 263, 563 P.2d 937 (1977); *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

This section does not deny defendant equal protection, even though it may permit using a prior burglary conviction in another jurisdiction as the "previous offense" when the same conduct might not have resulted in a burglary conviction if committed in this state. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Constitutionality of section upheld. *People v. Marques*, 179 Colo. 86, 498 P.2d 929 (1972).

The classification which prohibits certain previous offenders from carrying a weapon is not unreasonable in its relationship to the evil sought to be cured. To limit the possession of firearms by those who by their past conduct have demonstrated an unfitness to be entrusted with such dangerous instrumentalities is clearly in the interest of the public health, safety, and welfare and within the scope of the general assembly's police power, and, accordingly, the statute in question is not subject to constitutional attack on an equal protection basis. *People v. Trujillo*, 178 Colo. 147, 497 P.2d 1 (1972).

The felon with a gun statute is not unconstitutional. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975).

This section as amended in 1994 and as applied to defendant does not violate the prohibition against ex post facto laws because defendant's possession of a firearm occurred in 2009, well after the 1994 amendment. It does not matter that defendant's predicate felonies occurred before the change in the law, because defendant was punished for conduct occurring after the change. There is no ex post facto violation where one or some of the elements of an offense are committed prior to the effective date of a new statute, but where the crime is not completed until after the effective date. *People v. DeWitt*, __ P.3d __ (Colo. App. 2011).

"Involving" not constitutionally imprecise. "Involving" is a common, readily understood word, and whatever imprecision its use may entail does not rise to the level of constitutional infirmity. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Nor is "use of force or violence" extremely vague, though this phrase is not specifically defined by the Colorado criminal code, there can be little doubt that most persons would readily comprehend its import. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The time computation provision of this section is not too vague. Notwithstanding the fact that the wording of the time provision of this section might require more than a quick glance for full comprehension, its meaning is plain. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

This section is not an attempt to subvert the intent of section 13 of art. II, Colo. Const. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

This section is legitimate and constitutional means of accomplishing the general assembly's obvious purpose. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Limitations of section 13, art. II, Colo. Const., superimposed on section. In spite of the flat prohibition contained in this section, the specific limitations of section 13 of art. II, Colo. Const. must be superimposed on the section's otherwise valid language. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Because the right to bear arms is not absolute, nor is this section vague or overbroad. *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975).

The right to bear arms is not absolute as that right is limited to the defense of one's home, person, and property. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Affirmative defense under section 13, art. II, Colo. Const. A defendant charged under this section who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property as recognized by section 13 of art. II, Colo. Const., thereby raises an affirmative defense. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977); *People v. DeWitt*, __ P.3d __ (Colo. App. 2011).

Purpose in keeping weapons is question of fact which must be submitted to jury. The question of the defendant's purpose in keeping the weapons in order to establish the affirmative defense based on his constitutional right to keep and bear arms under section 13 of art. II, Colo. Const. is one for the fact finder to determine at trial. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

But burden of proof is still on prosecution. After the defendant by competent evidence has raised the affirmative defense under section 13 of art. II, Colo. Const., the prosecution will still have the overall burden of proving its case. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Trial court properly excluded affirmative defense based on section 13 of article II, Colo. Const., and a proposed jury instruction where the defendant's offer of proof was insufficient to support the proposed affirmative defense. *People v. Barger*, 732 P.2d 1225 (Colo. App. 1986).

Trial court's instruction to jury that second degree assault involved force or violence as a matter of law was proper for conviction under this statute notwithstanding fact that second degree assault could involve injury to another resulting from the administration of drug or other substance. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

Jury must find "knowing" possession to convict. To convict a previous offender of possessing a weapon, the jury must find, not mere possession, but that the defendant "knowingly" possessed the weapon and that he understood that the object possessed was a weapon. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

To convict under this section, the prosecution must prove that one of the defendant's intended uses for the instrument was as a weapon. As so construed, the section is not overbroad. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

The mental state of "knowingly" applies only to the possession element of subsection (1), not to the prior felony conviction element. *People v. DeWitt*, __ P.3d __ (Colo. App. 2011).

This section is not void for vagueness in regard to the definitions of weapon cited therein. "Weapon" has a commonly understood meaning and the definition of "knife" cited in this section is sufficiently specific to give fair warning of the proscribed conduct. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

Broad definition of "knife", incorporated into this section by reference to § 18-12-101, is constitutional. Where defendant possessed a screwdriver with specific intent to use it as a weapon, elements of crime were present. But this section does not prohibit possession of such an instrument for an innocent purpose, so prohibition is neither unconstitutionally vague nor overbroad. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

"Possession" means actual or physical control over a firearm and is a question of fact for the jury. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

"Previously convicted" element satisfied by proof of a guilty plea and deferred judgment; judgment of conviction and sentencing are not required. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

The term "possession" in this section is a common term which is to be given its generally accepted meaning. Where court imposed the requirement of exclusive control, the generally accepted meaning was altered, making it both unduly restrictive and a potential source of

confusion for jurors. *People v. Martinez*, 780 P.2d 560 (Colo. 1989).

"Involve" has been defined as "to have within or as part of itself: contain, include"; "to require as a necessary accompaniment". *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The word "force" in this section includes more than actual, applied physical force. *People v. Gallegos*, 193 Colo. 108, 563 P.2d 937 (1977).

Valid exercise of police power. The use, concealment, or possession of weapons specified in this section by a felon who has previously been convicted of one of the crimes itemized in this section may be validly prohibited under the police power. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Balancing of rights. The conflicting rights of the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people prohibits granting an absolute right to bear arms under all situations. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The felon with a gun statute, this section, must be read in pari materia with § 18-1-702. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Statute may be violated by either concealing or using any of the specified weapons. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Prior conviction element of offense. Under this section, the prior conviction does not go merely to the punishment to be imposed, but rather is an element of the substantive offense charged and this distinction is critical. *People v. Fullerton*, 186 Colo. 97, 525 P.2d 1166 (1974); *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

Defendant in a possession of weapon by prior offender trial may request limiting instruction or stipulate to the fact of conviction of another offense rather than requiring prosecution to agree to waive a trial by jury. *People v. District Court*, 953 P.2d 184 (Colo. 1998).

A prior conviction obtained in violation of a defendant's constitutional rights cannot be used as the underlying conviction in a prosecution under this section. *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

Reference by name or description to crimes committed in other jurisdictions is a proper means for the general assembly to define which prior crimes satisfy the "previous offender" element of this statute and such references to crimes committed elsewhere do not constitute delegation of this state's legislative power. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Conviction being challenged on appeal may be used as a predicate offense under statute prohibiting possession of firearms by

previous offenders since a conviction becomes final and is valid for purposes of appeal when sentencing occurs. *People v. Tramaglino*, 791 P.2d 1171 (Colo. App. 1989).

Showing necessary for conviction under conspiracy provision. A conviction under the conspiracy provision of this section does not require a showing that the overt act of the conspiracy was an act of force or violence, but rather that, the crime which is the object of the conspiracy was one of force or violence. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

Where one is charged under this section with possession of a weapon, having previously been convicted of conspiracy to commit the crime of robbery, it is unnecessary to prove that the underlying robbery which was the object of the conspiracy did in fact involve the use of force or violence. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

Defendant to invoke procedural safeguards where substantive offense also charged. While procedural safeguards such as separate trials or a bifurcated procedure should be available to ensure a fair trial for a defendant charged with a substantive offense and with violation of this section, it is the defendant who must make a tactical decision whether to invoke such procedures, and the defendant must exercise the right to these procedures by means of a timely, pre-trial motion. *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

Prior Colorado conviction not predicate felony for purposes of federal prohibition of possession of firearm by felon. Defendant was wrongly charged for possession of gun by felon, because at the time of his arrest he was once again entitled to possess a gun. Under this statute defendant's civil rights had been restored ten years after he served time on his prior conviction, such rights encompassing his ability to possess a firearm. *U.S. v. Hall*, 20 F.3d 1066 (10th Cir. 1994).

Plaintiff whose felony conviction in another state was set aside under that state's law and who was entitled to possess a handgun under

that state's law was entitled to possess a handgun under this section. *Seguna v. Maketa*, 181 P.3d 399 (Colo. App. 2008).

The fact that defendant assisted in purchase of firearm and was within "arm's reach" of firearm at time of arrest constituted prima facie evidence of illegal possession of a firearm, which precluded defendant from judgment of acquittal. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

Evidence sufficient in prosecution for possession of weapon. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Evidence including retrieval of gun from house where defendant arrested, witnesses' identifications of gun as belonging to defendant, and defendant's use of gun during previous threats provided ample support for verdict. *People v. Jackson*, 98 P.3d 940 (Colo. App. 2004).

An attempted robbery by threat is a felony involving the use of force under this section. *People v. Gallegos*, 193 Colo. 108, 563 P.2d 937 (1977).

Robbery is crime involving use of "force or violence". The offense of robbery, whether committed by actual force or by constructive force, i.e., threats or intimidation, is a crime involving the use of "force or violence" for the purposes of this section. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

Felony menacing is a felony involving the use of force or a deadly weapon and thus a class 5 felony. *People v. Montez*, __ P.3d __ (Colo. App. 2010).

When the same weapon is alleged in each charge, possession of an illegal weapon under § 18-12-102 (4) is a lesser included offense of possession of a weapon by a previous offender under subsection (1) of this section. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Defendant may receive a separate conviction under this statute for each firearm defendant possesses. Defendant properly convicted of two counts under this section because he possessed two shotguns removed from a house. *People v. Montez*, __ P.3d __ (Colo. App. 2010).

18-12-108.5. Possession of handguns by juveniles - prohibited - exceptions - penalty. (1) (a) Except as provided in this section, it is unlawful for any person who has not attained the age of eighteen years knowingly to have any handgun in such person's possession.

(b) Any person possessing any handgun in violation of paragraph (a) of this subsection (1) commits the offense of illegal possession of a handgun by a juvenile.

(c) (I) Illegal possession of a handgun by a juvenile is a class 2 misdemeanor.

(II) For any second or subsequent offense, illegal possession of a handgun by a juvenile is a class 5 felony.

(d) Any person under the age of eighteen years who is taken into custody by a law enforcement officer for an offense pursuant to this section shall be taken into temporary custody in the manner described in section 19-2-508, C.R.S.

(2) This section shall not apply to:

(a) Any person under the age of eighteen years who is:

- (I) In attendance at a hunter's safety course or a firearms safety course; or
- (II) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction in which such range is located or any other area where the discharge of a firearm is not prohibited; or
- (III) Engaging in an organized competition involving the use of a firearm or participating in or practicing for a performance by an organized group under 501 (c) (3) as determined by the federal internal revenue service which uses firearms as a part of such performance; or
- (IV) Hunting or trapping pursuant to a valid license issued to such person pursuant to article 4 of title 33, C.R.S.; or
- (V) Traveling with any handgun in such person's possession being unloaded to or from any activity described in subparagraph (I), (II), (III), or (IV) of this paragraph (a);
- (b) Any person under the age of eighteen years who is on real property under the control of such person's parent, legal guardian, or grandparent and who has the permission of such person's parent or legal guardian to possess a handgun;
- (c) Any person under the age of eighteen years who is at such person's residence and who, with the permission of such person's parent or legal guardian, possesses a handgun for the purpose of exercising the rights contained in section 18-1-704 or section 18-1-704.5.
- (3) For the purposes of subsection (2) of this section, a handgun is "loaded" if:
 - (a) There is a cartridge in the chamber of the handgun; or
 - (b) There is a cartridge in the cylinder of the handgun, if the handgun is a revolver; or
 - (c) The handgun, and the ammunition for such handgun, is carried on the person of a person under the age of eighteen years or is in such close proximity to such person that such person could readily gain access to the handgun and the ammunition and load the handgun.
- (4) Repealed.

Source: L. 93, 1st Ex. Sess.: Entire section added, p. 2, § 2, effective September 13. L. 96: (1)(d) amended, p. 1693, § 28, effective January 1, 1997. L. 98: (4) repealed, p. 729, § 15, effective May 18.

ANNOTATION

Possession of a handgun by a juvenile is a "status" offense, an offense consisting of conduct that would not constitute an offense if engaged in by an adult. *People v. Juvenile Court*, 893 P.2d 81 (Colo. 1995).

This section and the presumption statute (§ 19-2-204) were adopted to secure the safety of juveniles and the communities in which they reside. The Children's Code has

consistently evidenced a legislative intent to accomplish both such purposes. *People v. Juvenile Court*, 893 P.2d 81 (Colo. 1995).

The parental permission language in subsection (2)(b) is an affirmative defense to the offense of unlawful possession of a handgun by a juvenile. *People ex rel. L.M.*, 17 P.3d 829 (Colo. App. 2000).

18-12-108.7. Unlawfully providing or permitting a juvenile to possess a handgun - penalty - unlawfully providing a firearm other than a handgun to a juvenile - penalty.

(1) (a) Any person who intentionally, knowingly, or recklessly provides a handgun with or without remuneration to any person under the age of eighteen years in violation of section 18-12-108.5 or any person who knows of such juvenile's conduct which violates section 18-12-108.5 and fails to make reasonable efforts to prevent such violation commits the crime of unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun.

(b) Unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun in violation of this subsection (1) is a class 4 felony.

(2) (a) Any person who intentionally, knowingly, or recklessly provides a handgun to a juvenile or permits a juvenile to possess a handgun, even though such person is aware of a substantial risk that such juvenile will use a handgun to commit a felony offense, or who, being aware of such substantial risk, fails to make reasonable efforts to prevent the commission of the offense, commits the crime of unlawfully providing or permitting a juvenile to possess a handgun. A person shall be deemed to have violated this paragraph (a)

if such person provides a handgun to or permits the possession of a handgun by any juvenile who has been convicted of a crime of violence, as defined in section 18-1.3-406, or any juvenile who has been adjudicated a juvenile delinquent for an offense which would constitute a crime of violence, as defined in section 18-1.3-406, if such juvenile were an adult.

(b) Unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun in violation of this subsection (2) is a class 4 felony.

(3) With regard to firearms other than handguns, no person shall sell, rent, or transfer ownership or allow unsupervised possession of a firearm with or without remuneration to any juvenile without the consent of the juvenile's parent or legal guardian. Unlawfully providing a firearm other than a handgun to a juvenile in violation of this subsection (3) is a class 1 misdemeanor.

(4) It shall not be an offense under this section if a person believes that a juvenile will physically harm the person if the person attempts to disarm the juvenile or prevent the juvenile from committing a violation of section 18-12-108.5.

Source: L. 93, 1st Ex. Sess.: Entire section added, p. 3, § 2, effective September 13. L. 2000: Entire section amended, p. 642, § 1, effective July 1; (4) added, p. 641, § 1, effective July 1. L. 2002: (2)(a) amended, p. 1518, § 209, effective October 1.

Editor's note: Amendments to this section by House Bill 00-1247 and House Bill 00-1243 were harmonized by renumbering (3) from House Bill 00-1247 as (4).

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(a), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-12-109. Possession, use, or removal of explosives or incendiary devices - possession of components thereof - chemical, biological, and nuclear weapons - persons exempt - hoaxes. (1) As used in this section:

(a) (I) "Explosive or incendiary device" means:

(A) Dynamite and all other forms of high explosives, including, but not limited to, water gel, slurry, military C-4 (plastic explosives), blasting agents to include nitro-carbon-nitrate, and ammonium nitrate and fuel oil mixtures, cast primers and boosters, R.D.X., P.E.T.N., electric and nonelectric blasting caps, exploding cords commonly called detonating cord or det-cord or primacord, picric acid explosives, T.N.T. and T.N.T. mixtures, and nitroglycerin and nitroglycerin mixtures;

(B) Any explosive bomb, grenade, missile, or similar device; and

(C) Any incendiary bomb or grenade, fire bomb, or similar device, including any device, except kerosene lamps, which consists of or includes a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one individual acting alone.

(II) "Explosive or incendiary device" shall not include rifle, pistol, or shotgun ammunition, or the components for handloading rifle, pistol, or shotgun ammunition.

(b) (I) "Explosive or incendiary parts" means any substances or materials or combinations thereof which have been prepared or altered for use in the creation of an explosive or incendiary device. Such substances or materials may include, but shall not be limited to, any:

(A) Timing device, clock, or watch which has been altered in such a manner as to be used as the arming device in an explosive;

(B) Pipe, end caps, or metal tubing which has been prepared for a pipe bomb;

(C) Mechanical timers, mechanical triggers, chemical time delays, electronic time delays, or commercially made or improvised items which, when used singly or in combination, may be used in the construction of a timing delay mechanism, booby trap, or activating mechanism for any explosive or incendiary device.

(II) "Explosive or incendiary parts" shall not include rifle, pistol, or shotgun ammunition, or the components for handloading rifle, pistol, or shotgun ammunition, or any signaling device customarily used in operation of railroad equipment.

(2) Any person who knowingly possesses, controls, manufactures, gives, mails, sends, or causes to be sent an explosive or incendiary device commits a class 4 felony.

(2.5) Any person who knowingly possesses, controls, manufactures, gives, mails, sends, or causes to be sent a chemical, biological, or radiological weapon commits a class 3 felony.

(3) Subsection (2) of this section shall not apply to the following persons:

(a) A peace officer while acting in his official capacity transporting or otherwise handling explosives or incendiary devices;

(b) A member of the armed forces of the United States or Colorado National Guard while acting in his official capacity;

(c) An authorized employee of the office of active and inactive mines in the division of reclamation, mining, and safety while acting within the scope of his or her employment;

(d) A person possessing a valid permit issued under the provisions of article 7 of title 9, C.R.S., or an employee of such permittee acting within the scope of his employment;

(e) A person who is exempt from the necessity of possessing a permit under the provisions of section 9-7-106 (5), C.R.S., or an employee of such exempt person acting within the scope of his employment;

(f) A person or entity authorized to use chemical, biological, or radiological materials in their lawful business operations while using the chemical, biological, or radiological materials in the course of legitimate business activities. Authorized users shall include clinical, environmental, veterinary, agricultural, public health, or radiological laboratories and entities otherwise licensed to possess radiological materials.

(4) Any person who knowingly uses or causes to be used or gives, mails, sends, or causes to be sent an explosive or incendiary device or a chemical, biological, or radiological weapon or materials in the commission of or in an attempt to commit a felony commits a class 2 felony.

(5) Any person who removes or causes to be removed or carries away any explosive or incendiary device from the premises where said explosive or incendiary device is kept by the lawful user, vendor, transporter, or manufacturer thereof, without the consent or direction of the lawful possessor, commits a class 4 felony. A person convicted of this offense shall be subjected to a mandatory minimum sentence of two years in the department of corrections.

(5.5) Any person who removes or causes to be removed or carries away any chemical, biological, or radiological weapon from the premises where said chemical, biological, or radiological weapon is kept by the lawful user, vendor, transporter, or manufacturer thereof, without the consent or direction of the lawful possessor, commits a class 3 felony. A person convicted of this offense shall be subject to a mandatory minimum sentence of four years in the department of corrections.

(6) Any person who possesses any explosive or incendiary parts commits a class 4 felony.

(6.5) Any person who possesses any chemical weapon, biological weapon, or radiological weapon parts commits a class 3 felony.

(7) Any person who manufactures or possesses or who gives, mails, sends, or causes to be sent any false, facsimile, or hoax explosive or incendiary device or chemical, biological, or radiological weapon to another person or places any such purported explosive or incendiary device or chemical, biological, or radiological weapon in or upon any real or personal property commits a class 5 felony.

(8) Any person possessing a valid permit issued under the provisions of article 7 of title 9, C.R.S., or an employee of such permittee acting within the scope of his employment, who knowingly dispenses, distributes, or sells explosive or incendiary devices to a person who is not authorized to possess or control such explosive or incendiary device commits a class 4 felony.

Source: L. 74: Entire section added, p. 256, § 1, effective March 21. **L. 77:** (4) amended, p. 971, § 64, effective July 1; entire section R&RE, p. 992, § 1, effective July 1. **L. 81:** (1)(a)(I)(A) and (7) amended, p. 977, § 21, effective July 1. **L. 84:** (8) added, p. 539, § 18, effective July 1. **L. 92:** (3)(c) amended, p. 1970, § 72, effective July 1. **L. 2001:** (2) amended, p. 857, § 1, effective July 1. **L. 2002:** (2.5), (3)(f), (5.5), and (6.5) added and (4) and (7) amended, pp. 1195, 1196, §§ 1, 2, effective June 3. **L. 2003:** (5) and (5.5) amended, p. 1428, § 11, effective April 29; (5.5) amended, p. 1433, § 26, effective July 1. **L. 2006:** (3)(c) amended, p. 213, § 3, effective August 7.

Editor's note: Amendments to subsection (5.5) by section 11 of House Bill 03-1236 and section 26 of House Bill 03-1236 were harmonized.

ANNOTATION

This section is not unconstitutionally vague or overbroad. The prohibition of the possession of incendiary devices is reasonably related to the legitimate governmental interest of preventing harm to the public and such prohibition is within the state's police power. As a result, defendant's argument that the statute is unconstitutionally overbroad is without merit. The defendant's vagueness argument also fails because the statute provides reasonable notice of the prohibited conduct. *People v. Rowerdink*, 756 P.2d 986 (Colo. 1988).

1977 amendments harmonized. Two 1977 amendments were not irreconcilable and revisor of statute properly harmonized the amendments by adding "knowingly" and "or attempts to commit" in subsection (4); and defendant, who would not have been convicted under the language of either amendment as passed by the legislature, was properly convicted under the harmonized language. *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

The existence of a wick is not only material, but essential, to a charge under this section. *People v. Brown*, 194 Colo. 553, 574 P.2d 92 (1978).

Incendiary device without a wick may be prosecuted despite any apparent language to the contrary in *People v. Brown*, (194 Colo. 553, 574 P.2d 92 (1978)). *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

The prosecution's inability to produce the wick remnant does not require suppression of testimony regarding its existence where a good faith effort was made to preserve it pursuant to standard fire department procedures and the investigator who observed the wick remnant

is available for examination. *People v. Brown*, 194 Colo. 553, 574 P.2d 92 (1978).

"Explosive or incendiary" includes items which in themselves are not explosive or incendiary, but which have been prepared or altered for use in the creation of an explosive or incendiary device. *People v. Lovato*, 630 P.2d 597 (Colo. 1981).

Blasting cap within ambit of "other forms of high explosives". The material in a blasting cap is classified as a high explosive and, thus, falls within the ambit of "other forms of high explosives" which are expressly included in this section's definition of explosive or incendiary devices. *People v. Lovato*, 630 P.2d 597 (Colo. 1981).

Phrase "including any device" defined. The phrase "which consists of or includes a breakable container including a flammable liquid or compound and a wick" is not a limitation on all devices proscribed by this section, but instead defines the phrase "including any device". The statute thus proscribes the use of any incendiary bomb or grenade, including one with a wick and a breakable container. *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

Proscribed conduct unlike fourth degree arson. This section does not deny equal protection by proscribing the same conduct as the fourth degree arson statute yet carrying a substantially greater penalty; the elements of each offense and the mental states required are different. *People v. Owens*, 670 P.2d 1233 (Colo. 1983).

Applied in *Miller v. District Court*, 193 Colo. 404, 566 P.2d 1063 (1977); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981).

18-12-110. Forfeiture of firearms. Upon the motion of the prosecuting attorney after the conviction of a defendant, the court may order the forfeiture of any firearms which were used by the defendant during the course of the criminal episode which gave rise to said conviction as an element of sentencing or as a condition of probation or of a deferred sentence. Firearms forfeited under this section shall be disposed of pursuant to section 16-13-311, C.R.S.

Source: L. 83: Entire section added, p. 667, § 11, effective July 1.

18-12-111. Unlawful purchase of firearms. (1) Any person who knowingly purchases or otherwise obtains a firearm on behalf of or for transfer to a person who the transferor knows or reasonably should know is ineligible to possess a firearm pursuant to federal or state law commits a class 4 felony.

(2) (a) Any person who is a licensed dealer, as defined in 18 U.S.C. sec. 921 (a) (11), shall post a sign displaying the provisions of subsection (1) of this section in a manner that is easily readable. The person shall post such sign in an area that is visible to the public at each location from which the person sells firearms to the general public.

(b) Any person who violates any provision of this subsection (2) commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of two hundred fifty dollars.

Source: L. 2000: Entire section added, p. 638, § 1, effective July 1.

PART 2

PERMITS TO CARRY CONCEALED HANDGUNS

Law reviews: For article, "In the Crosshairs: Colorado's New Gun Laws", see 33 Colo. Law. 11 (January 2004).

18-12-201. Legislative declaration. (1) The general assembly finds that:

(a) There exists a widespread inconsistency among jurisdictions within the state with regard to the issuance of permits to carry concealed handguns and identification of areas of the state where it is lawful to carry concealed handguns;

(b) This inconsistency among jurisdictions creates public uncertainty regarding the areas of the state in which it is lawful to carry concealed handguns;

(c) Inconsistency results in the arbitrary and capricious denial of permits to carry concealed handguns based on the jurisdiction of residence rather than the qualifications for obtaining a permit;

(d) The criteria and procedures for the lawful carrying of concealed handguns historically has been regulated by state statute and should be consistent throughout the state to ensure the consistent implementation of state law; and

(e) It is necessary that the state occupy the field of regulation of the bearing of concealed handguns since the issuance of a concealed handgun permit is based on a person's constitutional right of self-protection and there is a prevailing state interest in ensuring that no citizen is arbitrarily denied a concealed handgun permit and in ensuring that the laws controlling the use of the permit are consistent throughout the state.

(2) Based on the findings specified in subsection (1) of this section, the general assembly hereby concludes that:

(a) The permitting and carrying of concealed handguns is a matter of statewide concern; and

(b) It is necessary to provide statewide uniform standards for issuing permits to carry concealed handguns for self-defense.

(3) In accordance with the findings and conclusions specified in subsections (1) and (2) of this section, the general assembly hereby instructs each sheriff to implement and administer the provisions of this part 2. The general assembly does not delegate to the sheriffs the authority to regulate or restrict the issuance of permits provided for in this part 2 beyond the provisions of this part 2. An action or rule that encumbers the permit process by placing burdens on the applicant beyond those sworn statements and specified documents detailed in this part 2 or that creates restrictions beyond those specified in this part 2 is in conflict with the intent of this part 2 and is prohibited.

Source: L. 2003: Entire part added, p. 635, § 1, effective May 17.

18-12-202. Definitions. As used in this part 2, unless the context otherwise requires:

(1) "Bureau" means the Colorado bureau of investigation within the department of public safety.

(2) "Certified instructor" means an instructor for a firearms safety course who is certified as a firearms instructor by:

- (a) A county, municipal, state, or federal law enforcement agency;
- (b) The peace officers standards and training board created in section 24-31-302, C.R.S.;
- (c) A federal military agency; or
- (d) A national nonprofit organization that certifies firearms instructors, operates national firearms competitions, and provides training, including courses in personal protection, in small arms safety, use, and marksmanship.

(3) "Chronically and habitually uses alcoholic beverages to the extent that the applicant's normal faculties are impaired" means:

(a) The applicant has at any time been committed as an alcoholic pursuant to section 27-81-111 or 27-81-112, C.R.S.; or

(b) Within the ten-year period immediately preceding the date on which the permit application is submitted, the applicant:

(I) Has been committed as an alcoholic pursuant to section 27-81-109 or 27-81-110, C.R.S.; or

(II) Has had two or more alcohol-related convictions under section 42-4-1301 (1) or (2), C.R.S., or a law of another state that has similar elements, or revocations related to misdemeanor, alcohol-related convictions under section 42-2-126, C.R.S., or a law of another state that has similar elements.

(4) "Handgun" means a handgun as defined in section 18-12-101 (1) (e.5); except that the term does not include a machine gun as defined in section 18-12-101 (1) (g).

(5) "Handgun training class" means:

(a) A law enforcement training firearms safety course;

(b) A firearms safety course offered by a law enforcement agency, an institution of higher education, or a public or private institution or organization or firearms training school, that is open to the general public and is taught by a certified instructor; or

(c) A firearms safety course or class that is offered and taught by a certified instructor.

(6) "Permit" means a permit to carry a concealed handgun issued pursuant to the provisions of this part 2; except that "permit" does not include a temporary emergency permit issued pursuant to section 18-12-209.

(7) "Sheriff" means the sheriff of a county, or his or her designee, or the official who has the duties of a sheriff in a city and county, or his or her designee.

(8) "Training certificate" means a certificate, affidavit, or other document issued by the instructor, school, club, or organization that conducts a handgun training class that evidences an applicant's successful completion of the class requirements.

Source: L. 2003: Entire part added, p. 636, § 1, effective May 17. **L. 2010:** (3)(a) and (3)(b)(I) amended, (SB 10-175), ch. 188, p. 787, § 32, effective April 29.

18-12-203. Criteria for obtaining a permit. (1) Beginning May 17, 2003, except as otherwise provided in this section, a sheriff shall issue a permit to carry a concealed handgun to an applicant who:

(a) Is a legal resident of the state of Colorado. For purposes of this part 2, a person who is a member of the armed forces and is stationed pursuant to permanent duty station orders at a military installation in this state, and a member of the person's immediate family living in Colorado, shall be deemed to be a legal resident of the state of Colorado.

(b) Is twenty-one years of age or older;

(c) Is not ineligible to possess a firearm pursuant to section 18-12-108 or federal law;

(d) Has not been convicted of perjury under section 18-8-503, in relation to information provided or deliberately omitted on a permit application submitted pursuant to this part 2;

(e) (I) Does not chronically and habitually use alcoholic beverages to the extent that the applicant's normal faculties are impaired.

(II) The prohibition specified in this paragraph (e) shall not apply to an applicant who provides an affidavit, signed by a professional counselor or addiction counselor who is licensed pursuant to article 43 of title 12, C.R.S., and specializes in alcohol addiction,

stating that the applicant has been evaluated by the counselor and has been determined to be a recovering alcoholic who has refrained from using alcohol for at least three years.

(f) Is not an unlawful user of or addicted to a controlled substance as defined in section 18-18-102 (5). Whether an applicant is an unlawful user of or addicted to a controlled substance shall be determined as provided in federal law and regulations.

(g) Is not subject to:

(I) A protection order issued pursuant to section 18-1-1001 or section 19-2-707, C.R.S., that is in effect at the time the application is submitted; or

(II) A permanent protection order issued pursuant to article 14 of title 13, C.R.S.; or

(III) A temporary protection order issued pursuant to article 14 of title 13, C.R.S., that is in effect at the time the application is submitted;

(h) Demonstrates competence with a handgun by submitting:

(I) Evidence of experience with a firearm through participation in organized shooting competitions or current military service;

(II) Evidence that, at the time the application is submitted, the applicant is a certified instructor;

(III) Proof of honorable discharge from a branch of the United States armed forces within the three years preceding submittal of the application;

(IV) Proof of honorable discharge from a branch of the United States armed forces that reflects pistol qualifications obtained within the ten years preceding submittal of the application;

(V) A certificate showing retirement from a Colorado law enforcement agency that reflects pistol qualifications obtained within the ten years preceding submittal of the application; or

(VI) A training certificate from a handgun training class obtained within the ten years preceding submittal of the application. The applicant shall submit the original training certificate or a photocopy thereof that includes the original signature of the class instructor. In obtaining a training certificate from a handgun training class, the applicant shall have discretion in selecting which handgun training class to complete.

(2) Regardless of whether an applicant meets the criteria specified in subsection (1) of this section, if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others if the applicant receives a permit to carry a concealed handgun, the sheriff may deny the permit.

(3) (a) The sheriff shall deny, revoke, or refuse to renew a permit if an applicant or a permittee fails to meet one of the criteria listed in subsection (1) of this section and may deny, revoke, or refuse to renew a permit on the grounds specified in subsection (2) of this section.

(b) Following issuance of a permit, if the issuing sheriff has a reasonable belief that a permittee no longer meets the criteria specified in subsection (1) of this section or that the permittee presents a danger as described in subsection (2) of this section, the sheriff shall suspend the permit until such time as the matter is resolved and the issuing sheriff determines that the permittee is eligible to possess a permit as provided in this section.

(c) If the sheriff suspends or revokes a permit, the sheriff shall notify the permittee in writing, stating the grounds for suspension or revocation and informing the permittee of the right to seek a second review by the sheriff, to submit additional information for the record, and to seek judicial review pursuant to section 18-12-207.

Source: L. 2003: Entire part added, p. 638, § 1, effective May 17. L. 2004: (1)(g) amended, p. 1198, § 52, effective August 4. L. 2008: (1)(e)(II) amended, p. 426, § 27, effective August 5.

ANNOTATION

Plaintiff whose felony conviction in another state was set aside under that state's law and who was entitled to possess a handgun under that state's law was entitled to possess a hand-

gun under § 18-12-108 and was entitled to a concealed handgun permit under this section. *Seguna v. Maketa*, 181 P.3d 399 (Colo. App. 2008).

Sheriff's decision not to reissue concealed handgun permit was a quasi-judicial decision. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Sheriff's refusal to reissue concealed handgun permit was based on proceedings and procedures that violated applicant's procedural due process rights. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Applicant was denied due process because he was not apprised of or allowed to review adverse evidence or given the opportunity to confront adverse evidence and witnesses. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Sheriff's findings of fact and conclusions of law, prepared on remand from the district court, did not satisfy statutory requirement for a written statement of the grounds for suspension or revocation. By the time case proceeded to district court, it was too late for sheriff to inform applicant of the evidence against him and the grounds for sheriff's decision in order to provide applicant with a reasonable opportunity to exercise his statutory rights to supplement the record or request a second review to confront such evidence. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

18-12-204. Permit contents - validity - carrying requirements. (1) (a) Each permit shall bear a color photograph of the permittee and shall display the signature of the sheriff who issues the permit. In addition, the sheriffs of this state shall ensure that all permits issued pursuant to this part 2 contain the same items of information and are the same size and the same color.

(b) A permit is valid for a period of five years after the date of issuance and may be renewed as provided in section 18-12-211. A permit issued pursuant to this part 2, including a temporary emergency permit issued pursuant to section 18-12-209, is effective in all areas of the state, except as otherwise provided in section 18-12-214.

(2) (a) A permittee, in compliance with the terms of a permit, may carry a concealed handgun as allowed by state law. The permittee shall carry the permit, together with valid photo identification, at all times during which the permittee is in actual possession of a concealed handgun and shall produce both documents upon demand by a law enforcement officer. Failure to produce a permit upon demand by a law enforcement officer raises a rebuttable presumption that the person does not have a permit. Failure to carry and produce a permit and valid photo identification upon demand as required in this subsection (2) is a class 1 petty offense. A charge of failure to carry and produce a permit and valid photo identification upon demand pursuant to this subsection (2) shall be dismissed by the court if, at or before the permittee's scheduled court appearance, the permittee exhibits to the court a valid permit and valid photo identification, both of which were issued to the permittee prior to the date on which the permittee was charged with failure to carry and produce a permit and valid photo identification upon demand.

(b) The provisions of paragraph (a) of this subsection (2) apply to temporary emergency permits issued pursuant to section 18-12-209.

(3) (a) A person who may lawfully possess a handgun may carry a handgun under the following circumstances without obtaining a permit and the handgun shall not be considered concealed:

(I) The handgun is in the possession of a person who is in a private automobile or in some other private means of conveyance and who carries the handgun for a legal use, including self-defense; or

(II) The handgun is in the possession of a person who is legally engaged in hunting activities within the state.

(b) The provisions of this subsection (3) shall not be construed to authorize the carrying of a handgun in violation of the provisions of section 18-12-105 or 18-12-105.5.

Source: L. 2003: Entire part added, p. 639, § 1, effective May 17.

18-12-205. Sheriff - application - procedure - background check. (1) (a) To obtain a permit, a person shall submit a permit application on a statewide standardized form developed by the sheriffs and available from each sheriff. The permit application form shall solicit only the following information from the applicant:

(I) The applicant's full name, date of birth, and address;

(II) The applicant's birth name, if different from the name provided pursuant to subparagraph (I) of this paragraph (a), and any other names the applicant may have used or by which the applicant may have been known;

(III) The applicant's home address or addresses for the ten-year period immediately preceding submittal of the application;

(IV) Whether the applicant is a resident of this state as of the date of application and whether the applicant has a valid driver's license or other state-issued photo identification or military order proving residence; and

(V) Whether the applicant meets the criteria for obtaining a permit specified in section 18-12-203 (1).

(b) The permit application form shall not require the applicant to waive or release a right or privilege, including but not limited to waiver or release of privileged or confidential information contained in medical records.

(2) (a) An applicant shall complete the permit application form and return it, in person, to the sheriff of the county or city and county in which the applicant resides, to the sheriff of the county or city and county in which the applicant maintains a secondary residence or owns or leases real property used by the applicant in a business, or to the sheriff that previously issued a permit to the applicant. The applicant shall sign the completed permit application form in person before the sheriff. The applicant shall provide his or her signature voluntarily upon a sworn oath that the applicant knows the contents of the permit application and that the information contained in the permit application is true and correct. An applicant who knowingly and intentionally makes a false or misleading statement on a permit application or deliberately omits any material information requested on the application commits perjury as described in section 18-8-503. Upon conviction, the applicant shall be punished as provided in section 18-1.3-501. In addition, the applicant shall be denied the right to obtain or possess a permit, and the sheriff shall revoke the applicant's permit if issued prior to conviction.

(b) An applicant shall also submit to the sheriff a permit fee not to exceed one hundred dollars for processing the permit application. The sheriff shall set the amount of the permit fee as provided in subsection (5) of this section. In addition, the applicant shall submit an amount specified by the director of the bureau, pursuant to section 24-72-306, C.R.S., for processing the applicant's fingerprints through the bureau and through the federal bureau of investigation. Neither the permit fee nor the fingerprint processing fee shall be refundable in the event the sheriff denies the applicant's permit application or suspends or revokes the permit subsequent to issuance.

(3) In addition to the items specified in subsection (2) of this section, an applicant, when submitting the completed permit application, shall submit the following items to the sheriff:

(a) Documentary evidence demonstrating competence with a handgun as specified in section 18-12-203 (1) (h); and

(b) A full frontal view color photograph of the applicant's head taken within the thirty days immediately preceding submittal of the permit application; except that the applicant need not submit a photograph if the sheriff photographs the applicant for purposes of issuing a permit. Any photograph submitted shall show the applicant's full head, including hair and facial features, and the depiction of the applicant's head shall measure one and one-eighth inches wide and one and one-fourth inches high.

(4) (a) The sheriff shall witness an applicant's signature on the permit application as provided in subsection (2) of this section and verify that the person making application for a permit is the same person who appears in any photograph submitted and the same person who signed the permit application form. To verify the applicant's identity, the applicant shall present to the sheriff the applicant's valid Colorado driver's license or valid Colorado or military photo identification.

(b) After verifying the applicant's identity, the sheriff shall take two complete sets of the applicant's fingerprints. The sheriff shall submit both sets of fingerprints to the bureau, and the sheriff shall not retain a set of the applicant's fingerprints.

(c) After receipt of a permit application and the items specified in this section, the sheriff shall verify that the applicant meets the criteria specified in section 18-12-203 (1)

and is not a danger as described in section 18-12-203 (2). The verification at a minimum shall include requesting the bureau to conduct a search of the national instant criminal background check system and a search of the state integrated criminal justice information system to determine whether the applicant meets the criteria specified in section 18-12-203 (1). In addition, if the applicant resides in a municipality or town, the sheriff shall consult with the police department of the municipality or town in which the applicant resides, and the sheriff may consult with other local law enforcement agencies.

(5) The sheriff in each county or city and county in the state shall establish the amount of the new and renewal permit fees within his or her jurisdiction. The amount of the new and renewal permit fees shall comply with the limits specified in paragraph (b) of subsection (2) of this section and section 18-12-211 (1), respectively. The fee amounts shall reflect the actual direct and indirect costs to the sheriff of processing permit applications and renewal applications pursuant to this part 2.

Source: L. 2003: Entire part added, p. 640, § 1, effective May 17.

18-12-206. Sheriff - issuance or denial of permits - report. (1) Within ninety days after the date of receipt of the items specified in section 18-12-205, a sheriff shall:

(a) Approve the permit application and issue the permit; or

(b) Deny the permit application based solely on the ground that the applicant fails to qualify under the criteria listed in section 18-12-203 (1) or that the applicant would be a danger as described in section 18-12-203 (2). If the sheriff denies the permit application, he or she shall notify the applicant in writing, stating the grounds for denial and informing the applicant of the right to seek a second review of the application by the sheriff, to submit additional information for the record, and to seek judicial review pursuant to section 18-12-207.

(2) If the sheriff does not receive the results of the fingerprint checks conducted by the bureau and by the federal bureau of investigation within ninety days after receiving a permit application, the sheriff shall determine whether to grant or deny the permit application without considering the fingerprint check information. If, upon receipt of the information, the sheriff finds that the permit was issued or denied erroneously, based on the criteria specified in section 18-12-203 (1) and (2), the sheriff shall either revoke or issue the permit, whichever is appropriate.

(3) (a) Each sheriff shall maintain a list of the persons to whom he or she issues permits pursuant to this part 2. Upon request by another criminal justice agency for law enforcement purposes, the sheriff may, at his or her discretion, share information from the list of permittees with a law enforcement agency for the purpose of determining the validity of a permit. A database maintained pursuant to this subsection (3) and any database operated by a state agency that includes permittees shall be searchable only by name.

(b) (I) Notwithstanding the provisions of paragraph (a) of this subsection (3), on and after July 1, 2011, a sheriff shall not share information from the list of permittees with a law enforcement agency for the purpose of creating a statewide database of permittees, and any law enforcement agency that receives information concerning permittees from a sheriff shall not use the information to create or maintain a statewide database of permittees. Any information concerning a permittee that is included in a statewide database pursuant to paragraph (a) of this subsection (3) shall be removed from the database no later than July 1, 2011.

(II) Prior to the repeal in subparagraph (I) of this paragraph (b), the state auditor's office shall conduct a performance audit of the statewide database of permittees as provided in section 2-3-118, C.R.S.

(c) Except for suspected violations of sections 18-12-105 and 18-12-105.5, a peace officer may not use or search a database of permittees maintained by a law enforcement agency to establish reasonable suspicion for a traffic stop, or when contacting an individual, to justify probable cause for a search or seizure of a person or a person's vehicle or property.

(4) Each sheriff shall annually prepare a report specifying, at a minimum, the number of permit applications received during the year for which the report was prepared, the number of permits issued during the year, the number of permits denied during the year, the

reasons for denial, the number of revocations during the year, and the reasons for the revocations. The report shall not include the name of a person who applies for a permit, regardless of whether the person receives or is denied a permit. Each sheriff shall submit the report on or before March 1, 2004, and on or before March 1 each year thereafter, to the members of the general assembly. In addition, each sheriff shall provide a copy of the annual report prepared pursuant to this subsection (4) to a member of the public upon request.

Source: L. 2003: Entire part added, p. 642, § 1, effective May 17. **L. 2007:** (3)(b) amended and (3)(c) added, p. 777, §§ 1, 2, effective May 14.

ANNOTATION

Sheriff's decision not to reissue concealed handgun permit was a quasi-judicial decision. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Sheriff's refusal to reissue concealed handgun permit was based on proceedings and procedures that violated applicant's procedural due process rights. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Applicant was denied due process because he was not apprised of or allowed to review adverse evidence or given the opportunity to confront adverse evidence and witnesses. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

Sheriff's findings of fact and conclusions of law, prepared on remand from the district court, did not satisfy statutory requirement for a written statement stating the grounds for suspension or revocation. By the time case proceeded to district court, it was too late for sheriff to inform applicant of the evidence against him and the grounds for sheriff's decision in order to provide applicant with a reasonable opportunity to exercise his statutory rights to supplement the record or request a second review to confront such evidence. Copley v. Robinson, 224 P.3d 431 (Colo. App. 2009).

18-12-207. Judicial review - permit denial - permit suspension - permit revocation.

(1) If a sheriff denies a permit application, refuses to renew a permit, or suspends or revokes a permit, the applicant or permittee may seek judicial review of the sheriff's decision. The applicant or permittee may seek judicial review either in lieu of or subsequent to the sheriff's second review.

(2) The procedure and time lines for filing a complaint, an answer, and briefs for judicial review pursuant to this section shall be in accordance with the procedures specified in rule 106 (a) (4) and (b) of the Colorado rules of civil procedure.

(3) Notwithstanding any other provision of law to the contrary, at a judicial review sought pursuant to this section, the sheriff shall have the burden of proving by a preponderance of the evidence that the applicant or permittee is ineligible to possess a permit under the criteria listed in section 18-12-203 (1) or, if the denial, suspension, or revocation was based on the sheriff's determination that the person would be a danger as provided in section 18-12-203 (2), the sheriff shall have the burden of proving the determination by clear and convincing evidence. Following completion of the review, the court may award attorney fees to the prevailing party.

Source: L. 2003: Entire part added, p. 644, § 1, effective May 17.

18-12-208. Colorado bureau of investigation - duties. (1) Upon receipt of a permit applicant's fingerprints from a sheriff pursuant to section 18-12-205 (4) or upon a sheriff's request pursuant to section 18-12-211 (1), the bureau shall process the full set of fingerprints to obtain any available state criminal justice information or federal information pursuant to section 16-21-103 (5), C.R.S., and shall report any information received to the sheriff. In addition, within ten days after receiving the fingerprints, the bureau shall forward one set of the fingerprints to the federal bureau of investigation for processing to obtain any available state criminal justice information or federal information.

(2) The bureau shall use the fingerprints received pursuant to this part 2 solely for the purposes of:

(a) Obtaining information for the issuance or renewal of permits; and

(b) Notifying an issuing sheriff that a permittee has been arrested for or charged with an offense that would require revocation or suspension of the permit or that a permittee has been convicted of such an offense.

(3) On or before January 15, 2004, and on or before January 15 each year thereafter until January 15, 2007, the bureau shall provide to the general assembly a list of the jurisdictions in which the sheriff provides to the bureau the names of persons to whom the sheriff issues permits.

Source: L. 2003: Entire part added, p. 644, § 1, effective May 17.

18-12-209. Issuance by sheriffs of temporary emergency permits. (1) Notwithstanding any provisions of this part 2 to the contrary, a sheriff, as provided in this section, may issue a temporary emergency permit to carry a concealed handgun to a person whom the sheriff has reason to believe may be in immediate danger.

(2) To receive a temporary emergency permit, a person shall submit to the sheriff of the county or city and county in which the person resides or in which the circumstances giving rise to the emergency exist the items specified in section 18-12-205; except that an applicant for a temporary emergency permit need not submit documentary evidence demonstrating competence with a handgun as required under section 18-12-205 (3) (a), and the applicant shall submit a temporary permit fee not to exceed twenty-five dollars, as set by the sheriff. Upon receipt of the documents and fee, the sheriff shall request that the bureau conduct a criminal history record check of the bureau files and a search of the national instant criminal background check system. The sheriff may issue a temporary emergency permit to the applicant if the sheriff determines the person may be in immediate danger and the criminal history record check shows that the applicant meets the criteria specified in section 18-12-203; except that the applicant need not demonstrate competence with a handgun and the applicant may be eighteen years of age or older. A temporary emergency permit issued pursuant to this section is valid for a period of ninety days after the date of issuance. Prior to or within ten days after expiration of a temporary emergency permit, the permittee may apply to the issuing sheriff for renewal of the permit. The issuing sheriff may renew a temporary emergency permit once for an additional ninety-day period; except that, if the permittee is younger than twenty-one years of age, the sheriff may renew the temporary emergency permit for subsequent ninety-day periods until the permittee reaches twenty-one years of age.

Source: L. 2003: Entire part added, p. 645, § 1, effective May 17.

18-12-210. Maintenance of permit - address change - invalidity of permit.

(1) Within thirty days after a permittee changes the address specified on his or her permit or within three business days after his or her permit is lost, stolen, or destroyed, the permittee shall notify the issuing sheriff of the change of address or permit loss, theft, or destruction. Failure to notify the sheriff pursuant to this subsection (1) is a class 1 petty offense.

(2) If a permit is lost, stolen, or destroyed, the permit is automatically invalid. The person to whom the permit was issued may obtain a duplicate or substitute therefor upon payment of fifteen dollars to the issuing sheriff and upon submission of a notarized statement to the issuing sheriff that the permit has been lost, stolen, or destroyed.

(3) The provisions of this section apply to temporary emergency permits issued pursuant to section 18-12-209.

Source: L. 2003: Entire part added, p. 645, § 1, effective May 17.

18-12-211. Renewal of permits. (1) Within one hundred twenty days prior to expiration of a permit, the permittee may obtain a renewal form from the issuing sheriff and renew the permit by submitting to the issuing sheriff a completed renewal form, a notarized affidavit stating that the permittee remains qualified pursuant to the criteria specified in

section 18-12-203 (1) (a) to (1) (g), and the required renewal fee not to exceed fifty dollars, as set by the sheriff pursuant to section 18-12-205 (5). The renewal form shall meet the requirements specified in section 18-12-205 (1) for an application. The sheriff shall verify pursuant to section 18-12-205 (4) that the permittee meets the criteria specified in section 18-12-203 (1) (a) to (1) (g) and is not a danger as described in section 18-12-203 (2) and shall either renew or deny the renewal of the permit in accordance with the provisions of section 18-12-206 (1). If the sheriff denies renewal of a permit, the permittee may seek a second review of the renewal application by the sheriff and may submit additional information for the record. The permittee may also seek judicial review as provided in section 18-12-207.

(2) A permittee who fails to file a renewal form on or before the permit expiration date may renew the permit by paying a late fee of fifteen dollars in addition to the renewal fee established pursuant to subsection (1) of this section. No permit shall be renewed six months or more after its expiration date, and the permit shall be deemed to have permanently expired. A person whose permit has permanently expired may reapply for a permit, but the person shall submit an application for a permit and the fee required pursuant to section 18-12-205. A person who knowingly and intentionally files false or misleading information or deliberately omits material information required under this section is subject to criminal prosecution for perjury under section 18-8-503.

Source: L. 2003: Entire part added, p. 645, § 1, effective May 17.

18-12-212. Exemption. (1) This part 2 shall not apply to law enforcement officers employed by jurisdictions outside this state, so long as the foreign employing jurisdiction exempts peace officers employed by jurisdictions within Colorado from any concealed handgun or concealed weapons laws in effect in the foreign employing jurisdiction.

(2) Notwithstanding any provision of this part 2 to the contrary, a retired peace officer, level I or Ia, as defined in section 18-1-901 (3) (I) (I) and (3) (I) (II), as said section existed prior to its repeal in 2003, within the first five years after retirement may obtain a permit by submitting to the sheriff of the jurisdiction in which the retired peace officer resides a letter signed by the sheriff or chief of police of the jurisdiction by which the peace officer was employed immediately prior to retirement attesting that the retired officer meets the criteria specified in section 18-12-203 (1). A retired peace officer who submits a letter pursuant to this subsection (2) is not subject to the fingerprint or criminal history check requirements specified in this part 2 and is not required to pay the permit application fee. Upon receipt of a letter submitted pursuant to this subsection (2), the sheriff shall issue the permit. A permit issued pursuant to this subsection (2) may not be renewed. Upon expiration of the permit, the permittee may apply for a new permit as provided in this part 2.

Source: L. 2003: Entire part added, p. 646, § 1, effective May 17. **L. 2004:** (2) amended, p. 1198, § 53, effective August 4.

Cross references: For additional provisions relating to peace officers, see article 2.5 of title 16.

18-12-213. Reciprocity. (1) A permit to carry a concealed handgun or a concealed weapon that is issued by a state that recognizes the validity of permits issued pursuant to this part 2 shall be valid in this state in all respects as a permit issued pursuant to this part 2 if the permit is issued to a person who is:

- (a) Twenty-one years of age or older; and
- (b) (I) A resident of the state that issued the permit, as demonstrated by the address stated on a valid picture identification that is issued by the state that issued the permit and is carried by the permit holder; or
- (II) A resident of Colorado for no more than ninety days, as determined by the date of issuance on a valid picture identification issued by Colorado and carried by the permit holder.

(2) For purposes of this section, a “valid picture identification” means a driver’s license or a state identification issued in lieu of a driver’s license.

Source: L. 2003: Entire part added, p. 646, § 1, effective May 17. L. 2007: Entire section amended, p. 956, § 1, effective May 17.

18-12-214. Authority granted by permit - carrying restrictions. (1) (a) A permit to carry a concealed handgun authorizes the permittee to carry a concealed handgun in all areas of the state, except as specifically limited in this section. A permit does not authorize the permittee to use a handgun in a manner that would violate a provision of state law. A local government does not have authority to adopt or enforce an ordinance or resolution that would conflict with any provision of this part 2.

(b) A peace officer may temporarily disarm a permittee, incident to a lawful stop of the permittee. The peace officer shall return the handgun to the permittee prior to discharging the permittee from the scene.

(2) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun into a place where the carrying of firearms is prohibited by federal law.

(3) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun onto the real property, or into any improvements erected thereon, of a public elementary, middle, junior high, or high school; except that:

(a) A permittee may have a handgun on the real property of the public school so long as the handgun remains in his or her vehicle and, if the permittee is not in the vehicle, the handgun is in a compartment within the vehicle and the vehicle is locked;

(b) A permittee who is employed or retained by contract by a school district as a school security officer may carry a concealed handgun onto the real property, or into any improvement erected thereon, of a public elementary, middle, junior high, or high school while the permittee is on duty;

(c) A permittee may carry a concealed handgun on undeveloped real property owned by a school district that is used for hunting or other shooting sports.

(4) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun into a public building at which:

(a) Security personnel and electronic weapons screening devices are permanently in place at each entrance to the building;

(b) Security personnel electronically screen each person who enters the building to determine whether the person is carrying a weapon of any kind; and

(c) Security personnel require each person who is carrying a weapon of any kind to leave the weapon in possession of security personnel while the person is in the building.

(5) Nothing in this part 2 shall be construed to limit, restrict, or prohibit in any manner the existing rights of a private property owner, private tenant, private employer, or private business entity.

(6) The provisions of this section apply to temporary emergency permits issued pursuant to section 18-12-209.

Source: L. 2003: Entire part added, p. 647, § 1, effective May 17.

ANNOTATION

Institutions of higher education not exempt from the express authorization of permittees to carry concealed handguns “in all areas of the state”. The concealed carry act, §§ 18-12-201 to 18-12-216, satisfies the “unless otherwise [provided] by law” provision of article VIII, section 5(2), of the state constitution by

manifesting a clear and unmistakable intent to subject the entire state to a single statutory scheme regulating concealed handgun carry, subject to specified exceptions. *Students for Concealed Carry on Campus, LLC v. Regents of Univ. of Colo.*, __ P.3d __ (Colo. App. 2010).

18-12-215. Immunity. (1) The bureau and a local law enforcement agency and an individual employed by the bureau or a local law enforcement agency shall not be liable for

any damages that may result from good faith compliance with the provisions of this part 2.

(2) A law enforcement officer or agency, medical personnel, and an organization that offers handgun training classes and its personnel who in good faith provide information regarding an applicant shall not be liable for any damages that may result from issuance or denial of a permit.

Source: L. 2003: Entire part added, p. 648, § 1, effective May 17.

18-12-216. Permits issued prior to May 17, 2003. (1) A permit issued pursuant to section 18-12-105.1, as it existed prior to its repeal, shall permanently expire on June 30, 2007, or on the expiration date specified on the permit, whichever occurs first. A person who submitted a full set of fingerprints to obtain a permit prior to May 17, 2003, upon expiration of the permit, may apply for renewal of the permit as provided in this part 2. A person who did not submit a full set of fingerprints to obtain a permit prior to May 17, 2003, upon expiration of the permit, may apply for a new permit as provided in this part 2.

(2) Within one hundred twenty days prior to the expiration of a permit issued pursuant to section 18-12-105.1, as it existed prior to its repeal, the issuing authority shall send a notice of expiration to the permittee to notify the permittee of the permit expiration as provided in subsection (1) of this section and of his or her ability to renew the permit or obtain a new permit as provided in subsection (1) of this section.

Source: L. 2003: Entire part added, p. 648, § 1, effective May 17.

ARTICLE 13

Miscellaneous Offenses

Editor's note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor's note following the title heading.

18-13-101.	Abuse of a corpse.		
18-13-102.	Endurance contests. (Repealed)	18-13-114.	age containers with detachable opening devices.
18-13-103.	Endangering the welfare of an incompetent person. (Repealed)	18-13-114.5.	Sale of secondhand property - record - inspection - crime. Proof of ownership required - penalty - definitions.
18-13-104.	Fighting by agreement - dueling.	18-13-115.	Notice - penalties.
18-13-105.	Criminal libel. (Repealed)	18-13-116.	Sales tax license.
18-13-106.	Unlawful to discard or abandon iceboxes or motor vehicles and similar items.	18-13-117.	Record of sales.
18-13-107.	Interference with persons with disabilities.	18-13-118.	Regulation of secondhand dealers.
18-13-108.	Removal of timber from state lands.	18-13-119.	Health care providers - abuse of health insurance.
18-13-109.	Firing woods or prairie.	18-13-119.5.	Abuse of property insurance.
18-13-109.5.	Intentionally setting wildfire.	18-13-120.	Use, transportation, and storage of drip gasoline.
18-13-110.	Air pollution violations. (Repealed)	18-13-121.	Furnishing cigarettes or tobacco products to minors.
18-13-111.	Purchases of commodity metals - violations - commodity metals theft task force - creation - composition - reports - legislative declaration - definitions - repeal.	18-13-122.	Illegal possession or consumption of ethyl alcohol by an underage person - definitions - adolescent substance abuse prevention and treatment fund - legislative declaration.
18-13-112.	Hazardous waste violations.	18-13-123.	Unlawful administration of gamma hydroxybutyrate (GHB) or ketamine.
18-13-113.	Unlawful to sell metal beverage containers with detachable opening devices.	18-13-124.	Dissemination of false information

	mation to obtain hospital admittance or care.	18-13-128.	pealed) Smuggling of humans.
18-13-125.	Telephone records - sale or purchase.	18-13-129.	Coercion of involuntary servitude. (Repealed)
18-13-126.	Locating protected persons.	18-13-130.	Bail bond - prohibited activities - penalties.
18-13-127.	Trafficking in adults. (Re-		

18-13-101. Abuse of a corpse. (1) A person commits abuse of a corpse if, without statutory or court-ordered authority, he or she:

(a) Removes the body or remains of any person from a grave or other place of sepulcher without the consent of the person who has the right to dispose of the remains pursuant to section 15-19-106, C.R.S.; or

(b) Treats the body or remains of any person in a way that would outrage normal family sensibilities.

(2) Abuse of a corpse is a class 2 misdemeanor.

Source: L. 71: R&RE, p. 483, § 1. C.R.S. 1963: § 40-13-101. L. 2005: Entire section amended, p. 206, § 1, effective July 1.

ANNOTATION

Applied in *People v. Bookman*, 646 P.2d 924 (Colo. 1982).

18-13-102. Endurance contests. (Repealed)

Source: L. 71: R&RE, p. 483, § 1. C.R.S. 1963: § 40-13-102. L. 85: Entire section repealed, p. 624, § 11, effective July 1.

18-13-103. Endangering the welfare of an incompetent person. (Repealed)

Source: L. 71: R&RE, p. 483, § 1. C.R.S. 1963: § 40-13-103. L. 91: Entire section repealed, p. 1784, § 16, effective July 1.

18-13-104. Fighting by agreement - dueling. (1) If two or more persons shall fight by agreement in a public place, except in a sporting event authorized by law, the persons so fighting commit a class 1 petty offense.

(2) Persons who by agreement engage in a fight with deadly weapons, whether in a public or private place, commit dueling, which is a class 4 felony.

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-104.

18-13-105. Criminal libel. (Repealed)

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-105. L. 73: p. 540, § 14. L. 77: (1) amended, p. 971, § 65, effective July 1. L. 89: (3) amended, p. 842, § 102, effective July 1. L. 2012: Entire section repealed, (SB 12-102), ch. 113, p. 391, § 1, effective September 1.

Cross references: For affirmative defenses generally, see §§ 18-1-407, 18-1-710, and 18-1-805; for provisions on damages for broadcasting defamatory statements, see § 13-21-106.

18-13-106. Unlawful to discard or abandon iceboxes or motor vehicles and similar items. Any person abandoning or discarding, in any public or private place accessible to children, any chest, closet, piece of furniture, refrigerator, icebox, motor vehicle, or other article, having a compartment of a capacity of one and one-half cubic feet or more and

having a door or lid which when closed cannot be opened easily from the inside, or who, being the owner, lessee, or manager of such place, knowingly permits such abandoned or discarded article to remain in such condition commits a class 1 petty offense.

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-106.

18-13-107. Interference with persons with disabilities. (1) No person, except one wholly or partially blind, or wholly or partially deaf, or both wholly or partially blind and wholly or partially deaf, shall carry, hold, or use upon any street, highway, sidewalk, or any other public place a cane or walking stick which is white or white tipped with red or metallic in color or a leash blaze orange in color on any dog accompanying such person.

(2) Repealed.

(3) No person shall beat, harass, intimidate, entice, distract, or otherwise interfere with any dog on a blaze orange leash or accompanying a person carrying a white or white tipped with red or metallic colored cane or walking stick or any assistance dog, as defined in section 24-34-803 (7), C.R.S., accompanying a person when that dog is being controlled by or wearing a harness normally used for dogs accompanying or leading persons with disabilities.

(4) Violation of the provisions of subsection (1) of this section is a class 1 petty offense. Violation of the provisions of subsection (3) of this section is a class 3 misdemeanor.

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-107. L. 72: p. 276, § 10. L. 82: (2) repealed and (4) amended, pp. 593, 592, §§ 4, 2, effective April 9. L. 93: (3) amended, p. 1637, § 22, effective July 1. L. 95: (3) and (4) amended, p. 325, § 4, effective August 7.

18-13-108. Removal of timber from state lands. Any person who cuts or removes any timber from any state land without lawful authority commits a class 3 misdemeanor.

Source: L. 71: R&RE, p. 484, § 1. C.R.S. 1963: § 40-13-108.

18-13-109. Firing woods or prairie. (1) (a) Except as otherwise provided in subsection (2) of this section, any person who, without lawful authority and knowingly, recklessly, or with criminal negligence, sets on fire, or causes to be set on fire, any woods, prairie, or grounds of any description, other than his or her own, or who, knowingly, recklessly, or with criminal negligence, permits a fire, set or caused to be set by such person, to pass from his or her own grounds to the injury of any other person commits a class 2 misdemeanor.

(b) Any person convicted under paragraph (a) of this subsection (1) shall be assessed a fine of not less than two hundred fifty dollars and not greater than one thousand dollars. The fine imposed by this paragraph (b) shall be mandatory and not subject to suspension. Nothing in this paragraph (b) shall be construed to limit the court's discretion in exercising other available sentencing alternatives in addition to the mandatory fine.

(2) (a) Any person who knowingly violates paragraph (a) of subsection (1) of this section and who knows or reasonably should know that he or she violates any applicable order, rule, or regulation lawfully issued by a governmental authority that prohibits, bans, restricts, or otherwise regulates fires during periods of extreme fire hazard and that is designed to promote the safety of persons and property, commits a class 6 felony.

(b) The following activities shall not be offenses under this subsection (2):

(I) Open burning lawfully conducted in the course of agricultural operations;

(II) State, municipality, or county fire management operations;

(III) Prescribed or controlled fires conducted with written authority from the state forester;

(IV) Lawful activities conducted pursuant to rules, regulations, or policies adopted by the relevant state, tribal, or federal regulatory agency or agencies.

Source: **L. 71:** R&RE, p. 484, § 1. **C.R.S. 1963:** § 40-13-109. **L. 75:** Entire section amended, p. 211, § 29, effective July 16. **L. 77:** Entire section amended, p. 971, § 66, effective July 1. **L. 2002, 3rd Ex. Sess.:** Entire section amended, p. 37, § 2, effective July 17.

Cross references: For a civil action for damages from fire set in woods or prairie, see § 13-21-105.

ANNOTATION

An action for strict liability for violation of this section may not lie. King v. U.S., 53 F. Supp.2d 1056 (D. Colo. 1999).

18-13-109.5. Intentionally setting wildfire. (1) A person commits the crime of intentionally setting a wildfire if he or she:

(a) (I) Intentionally and without lawful authority sets on fire, or causes to be set on fire, any woods, prairie, or grounds of any description, other than his or her own; or

(II) Intentionally permits a fire, set or caused to be set by such person, to pass from his or her own grounds to the grounds of another; and

(b) By so doing, places another in danger of death or serious bodily injury or places any building or occupied structure of another in danger of damage.

(2) Intentionally setting a wildfire is a class 3 felony.

(3) For purposes of this section, "building" shall have the same meaning as set forth in section 18-4-101 (1) and "occupied structure" shall have the same meaning as set forth in section 18-4-101 (2).

Source: **L. 2002, 3rd Ex. Sess.:** Entire section added, p. 38, § 3, effective July 17.

18-13-110. Air pollution violations. (Repealed)

Source: **L. 73:** p. 744, § 5. **C.R.S. 1963:** § 40-13-110. **L. 79:** Entire section R&RE, p. 1552, § 16, effective June 20; (1)(a)(I) to (1)(a)(III), (1)(b), and (2)(a) amended, p. 1057, § 2, effective June 20. **L. 81:** (4)(a) and (4)(b) amended, p. 2025, § 19, effective July 14. **L. 84:** (2)(a) and (3) amended, p. 1084, § 1, effective July 1; (2)(b)(I) amended, p. 677, § 1, effective July 1. **L. 86:** (2)(a) and (3)(b) amended, p. 1185, § 16, effective July 1, 1987. **L. 89:** (2)(a) amended and (4)(d) added, pp. 1161, 1160, §§ 9, 6, effective May 26. **L. 93:** (3) amended, p. 1922, § 1, effective July 1. **L. 94:** (2)(b)(II) amended, p. 2735, § 359, effective July 1; entire section repealed, p. 2541, § 5, effective January 1, 1995.

18-13-111. Purchases of commodity metals - violations - commodity metals theft task force - creation - composition - reports - legislative declaration - definitions - repeal. (1) (a) Except as otherwise provided in subsection (3) of this section, every owner, keeper, or proprietor of a junk shop, junk store, salvage yard, or junk cart or other vehicle and every collector of or dealer in junk, salvage, or other secondhand property shall keep a book or register detailing all transactions involving commodity metals.

(b) The owner, keeper, proprietor, collector, or dealer shall record the identification of a seller of commodity metals in the book or register and the method by which the seller verified his or her identity. The seller shall verify his or her identity by one of the following:

(I) A valid Colorado driver's license;

(II) An identification card issued in accordance with section 42-2-302, C.R.S.;

(III) A valid driver's license from another state that contains a picture identification;

(IV) A military identification card;

(V) A valid United States passport; or

(VI) An alien registration card.

(VII) (Deleted by amendment, L. 2011, (HB 11-1130), ch. 106, p. 330, § 1, effective April 13, 2011.)

(c) The owner, keeper, proprietor, collector, or dealer shall require the seller of a commodity metal to provide for the book or register:

(I) A signed affidavit, sworn and affirmed under penalty of law, that the seller is the owner of the commodity metal or is otherwise entitled to sell the commodity metal. The owner, keeper, proprietor, collector, or dealer shall provide the affidavit form to the seller.

(II) The license plate number and description of the vehicle or conveyance if any, in which the commodity metal was delivered.

(d) The owner, keeper, proprietor, collector, or dealer shall include the following in the book or register:

(I) The date and place of each purchase of the commodity metal; and

(II) The description and quantity of the commodity metal purchased.

(e) The book or register shall be made available to any peace officer for inspection at any reasonable time.

(1.3) (a) A purchaser of commodity metals shall:

(I) Sign up with the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated, or its successor organization, to receive alerts regarding thefts of commodity metals in the purchaser's geographic area;

(II) Download and maintain the scrap metal theft alerts generated by the scrap theft alert system;

(III) Use the alerts to identify potentially stolen commodity metals, including training the purchaser's employees to use the alerts during the purchaser's daily operations.

(b) A purchaser of commodity metals shall maintain for ninety days copies of any theft alerts received and downloaded pursuant to paragraph (a) of this subsection (1.3). A purchaser shall also maintain documentation that the purchaser educates employees about, and provides to employees, scrap theft alerts.

(1.5) (a) An owner, keeper, proprietor, collector, or dealer is permitted to pay a seller in cash for any commodity metals transaction of three hundred dollars or less.

(b) If the transaction costs more than three hundred dollars, the owner, keeper, proprietor, collector, or dealer shall pay the seller of a commodity metal by check unless the seller is paid by means of any process in which a picture of the seller is taken when the money is paid.

(2) Except as otherwise provided in subsection (3) of this section, the owner, keeper, proprietor, collector, or dealer of any commodity metal shall make a digital photographic record, video record, or other record that identifies the seller and the commodity metal that the seller is selling. The digital photographic record, video record, or other record format shall be retained for one hundred eighty days, and the owner shall permit a law enforcement officer to make inspections of the record.

(3) The following transactions and materials are exempt from the requirements specified in subsections (1) and (2) of this section:

(a) Any materials purchased from a regulated public utility or an original manufacturer of scrap or industrially generated scrap;

(b) The purchase of recyclable food and beverage containers from any source; except that, for purposes of this exemption, a metal beer keg suitable for reuse shall not be considered a recyclable beverage container;

(c) Any scrap that is involved in a transaction between dealers or governmental entities;

(d) (Deleted by amendment, L. 2007, p. 759, § 1, effective July 1, 2007.)

(e) (Deleted by amendment, L. 2011, (HB 11-1130), ch. 106, p. 330, § 1, effective April 13, 2011.)

(4) The information entered in the book or register, as provided in subsection (1) of this section, need not be kept for a period longer than three years after the date of purchase of the commodity metal.

(5) A person who violates subsection (1) of this section by failing to keep a book or register, any person who knowingly gives false information with respect to the information required to be maintained in the book or register provided for in subsection (1) of this section, and any person who violates subsection (1.3), (1.5), or (2) of this section commits:

(a) A class 2 misdemeanor if the value of the commodity metal involved is less than five hundred dollars; or

(b) A class 1 misdemeanor if the value of the commodity metal involved is five hundred dollars or more.

(6) There is a rebuttable presumption that metal purchased by a dealer for the purpose of recycling is a commodity metal if the commodity metal has a value of fifty cents per pound or greater for purposes of recycling the commodity metal.

(7) This section shall not apply to a person or entity that does not provide remuneration for commodity metals collected in drop-off curbside containers or at materials recovery sites.

(8) For the purposes of this section, unless the context otherwise requires:

(a) (Deleted by amendment, L. 2007, p. 759, § 1, effective July 1, 2007.)

(b) "Book or register" means any written or electronic record of transactions kept by any owner, keeper, proprietor, collector, or dealer, including sequentially numbered receipts containing the information required by subsection (1) of this section.

(b.5) "Commodity metal" means a metal containing brass, copper, copper alloy, aluminum, stainless steel, or magnesium or another metal traded on the commodity markets that sells for fifty cents per pound or greater. "Commodity metal" does not include precious metals such as gold, silver, or platinum.

(c) (Deleted by amendment, L. 2007, p. 759, § 1, effective July 1, 2007.)

(d) "Dealer" means any person, business, or entity that buys, sells, or distributes, for the purpose of recycling, any commodity metal on a wholesale basis.

(e) (Deleted by amendment, L. 2011, (HB 11-1130), ch. 106, p. 330, § 1, effective April 13, 2011.)

(9) (a) There is hereby created the commodity metals theft task force, also referred to in this subsection (9) as the "task force".

(b) The task force consists of the following ten persons or their designees:

(I) The chief of the Colorado state patrol;

(II) A sheriff appointed by a Colorado sheriffs' association;

(III) A municipal police chief appointed by the Colorado association of chiefs of police;

(IV) A contractor that uses commodity metals in construction;

(V) A representative of a national trade association or other organization that represents commodity metals recyclers, such as the institute of scrap recycling industries, incorporated, or its successor organization or another entity representing comparable interests;

(VI) A scrap metal dealer located in Colorado who is a member of the institute of scrap recycling industries, incorporated, or its successor organization;

(VII) A representative of the Colorado municipal league, or its successor entity;

(VIII) A representative of Colorado counties, incorporated, or its successor entity;

(IX) A representative of a public utility that uses commodity metals; and

(X) A representative of a railroad company that operates in Colorado.

(c) The task force shall hold its first meeting no later than July 1, 2011. At the first meeting, the task force shall discuss the best way to distribute and use information related to theft of scrap metals, including whether and how to promote use by law enforcement agencies of the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated, or its successor organization. Thereafter, the task force shall meet on a regular basis, convening at least every October, to discuss issues related to theft of commodity metals, including sharing relevant information on theft of scrap metal, identifying ways in which Colorado's laws regulating commodity metals purchases can be improved to reduce theft, and reviewing any performance problems or communication issues. The task force is specifically directed to consider: Possible policies or practices to aid in tracking or apprehending stolen commodity metals prior to the point of sale in order to assist law enforcement personnel in theft prevention and recovery of stolen materials; recommendations regarding when and how a commodity metals purchaser should be required to apprise local law enforcement authorities if a purchased commodity metal is a potential match of a commodity metal reported stolen in the scrap theft alert system; and the creation and attributes of a civil penalty process for egregious and repeat violators of the record-keeping requirements of this section.

(d) A member of the task force, as designated by the task force, shall report annually to the judiciary committees of the house of representatives and the senate, or any successor committees, regarding the task force's meetings, findings, and recommendations.

(e) Members of the task force shall not be compensated for, or reimbursed for expenses incurred in, attending meetings of the task force.

(f) This subsection (9) is repealed, effective July 1, 2016. Before the repeal, the commodity metals theft task force, created pursuant to this subsection (9), shall be reviewed as provided in section 2-3-1203, C.R.S.

(10) (a) The general assembly hereby finds, determines, and declares that:

(I) Thefts of commodity metals jeopardize the safety and welfare of the public, financially burden taxpayers and industry, and exhaust law enforcement resources;

(II) Such thefts impact every community in Colorado; and

(III) The regulation of commodity metal purchases is a matter of statewide concern.

(b) The general assembly further encourages law enforcement authorities in the state to report thefts of commodity metals occurring within their jurisdictions to the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated, or its successor organization, in order to ensure that persons using the system receive timely and thorough information. The general assembly also encourages commercial stakeholders affected by commodity metals theft to sign up for and participate in the scrap theft alert system.

Source: **L. 75:** Entire section added, p. 641, § 1, effective June 20. **L. 90:** Entire section amended, p. 997, § 1, effective April 3. **L. 2007:** Entire section amended, p. 759, § 1, effective July 1. **L. 2011:** (1)(b)(V), (1)(b)(VI), (1)(b)(VII), (2), (3)(e), (5), (8)(b.5), and (8)(e) amended and (1.3), (1.5), (9), and (10) added, (HB 11-1130), ch. 106, p. 330, § 1, effective April 13.

18-13-112. Hazardous waste violations. (1) No person shall abandon any vehicle containing any hazardous waste or intentionally spill hazardous waste upon a street, highway, right-of-way, or any other public property or upon any private property without the express consent of the owner or person in lawful charge of that private property.

(2) As used in this section:

(a) (I) "Abandon" means to leave a thing with the intention not to retain possession of or assert ownership or control over it. The intent need not coincide with the act of leaving.

(II) It is prima facie evidence of the necessary intent that:

(A) The vehicle has been left for more than three days unattended and unmoved; or

(B) License plates or other identifying marks have been removed from the vehicle; or

(C) The vehicle has been damaged or is deteriorated so extensively that it has value only for junk or salvage; or

(D) The owner has been notified by a law enforcement agency to remove the vehicle and it has not been removed within twenty-four hours after notification.

(b) (I) "Hazardous waste" means any waste or other material, alone, mixed with, or in combination with other wastes or materials, which because of its quantity, concentration, or physical or chemical characteristics:

(A) Causes, or significantly contributes to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) Poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise improperly managed.

(II) "Hazardous waste" also means any waste or other material defined as a hazardous waste in the rules and regulations promulgated pursuant to the federal "Solid Waste Disposal Act" (42 U.S.C. 3251 et seq.), as amended by the federal "Resource Conservation and Recovery Act of 1976", as amended (42 U.S.C. 6905, 6912 (a), 6921-6927, 6930, 6974), as such rules and regulations are set forth in 40 C.F.R. Parts 122-124 and 260-265 on July 1, 1981.

(c) "Hazardous waste" does not include:

(I) Discharges which are point sources subject to permits under section 402 of the "Federal Water Pollution Control Act", as amended;

(II) Source, special nuclear, or byproduct material as defined by the federal "Atomic Energy Act of 1954", as amended;

(III) Agricultural waste;

(IV) Domestic sewage which includes final use for beneficial purposes, including fertilizer, soil conditioner, fuel, and livestock feed, of sludge from wastewater treatment plants if such sludge meets all applicable standards of the department;

(V) Irrigation return flows;

(VI) Inert materials deposited for construction fill or topsoil placement in connection with actual or contemplated construction at such location or for changes in land contour for agricultural purposes; or

(VII) Any waste or other materials exempted or otherwise not regulated as a hazardous waste in the rules and regulations promulgated pursuant to the federal "Solid Waste Disposal Act" (42 U.S.C. 3251 et seq.), as amended by the federal "Resource Conservation and Recovery Act of 1976", as amended (42 U.S.C. 6905, 6912 (a), 6921-6927, 6930, 6974), as such rules and regulations are set forth in 40 C.F.R. Parts 122-124 and 260-265 on July 1, 1981.

(d) "Inert material" means non-water-soluble and nondecomposable inert solids together with such minor amounts and types of other materials as will not significantly affect the inert nature of such solids. The term includes but is not limited to earth, sand, gravel, rock, concrete which has been in a hardened state for at least sixty days, masonry, asphalt paving fragments, and such other non-water-soluble and nondecomposable inert solids.

(e) "Vehicle" means any device which is capable of moving itself, or of being moved, from place to place upon wheels or endless tracks. The term includes but is not limited to any motor vehicle, trailer, or semitrailer.

(3) Any person who violates any provision of this section commits a class 4 felony.

Source: L. 81: Entire section added, p. 977, § 22, effective July 1. L. 92: IP(2)(b)(I) amended, p. 1258, § 15, effective August 1.

Cross references: For the penalty for other hazardous waste violations, see § 25-15-310; for the penalty for causing or contributing to the occurrence of a hazardous substance incident, see § 29-22-108; for penalties for violations of the "Hazardous Materials Transportation Act of 1987", see §§ 42-20-109, 42-20-111, 42-20-204, and 42-20-305.

ANNOTATION

Law reviews. For article, "Using Local Police Powers to Protect the Environment", see 24 Colo. Law. 1063 (1995).

18-13-113. Unlawful to sell metal beverage containers with detachable opening devices. (1) As used in this section:

(a) "Beverage" means each of the following forms of liquid refreshment intended for human consumption:

(I) Fermented malt beverages, malt liquors, beers, or any beverages obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product, or any combination thereof, in water;

(II) Alcoholic beverages obtained by distillation, and mixed with water or other substances in solution;

(III) Alcoholic beverages obtained by the fermentation of the natural sugar contents of fruits or other agricultural products containing sugar;

(IV) Mineral or soda waters;

(V) Carbonated or noncarbonated soft drinks; or

(VI) Fruit juices or vegetable juices or fruitades.

(b) "Beverage container" means an individual, sealed metal can which contains a beverage.

(c) "Within Colorado" means within the exterior limits of Colorado and includes all territory within these limits owned or ceded to the United States of America.

(2) No person shall sell or offer for sale at retail within Colorado any metal beverage container with a detachable opening device designed to detach from the beverage container when a user opens the beverage container in a manner reasonably calculated to gain access to its contents.

(3) Subsection (2) of this section shall not apply to metal beverage containers with opening devices consisting of sensitized adhesive tape.

(4) Any person who violates subsection (2) of this section commits a class 2 petty offense and, upon conviction thereof, shall be fined not less than fifty dollars nor more than one hundred dollars.

Source: L. 82: Entire section added, p. 325, § 1, effective January 1, 1983.

18-13-114. Sale of secondhand property - record - inspection - crime. (1) Every secondhand dealer, as defined in subsection (5) of this section, shall make a record, as provided in subsection (2) of this section, of each sale or trade of secondhand property made by him, his agent, or any person acting on his behalf, which sale or trade equals or exceeds thirty dollars in value for each item. Such record shall be made available to any peace officer for inspection at any reasonable time. The secondhand dealer shall mail or deliver the record of the sale or trade to the local law enforcement agency within three days of the date of such sale or trade. The secondhand dealer shall keep a copy of the record of the sale or trade for at least one year after the date of the sale or trade.

(2) The record required by this section shall be made in writing on forms designed by the Colorado bureau of investigation or a reasonable facsimile thereof as provided in subsection (3) or (4) of this section and shall consist of the following:

- (a) The name, address, and date of birth of the seller or trader;
- (b) The date, time, and place of the sale or trade;
- (c) An accurate and detailed account and description of the item sold or traded, including, but not limited to, any trademark, identification number, serial number, model number, brand name, or other identifying mark on such item;
- (d) The identification number from any of the following forms of identification of the seller or trader:
 - (I) A valid Colorado driver's license;
 - (II) An identification card issued in accordance with section 42-2-302, C.R.S.;
 - (III) A valid driver's license, containing a picture, issued by another state;
 - (IV) A military identification card;
 - (V) A valid passport;
 - (VI) An alien registration card; or
 - (VII) A nonpicture identification document issued by a state or federal government entity;

(e) The signature of the seller or trader;

(f) A declaration by the secondhand dealer that he is the rightful owner of the secondhand property and a description of how he obtained the property, including the serial number of such property if available or a copy of the bill of sale of such property; and

(g) A declaration by the secondhand dealer that he has knowledge of the requirement that he mail or deliver a record of the sale or trade to the local law enforcement agency, as required by subsection (1) of this section.

(3) Any city, municipality, city and county, or county which regulates secondhand dealers and assesses a fee as provided in section 18-13-118 shall print and provide the forms for reporting required pursuant to subsection (2) of this section.

(4) In cities, municipalities, city and counties, and counties which do not license secondhand dealers and assess a fee as provided in section 18-13-118, the secondhand dealer shall report all the information required pursuant to subsection (2) of this section in a form acceptable to the local law enforcement agency.

(5) As used in this section and sections 18-13-115 to 18-13-118, unless the context otherwise requires:

(a) "Local law enforcement agency" means any marshal's office, police department, or sheriff's office with jurisdiction in the locality in which the sale or trade occurs.

(b) "Peace officer" means any undersheriff, deputy sheriff other than one appointed with authority only to receive and serve summons and civil process, police officer, Colorado state patrol officer, town marshal, or investigator for a district attorney or the attorney general who is engaged in full-time employment by the state, a city, city and county, town, judicial district, or county within this state.

(c) "Secondhand dealer" means any person whose principal business is that of engaging in selling or trading secondhand property. The term also includes the following: Any person whose principal business is not that of engaging in selling or trading secondhand property but who sells or trades secondhand property through means commonly known as flea markets or any similar facilities in which secondhand property is offered for sale or trade; any person who sells or trades secondhand property from a nonpermanent location; and any person who purchases for resale any secondhand property which carries a manufacturer or serial number. The term does not include:

(I) A person selling or trading secondhand property so long as such property was not originally purchased for resale and so long as such person does not sell or trade secondhand property more than five weekend periods in any one calendar year, as verified by a declaration to be prepared by the seller. For the purposes of this subparagraph (I), "weekend period" means Friday through the immediately following Monday.

(II) A person who is a retailer as defined in section 39-26-102 (8), C.R.S., or a wholesaler as defined in section 39-26-102 (18), C.R.S., and who is selling or trading secondhand property in a location which is a permanent storefront location, unless such property carries a manufacturer or serial number;

(III) A person or organization selling or trading secondhand property at an exhibition or show which is intended to display and advertise a particular commodity or class of products, including, but not limited to, antique exhibitions, firearm exhibitions, home and garden shows, and recreational vehicle shows;

(IV) A person or organization which is charitable, nonprofit, recreational, fraternal, or political in nature or which is exempt from taxation pursuant to section 501 (c) (3) of the federal "Internal Revenue Code of 1986", as amended;

(V) A person selling or trading firewood, Christmas trees, plants, food products, agricultural products, fungible goods, pets, livestock, or arts and crafts, excluding jewelry and items crafted of gold or silver, if sold or traded by the artist or craftsman, his immediate family, or regular employees;

(VI) A person who sells new goods exclusively, is in the business of selling such goods, is in all respects a retailer of such goods, and holds a retail license and a sales tax license in the city, county, or city and county in which the sale occurs;

(VII) An antique dealer who sells antiques, has a retail license and sales tax license in the city, county, or city and county in which the sale occurs, and sells such antiques from a permanent storefront location.

(d) "Secondhand property" means the following items of tangible personal property sold or traded by a secondhand dealer:

(I) Cameras, camera lenses, slide or movie projectors, projector screens, flashguns, enlargers, tripods, binoculars, telescopes, and microscopes;

(II) Televisions, phonographs, tape recorders, video recorders, radios, tuners, speakers, turntables, amplifiers, record changers, citizens' band broadcasting units and receivers, and video games;

(III) Skis, ski poles, ski boots, ski bindings, golf clubs, guns, jewelry, coins, luggage, boots, and furs;

(IV) Typewriters, adding machines, calculators, computers, portable air conditioners, cash registers, copying machines, dictating machines, automatic telephone answering machines, and sewing machines;

(V) Bicycles, bicycle frames, bicycle derailleur assemblies, bicycle hand brake assemblies, and other bicycle components; and

(VI) Any item of tangible personal property which is marked with a serial or identification number and the selling price of which is thirty dollars or more, except motor vehicles, off-highway vehicles as defined in section 42-1-102 (63), C.R.S., snowmobiles, ranges, stoves, dishwashers, refrigerators, garbage disposals, boats, airplanes, clothes washers, clothes driers, freezers, mobile homes, and nonprecious scrap metal.

(6) (a) Any secondhand dealer who violates any of the provisions of subsection (1) or (2) of this section commits a class 1 misdemeanor. Upon a second or subsequent conviction for a violation of subsection (1) or (2) of this section within three years of the date of a prior conviction, a secondhand dealer commits a class 5 felony.

(b) Any buyer or person who trades with a secondhand dealer or any secondhand dealer who knowingly gives false information with respect to the information required by subsection (2) of this section commits a class 1 misdemeanor.

(7) (a) Local law enforcement agencies who print and provide forms as designed by the Colorado bureau of investigation for recording the information required by subsection (2) of this section may charge a reasonable fee for each form to defray the cost of providing such form.

(b) Each local law enforcement agency may establish rules or policies requiring that secondhand dealers provide it with copies of such records. The local law enforcement agency may set forth how often such copies shall be provided to it. Each local law enforcement agency shall forward copies of records received by it to the law enforcement agency having jurisdiction in the area in which the buyer or trader resides.

(8) In the case of flea markets and similar facilities in which secondhand property is offered for sale or trade, the operator thereof shall inform each secondhand dealer of the requirements of this section and shall provide the forms for recording the information required by subsection (2) of this section. Any person who violates the provisions of this subsection (8) commits a class 3 misdemeanor.

(9) In the case of flea markets and similar facilities in which secondhand property is offered for sale or trade, the operator thereof shall record the name and address of each secondhand dealer operating at the flea market or similar facility and the identification number of such dealer as obtained from any of the forms of identification enumerated in paragraph (d) of subsection (2) of this section. Such record shall be mailed or delivered by the operator to the local law enforcement agency within three days of the date the secondhand dealer offered secondhand property for sale or trade at the flea market or similar facility. A copy of such record shall be retained by the operator for at least one year after the date the secondhand dealer offered secondhand property for sale or trade at the flea market or similar facility.

Source: L. 83: Entire section added, p. 713, § 1, effective July 1. L. 89: IP(5)(c), (5)(c)(II), and (5)(d)(VI) amended, p. 912, § 1, effective July 1. L. 94: (2)(d)(II) and (5)(d)(VI) amended, p. 2553, § 43, effective January 1, 1995. L. 2000: (5)(c)(IV) amended, p. 1848, § 37, effective August 2.

18-13-114.5. Proof of ownership required - penalty - definitions. (1) A person who is a secondhand dealer or a dealer and retailer of new goods and who sells goods at a flea market or similar facility shall not sell or offer for sale any of the following property items without proof of ownership:

- (a) Baby food of a type usually consumed by children under three years of age;
- (b) Cosmetics;
- (c) Devices;
- (d) Drugs;
- (e) Infant formula;
- (f) Batteries; or
- (g) Razor blades.

(2) A person required to have proof of ownership under subsection (1) of this section shall make such proof of ownership available to any peace officer for inspection at any reasonable time.

- (3) For purposes of this section:

(a) “Cosmetic” means an article, or its components, intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to, the human body, or any part of the human body, for cleansing, beautifying, promoting attractiveness, or altering appearance. “Cosmetic” does not include soap.

(b) “Device” means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component, part, or accessory, that is:

(I) Recognized in the official national formulary or the United States pharmacopoeia, or any supplement to them;

(II) Intended for use in the diagnosis of disease or other condition, or in the cure, mitigation, treatment, or prevention of disease in humans or animals; or

(III) Intended to affect the structure or any function of the body of humans or animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or animals and that is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

(c) “Drug” means:

(I) Any article recognized in an official compendium of drugs;

(II) An article used or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(III) An article, other than food, that is used or intended to affect the structure or any function of the body of humans or animals; or

(IV) An article intended for use as a component of an article specified in subparagraph (I), (II), or (III) of this paragraph (c).

(d) “Infant formula” means a food that purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

(e) “Proof of ownership” shall include:

(I) The name, address, telephone number, and signature of the seller or the seller’s authorized representative;

(II) The name and address of the buyer or consignee if not sold; and

(III) A description and quantity of the product.

(4) A violation of this section is a class 3 misdemeanor.

Source: L. 2006: Entire section added, p.1276, § 1, effective July 1.

18-13-115. Notice - penalties. (1) Except in the case of flea markets and similar facilities as provided in this subsection (1), every secondhand dealer shall conspicuously post a notice in a place clearly visible to all buyers and traders which sets forth the provisions of this section and of sections 18-13-114 and 18-13-116 and which sets forth the penalties for violating such sections and for violating section 18-4-410, concerning theft by receiving. Such notification shall include information to the effect that stolen property may be confiscated by any peace officer and returned to the rightful owner without compensation to the buyer. In the case of flea markets and similar facilities, the operator thereof shall post the notice required in this subsection (1) in such a manner as to be obvious to all persons who enter the flea market or similar facility.

(2) Each city, municipality, city and county, and county which regulates secondhand dealers as provided in section 18-13-118 shall print and provide the notices required by subsection (1) of this section to the secondhand dealers within their jurisdiction who are licensed pursuant to section 18-13-116. In any city, municipality, city and county, and county, which does not regulate secondhand dealers as provided in section 18-13-118, the secondhand dealers shall construct a notification containing the information required by subsection (1) of this section.

(3) Any secondhand dealer or operator of a flea market or similar facility who violates any of the provisions of subsection (1) of this section commits a class 3 misdemeanor.

Source: L. 83: Entire section added, p. 717, § 1, effective July 1.

18-13-116. Sales tax license. (1) Every secondhand dealer shall obtain a sales tax license as provided in section 39-26-103, C.R.S.; except that secondhand dealers and other persons operating at a flea market or similar facility shall not be required to obtain a sales tax license, but they shall be required to collect the sales tax and to remit the proceeds to the operator of the flea market or similar facility, as provided in this section. The operator shall obtain a sales tax license which is applicable to all sales occurring at the flea market or similar facility, shall collect the sales tax from each secondhand dealer operating therein who does not have his own sales tax license, and shall remit such proceeds as provided by law for the remittance of sales taxes.

(2) Any person who violates any of the provisions of subsection (1) of this section commits a class 3 misdemeanor.

Source: L. 83: Entire section added, p. 717, § 1, effective July 1.

18-13-117. Record of sales. (1) Every secondhand dealer or any person who is a dealer of new goods who is a retailer and sells such goods at a flea market or similar facility or any nonpermanent location shall keep and preserve suitable records of sales made by him and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he is liable under part 1 of article 26 of title 39, C.R.S. It is the duty of every such person to keep and preserve for a period of three years all invoices of goods and merchandise purchased for resale, and all such books, invoices, and other records shall be open for examination at any time by the executive director of the department of revenue, his duly authorized agent, or any peace officer.

(2) Any person who violates any of the provisions of subsection (1) of this section commits a class 3 misdemeanor.

Source: L. 83: Entire section added, p. 717, § 1, effective July 1.

18-13-118. Regulation of secondhand dealers. Any city, municipality, city and county, or county may enact ordinances or resolutions regulating secondhand dealers, including license requirements and assessment of fees to cover costs of administration and enforcement of such regulation; however, such ordinances may not be less stringent than the provisions of sections 18-13-114 to 18-13-117.

Source: L. 83: Entire section added, p. 718, § 1, effective July 1.

18-13-119. Health care providers - abuse of health insurance. (1) The general assembly hereby finds, determines, and declares that:

(a) Business practices that have the effect of eliminating the need for actual payment by the recipient of health care of required copayments and deductibles in health benefit plans interfere with contractual obligations entered into between the insured and the insurer relating to such payments;

(b) Such interference is not in the public interest when it is conducted as a regular business practice because it has the effect of increasing health care costs by removing the incentive that copayments and deductibles create in making the consumer a cost-conscious purchaser of health care; and

(c) Advertising of such practices may aggravate the adverse financial and other impacts upon recipients of health care.

(2) Therefore, the general assembly declares that such business practices are illegal and that violation thereof or the advertising thereof shall be grounds for disciplinary actions. The general assembly further declares that nothing contained in this section shall be construed to otherwise prohibit advertising by health care providers.

(3) Except as otherwise provided in subsections (5), (6), and (8) of this section, if the effect is to eliminate the need for payment by the patient of any required deductible or copayment applicable in the patient's health benefit plan, a person who provides health care commits abuse of health insurance if the person knowingly:

(a) Accepts from any third-party payor, as payment in full for services rendered, the amount the third-party payor covers; or

(b) Submits a fee to a third-party payor which is higher than the fee he has agreed to accept from the insured patient with the understanding of waiving the required deductible or copayment.

(4) Abuse of health insurance is a class 1 petty offense.

(5) (a) Reimbursements made pursuant to articles 3 to 6 of title 25.5, C.R.S., federal medicare laws for inpatient hospitalization, and mental health services purchased in accordance with article 66 of title 27, C.R.S., are exempt from the provisions of this section.

(b) Health care services are exempt from the provisions of this section if such health care services are provided:

(I) In accordance with a contract or agreement between an employer and an employee or employees and the contract includes, as a part of an employee's salary or employment benefits, terms that authorize a practice that would otherwise be prohibited by subsection (3) of this section; or

(II) In accordance with a contract or agreement between a town, city, city and county, or municipality or a special health assurance district pursuant to section 31-15-302 (1), C.R.S., under terms that authorize a practice that would otherwise be prohibited by subsection (3) of this section.

(6) (a) The waiver of any required deductible or copayment for charitable purposes is exempt from the provisions of subsection (3) of this section if:

(I) The person who provides the health care determines that the services are necessary for the immediate health and welfare of the patient; and

(II) The waiver is made on a case-by-case basis and the person who provides the health care determines that payment of the deductible or copayment would create a substantial financial hardship for the patient; and

(III) The waiver is not a regular business practice of the person who provides the health care.

(b) Any person who provides health care and who waives the deductible or copayment for more than one-fourth of his patients during any calendar year, excluding patients covered by subsection (5) of this section, or who advertises through newspapers, magazines, circulars, direct mail, directories, radio, television, or otherwise that he will accept from any third-party payor, as payment in full for services rendered, the amount the third-party payor covers shall be presumed to be engaged in waiving the deductible or copayment as a regular business practice.

(7) Repealed.

(8) The waiver of a required deductible or copayment for health care services provided by a school-based health center, as defined in section 25-20.5-502, C.R.S., is exempt from the provisions of this section.

Source: L. 85: Entire section added, p. 680, § 1, effective July 1. L. 2001: (5)(b) amended, p. 1164, § 12, effective June 5. L. 2002: (7) added, p. 384, § 1, effective April 25. L. 2006: (7) repealed, p. 1493, § 22, effective June 1. L. 2010: (5)(a) amended, (SB 10-175), ch. 188, p. 787, § 33, effective April 29. L. 2011: IP(3) amended and (8) added, (HB 11-1019), ch. 27, p. 67, § 1, effective March 17; (5)(a) amended, (HB 11-1303), ch. 264, p. 1157, § 34, effective August 10.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (5)(b), see section 1 of chapter 300, Session Laws of Colorado 2001.

ANNOTATION

Law reviews. For article, "Professional Courtesy Discounts Under Siege-Part I", see 28 Colo. Law. 51 (December 1999).

This section is constitutional because the legislature may regulate or ban entirely com-

mercial speech related to illegal activity since such speech does not rise to the level of a fundamental right. *Parrish v. Lamm*, 758 P.2d 1356 (Colo. 1988).

18-13-119.5. Abuse of property insurance. (1) The general assembly hereby finds, determines, and declares that:

(a) (I) Business practices that have the effect of reducing or eliminating the need for actual payment of required copayments and deductibles by an insured for property damages interfere with contractual obligations entered into by the insured and insurer relating to such payments;

(II) Interference described in subparagraph (I) of this paragraph (a) is not in the public interest because it has the effect of increasing insurance costs by removing the incentives that copayments and deductibles create in making the consumer a cost-conscious purchaser; and

(b) (I) Business practices that have the effect of providing rebates or something of value to an insured to attract business relating to property damages when the costs of the rebate or thing of value is passed on to an insurer interfere with contractual obligations entered into by the insured and insurer relating to such property damages;

(II) Interference described in subparagraph (I) of this paragraph (b) is not in the public interest because it has the effect of increasing insurance costs by including items unrelated to the property damage in the costs paid by insurers; and

(c) Advertising of practices described in paragraphs (a) and (b) of this subsection (1) may aggravate the impact of such practices.

(2) (a) The general assembly further declares that business practices described in subsection (1) of this section are illegal and that such practices or the advertising thereof shall be grounds for disciplinary actions by any governmental body which is responsible for licensing or regulating persons who engage in such practices.

(b) The general assembly further declares that this section shall create a private right of action in courts of the state of Colorado, including an action for injunctive relief.

(3) Any person who provides repairs, goods, or services commits abuse of property insurance if such person knowingly:

(a) Submits a fee to an insurer which is higher than a fee estimate such person provided to the insured or which is higher than the fee such person has agreed to accept from the insured if the effect is to provide the insured a rebate or something of value to attract the insured to do business with such person and the cost of providing the rebate or thing of value is passed on to the insurer as a part of the higher fee; or

(b) Provides a rebate or a gift, cash, or thing of value to an insurance company or its representative, agent, employee, or others acting on behalf of the insurance company, in connection with any claim under an insurance policy which insures for property damage.

(4) Any insurance company, or its agent, employee, representative, or other person acting on behalf of the insurance company, commits abuse of property insurance if such company or person knowingly: Accepts a rebate or a gift, cash, or thing of value from any person who provides repairs, goods, or services in connection with any claim under an insurance policy which insures for property damage.

(5) Abuse of property insurance is a class 2 misdemeanor.

Source: L. 92: Entire section added, p. 409, § 1, effective July 1. **L. 96:** (2)(b) amended, p. 1846, § 17, effective July 1.

18-13-120. Use, transportation, and storage of drip gasoline. (1) As used in this section, "drip gasoline" means a combustible hydrocarbon liquid formed as a product of condensation from either associated or nonassociated natural or casing-head gas which remains a liquid at the existing atmospheric temperature and pressure.

(2) Every person, other than a producer, refiner, pipeline company, or owner or operator of a natural gas processing plant or their authorized agents, who transports or stores drip gasoline in this state shall have in his possession a written instrument issued and signed by a licensed seller of gasoline, stating the names and addresses of the seller and purchaser, the date of sale, and the amount sold and paid for such drip gasoline, or a copy of a contract authorizing the loading and transportation of the drip gasoline.

(3) The use of drip gasoline in a motor vehicle operated on the highways of this state is prohibited.

(4) Any person who violates subsection (2) or (3) of this section commits a class 2 misdemeanor.

Source: L. 86: Entire section added, p. 787, § 1, effective April 18.

18-13-121. Furnishing cigarettes or tobacco products to minors. (1) (a) A person shall not give, sell, distribute, or offer for sale to any person who is under eighteen years of age any cigarettes or tobacco products.

(b) Before selling to any individual any cigarette or tobacco product, a person shall request from the individual and examine a government-issued photographic identification that establishes that the individual is eighteen years of age or older; except that, in face-to-face transactions, this requirement shall be waived if the individual appears older than thirty years of age.

(c) A person who violates paragraph (a) or (b) of this subsection (1) commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of two hundred dollars.

(d) It shall be an affirmative defense to a prosecution under paragraph (a) of this subsection (1) that the person furnishing the cigarette or tobacco product was presented with and reasonably relied upon a document that identified the individual receiving the cigarette or tobacco product as being eighteen years of age or older.

(2) (a) Any person who is under eighteen years of age and who purchases or attempts to purchase any cigarettes or tobacco products commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of one hundred dollars; except that, following a conviction or adjudication for a first offense under this subsection (2), the court in lieu of the fine may sentence the person to participate in a tobacco education program. The court may allow a person convicted under this subsection (2) to perform community service and be granted credit against the fine and court costs at the rate of five dollars for each hour of work performed for up to fifty percent of the fine and court costs.

(b) It shall not be an offense under paragraph (a) of this subsection (2) if the person under eighteen years of age was acting at the direction of an employee of a governmental agency authorized to enforce or ensure compliance with laws relating to the prohibition of the sale of cigarettes and tobacco products to minors.

(3) Nothing in this section shall be construed to prohibit any statutory or home-rule municipality from enacting an ordinance that prohibits a person under eighteen years of age from purchasing any cigarettes or tobacco products or imposes requirements more stringent than provided in this section.

(4) (Deleted by amendment, L. 98, p. 1185, § 2, effective July 1, 1998.)

(5) (a) As used in this section, "tobacco product" means:

(I) Any product that contains nicotine or tobacco or is derived from tobacco and is intended to be ingested or inhaled by or applied to the skin of an individual; or

(II) Any electronic device that can be used to deliver nicotine to the person inhaling from the device, including but not limited to an electronic cigarette, cigar, cigarillo, or pipe.

(b) Notwithstanding any provision of paragraph (a) of this subsection (5) to the contrary, "tobacco product" does not mean any product that the food and drug administration of the United States department of health and human services has approved as a tobacco use cessation product.

Source: L. 87: Entire section added, p. 676, § 1, effective July 1. L. 91: Entire section amended, p. 410, § 1, effective April 19. L. 97: (4)(a) amended, p. 794, § 1, effective May 16; L. 98: (2) and (4) amended, p. 1185, § 2, effective July 1. L. 2001: (2)(a) amended, p. 581, § 6, effective July 1. L. 2008: (1), (2)(a), and (3) amended and (5) added, p. 886, § 1, effective July 1. L. 2011: (5) amended, (HB 11-1016), ch. 60, p. 157, § 1, effective March 25.

18-13-122. Illegal possession or consumption of ethyl alcohol by an underage person - definitions - adolescent substance abuse prevention and treatment fund - legislative declaration. (1) As used in this section, unless the context otherwise requires:

(a) "Establishment" means a business, firm, enterprise, service or fraternal organization, club, institution, entity, group, or residence, and any real property, including buildings and improvements, connected therewith, and shall also include any members, employees, and occupants associated therewith.

(b) "Ethyl alcohol" means any substance which is or contains ethyl alcohol.

(c) "Possession of ethyl alcohol" means that a person has or holds any amount of ethyl alcohol anywhere on his person, or that a person owns or has custody of ethyl alcohol, or has ethyl alcohol within his immediate presence and control.

(d) "Private property" means any dwelling and its curtilage which is being used by a natural person or natural persons for habitation and which is not open to the public and privately owned real property which is not open to the public. "Private property" shall not include:

(I) Any establishment which has or is required to have a license pursuant to article 46, 47, or 48 of title 12, C.R.S.; or

(II) Any establishment which sells ethyl alcohol or upon which ethyl alcohol is sold; or

(III) Any establishment which leases, rents, or provides accommodations to members of the public generally.

(2) (a) Except as described by section 18-1-711 and subsection (4.5) of this section, a person under twenty-one years of age who possesses or consumes ethyl alcohol anywhere in the state of Colorado commits illegal possession or consumption of ethyl alcohol by an underage person. Illegal possession or consumption of ethyl alcohol by an underage person is a strict liability offense.

(b) (I) Upon conviction of a first offense, illegal possession or consumption of ethyl alcohol by an underage person shall be punished by a fine of not more than two hundred fifty dollars. The court, upon sentencing a defendant pursuant to this paragraph (b), may, in addition to any fine, order that the defendant perform up to twenty-four hours of useful public service, subject to the conditions and restrictions of section 18-1.3-507, and may further order that the defendant submit to and complete an alcohol evaluation or assessment, an alcohol education program, or an alcohol treatment program at such defendant's own expense.

(II) Upon conviction of a second offense, illegal possession or consumption of ethyl alcohol by an underage person shall be punished by a fine of not more than five hundred dollars, and the court shall order the defendant to submit to and complete an alcohol evaluation or assessment, an alcohol education program, or an alcohol treatment program, at the defendant's own expense. The court may further order the defendant to perform up to twenty-four hours of useful public service, subject to the conditions and restrictions specified in section 18-1.3-507.

(III) Upon conviction of a third or subsequent offense, illegal possession or consumption of ethyl alcohol by an underage person shall be a class 2 misdemeanor, and the court, in addition to sentencing the defendant pursuant to the provisions of section 18-1.3-501, shall order the defendant to submit to and complete an alcohol evaluation or assessment, an alcohol education program, or an alcohol treatment program, at the defendant's own expense.

(IV) A person convicted of a violation of this section is subject to an additional penalty surcharge of twenty-five dollars that shall be administered to the adolescent substance abuse prevention and treatment fund.

(3) It shall be an affirmative defense to the offense described in subsection (2) of this section that the ethyl alcohol was possessed or consumed by a person under twenty-one years of age under the following circumstances:

(a) While such person was legally upon private property with the knowledge and consent of the owner or legal possessor of such private property and the ethyl alcohol was possessed or consumed with the consent of his parent or legal guardian who was present during such possession or consumption; or

(b) When the existence of ethyl alcohol in a person's body was due solely to the ingestion of a confectionery which contained ethyl alcohol within the limits prescribed by section 25-5-410 (1) (i) (II), C.R.S.; or the ingestion of any substance which was manufactured, designed, or intended primarily for a purpose other than oral human ingestion; or the ingestion of any substance which was manufactured, designed, or intended solely for medicinal or hygienic purposes; or solely from the ingestion of a beverage which contained less than one-half of one percent of ethyl alcohol by weight.

(c) The person is a student who:

(I) Tastes but does not imbibe an alcohol beverage only while under the direct supervision of an instructor who is at least twenty-one years of age and employed by a post-secondary school;

(II) Is enrolled in a university or a post-secondary school accredited or certified by an agency recognized by the United States department of education, a nationally recognized accrediting agency or association, or the "Private Occupational Education Act of 1981", article 59 of title 12, C.R.S.;

(III) Is participating in a culinary arts, food service, or restaurant management degree program; and

(IV) Tastes but does not imbibe the alcohol beverage for instructional purposes as a part of a required course in which the alcohol beverage, except the portion the student tastes, remains under the control of the instructor.

(4) The possession or consumption of ethyl alcohol shall not constitute a violation of this section if such possession or consumption takes place for religious purposes protected by the first amendment to the United States constitution.

(4.5) An underage person shall be immune from criminal prosecution under this section if he or she establishes the following:

(a) The underage person called 911 and reported in good faith that another underage person was in need of medical assistance due to alcohol consumption;

(b) The underage person who called 911 provided his or her name to the 911 operator;

(c) The underage person was the first person to make the 911 report; and

(d) The underage person who made the 911 call remained on the scene with the underage person in need of medical assistance until assistance arrived and cooperated with medical assistance or law enforcement personnel on the scene.

(5) Prima facie evidence of a violation of subsection (2) of this section shall consist of:

(a) Evidence that the defendant was under the age of twenty-one years and possessed or consumed ethyl alcohol anywhere in this state; or

(b) Evidence that the defendant was under the age of twenty-one years and manifested any of the characteristics commonly associated with ethyl alcohol intoxication or impairment while present anywhere in this state.

(6) During any trial for a violation of subsection (2) of this section, any bottle, can, or any other container with labeling indicating the contents of such bottle, can, or container shall be admissible into evidence, and the information contained on any label on such bottle, can, or other container shall be admissible into evidence and shall not constitute hearsay. A jury or a judge, whichever is appropriate, may consider the information upon such label in determining whether the contents of the bottle, can, or other container were composed in whole or in part of ethyl alcohol. A label which identifies the contents of any bottle, can, or other container as "beer", "ale", "malt beverage", "fermented malt beverage", "malt liquor", "wine", "champagne", "whiskey" or "whisky", "gin", "vodka", "tequila", "schnapps", "brandy", "cognac", "liqueur", "cordial", "alcohol", or "liquor" shall constitute prima facie evidence that the contents of the bottle, can, or other container was composed in whole or in part of ethyl alcohol.

(7) A parent or legal guardian of a person under twenty-one years of age or any natural person who has the permission of such parent or legal guardian may give or permit the possession and consumption of ethyl alcohol to or by a person under the age of twenty-one years under the conditions described in paragraph (a) of subsection (3) of this section. This subsection (7) shall not be construed to permit any establishment which is or is required to be licensed pursuant to article 46, 47, or 48 of title 12, C.R.S., or any members, employees,

or occupants of any such establishment to give, provide, make available, or sell ethyl alcohol to a person under twenty-one years of age.

(8) Nothing in this section shall be construed to prohibit any statutory or home rule municipality from enacting any ordinance which prohibits persons under the age of twenty-one years from possessing or consuming ethyl alcohol, which ordinance is at least as restrictive or more restrictive than this section.

(9) Nothing in this section shall be construed to limit or preclude prosecution for any offense pursuant to article 46, 47, or 48 of title 12, C.R.S., except as provided in such articles.

(10) Upon the expiration of one year from the date of a conviction, dismissal, completion of deferred judgment, or conclusion of deferred prosecution for a violation of subsection (2) of this section, the person convicted of such violation may petition the court in which the conviction was assigned for an order sealing the record of such conviction. The court shall grant such petition if the petitioner has not been arrested for, charged with, or convicted of any felony, misdemeanor, or petty offense during the period of one year following the date of such petitioner's conviction for a violation of subsection (2) of this section.

(11) The qualitative result of an alcohol test or tests shall be admissible at the trial of any person charged with a violation of subsection (2) of this section upon a showing that the device or devices used to conduct such test or tests have been approved as accurate in detecting alcohol by the executive director of the department of public health and environment.

(12) Official records of the department of public health and environment relating to the certification of breath test instruments, certification of operators and operator instructors of breath test instruments, certification of standard solutions, and certification of laboratories shall be official records of the state. Copies of such records, attested by the executive director of the department of public health and environment or his deputy and accompanied by a certificate bearing the official seal for said department, which state that the executive director of the department has custody of such records, shall be admissible in all courts of record and shall constitute prima facie evidence of the information contained in such records. The official seal of the department described in this subsection (12) may consist of a rubber stamp producing a facsimile of the seal stamped upon the document.

(13) In any judicial proceeding in any court of this state concerning a charge under subsection (2) of this section, the court shall take judicial notice of methods of testing a person's blood, breath, saliva, or urine for the presence of alcohol and of the design and operation of devices certified by the department of public health and environment for testing a person's blood, breath, saliva, or urine for the presence of alcohol. This subsection (13) shall not prevent the necessity of establishing during a trial that the testing devices were working properly and that such testing devices were properly operated. Nothing in this subsection (13) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

(14) No law enforcement officer shall enter upon any private property to investigate any violation of this section without probable cause.

(15) Repealed.

(16) (a) The general assembly hereby finds and declares that:

(I) There are many children in Colorado who struggle with substance abuse, and their substance abuse problems have a direct social and economic impact on the state;

(II) It is estimated that in Colorado there are thirty thousand children and youth between the ages of twelve and seventeen with a substance abuse problem that often continues into young adulthood;

(III) At any one time, sixty to eighty percent of the youth in the juvenile justice system have a substance abuse problem, and thirty percent of the referrals for substance abuse problems in the juvenile justice system have co-occurring disorders;

(IV) Colorado does not have the capacity to provide substance abuse treatment for all children who need the treatment. In fiscal year 2004, only four thousand three hundred eighty children received publicly funded substance abuse treatment, representing only fifteen percent of the children in the state who needed substance abuse treatment.

(V) It is necessary for the state of Colorado to provide more adolescent substance abuse treatment in a developmentally, intellectually, and socially appropriate manner and therefore it is necessary to create the adolescent substance abuse prevention and treatment fund for that purpose.

(b) The surcharge collected pursuant to subparagraph (IV) of paragraph (b) of subsection (2) of this section shall be transmitted to the state treasurer, who shall credit the same to the adolescent substance abuse prevention and treatment fund, which fund is hereby created and referred to in this section as the "fund". The moneys in the fund shall be subject to annual appropriation by the general assembly to the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, established in article 80 of title 27, C.R.S., for adolescent substance abuse prevention and treatment programs. The unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse, is authorized to seek and accept gifts, grants, or donations from private or public sources for the purposes of this section. All private and public funds received through gifts, grants, or donations shall be transmitted to the state treasurer, who shall credit the same to the fund. Any unexpended moneys in the fund may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund.

Source: **L. 90:** Entire section added, p. 1000, § 1, effective May 22. **L. 93:** (15) repealed, p. 1735, § 28, effective July 1. **L. 94:** (11) and (13) amended, p. 2736, § 360, effective July 1. **L. 99:** (2)(b) amended, p. 795, § 7, effective July 1. **L. 2002:** (2)(b) amended, p. 1518, § 210, effective October 1. **L. 2004:** (3)(c) added, p. 1096, § 1, effective July 1. **L. 2005:** (2) amended and (4.5) added, pp. 1244, 1245, §§ 5, 7, effective July 1. **L. 2006:** (2)(b)(IV) and (16) added, pp. 1537, 1536, §§ 2, 1, effective July 1. **L. 2010:** (16)(b) amended, (SB 10-175), ch. 188, p. 787, § 34, effective April 29. **L. 2012:** (2)(a), IP(4.5), (4.5)(a), (4.5)(b), and (4.5)(d) amended, (SB 12-020), ch. 225, p. 989, § 8, effective May 29; (10) amended, (HB 12-1310), ch. 268, p. 1398, § 16, effective June 7.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2005 act amending subsection (2) and enacting subsection (4.5), see section 1 of chapter 282, Session Laws of Colorado 2005. For the legislative declaration in the 2012 act amending subsection (2)(a), the introductory portion to subsection (4.5), and subsections (4.5)(a), (4.5)(b), and (4.5)(d), see section 1 of chapter 225, Session Laws of Colorado 2012.

ANNOTATION

General assembly's reenactment of criminal code provisions do not supersede provisions of the liquor code, and person violating liquor code must be prosecuted for those viola-

tions and not provisions of the criminal code. *People v. O'Donnell*, 926 P.2d 114 (Colo. App. 1996).

18-13-123. Unlawful administration of gamma hydroxybutyrate (GHB) or ketamine.

(1) and (2) (Deleted by amendment, L. 2001, p. 858, § 4, effective July 1, 2001.)

(3) Except as otherwise provided in subsection (4) of this section, it shall be unlawful for any person to knowingly cause or attempt to cause any other person to unknowingly consume or receive the direct administration of gamma hydroxybutyrate (GHB) or ketamine or the immediate chemical precursors or chemical analogs for either of such substances.

(4) (a) It shall not be a violation of this section if gamma hydroxybutyrate (GHB) or ketamine is distributed or dispensed for bona fide medical needs by or under the direction

of a person licensed or authorized by law to prescribe, administer, or dispense such substances.

(b) It shall not be a violation of this section if ketamine is distributed or dispensed by or under the direction of such authorized person for use by a humane society that is duly registered with the secretary of state and has been in existence and in business for at least five years in this state as a nonprofit corporation or by an animal control agency that is operated by a unit of government to control animals and to euthanize injured, sick, homeless, or unwanted pets or animals if the humane society or animal control agency is registered pursuant to section 12-42.5-117 (12), C.R.S.

(5) Violation of the provisions of subsection (3) of this section is a class 3 felony; except that such violation is a class 2 felony if the violation is subsequent to a prior conviction for a violation of subsection (3) of this section or section 18-18-405 where the controlled substance was gamma hydroxybutyrate (GHB) or ketamine or the immediate chemical precursors or chemical analogs for either of such substances.

Source: L. 99: Entire section added, p. 1093, § 2, effective July 1. **L. 2000:** (1), (2), and (4) amended, p. 697, § 15, effective July 1. **L. 2001:** Entire section amended, p. 858, § 4, effective July 1. **L. 2004:** (4) amended, p. 799, § 2, effective July 1. **L. 2012:** (4)(b) amended, (HB 12-1311), ch. 281, p. 1620, § 49, effective July 1.

18-13-124. Dissemination of false information to obtain hospital admittance or care. (1) Any person commits the offense of dissemination of false information to obtain hospital admittance or care where such person knowingly provides false identifying information for the purpose of either obtaining admittance to, or health services from, a hospital or evading an obligation by the person to make payment to the hospital for services provided at the person's request. For purposes of this section, "identifying information" includes, without limitation, a name, address, or telephone number, or health coverage information.

(2) Any person who commits the offense of dissemination of false information to obtain hospital admittance or care commits a class 1 misdemeanor and, upon conviction thereof, shall be punished as provided in section 18-1.3-501.

Source: L. 2002: Entire section added, p. 1809, § 1, effective July 1.

18-13-125. Telephone records - sale or purchase. (1) A person commits unauthorized trading in telephone records if the person, without lawful authorization:

- (a) Knowingly procures or attempts to procure a telephone record;
- (b) Knowingly sells, buys, offers to sell, or offers to buy a telephone record;
- (c) Possesses a telephone record with the intent to use such record, or information contained in such record, to harm another person; or
- (d) Receives a telephone record of a resident of Colorado knowing that such record was obtained without lawful authorization or by fraud or deception.

(2) For the purposes of this section:

(a) "Lawful authorization" means authorization from the person or the agent of the person to whom the telephone number is assigned or from the person or the agent of the person who purchases the telephone service.

(b) "Procure" means to obtain by any means, with or without consideration.

(c) "Telecommunications provider" means a company and its affiliates that provide commercial telephone service to a customer, irrespective of the technology employed, including, without limitation, wired, wireless, cable, broadband, satellite, or voice-over-internet protocol.

(d) (I) "Telephone record" means information retained by a telecommunications provider that relates to the number dialed by the customer or subscriber, to the number of a person who dialed the customer, or to other data that are typically contained on a customer's telephone bill for either wired or wireless telephone service, including, without limitation, the time a call was made, the duration of a call, or the charges for a call.

(II) "Telephone record" shall not include a directory listing or information collected and retained by customers utilizing caller identification technology or similar technology.

(3) (a) This section shall not prohibit a peace officer, a law enforcement agency, or an employee or agent of a law enforcement agency from obtaining telephone records in the performance of their duties or as authorized by law.

(b) This section shall not prohibit a telecommunications provider from obtaining, using, disclosing, or permitting access to a telephone record when such access:

(I) Is otherwise authorized by Colorado law, any other state law, or federal law, including, without limitation, the rules promulgated by the federal communications commission;

(II) Is necessary to operations of the telecommunications provider, or to provide services or products, or to protect the rights and property of the telecommunications provider;

(III) Protects users of the service and other telecommunications providers from fraudulent, abusive, or unlawful use of or subscription to such service;

(IV) Is made to a government entity if the telecommunications provider reasonably believes that an emergency involving immediate danger of serious physical injury to any person justifies disclosure of the information;

(V) Is made to the national center for missing and exploited children or its successor entity and concerns a report submitted under 42 U.S.C. sec. 13032;

(VI) Is in connection with the sale, purchase, or transfer of all or part of a telecommunications provider's business; or

(VII) Is in connection with the migration of a customer from one telecommunications provider to another.

(c) This section shall not be construed to imply that telephone records belong to a person other than the telecommunications provider that maintains them.

(4) Unauthorized trading in telephone records is a class 1 misdemeanor.

(5) This section shall not apply to a telecommunications provider or its agents or representatives who reasonably and in good faith act pursuant to Colorado law, any other state law, or federal law, including, without limitation, the rules promulgated by the federal communications commission, notwithstanding a later determination that the act was not authorized by such law.

Source: L. 2006: Entire section added, p. 584, § 1, effective July 1.

18-13-126. Locating protected persons. (1) (a) Except as otherwise provided in paragraph (b) of this subsection (1), a person shall not accept money or other form of compensation to assist a restrained person from discovering the location of a protected person when the person knows or reasonably should know that the restrained person is subject to a court order prohibiting contact with the protected person.

(b) The provisions of paragraph (a) of this subsection (1) shall not apply to a person who is working pursuant to an agreement with counsel for a restrained person or with the restrained person if he or she is representing himself or herself, if:

(I) (A) The restrained person seeks discovery of the location of the protected person for a lawful purpose as specified in a written agreement between the person and the restrained person or his or her counsel; and

(B) The written agreement states that the location of the protected person shall not be disclosed by the person or by counsel for the restrained person to the restrained person unless the protected person has agreed to the disclosure in writing or the restrained person obtains court permission to obtain disclosure of the location for the stated lawful purpose; or

(II) (A) The restrained person is a defendant in a criminal case or a party to a civil case, an action for dissolution of marriage, or other legal proceeding; and

(B) The agreement states that the lawful purpose for locating the protected person is to interview or issue a lawful subpoena or summons to the protected person or for any other lawful purpose relating to the proper investigation of the case.

(2) A violation of subsection (1) of this section is a class 1 misdemeanor offense.

(3) It shall be an affirmative defense to a charge under subsection (1) of this section if the person:

(a) Within seventy-two hours prior to disclosing the location of the protected person to the restrained person, verified that there was not a protection order relating to the protected person; and

(b) Prior to disclosing the location of the protected person to the restrained person, obtained from the restrained person a signed affidavit verifying that the restrained person was not aware of any protection order related to the protected person.

(4) As used in this section, unless the context otherwise requires:

(a) "Protected person" means the person or persons identified in a protection order as the person or persons for whose benefit the protection order was issued.

(b) "Protection order" means an order as described in section 18-6-803.5 (1.5) (a.5) that prohibits a restrained person from contacting a protected person.

(c) "Restrained person" means the person identified in the protection order as the person prohibited from doing the specified act or acts.

Source: L. 2006: Entire section added, p. 1056, § 1, effective July 1.

18-13-127. Trafficking in adults. (Repealed)

Source: L. 2006: Entire section added, p. 1307, § 1, effective May 30. L. 2009: (2) amended, (HB 09-1123), ch. 306, p. 1652, § 2, effective May 21. L. 2010: Entire section repealed, (SB 10-140), ch. 156, p. 540, § 13, effective April 21.

Editor's note: This section was relocated to § 18-3-501 in 2010.

18-13-128. Smuggling of humans. (1) A person commits smuggling of humans if, for the purpose of assisting another person to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws, he or she provides or agrees to provide transportation to that person in exchange for money or any other thing of value.

(2) Smuggling of humans is a class 3 felony.

(3) A person commits a separate offense for each person to whom he or she provides or agrees to provide transportation in violation of subsection (1) of this section.

(4) Notwithstanding the provisions of section 18-1-202, smuggling of humans offenses may be tried in any county in the state where a person who is illegally present in the United States who is a subject of the action is found.

Source: L. 2006: Entire section added, p. 1301, § 1, effective May 30.

ANNOTATION

Law reviews. For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (October 2006). For comment, "Interstate Insta-

bility: Why Colorado's Alien Smuggling Statute is Preempted by Federal Immigration Laws", see 79 U. Colo. L. Rev. 237 (2008).

18-13-129. Coercion of involuntary servitude. (Repealed)

Source: L. 2006, 1st Ex. Sess.: Entire section added, p. 15, § 1, effective July 31. L. 2009: (1) amended, (HB 09-1123), ch. 306, p. 1652, § 3, effective May 21. L. 2010: Entire section repealed, (SB 10-140), ch. 156, p. 540, § 13, effective April 21.

Editor's note: This section was relocated to § 18-3-503 in 2010.

18-13-130. Bail bond - prohibited activities - penalties. (1) It is unlawful for any person who engages in the business of writing bail bonds to engage in any of the following activities related to a bail bond transaction:

(a) Specify, suggest, or advise the employment of a particular attorney to represent the licensee's principal;

(b) Pay a fee or rebate or give or promise anything of value to a jailer, peace officer, clerk, deputy clerk, an employee of a court, district attorney or district attorney's employees, or any person who has power to arrest or to hold a person in custody;

(c) Pay a fee or rebate or give anything of value to an attorney in bail bond matters, except in defense of any action on a bond or as counsel to represent the person who wrote or posted the bond or the person's representative or employees;

(d) Pay a fee or rebate or give or promise to give anything of value to the person on whose bond the person is surety;

(e) Accept anything of value from a person on whose bond the person in the business of writing bail bonds is surety or from others on behalf of the person except the fee or premium on the bond, but the producer or agent may accept collateral security or other indemnity if:

(I) No collateral or security in tangible property is taken by pledge or debt instrument that allows retention, sale, or other disposition of the property upon default except in accordance with article 9 of title 4, C.R.S.;

(II) No collateral or security interest in real property is taken by deed or any other instrument unless the interest in the property is limited to the amount of the bond and the interest is recorded in the name of the bail insurance company or insurance producer, cash-bonding agent, or professional cash-bail agent who posted the bond with the court;

(III) The collateral or security is not pledged directly to any court as security for any appearance bond; and

(IV) The person from whom the collateral or security is taken is issued a receipt describing the condition of the collateral at the time it is taken into custody;

(f) Coerce, suggest, aid and abet, offer promise of favor, or threaten any person on whose bail bond the person is surety or offers to become surety to induce that person to commit any crime;

(g) Post a bail bond in any court of record in this state while the name of the person is on the board under section 16-4-112 (5) (e), C.R.S., or under any circumstance where the person has failed to pay a bail forfeiture judgment after all applicable stays of execution have expired and the bond has not been exonerated or discharged;

(h) Except for the bond fee, to fail to return any nonforfeited collateral or security within fourteen days after receipt of a copy of the court order that results in a release of the bond by the court, or if the defendant fails to appear and the surety is exonerated, fails to return the collateral to the indemnitor upon request within fourteen days after the three-year period, unless:

(I) The collateral also secures another obligation, premium payment plan, or bail recovery fee; or

(II) The later of three years or, if the court grants an extension, six years have elapsed from the date the bond was posted.

(i) Accept anything of value from a person on whose bond the person in the business of writing bail bonds is indemnitor or from another on behalf of the principal except the premium, except as authorized by title 10, C.R.S., or any rule of the division of insurance promulgated under title 10, C.R.S.;

(j) Sign or countersign blank bail bonds;

(k) To have more than one bond posted at one time in one case on behalf of one person;

(l) Fail to issue to the person from whom collateral or security is taken a receipt that includes a description of the collateral or security when it is taken into custody;

(2) A person who violates subsection (1) of this section is guilty of an unclassified misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. Any criminal penalty prescribed in this section for a violation of this article is in addition to, and not exclusive of, any other applicable penalty prescribed by law.

Source: L. 2012: Entire section added, (HB 12-1266), ch. 280, p. 1526, § 46, effective July 1.

Editor’s note: (1) This section is similar to former § 12-7-109 (1) and (2) as it existed prior to 2012.

(2) Section 52 of chapter 280, Session Laws of Colorado 2012, provides that the act adding this section applies to offenses committed and applications submitted on or after on or after July 1, 2012.

ANNOTATION

Annotator’s note. Since § 18-13-130 is similar to § 12-7-109 as it existed prior to its 2012 relocation with amendments to this section, a relevant case construing that provision has been included in the annotations to this section.

A constitutional challenge on the basis of vagueness to this section is without merit since this section is definite that gifts shall not be made to court employees by professional bondsmen. *Herbertson v. Dept. of Ins.*, 173 Colo. 327, 478 P.2d 668 (1970).

It is generally recognized that the bail bond business is a matter of public concern, and hence, is subject to reasonable regulation under

the police power of the state. *Herbertson v. Dept. of Ins.*, 173 Colo. 327, 478 P.2d 668 (1970).

Where the general assembly has proscribed the making of a gift to certain specified officials with whom bail bondsmen must deal in the normal course of their licensed activities, and has not required that such act be done with an evil purpose, guilty knowledge, scienter, or mens rea, held, under such circumstances, the constitutional challenge to this section on the basis of lack of mens rea or criminal intent is without merit. *Herbertson v. Dept. of Ins.*, 173 Colo. 327, 478 P.2d 668 (1970).

ARTICLE 14

Hotel Facility Rates: Posting - Notice

18-14-101.	Definitions.	18-14-103.	Advertising prohibited -
18-14-102.	Accommodations and rates posted.		when.
		18-14-104.	Violations - penalty.

18-14-101. Definitions. “Hotel facility” means an establishment engaged in the business of furnishing overnight room accommodations primarily for transient persons.

Source: L. 72: p. 593, § 70. **C.R.S. 1963:** § 40-14-101.

18-14-102. Accommodations and rates posted. (1) There shall be displayed at each hotel facility in its office or place of guest registration, in a conspicuous place, a sign which includes, in letters and figures of the same size and prominence, the following information: The number of apartments, rooms, or units in the hotel facility and the rates charged for each; whether the rates quoted are for single or multiple occupancy where such fact affects the rates charged; and the dates during which rates are in effect.

(2) There shall be posted in a plainly legible fashion, in a conspicuous place in, or at, each room, unit, and apartment of every hotel facility, the rates at which such room or apartment is rented. Such posting shall be in the form of a sign showing the maximum amount charged for occupancy and the maximum amount per person if the rate varies with the number of occupants. The sign shall also show the amount charged for extra conveniences, more complete accommodations, or additional furnishings and shall show the dates during the year when such charges prevail.

Source: L. 72: p. 593, § 70. **C.R.S. 1963:** § 40-14-102.

18-14-103. Advertising prohibited - when. (1) No person shall display or cause to be displayed any sign which may be seen from a public highway or street, which sign includes in dollars and cents a statement relating to the rates charged at a hotel facility unless accommodations are available at the rates quoted at all times such sign is posted.

(2) No person shall publish or cause to be published an advertisement which includes in dollars and cents a statement relating to rates charged at a hotel facility unless such advertisement includes in letters or figures of similar size and prominence: The number of apartments or rooms in said hotel facility at the published rates; whether the rates quoted are for single or multiple occupancy where such fact affects the rates charged; the dates during which such rates are in effect; and an indication as to whether there are other rates in effect in said hotel facility. Advertisements or listings in guides or directories which are published by nonprofit hotel, motel, motor court, or apartment organizations or similar associations are excepted from this subsection (2).

(3) There shall not be published or displayed any sign with regard to any hotel facility which may be seen from a public highway or street and which contains any advertisement that contains false or misleading statements as to any matter whatsoever.

Source: L. 72: p. 593, § 70. C.R.S. 1963: § 40-14-103.

18-14-104. Violations - penalty. Any owner, agent, lessee, or manager of any hotel facility who violates, or causes to be violated, any of the provisions of this article commits a class 1 petty offense.

Source: L. 72: p. 593, § 70. C.R.S. 1963: § 40-14-104.

ARTICLE 15

Offenses - Making, Financing,
or Collection of Loans

18-15-101.	Definitions.	18-15-106.	Financing criminal usury.
18-15-102.	Extortionate extension of credit - penalty.	18-15-107.	Collection of extensions of credit by extortionate means.
18-15-103.	Presumption that extension of credit is extortionate.	18-15-108.	Possession or concealment of records of criminal usury.
18-15-104.	Engaging in criminal usury.	18-15-109.	Loan finder - definitions - prohibited fees.
18-15-105.	Financing extortionate extensions of credit.		

18-15-101. Definitions. As used in this article, unless the context otherwise requires:

(1) To “collect” an extension of credit means to induce in any way any person to make repayment thereof.

(2) “Creditor” means any person who extends credit or any person claiming by, under, or through any such person.

(3) “Debtor” means any person who receives an extension of credit or any person who guarantees the repayment of an extension of credit or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person who receives an extension of credit to repay the same.

(4) To “extend credit” means to make or renew any loan or to enter into any agreement, express or implied, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(5) An “extortionate means” is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(6) (a) “Loan finance charge” means the sum of all charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to or as a condition of the extension of credit, whether paid or payable by the debtor, the lender, or any other person on behalf of the debtor to the lender or to a third party, including, but not limited to, any of the following types of charges that are applicable:

(1) Interest or any amount payable under a point, discount, or other system of charges, however denominated;

(II) Premium or other charge for any guarantee of insurance protecting the lender against the debtor's default or other credit loss;

(III) Charges incurred for investigating the collateral or credit-worthiness of the debtor or for commissions or brokerage for obtaining the credit.

(b) The term does not include the charges as a result of additional charges as defined in section 5-2-202, C.R.S., delinquency charges as defined in section 5-2-203, C.R.S., deferral charges as defined in section 5-2-204, C.R.S., similar charges specifically authorized by law, or additional interest charges permitted by section 5-12-107 (3), C.R.S.

(7) "Repayment" of an extension of credit includes the repayment, satisfaction, or discharge, in whole or in part, of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

Source: L. 72: p. 288, § 3. C.R.S. 1963: § 40-15-101. L. 94: (6) amended, p. 1613, § 14, effective July 1. L. 96: (6) amended, p. 412, § 14, effective July 1. L. 2000: (6)(b) amended, p. 1872, § 109, effective August 2.

18-15-102. Extortionate extension of credit - penalty. Any person who makes any extension of credit in any amount regardless of the loan finance charge with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment will result in the use of extortionate means of collection is guilty of extortionate extension of credit, which is a class 4 felony.

Source: L. 72: p. 289, § 3. C.R.S. 1963: § 40-15-102.

18-15-103. Presumption that extension of credit is extortionate. (1) The provisions of this section are nonexclusive and in no way limit the effect or applicability of section 18-15-102.

(2) In any prosecution under section 18-15-102, if it is shown that the factors enumerated in paragraphs (a), (b), and (c) of this subsection (2) were present in connection with the making of the extension of credit in question, there shall arise a presumption that the extension of credit was extortionate:

(a) The extension of credit was made with a loan finance charge in excess of that established for criminal usury.

(b) At the time credit was extended, the debtor reasonably believed that one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means or the nonrepayment thereof had been punished by extortionate means.

(c) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded one hundred dollars.

(3) In any prosecution under section 18-15-102, evidence of similar offenses tending to establish the existence of a plan, scheme, or design on the part of the defendant to produce a result of which the act charged is a part shall be admissible in evidence against the defendant. Such evidence of similar offenses, if known to the debtor, shall also be admissible in evidence for the purpose of establishing the reasonable belief of the debtor referred to in paragraph (b) of subsection (2) of this section.

(4) Whether evidence introduced under the provisions of subsection (2) of this section giving rise to the presumption that the extension of credit was extortionate is sufficient to establish the guilt of the defendant beyond a reasonable doubt, if such evidence is not disputed, is a question to be determined by the jury under proper instructions or by the court if no jury trial is had. Where there is evidence tending to show the innocence of the transaction, the issue of whether the extension of credit was extortionate shall be submitted to the jury, if trial is to a jury, unless the court is satisfied that the evidence as a whole clearly negates the presumed offense.

Source: L. 72: p. 289, § 3. C.R.S. 1963: § 40-15-103.

18-15-104. Engaging in criminal usury. (1) Any person who knowingly charges, takes, or receives any money or other property as a loan finance charge where the charge exceeds an annual percentage rate of forty-five percent or the equivalent for a longer or shorter period commits the crime of criminal usury, which is a class 6 felony.

(2) It is an affirmative defense to criminal usury for a person, or his agent or assignee, who charges, takes, or receives money or property as a loan finance charge in excess of an annual percentage rate of forty-five percent in either of the following circumstances:

(a) That at the time of making the loan finance charge it could not have been determined by a mathematical computation that the annual percentage rate would exceed an annual percentage rate of forty-five percent;

(b) That the loan finance charge was not in excess of an annual percentage rate of forty-five percent when the rate of the finance charge was calculated on the unpaid balance of the debt on the assumption that the debt is to be paid according to its terms and is not paid before the end of the agreed term.

(3) The affirmative defenses referred to in subsection (2) of this section shall only apply when the provisions relating to the loan finance charge are set forth in a written agreement signed by all the parties and such written agreement is submitted to the court and the district attorney at least ten days prior to trial.

(4) This section shall not apply to:

(a) Charges and fees permitted by articles 1 to 6 of title 5, C.R.S., or charges and fees that are similar to such charges and fees and are specifically authorized by law;

(b) Credit card charges and fees not exceeding those permitted for consumer transactions under articles 1 to 6 of title 5, C.R.S., when imposed upon or collected from a person or in a transaction not subject to said provisions;

(c) A reverse mortgage as defined in section 11-38-102, C.R.S.; and

(d) Additional interest charges permitted by section 5-12-107 (3), C.R.S.

Source: L. 72: p. 290, § 3. C.R.S. 1963: § 40-15-104. L. 89: (1) amended, p. 843, § 103, effective July 1. L. 92: (4) amended, p. 944, § 3, effective April 23. L. 94: (4)(a) amended, p. 1613, § 15, effective July 1. L. 96: (4)(b) and (4)(c) amended and (4)(d) added, p. 412, § 15, effective July 1.

Cross references: For penalties for charges under forty-five percent, see § 5-5-301.

ANNOTATION

Applied in *Haugen v. Western Fed. Sav. & Loan Ass'n*, 633 P.2d 497 (Colo. App. 1981).

18-15-105. Financing extortionate extensions of credit. Any person who knowingly advances money or property, whether as a gift, a loan, or an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of the person to whom the advance is made to use the money or property, directly or indirectly, for the purpose of making an extortionate extension of credit, commits financing extortionate extensions of credit, which is a class 5 felony.

Source: L. 72: p. 290, § 3. C.R.S. 1963: § 40-15-105. L. 89: Entire section amended, p. 843, § 104, effective July 1.

18-15-106. Financing criminal usury. Any person who knowingly advances money or property, whether as a gift, a loan, or an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of the person to whom the advance is made to use the money or property, directly or indirectly, for the purpose of engaging in criminal usury, commits financing criminal usury, which is a class 6 felony.

Source: L. 72: p. 291, § 3. C.R.S. 1963: § 40-15-106. L. 89: Entire section amended, p. 843, § 105, effective July 1.

18-15-107. Collection of extensions of credit by extortionate means. (1) It is unlawful for any person knowingly to participate in any way, or to conspire to do so, in the use of any extortionate means to collect or to attempt to collect any extension of credit or to punish any person for the nonrepayment of any extension of credit.

(2) Any person who violates the provisions of subsection (1) of this section commits collection of extensions of credit by extortionate means, which is a class 4 felony.

(3) In any prosecution under this section for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment of an extension of credit was punished by extortionate means.

Source: L. 72: p. 291, § 3. C.R.S. 1963: § 40-15-107.

18-15-108. Possession or concealment of records of criminal usury. (1) Any person who possesses or conceals any writing, paper, instrument, or article used to record criminally usurious transactions, and who knows or has reasonable grounds to know that the contents have been used, are being used, or are intended to be used to conduct a criminally usurious transaction, or who possesses or conceals such instruments with intent to aid, assist, or facilitate criminal usury commits possession or concealment of records of criminal usury, which is a class 6 felony.

(2) This section is not applicable to any person who may take possession of any such documents while acting on behalf of another as attorney or in a related capacity with respect to judicial proceedings already commenced.

Source: L. 72: p. 291, § 3. C.R.S. 1963: § 40-15-108. L. 89: (1) amended, p. 843, § 106, effective July 1.

18-15-109. Loan finder - definitions - prohibited fees. (1) As used in this section, unless the context otherwise requires:

(a) "Borrower" means any person seeking to obtain a loan through the services of a loan finder.

(b) "Loan" has the same meaning as set forth in section 5-1-301 (25), C.R.S.

(c) "Loan finder" means any person who, directly or indirectly, serves or offers to serve as a lender or as an agent to obtain a loan or who holds himself out as capable of obtaining a loan for any person; except that the following persons shall be exempt from the provisions of this section:

(I) A supervised financial organization, as defined in section 5-1-301 (45), C.R.S., and its employees, when acting within the scope of their employment;

(II) A person duly licensed to make supervised loans pursuant to part 3 of article 2 of title 5, C.R.S.;

(III) A business development corporation, created pursuant to article 48 of title 7, C.R.S.;

(IV) A pawnbroker licensed pursuant to article 56 of title 12, C.R.S., acting as such;

(V) Any governmental entity or employee thereof, acting in his official capacity;

(VI) A mortgage broker, as defined in paragraph (d) of this subsection (1), acting as such.

(d) "Mortgage broker" means any person who, directly or indirectly, serves or offers to serve as an agent for any person to obtain a loan secured by a mortgage, deed of trust, or lien on real property.

(2) A loan finder shall not charge or collect any fee from a borrower until a borrower actually receives the agreed-upon loan; except that nothing in this section shall preclude a

borrower from paying for a credit check or for an appraisal of security for the loan where such payment is by check or money order made payable to a party independent of the loan finder.

(3) In any proceeding brought pursuant to this section, the burden of production with respect to an exemption from its provisions shall be upon the person claiming the exemption, and said claim of exemption shall constitute an affirmative defense.

(4) Any person who violates this section commits a class 1 misdemeanor. A violation of this section shall also constitute a class 1 public nuisance subject to the provisions of part 3 of article 13 of title 16, C.R.S.

Source: **L. 90:** Entire section added, p. 382, § 3, effective July 1. **L. 2000:** (1)(b), (1)(c)(I), and (1)(c)(II) amended, p. 1873, § 110, effective August 2.

ARTICLE 16

Purchasers of Valuable Articles

Editor’s note: The Colorado Supreme Court held this entire article constitutional on the basis that it did not infringe on the federal government’s exclusive jurisdiction over the regulation of currency and gold and silver bullion nor does it place an impermissible burden on interstate commerce. See *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985).

18-16-101.	Legislative declaration.		seller’s ownership.
18-16-102.	Definitions.	18-16-106.	Holding period.
18-16-103.	Purchaser to identify seller.	18-16-107.	Reports required.
18-16-104.	Purchases prohibited.	18-16-108.	Penalty.
18-16-105.	Purchaser to maintain register and obtain declaration of	18-16-109.	Applicability.
		18-16-110.	Severability.

18-16-101. Legislative declaration. The general assembly hereby finds and determines that illicit traffic in stolen valuable articles is encouraged by the absence of any required record-keeping system by persons purchasing such valuable articles. The general assembly further finds that law enforcement officials are hindered in the identification and recovery of stolen valuable articles, and that law enforcement officials are hindered in the discovery and identification of persons selling stolen valuable articles due to the absence of such a required record-keeping system. Accordingly, it is the intent of the general assembly, by enacting this article, to aid law enforcement officials in the discovery and identification of sellers of stolen valuable articles and in the identification and recovery of stolen valuable articles by providing a mandatory record-keeping and reporting system by purchasers and by providing a holding period during which time such articles shall not be disposed of or altered in any manner. Local governments may adopt ordinances more strict than the provisions of this article.

Source: **L. 81:** Entire article added, p. 1011, § 1, effective May 22.

ANNOTATION

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-102. Definitions. As used in this article, unless the context otherwise requires:

(1) “Local law enforcement agency” means any marshal’s office, police department, or sheriff’s office with jurisdiction in the locality in which the purchaser makes the purchase.

(2) “Peace officer” means any undersheriff, deputy sheriff other than one appointed with authority only to receive and serve summons and civil process, police officer, state patrol officer, town marshal, or investigator for a district attorney or the attorney general

who is engaged in full-time employment by the state, a city, city and county, town, judicial district, or county within this state.

(3) "Precious or semiprecious metals or stones" means such metals as, but not limited to, gold, silver, platinum, and pewter and such stones as, but not limited to, alexandrite, diamonds, emeralds, garnets, opals, rubies, sapphires, and topaz. For the purposes of this article, ivory, coral, pearls, jade, and such other minerals, stones, or gems as are customarily regarded as precious or semiprecious are deemed to be precious or semiprecious stones.

(4) "Purchase" means giving money to acquire any valuable article, taking valuable articles in full or part satisfaction of a debt, taking valuable articles for resale for the purpose of full or part satisfaction of a debt, or taking valuable articles for sale on consignment.

(5) "Purchaser" means any person holding himself out to the public as being engaged in the business of buying valuable articles or any person who purchases five or more valuable articles during any thirty-day period. "Purchaser" does not include a person purchasing valuable articles from an estate or from a retail or wholesale merchant.

(6) "Seller" means any person offering a valuable article for money to any purchaser, offering a valuable article in full or part satisfaction of a debt, or offering a valuable article for resale for the purpose of full or part satisfaction of a debt.

(7) (a) "Valuable article" means any tangible personal property consisting, in whole or in part, of precious or semiprecious metals or stones, whether solid, plated, or overlaid, including, but not limited to, household goods, jewelry, United States commemorative medals or tokens, and gold and silver bullion.

(b) "Valuable article" shall also include foreign currency when purchased for more than its face value or foreign currency exchange value.

Source: L. 81: Entire article added, p. 1011, § 1, effective May 22. L. 83: (4) amended, p. 668, § 12, effective July 1.

ANNOTATION

Constitutionality of terms. The following terms were found not to be unconstitutionally vague: Valuable article, purchaser, precious and semi-precious metals or stones, bullion, law enforcement agency, and peace officer. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo.),

cert. denied, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed.2d 214 (1985); *People v. Rankin*, 724 P.2d 1354 (Colo. 1986).

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-103. Purchaser to identify seller. (1) No purchaser shall purchase any valuable article without first securing adequate identification from the seller. The type and kind of identification shall be limited to the following:

- (a) A valid Colorado driver's license;
- (b) An identification card issued in accordance with section 42-2-302, C.R.S.;
- (c) A valid driver's license, containing a picture, issued by another state;
- (d) A military identification card;
- (e) A valid passport;
- (f) An alien registration card; or
- (g) A nonpicture identification document issued by a state or federal government entity if the purchaser also obtains a clear imprint of the seller's right index finger.

Source: L. 81: Entire article added, p. 1012, § 1, effective May 22. L. 94: (1)(b) amended, p. 2553, § 44, effective January 1, 1995.

ANNOTATION

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-104. Purchases prohibited. No purchaser shall purchase any valuable article from any person under the age of eighteen years.

Source: L. 81: Entire article added, p. 1013, § 1, effective May 22.

ANNOTATION

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-105. Purchaser to maintain register and obtain declaration of seller's ownership. (1) Every purchaser of valuable articles shall keep a register, in a permanent, well-bound book, in which he shall record the following information: The name, address, and date of birth of the seller and his driver's license number or other I.D. number from any other allowed form of identification pursuant to section 18-16-103; the date, time, and place of the purchase; an accurate and detailed account and description of each valuable article being purchased, including, but not limited to, any trademark, identification number, serial number, model number, brand name, or other identifying marks on such articles and a description by weight and design of such articles. The purchaser shall also obtain a written declaration of the seller's ownership which shall state whether the valuable article is totally owned by the seller, how long the seller has owned the article, whether the seller or someone else found the article, and, if the article was found, the details of its finding.

(2) The seller shall sign his name in such register and on the declaration of ownership.

(3) Such register shall be made available to any peace officer for inspection at any reasonable time.

(4) The purchaser shall keep each register for at least three years after the last date of purchase of valuable articles described therein.

Source: L. 81: Entire article added, p. 1013, § 1, effective May 22.

ANNOTATION

Constitutionality of the maintenance and inspection of the register. Allowing the inspection of the register without a warrant is not inconsistent with the constitutional protections against unreasonable search and seizure. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985), cert. denied, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed.2d 214 (1985).

Evidence sufficient to sustain defendant's conviction for giving false information. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

Applied in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18-16-106. Holding period. (1) Except as provided in subsection (2) of this section, a purchaser shall hold all valuable articles within the jurisdiction of purchase for a period of thirty days from the date of purchase, during which time the valuable articles shall be held separate and apart from any other transaction and shall not be changed in form or altered in any way. The purchaser shall permit any requesting law enforcement officer to inspect the valuable articles during the thirty-day period.

(2) Stamped and assayed gold and silver bullion and gold coins shall not be subject to the holding requirement imposed by subsection (1) of this section. In lieu of such requirement, the purchaser shall be required to record the identity of any person to whom he transfers any such bullion or coins and the date, time, and place of such transfer.

Source: L. 81: Entire article added, p. 1013, § 1, effective May 22.

ANNOTATION

Applied in Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

18-16-107. Reports required. (1) Every purchaser of valuable articles shall provide the local law enforcement agency, on a weekly basis, with two records, on a form to be provided by the local law enforcement agency, of all valuable articles purchased during the preceding week and one copy of the seller's declaration of ownership. The form for recording such purchases shall contain the information required to be recorded in the purchaser's register pursuant to section 18-16-105 and shall also include a physical description of the seller and the dollar amount of the purchase. Said form shall be signed, at the time of the purchase, by the seller and by the individual purchaser or his agent who participated in the purchase. The local law enforcement agency shall designate the day of the week on which the records and declarations shall be submitted.

(2) A copy of such record and the seller's declaration of ownership shall also be forwarded to the local law enforcement agency having jurisdiction in the area where the seller resides.

(3) The local law enforcement agency shall forward copies of such records and declarations of sellers' ownership, upon request, to any other law enforcement agency.

Source: L. 81: Entire article added, p. 1013, § 1, effective May 22. **L. 83:** (1) amended, p. 668, § 13, effective July 1.

ANNOTATION

Constitutionality of reporting requirements. The requirement that purchasers provide the local law enforcement agency on a weekly basis, two records regarding valuable articles purchased does not constitute a violation of the purchaser's fifth amendment privilege against self-incrimination. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo.), cert. denied, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed.2d 214 (1985).

Jeweler's failure to comply with record-keeping requirement does not constitute defense to criminal charge under § 18-16-108, and the prosecution's failure to introduce proof of jeweler's compliance with this section was not fatal to defendant's conviction. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

Applied in Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

18-16-108. Penalty. Any person who violates any of the provisions of this article commits a class 6 felony. Any person who knowingly gives false information with respect to the information required by sections 18-16-103 and 18-16-105 commits a class 6 felony.

Source: L. 81: Entire article added, p. 1014, § 1, effective May 22. **L. 89:** Entire section amended, p. 843, § 107, effective July 1.

ANNOTATION

Act does not create a strict liability crime. The second sentence of this provision requires a "knowing" violation. This mental state applies to the first sentence as well. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985), cert. denied, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed.2d 214 (1985).

Jeweler's failure to comply with record-keeping requirement under § 18-16-107 does

not constitute defense to criminal charge under this section and the prosecution's failure to introduce proof of jeweler's compliance with § 18-16-107 was not fatal to defendant's conviction. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

Evidence sufficient to sustain defendant's conviction for giving false information. *People v. Chavez*, 764 P.2d 371 (Colo. App. 1988).

18-16-109. Applicability. The provisions of this article shall not apply to private collectors purchasing collectors' items from other private collectors or businesses engaged

in selling valuable articles exclusively as collectors' items, and who pay for such purchases by check, nor shall the provisions of sections 18-16-101 to 18-16-108 apply to valuable articles purchased exclusively in interstate commerce and paid for by check mailed to the seller in another state, if a record of the check by which payment was made and the name and address of the seller is maintained for a period of three years, or a retail merchant who, in a retail transaction involving the sale of a valuable article, receives another valuable article as a trade-in and credits the retail purchaser with the value thereof if the retail purchaser provides proof satisfactory to the retailer that the valuable article was originally purchased from that retailer. For the purpose of this section, a "private collector" is an individual, business, or corporation who purchases an item for a price based on the value of the article as a historical item rather than the prevailing market price of the item's metallic or stone composition; who has an interest in preserving the item in its unique or historical form and who does not alter the form of the article; and whose primary purpose is to keep the article in a collection or to sell to another collector.

Source: L. 81: Entire article added, p. 1014, § 1, effective May 22.

ANNOTATION

Constitutionality of exclusions. The exclusions from the act's application are not unconstitutionally vague. *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985), cert. denied, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed.2d 214 (1985).

18-16-110. Severability. If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this article which may be given effect without the invalid provision or application, and, to this end, the provisions of this article are declared to be severable.

Source: L. 81: Entire article added, p. 1014, § 1, effective May 22.

ARTICLE 17

Colorado Organized Crime
Control Act

Law reviews: For article, "Misstatements of the Rule Against Perpetuities by Experts", see 15 Colo. Law. 210 (1986); for article, "The Distinction Between a Financial Planner, Investment Advisor and Broker/Dealer", see 15 Colo. Law. 211 (1986); for article, "Criminal Law", which discusses the RICO act, see 64 Den. U.L. Rev. 241 (1987); for article, "Emerging Issues Under the Colorado Organized Crime Control Act — Colorado's Little RICO", see 18 Colo. Law. 2077 (1989); for a discussion of Tenth Circuit decisions dealing with questions regarding RICO, see 67 Den. U.L. Rev. 763 (1990); for article, "Civil Litigation Under the Colorado Organized Crime Control Act—Part I", see 37 Colo. Law. 69 (July 2008); for article, "Civil Litigation Under the Colorado Organized Crime Control Act—Part II", see 37 Colo. Law. 67 (August 2008).

18-17-101.	Short title.	18-17-106.	Civil remedies.
18-17-102.	Legislative declaration.	18-17-107.	Civil investigative demand.
18-17-103.	Definitions.	18-17-108.	Construction of article.
18-17-104.	Prohibited activities.	18-17-109.	Severability.
18-17-105.	Criminal penalties.		

18-17-101. Short title. This article shall be known and may be cited as the "Colorado Organized Crime Control Act".

Source: L. 81: Entire article added, p. 1015, § 1, effective July 1.

18-17-102. Legislative declaration. The general assembly hereby finds that organized crime in the state of Colorado, as well as nationwide, is a highly sophisticated, diversified,

and widespread activity that annually consumes millions of dollars locally and billions of dollars nationally from this state's and the nation's economy through unlawful conduct and the illegal use of force, fraud, and corruption. Organized crime derives a major portion of its power through money procured from such illegal endeavors as syndicated and organized gambling, loan-sharking, the theft of property and fencing of stolen property, the illegal importation, manufacture, and distribution of drugs and other controlled substances, and other forms of social exploitation. This money and power are increasingly being used to infiltrate and corrupt legitimate business and labor organizations and to subvert and corrupt our democratic processes. Organized crime activities within this state weaken the stability of this state's and the nation's economy, harm innocent investors and competing organizations, impede free competition, threaten the peace and health of the public, endanger the domestic security, and undermine the general welfare of the state and its citizens. The general assembly further finds that organized crime continues to grow and flourish because of defects in the evidence-gathering process of the law which inhibits the development and use of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies presently available to the state are unnecessarily limited in scope and impact. Therefore, the general assembly declares that it is the purpose of this article to seek the eradication of organized crime in this state by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Source: L. 81: Entire article added, p. 1015, § 1, effective July 1; entire section amended, p. 2032, § 47, effective July 14.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982).

18-17-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonorecord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other functionally similar tangible item.

(2) "Enterprise" means any individual, sole proprietorship, partnership, corporation, trust, or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities.

(3) "Pattern of racketeering activity" means engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise, if at least one of such acts occurred in this state after July 1, 1981, and if the last of such acts occurred within ten years (excluding any period of imprisonment) after a prior act of racketeering activity.

(4) "Person" means any individual or entity holding or capable of holding a legal or beneficial interest in property.

(5) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any conduct defined as "racketeering activity" under 18 U.S.C. 1961 (1) (A), (1) (B), (1) (C), and (1) (D); or

(b) Any violation of the following provisions of the Colorado statutes or any criminal act committed in any jurisdiction of the United States which, if committed in this state, would be a crime under the following provisions of the Colorado statutes:

(I) Offenses against the person, as defined in sections 18-3-102 (first degree murder), 18-3-103 (second degree murder), 18-3-104 (manslaughter), 18-3-202 (first degree assault), 18-3-203 (second degree assault), 18-3-204 (third degree assault), 18-3-206 (menacing),

18-3-207 (criminal extortion), 18-3-301 (first degree kidnapping), 18-3-302 (second degree kidnapping), 18-3-501 (trafficking in adults), 18-3-502 (trafficking in children), and 18-3-503 (coercion of involuntary servitude);

(II) Offenses against property, as defined in sections 18-4-102 (first degree arson), 18-4-103 (second degree arson), 18-4-104 (third degree arson), 18-4-105 (fourth degree arson), 18-4-202 (first degree burglary), 18-4-203 (second degree burglary), 18-4-301 (robbery), 18-4-302 (aggravated robbery), 18-4-303 (aggravated robbery of controlled substances), 18-4-401 (theft), 18-4-402 (theft of rental property), 18-4-409 (aggravated motor vehicle theft), 18-4-410 (theft by receiving), and 18-4-501 (criminal mischief);

(III) Offenses involving computer crime, as defined in article 5.5 of this title;

(IV) Offenses involving fraud, as defined in sections 18-5-102 (forgery), 18-5-104 (second degree forgery), 18-5-105 (criminal possession of forged instrument), 18-5-109 (criminal possession of forgery devices), 18-5-110.5 (trademark counterfeiting), 6-16-111, C.R.S., (felony charitable fraud), 18-5-206 (defrauding a secured creditor or debtor), 18-5-309 (money laundering), 18-5-403 (bribery in sports), 18-5-113 (criminal impersonation), 18-5-114 (offering a false document for recording), 18-5-702 (unauthorized use of a financial transaction device), 18-5-705 (criminal possession or sale of a blank financial transaction device), 18-5-706 (criminal possession of forgery devices), 18-5-707 (unlawful manufacture of a financial transaction device), 18-5-902 (identity theft), 18-5-903 (criminal possession of a financial device), 18-5-903.5 (criminal possession of an identification document), 18-5-904 (gathering identity information by deception), and 18-5-905 (possession of identity theft tools);

(V) Offenses involving the family relation, as defined in section 18-6-403 (sexual exploitation of children);

(VI) Offenses relating to morals, as defined in sections 18-7-102 (wholesale promotion of obscenity or promotion of obscenity), 18-7-203 (pandering), 18-7-206 (pimping), 18-7-402 (soliciting for child prostitution), 18-7-403 (pandering of a child), 18-7-404 (keeping a place of child prostitution), and 18-7-405 (pimping of a child);

(VII) Offenses involving governmental operations, as defined in sections 18-8-302 (bribery), 18-8-303 (compensation for past official behavior), 18-8-306 (attempt to influence a public servant), 18-8-402 (misuse of official information), 18-8-502 (first degree perjury), 18-8-503 (second degree perjury), 18-8-603 (bribe-receiving by a witness), 18-8-606 (bribing a juror), 18-8-608 (intimidating a juror), 18-8-609 (jury-tampering), 18-8-610 (tampering with physical evidence), 18-8-703 (bribing a witness or victim), 18-8-704 (intimidating a witness or victim), and 18-8-707 (tampering with a witness or victim);

(VIII) Offenses against public peace, order, and decency, as defined in sections 18-9-303 (prohibited wiretapping) and 18-9-304 (prohibited eavesdropping);

(IX) Gambling, as defined in sections 18-10-103 (2) (professional gambling), 18-10-105 (possession of a gambling device or record), 18-10-106 (transmission of receipt of gambling information), and 18-10-107 (maintaining gambling premises);

(X) Offenses relating to firearms and weapons, as defined in sections 18-12-102 (possessing an illegal weapon or a dangerous weapon), 18-12-107.5 (illegal discharge of a firearm), and 18-12-109 (possession, use, or removal of explosives or incendiary devices or the possession of components thereof);

(XI) Offenses involving the making, financing, or collection of loans, as defined in sections 18-15-102 (extortionate extension of credit), 18-15-104 (engaging in criminal usury), 18-15-105 (financing extortionate extensions of credit), 18-15-106 (financing criminal usury), 18-15-107 (collection of extensions of credit by extortionate means), and 18-15-108 (possession or concealment of records of criminal usury);

(XII) Fraud upon the department of revenue, as defined in section 39-21-118, C.R.S.;

(XIII) Securities offenses, as defined in sections 11-51-401 and 11-51-603 (registration of brokers and dealers), 11-51-301 and 11-51-603 (registration of securities), and 11-51-501 and 11-51-603 (fraud and other prohibited practices), C.R.S.;

(XIV) Offenses relating to controlled substances (part 1 of article 42.5 of title 12, C.R.S., part 2 of article 80 of title 27, C.R.S., and article 18 of this title);

(XV) Offenses relating to taxation, as defined in section 39-22-621, C.R.S.;

(XVI) Offenses relating to limited gaming, as defined in article 47.1 of title 12, C.R.S., or article 20 of this title; and

(XVII) Offenses relating to telecommunications crime as set forth in section 18-9-309.

(6) "Unlawful debt" means a debt incurred or contracted in an illegal gambling activity or business or which is unenforceable under state or federal law in whole or in part as to principal or interest because of the law relating to usury.

Source: **L. 81:** Entire article added, p. 1015, § 1, effective July 1; (5)(b)(XIV) amended, p. 2032, § 48, effective July 14. **L. 82:** (5)(b)(XIII) amended, p. 623, § 19, effective April 2; (5)(b)(II) amended, p. 254, § 11, effective May 3. **L. 83:** (5)(b)(VI) and (5)(b)(X) amended, p. 2048, §§5, 6, effective October 14. **L. 84:** (5)(b)(VII) amended, p. 503, § 6, effective July 1. **L. 88:** (5)(b)(IV) amended, p. 358, § 2, effective July 1. **L. 90:** (5)(b)(II) amended, p. 987, § 12, effective April 24; (5)(b)(XIII) amended, p. 740, § 4, effective July 1. **L. 91:** (5)(b)(XVI) added, p. 1582, § 10, effective June 4. **L. 93:** (5)(b)(X) amended, p. 969, § 3, effective July 1. **L. 95:** (5)(b)(IV) amended, p. 1256, § 21, effective July 1. **L. 97:** (5)(b)(XVII) added, p. 991, § 3, effective July 1. **L. 2000:** (5)(b)(IV) amended, p. 692, § 2, effective July 1. **L. 2001:** (5)(b)(IV) amended, p. 769, § 4, effective August 8. **L. 2006:** (5)(b)(IV) amended, p. 1323, § 9, effective July 1. **L. 2009:** (5)(b)(IV) amended, (SB 09-093), ch. 326, p. 1738, § 4, effective July 1, 2011. **L. 2010:** (5)(b)(I) amended, (SB 10-140), ch. 156, p. 536, § 2, effective April 21; (5)(b)(IV) amended, (HB 10-1081), ch. 256, p. 1140, §§ 2, 3, effective August 11. **L. 2012:** (5)(b)(XIV) amended, (HB 12-1311), ch. 281, p. 1620, § 50, effective July 1.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (5)(b)(IV), see section 1 of chapter 224, Session Laws of Colorado 2001.

ANNOTATION

Law reviews. For article, "Civil RICO Update: The Evolving 'Pattern' Requirement — Parts I and II", see 16 Colo. Law. 806 and 1004 (1987).

Neither RICO nor this act require that the plaintiff in a civil action aver and prove that the conduct described as racketeering activity is connected to organized crime. *Plains Res., Inc. v. Gable*, 782 F.2d 883 (10th Cir. 1986).

Federal case law under "RICO" is instructive in determining existence of a pattern of racketeering activity, in absence of prior interpretation by state courts, because COCCA was modeled after the federal act. *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

In order to establish "pattern of racketeering activity" under Colorado Organized Crime Control Act, it was not necessary to prove that the criminal acts meet standards of continuity or of relatedness to one another as those requirements have been established by judicial construction under the federal Racketeer Influenced and Corrupt Organization Act (RICO). *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

"Pattern of racketeering activity" under subsection (3) can be established by proving at least two acts of "racketeering", as defined in subsection (5), that are related to the conduct of the enterprise. *People v. Chaussee*, 880 P.2d 749

(Colo. 1994), aff'd in part and rev'd in part on other grounds, *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

"Pattern of racketeering activity", as defined in subsection (3), found to exist. *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

Alleged perjury and forgery in court proceedings arising from fraudulent scheme were not part of a "pattern of racketeering activity". *People v. Chaussee*, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).

Definition of "enterprise" not unconstitutionally impermissibly vague. Although the definition is broad, it is not so vague that a person of common intelligence must necessarily guess at its meaning. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

Defendant fit within the definition of "enterprise" where indictment defined "enterprise" as "a group of individuals..." and where alleged prostitution ring qualified as "a group of individuals associated in fact although not a legal entity". *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993); aff'd on other grounds, 900 P.2d 45 (Colo. 1995).

Enterprise need not be separate and distinct from the racketeering activity. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993); aff'd on other grounds, 900 P.2d 45 (Colo. 1995).

Defendant can be both the “person” and the “enterprise” defined in the statute. *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993); *aff’d* on other grounds, 900 P.2d 45 (Colo. 1995).

Vicarious liability claim against mortgage brokerage firm that employed licensed secu-

rities broker who violated this section survives motion to dismiss. *Dolin v. Contemporary Fin. Solutions, Inc.*, 622 F. Supp. 2d 1077 (D. Colo. 2009).

18-17-104. Prohibited activities. (1) (a) It is unlawful for any person who knowingly has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(b) A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection (1) if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to knowingly acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (1), (2), or (3) of this section.

Source: L. 81: Entire article added, p. 1018, § 1, effective July 1.

ANNOTATION

Law reviews. For article, “Civil RICO in Colorado: New Twists in the Road to Treble Damages”, see 15 *Colo. Law.* 9 (1986). For article, “The Potential Application of RICO in the Natural Resources/Environmental Law Context”, see 63 *Den. U.L. Rev.* 535 (1986). For article, “Civil RICO Update: The Evolving ‘Pattern’ Requirement — Parts I and II”, see 16 *Colo. Law.* 806 and 1004 (1987).

Federal case law under the federal Racketeer Influenced and Corrupt Organization Act (RICO) is instructive upon similar issues arising under the Colorado Organized Crime Control Act (COCCA), because COCCA was modeled after the federal act. *Tallitsch v. Child Support Servs., Inc.*, 926 P.2d 143 (Colo. App. 1996); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997).

The absence of knowledge of the underlying fraudulent activity defeats liability under subsection (1)(a). *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006).

Trial court properly dismissed claim brought under this section where employee

did not allege that employer received proceeds from pattern of racketeering and engaged in the laundering of proceeds from such activity. *Ferris v. Local 26*, 867 P.2d 38 (Colo. App. 1993).

Enterprise and person cannot be the same entity for purpose of alleged violation of this article. *Ferris v. Local 26*, 867 P.2d 38 (Colo. App. 1993).

When instructing the jury on a COCCA charge, the court should include a definition of enterprise that defines an enterprise as consisting of at least one individual and the defendant. The addition of such a definition eliminates any confusion regarding a COCCA charge against an individual defendant and the fact the enterprise must include the defendant and at least one other individual. *People v. James*, 40 P.3d 36 (Colo. App. 2001).

When a separate entity is formed by incorporation, the corporation constitutes an enterprise within the meaning of the statutory definition, separate from the person engaged in the pattern of racketeering activity. *People v. Pollard*, 3 P.3d 473 (Colo. App. 2000).

Enterprise need not be separate and distinct from the racketeering activity. People v. Cerrone, 867 P.2d 143 (Colo. App. 1993).

In order to establish "pattern of racketeering activity" under Colorado Organized Crime Control Act, it was not necessary to prove that the criminal acts meet standards of continuity or of relatedness to one another as those requirements have been established by judicial construction under the federal Racketeer Influenced and Corrupt Organization Act (RICO). People v. Chaussee, 880 P.2d 749 (Colo. 1994); Brooks v. Bank of Boulder, 891 F. Supp. 1469 (D. Colo. 1995); Brooks v. Bank of Boulder, 911 F. Supp. 470 (D. Colo. 1996).

"Pattern of racketeering activity", as defined in § 18-17-103 (3), can be established by proving at least two acts of "racketeering", as defined in § 18-17-103 (5), that are related to the conduct of the enterprise. People v. Chaussee, 880 P.2d 749 (Colo. 1994); Brooks v. Bank of Boulder, 891 F. Supp. 1469 (D. Colo. 1995); Brooks v. Bank of Boulder, 911 F. Supp. 470 (D. Colo. 1996).

Pattern of racketeering activity construed. Manufacturer's single scheme of efforts to market mortar and brick bonding compound for use in construction industry was not "pattern of racketeering activity". Behunin v. Dow Chemical Co., 650 F. Supp. 1387 (D. Colo. 1986).

Multiple predicate acts allegedly committed in the course of perpetration of fraud on more than one victim using the same modus operandi, and which apparently would have continued but for the institution of legal proceedings, formed a "pattern of racketeering activity". People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

Alleged perjury and forgery in court proceedings arising from fraudulent scheme were not part of a "pattern of racketeering activity". People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

A "close-ended" pattern of racketeering refers to a series of related predicate acts extending over a substantial period of time concluded by the time the RICO action is brought. A period of six to seven months is not a long enough period to state a close-ended RICO claim. Alter v. DBLKM, Inc., 840 F. Supp. 799 (D. Colo. 1993).

An "open-ended" pattern of racketeering involves a series of predicate acts that by their nature indicate the likelihood of continuing criminal activity. Bare allegations that defendants will engage in future similar conduct, without specific facts, will not suffice to state a RICO claim. Alter v. DBLKM, 840 F. Supp. 799 (D. Colo. 1993).

Plaintiff must show at least one injury resulting from each of the predicate acts, but it

is not necessary to establish that an injury resulted from a pattern of racketeering. New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363 (Colo. App. 1993); Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997).

To state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) and its state law correlate Colorado Organized Crime Control Act (COCCA), plaintiffs must allege a "pattern of racketeering activity" of sufficient relatedness and that poses a sufficient threat of continuity. Alter v. DBLKM, Inc., 840 F. Supp. 199 (D. Colo. 1993).

Predicate acts are of sufficient relatedness if they have same or similar purposes, results, participants, victims, or methods of commission, otherwise are interrelated by distinguishing characteristics and are not isolated events. Alter v. DBLKM, Inc., 840 F. Supp. 199 (D. Colo. 1993).

The continuity requirement involves an examination of the temporal aspect of the alleged predicate acts. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed.2d 195 (1989); Alter v. DBLKM, Inc., 840 F. Supp. 199 (D. Colo. 1993).

To state a claim under subsection (1)(a), a plaintiff must plead that an injury flowed from defendant's use or investment of racketeering income, not the predicate acts themselves. Brooks v. Bank of Boulder, 891 F. Supp. 1469 (D. Colo. 1995).

A violation of subsection (1) is stated when at least one predicate acts results in the production of proceeds that are invested in or used to operate a separate enterprise. New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363 (Colo. App. 1993).

Investors in an alleged Ponzi scheme adequately alleged the bank into which the defendant deposited funds from the scheme used or invested income derived from defendant's pattern of racketeering in itself and defendant in violation of subsection (1)(a). Therefore, the filing of claims for relief in an amended complaint would not be futile. Brooks v. Bank of Boulder, 911 F. Supp. 470 (D. Colo. 1996).

Allegations adequate so that filing claims for relief in an amended complaint would not be futile where investors in an alleged Ponzi scheme alleged the bank into which the defendant deposited funds from the scheme participated in directing defendant's affairs through the commission of criminal predicate acts. Brooks v. Bank of Boulder, 911 F. Supp. 470 (D. Colo. 1996).

The required nexus between racketeering activities and the affairs of an enterprise is shown if the predicate acts are carried out in the conduct of the enterprise's affairs. New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363 (Colo. App. 1993).

Legal advice and representation is, by itself, insufficient to justify liability under subsection (3). *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006).

No conspiracy is required to establish a violation of subsection (4); an endeavor or attempt by a single person is sufficient. *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363 (Colo. App. 1993).

To state a claim under subsection (4), a plaintiff must plead with particularity an agreement to a pattern of racketeering activity and an agreement to the statutorily proscribed conduct. A conspiracy claim must fail where plaintiffs fail to allege any agreement or concerted action. *Brooks v. Bank of Boulder*, 891 F. Supp. 1469 (D. Colo. 1995).

Mere association with conspirators, even with knowledge of their involvement in a crime, is insufficient to prove participation in a conspiracy. *Sender v. Mann*, 423 F. Supp. 2d 1155 (D. Colo. 2006).

Indictment sufficiently alleged a violation of the act where it gives the defendant notice of the crime allegedly committed and defines

the acts which formed the basis for the crime with sufficient particularity. *People v. Edebohls*, 944 P.2d 552 (Colo. App. 1996).

Information sufficiently alleged a violation of the act because, although the charge under the act failed to allege other crimes, the information contained separate charges of such other crimes. *People v. Pollard*, 3 P.3d 473 (Colo. App. 2000).

The allegation of a completed act under subsection (1), (2), or (3) includes an allegation of an attempt to violate subsection (4). *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363 (Colo. App. 1993).

Allegations of secondary liability through aiding and abetting state a viable claim under the Colorado Organized Crime Control Act. *F.D.I.C. v. First Interstate Bank of Denver, N.A.*, 937 F. Supp. 1461 (D. Colo. 1996).

Allegations of secondary liability based on principles of respondeat superior state a viable claim under the Colorado Organized Crime Control Act. *F.D.I.C. v. First Interstate Bank of Denver, N.A.*, 937 F. Supp. 1461 (D. Colo. 1996).

18-17-105. Criminal penalties. (1) Any person convicted of engaging in activity in violation of the provisions of section 18-17-104 commits a class 2 felony and, upon conviction thereof, shall, in addition to the penalty provided for in section 18-1.3-401:

(a) Be fined not more than twenty-five thousand dollars; and

(b) Forfeit to the state any interest, including proceeds, he has acquired or maintained in violation of section 18-17-104 and any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has established, operated, controlled, conducted, or participated in the conduct of in violation of section 18-17-104.

(2) In lieu of the fine authorized by paragraph (a) of subsection (1) of this section, any person convicted of engaging in conduct in violation of the provisions of section 18-17-104, through which he derived pecuniary value, or by which he caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed three times the gross value gained or three times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

(3) The court shall hold a hearing to determine the amount of the fine authorized by subsection (2) of this section.

(4) For the purposes of subsection (2) of this section, "pecuniary value" means:

(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else, the primary significance of which is economic advantage; or

(b) Any other property or service that has a value in excess of one hundred dollars.

(5) In any action brought under this section, the district court may, at any time, enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as the court may deem proper.

(6) Upon conviction of a person under this section, the district court shall authorize the district attorney or the attorney general to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. The state shall dispose of all property or other interest seized under this section as soon as feasible, making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the state, it shall expire and shall not revert to the convicted person. The disposition of seized property shall be as follows:

(a) Any personal property which is required by law to be destroyed, or the possession of which is illegal, or which, in the opinion of the court is not properly the subject of a sale

may be destroyed pursuant to a warrant for the destruction of personal property, issued by the district court, directed to the sheriff, and returned by the sheriff upon execution thereof. The district court shall stay the execution of any such warrant during the period in which the property is used as evidence in any pending criminal or civil proceeding.

(b) Any personal property seized and forfeited under the provisions of this section shall be sold by the sheriff in the manner provided for sales on execution. In lieu of ordering the sale of such property, the court may, if it finds that it can be used by a law enforcement agency, order it delivered to a law enforcement agency for such use.

(c) As to any real property, the district court shall enter a permanent order of abatement. The order of abatement shall direct the sheriff to sell such building or place and the ground upon which it is situated, to the extent of the interest, direct or indirect, of such person convicted under this section, at public sale in the manner provided for sales of property upon execution.

(d) The proceeds realized from such sales shall be applied as follows:

(I) To the fees and costs of sale;

(II) All costs and expenses of investigation and prosecution, including, but not limited to, costs of resources and manpower incurred in investigation and prosecution;

(III) The balance, if any, to the general fund of the state.

Source: **L. 81:** Entire article added, p. 1018, § 1, effective July 1. **L. 87:** IP(6) and (6)(c) amended, p. 645, § 25, effective July 1. **L. 2002:** IP(1) amended, p. 1518, § 211, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending the introductory portion to subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, “State and Federal Forfeiture of Property Used in Criminal Activity”, see 11 Colo. Law. 2597 (1982).

No violation of equal protection because the Colorado Organized Crime Control Act (COCCA) punishes defendant with a class 2 felony when the two underlying predicate crimes are misdemeanors. The additional requirement that the offense be conducted as a part of an enterprise satisfies the related legislative purpose of deterring organized crime. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

No double jeopardy. Separate convictions for a violation of the Colorado Organized Crime

Control Act (COCCA) and underlying predicate offenses, which convictions were based upon the same activity, do not constitute double jeopardy. *People v. Hoover*, 165 P.3d 784 (Colo. App. 2006).

The general assembly intended the provisions of COCCA to deter specific criminal activities using the threat of multiple or cumulative sentences to be imposed in conjunction with other punishments. *People v. Hoover*, 165 P.3d 784 (Colo. App. 2006).

18-17-106. Civil remedies. (1) Any district court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of section 18-17-104 by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself of any interest in any enterprise, including real property;

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of the provisions of section 18-17-104;

(c) Ordering the dissolution or reorganization of any enterprise;

(d) Ordering the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent

acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of section 18-17-104 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the provisions of section 18-17-104 is subject to civil forfeiture to the state. The state shall dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, it shall expire. All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. The disposition of seized property shall be as follows:

(a) Any personal property which is required by law to be destroyed, or the possession of which is illegal, or which, in the opinion of the court is not properly the subject of a sale may be destroyed pursuant to a warrant for the destruction of personal property, issued by the district court, directed to the sheriff, and returned by the sheriff upon execution thereof. The district court shall stay the execution of any such warrant during the period in which the property is used as evidence in any pending criminal or civil proceeding.

(b) Any personal property seized and forfeited under the provisions of this section shall be sold by the sheriff in the manner provided for sales on execution.

(c) As to any real property, the district court shall enter a permanent order of abatement. The order of abatement shall direct the sheriff to sell such building or place and the ground upon which it is situated, to the extent of the interest, direct or indirect, of such person found to be in violation of the provisions of section 18-17-104, at public sale in the manner provided for sales of property upon execution.

(d) The proceeds realized from such sales shall be applied pursuant to section 16-13-311 (3) (a), C.R.S.

(3) Property subject to forfeiture under this section may be seized by a law enforcement officer upon court process. Seizure without process may be made if:

(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding based upon this section.

(4) In the event of a seizure under subsection (3) of this section, a forfeiture proceeding shall be instituted promptly. Property taken or detained under this section shall not be subject to replevin but is deemed to be in the custody of the law enforcement officer making the seizure, subject only to the order of the court. When property is seized under this section, pending forfeiture and final disposition, the law enforcement officer may:

(a) Place the property under seal;

(b) Remove the property to a place designated by court;

(c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(5) The attorney general or district attorney may institute civil proceedings under this section. Any action instituted under this section shall conform to the procedures set forth in part 3 or part 5 of article 13 of title 16, C.R.S. In any action brought under this section, the district court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the district court may, at any time, enter such injunctions, prohibitions, or restraining orders or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

(6) Any aggrieved person may institute a proceeding under subsection (1) of this section. In such proceeding, relief shall be granted in conformity with the principles that govern that granting of injunctive relief from threatened loss or damage in other civil cases; except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(7) Any person injured by reason of any violation of the provisions of section 18-17-104 shall have a cause of action for threefold the actual damages sustained. Such person shall also recover attorney fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred; except that:

(a) The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this section; and

(b) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state has in the same property or proceeds.

(8) A final judgment or decree rendered in favor of the people in any criminal proceeding under this article shall estop the defendant in any subsequent civil action or proceeding as to all matters as to which such judgment or decree would be an estoppel as between the parties.

(9) The application of one civil remedy under any provision of this article shall not preclude the application of any other remedy, civil or criminal, under this article or any other provision of law. Civil remedies under this article are supplemental and not mutually exclusive.

(10) Whenever it is established in an action brought pursuant to this section that a person has received proceeds derived from activities prohibited by section 18-17-104, the court shall, upon request, award to the plaintiff a money judgment of forfeiture for the amount of such proceeds. The person subjected to such a money judgment may claim a setoff in an amount equal to the fair market value of other property forfeited if he shows that said property is traceable to a pattern of racketeering activity.

(11) The burden of proof in an action brought pursuant to this section shall be by clear and convincing evidence.

(12) (Deleted by amendment, L. 2002, p. 931, § 14, effective July 1, 2002.)

Source: **L. 81:** Entire article added, p. 1020, § 1, effective July 1. **L. 87:** (2)(c) amended and (10) to (12) added, p. 645, § 26, effective July 1. **L. 2002:** (2)(b), (2)(d), (5), (11), and (12) amended, p. 931, § 14, effective July 1.

ANNOTATION

Law reviews. For article, "State and Federal Forfeiture of Property Used in Criminal Activity", see 11 Colo. Law. 2597 (1982). For article, "The Potential Application of RICO in the Natural Resources/Environmental Law Context", see 63 Den. U.L. Rev. 535 (1986).

The Colorado Organized Crime Control Act does not interdict the court's authority to order a stay, but the requirement in subsection (5) that a court proceed to the merits "as soon as practicable" is a factor that the court should consider in deciding whether to grant a stay. In re Kozeny, 236 F.3d 615 (10th Cir. 2000).

Subsection (6) concerning the granting of injunctive relief is applied in Federal Deposit Ins. Corp. v. Antonio, 649 F. Supp. 1352 (D. Colo. 1986).

Court has authority under this statute to freeze assets which are not related to the illegal conduct in order to ensure availability of assets to satisfy monetary judgments. Federal Deposit Ins. Corp. v. Antonio, 843 F.2d 1311 (10th Cir. 1988).

Federal cases construing RICO may be instructive. However, where there exists appro-

prate Colorado authority on an issue, that authority is controlling. Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

Method for determining an award of attorney fees described, and appropriate factors enumerated, in Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

No "rule of proportionality" for attorney fees. Purpose of this statute to encourage "private attorneys general" would be defeated if the fees to be awarded were limited according to the amount recovered in damages. However, this does not preclude a trial court's review of the success achieved and the results obtained when setting a reasonable fee. Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

Plaintiff claiming injury "by reason of any violation" of § 18-17-104 has standing under this section only if plaintiff has been injured by the conduct constituting the violation and can recover only for harm caused by one or more of the predicate acts under COCCA. Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997).

18-17-107. Civil investigative demand. (1) Whenever the attorney general or the district attorney has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(2) Each such demand shall:

(a) State the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(b) Describe the class or classes of documentary material demanded thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(c) State that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction;

(d) Identify the custodian to whom such material shall be made available; and

(e) State an advisement of rights, available under the provisions of this article, in addition to any appropriate constitutional rights advisement.

(3) No such demand shall:

(a) Contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the state in aid of a grand jury investigation of such alleged racketeering violation; or

(b) Require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the state in aid of a grand jury investigation of such alleged racketeering violation.

(4) Service of such demand or any petition filed under this section may be made upon a person by:

(a) Delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person or upon any individual person;

(b) Delivering a duly executed copy thereof to the residence, principal office, or place of business of the person to be served; or

(c) Depositing such copy in the United States mail, by registered or certified mail, duly addressed to such person at its residence, principal office, or place of business.

(5) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post-office receipt of delivery of such demand.

(6) (a) The attorney general or district attorney shall designate an investigator to serve as racketeer document custodian and such racketeering investigators as he shall determine to be necessary to serve as deputies to such officer.

(b) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section, on the return date specified in such demand or on such later date as such custodian may prescribe in writing. Such person may, upon written agreement between such person and the custodian, substitute for copies of all or any part of such material originals thereof.

(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof and shall be responsible for the use made thereof and for the return thereof pursuant to this article. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the attorney general or the district attorney. Under such reasonable terms and conditions as the attorney general or district attorney shall prescribe, documentary material, while in the possession of the custodian, shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(d) Whenever any attorney has been designated to appear on behalf of the state before any court or grand jury in any case or proceeding involving any alleged violation of this article, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the state. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(e) Upon the completion of the racketeering investigation for which any documentary material was produced under this article or in any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the attorney general or the district attorney pursuant to this subsection (6) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(f) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the attorney general or district attorney, to the return of all documentary material other than copies thereof made pursuant to this subsection (6) so produced by such person.

(g) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the attorney general or district attorney shall promptly designate another racketeering investigator to serve as custodian thereof and transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto; except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(7) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general or a district attorney may file, in the district court of the state for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section.

(8) Within twenty-one days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the state for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(9) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the state for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(10) Whenever any petition is filed in any district court of the state under this section, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry into effect the provisions of this section.

Editor’s note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (8) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

ANNOTATION

Constitutionality. This section does not violate the prohibition against unreasonable searches and seizures if the investigation is for a lawfully authorized purpose; the information sought is relevant to the inquiry; and the demand is sufficiently specific and spans a reasonable period of time. *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

Nor does it violate due process because the procedural protections it affords are as complete

as those afforded persons served with a grand jury subpoena. *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

Demand need not be specific. A civil investigative demand complies with this section if it adequately notifies the recipient of the pending investigation and states the general nature of the conduct being investigated. *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

18-17-108. Construction of article. To effectuate the intent and purpose of this article, the provisions of this article shall be liberally construed.

Source: L. 81: Entire article added, p. 1025, § 1, effective July 1.

ANNOTATION

Section 18-17-107, used in the civil context, is remedial and not penal in nature. Thus, statute of limitation for bringing an action under that section may be tolled until the time of

reasonable discovery of injurious act as provided by § 13-80-101. *Todd Holding Co. v. Super Valu Stores*, 874 P.2d 402 (Colo. App. 1993).

18-17-109. Severability. If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this article which may be given effect without the invalid provision or application, and, to this end, the provisions of this article are declared to be severable.

Source: L. 81: Entire article added, p. 1025, § 1, effective July 1.

ARTICLE 18

Uniform Controlled Substances
Act of 1992

Editor’s note: This article was added in 1981. This article was repealed and reenacted in 1992, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1992, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated.

PART 1

DEFINITIONS

- 18-18-101. Short title.
- 18-18-102. Definitions.
- 18-18-103. Special definition - board.

PART 2

STANDARDS AND SCHEDULES

- 18-18-201. Authority to control.
- 18-18-202. Nomenclature.
- 18-18-203. Schedule I.

18-18-204.	Schedule II.	18-18-409.	Reduction or suspension of sentence for providing substantial assistance.
18-18-205.	Schedule III.		
18-18-206.	Schedule IV - repeal.		
18-18-207.	Schedule V.	18-18-410.	Declaration of class 1 public nuisance.
PART 3		18-18-411.	Keeping, maintaining, controlling, renting, or making available property for unlawful distribution or manufacture of controlled substances.
REGULATION OF MANUFACTURE, DISTRIBUTION, AND DISPENSING OF CONTROLLED SUBSTANCES		18-18-412.	Abusing toxic vapors - prohibited.
18-18-301.	Rules.	18-18-412.5.	Unlawful possession of materials to make methamphetamine and amphetamine - penalty.
18-18-302.	Registration requirements.	18-18-412.7.	Sale or distribution of materials to manufacture controlled substances.
18-18-303.	Registration.	18-18-412.8.	Retail sale of methamphetamine precursor drugs - unlawful acts - penalty.
18-18-304.	Suspension or revocation of registration.	18-18-413.	Authorized possession of controlled substances.
18-18-305.	Order to show cause.	18-18-414.	Unlawful acts - licenses - penalties.
18-18-306.	Records of registrants.	18-18-415.	Fraud and deceit.
18-18-307.	Order forms.	18-18-416.	Controlled substances - inducing consumption by fraudulent means.
18-18-308.	Prescriptions.	18-18-417.	Notice of conviction.
18-18-309.	Diversion prevention and control.	18-18-418.	Exemptions.
PART 4		18-18-419.	Imitation and counterfeit controlled substances act.
OFFENSES AND PENALTIES		18-18-420.	Imitation controlled substances - definitions.
18-18-401.	Legislative declaration.	18-18-421.	Imitation controlled substances - determination - considerations.
18-18-402.	Definitions - terms used.	18-18-422.	Imitation controlled substances - violations - penalties.
18-18-403.	Additional definition.	18-18-423.	Counterfeit substances prohibited - penalty.
18-18-403.5.	Unlawful possession of a controlled substance.	18-18-424.	Imitation controlled substances - exceptions.
18-18-404.	Unlawful use of a controlled substance.	18-18-425.	Drug paraphernalia - legislative declaration.
18-18-405.	Unlawful distribution, manufacturing, dispensing, or sale.	18-18-426.	Drug paraphernalia - definitions.
18-18-406.	Offenses relating to marijuana and marijuana concentrate.	18-18-427.	Drug paraphernalia - determination - considerations.
18-18-406.1.	Unlawful use or possession of synthetic cannabinoids or salvia divinorum.	18-18-428.	Possession of drug paraphernalia - penalty.
18-18-406.2.	Unlawful distribution, manufacturing, dispensing, sale, or cultivation of synthetic cannabinoids or salvia divinorum.	18-18-429.	Manufacture, sale, or delivery of drug paraphernalia - penalty.
18-18-406.3.	Medical use of marijuana by persons diagnosed with debilitating medical conditions - unlawful acts - penalty - medical marijuana program cash fund.	18-18-430.	Advertisement of drug paraphernalia - penalty.
18-18-406.5.	Unlawful use of marijuana in a detention facility.	18-18-430.5.	Drug paraphernalia - exemption.
18-18-406.7.	Unlawful possession of cathinones.	18-18-431.	Defenses.
18-18-406.8.	Unlawful distribution, manufacturing, dispensing, or sale of cathinones.	18-18-432.	Drug offender public service and rehabilitation program.
18-18-407.	Special offender.		
18-18-408.	Money laundering - illegal investments - penalty. (Repealed)		

PART 5

18-18-506.

Education and research.

ENFORCEMENT AND
ADMINISTRATIVE PROCEDURES

PART 6

MISCELLANEOUS

- 18-18-501. Administrative inspections and warrants.
 18-18-502. Injunctions.
 18-18-503. Cooperative arrangements and confidentiality.
 18-18-504. Pleadings - presumptions - liabilities.
 18-18-505. Judicial review.

- 18-18-601. Pending proceedings - applicability.
 18-18-602. Continuation of rules - application to existing relationships.
 18-18-603. Statutes of limitations.
 18-18-604. Uniformity of interpretation.
 18-18-605. Severability.

PART 1

DEFINITIONS

18-18-101. Short title. This article shall be known and may be cited as the "Uniform Controlled Substances Act of 1992".

Source: L. 92: Entire article R&RE, p. 324, § 1, effective July 1.

ANNOTATION

The Uniform Controlled Substances Act is intended to control the illegal manufacture and distribution of substances that may have legitimate medical purposes but are subject to abuse and have a detrimental effect. Drugs

are divided into schedules based on their common characteristics. *People v. Moran*, 983 P.2d 143 (Colo. App. 1999); *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

18-18-102. Definitions. As used in this article:

(1) "Administer", unless the context otherwise requires, means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by:

(a) A practitioner (or, in the practitioner's presence, by the practitioner's authorized agent); or

(b) The patient or research subject at the direction and in the presence of the practitioner.

(2) "Agent" means an authorized person who acts on behalf of or at the direction of a person licensed or otherwise authorized under this article or under part 2 of article 80 of title 27, C.R.S. "Agent" does not include a common or contract carrier, a public warehouseman, or an employee of a carrier or warehouseman.

(3) (a) "Anabolic steroid" means any material, drug, hormonal compound, salt, isomer or salts of isomers of testosterone, or synthetic or natural derivatives of testosterone having pronounced anabolic properties which is used primarily to promote growth of muscle tissue, which includes, but is not limited to, any of the following:

- (I) Boldenone;
- (II) Chlorotestosterone;
- (III) Clostebol;
- (IV) Dehydrochloromethyltestosterone;
- (V) Dihydrotestosterone;
- (VI) Drostanolone;
- (VII) Ethylestrenol;
- (VIII) Fluoxymesterone;
- (IX) Formebolone;
- (X) Human chorionic gonadotropin;
- (XI) Human growth hormone;

- (XII) Mesterolone;
- (XIII) Methandienone;
- (XIV) Methandranone;
- (XV) Methandriol;
- (XVI) Methandrostenolone;
- (XVII) Methenolone;
- (XVIII) Methyltestosterone;
- (XIX) Mibolerone;
- (XX) Nandrolone;
- (XXI) Norethandrolone;
- (XXII) Oxandrolone;
- (XXIII) Oxymesterone;
- (XXIV) Oxymetholone;
- (XXV) Stanolone;
- (XXVI) Stanozolol;
- (XXVII) Testolactone;
- (XXVIII) Testosterone;
- (XXIX) Trenbolone;

(XXX) Any salt, ester, or isomer of a drug or substance described or listed in this paragraph (a) if that salt, ester, or isomer promotes muscle growth.

(b) (I) Except as provided in subparagraph (II) of this paragraph (b), such term does not include an anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the secretary of health and human services for such administration.

(II) If any person prescribes, dispenses, or distributes a steroid described in subparagraph (I) of this paragraph (b) for human use, such person shall be considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of paragraph (a) of this subsection (3).

(3.5) (a) "Cathinones" means any synthetic or natural material containing any quantity of a cathinone chemical structure, including any analogs, salts, isomers, or salts of isomers of any synthetic or natural material containing a cathinone chemical structure, including but not limited to the following substances and any analogs, salts, isomers, or salts of isomers of any of the following substances:

- (I) alpha-Phthalimidopropiophenone;
- (II) N, N-Dimethylcathinone (Metamfepramone);
- (III) N-Ethylcathinone (Ethcathinone);
- (IV) alpha-Pyrrolidinopropiophenone (α -PPP);
- (V) 2-Methylamino-1-phenylbutan-1-one (Buphedrone);
- (VI) alpha-Pyrrolidinobutiophenone (α -PBP);
- (VII) alpha-Pyrrolidinovalerophenone (α -PVP, PVP);
- (VIII) 4-Methylmethcathinone (4-MMC, Mephedrone);
- (IX) 4'-Methyl-alpha-pyrrolidinopropiophenone (MPPP);
- (X) 4'-Methyl-alpha-pyrrolidinobutiophenone (MPBP);
- (XI) 4'-Methyl-alpha-pyrrolidinohexiophenone (MPHP);
- (XII) 4-Methoxymethcathinone (PMMC, Methedrone, bk-PMMA);
- (XIII) 4'-Methoxy-alpha-pyrrolidinopropiophenone (MOPPP);
- (XIV) Fluoromethcathinone (4-FMC, Flephedrone, 3-FMC);
- (XV) 3,4-Methylenedioxymethcathinone (methylone, bk-MDMA);
- (XVI) 3,4-Methylenedioxyethcathinone (Ethylone, bk-MDEA);
- (XVII) 3',4'-Methylenedioxy-alpha-pyrrolidinopropiophenone (MDPPP);
- (XVIII) 2-Methylamino-1-(3,4-methylenedioxyphenyl)-1-butanone (Butylone, bk-MDBD);
- (XIX) 3',4'-Methylenedioxy-alpha-pyrrolidinobutiophenone (MDPBP);
- (XX) 2-Methylamino-1-(3,4-methylenedioxyphenyl)-1-pentanone (bk-MBDP);
- (XXI) 3,4-Methylenedioxyprovalerone (MDPV);
- (XXII) Naphthylpyrovalerone (Naphyrone);
- (XXIII) 2-(Methylamino)-1-phenyl-1-pentanone (Pentedrone); and

(XXIV) N-methylethcathinone (4-MEC).

(b) "Cathinones" does not include diethylpropion or bupropion.

(c) As used in this subsection (3.5), "analog" means any chemical that is substantially similar in chemical structure to the chemical structure of any cathinones.

(4) "Cocaine" means coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this subsection (4).

(5) "Controlled substance" means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana, marijuana concentrate, a cathinone, any synthetic cannabinoid, and salvia divinorum.

(6) (a) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in or added to schedule I or II and:

(I) Which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II; or

(II) With respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II.

(b) The term does not include:

(I) A controlled substance;

(II) A substance for which there is an approved drug application, so long as such substance is in its intended and unconverted form;

(III) A substance with respect to which an exemption is in effect for investigational use by a particular person under section 505 of the "Federal Food, Drug, and Cosmetic Act", 21 U.S.C. sec. 355, to the extent conduct with respect to the substance is pursuant to the exemption; or

(IV) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(7) "Deliver" or "delivery", unless the context otherwise requires, means to transfer or attempt to transfer a substance, actually or constructively, from one person to another, whether or not there is an agency relationship.

(8) "Department" means the department of human services.

(9) "Dispense" means to deliver a controlled substance to an ultimate user, patient, or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(10) "Dispenser" means a practitioner who dispenses.

(11) "Distribute" means to deliver other than by administering or dispensing a controlled substance, with or without remuneration.

(12) "Distributor" means a person who distributes.

(13) (a) "Drug" means:

(I) Substances recognized as drugs in the official United States pharmacopoeia, national formulary, or the official homeopathic pharmacopoeia of the United States, or any supplement to any of them;

(II) Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals;

(III) Substances (other than food) intended to affect the structure or any function of the body of individuals or animals; and

(IV) Substances intended for use as a component of any substance specified in subparagraph (I), (II), or (III) of this paragraph (a).

(b) The term does not include devices or their components, parts, or accessories.

(14) "Drug enforcement administration" means the drug enforcement administration in the United States department of justice, or its successor agency.

(15) "Immediate precursor" means a substance which is a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used, or likely to be used, in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

(16) "Isomer" means an optical isomer, but in paragraph (e) of subsection (20) of this section and sections 18-18-203 (2) (a) (XII) and (2) (a) (XXXIV) and 18-18-204 (2) (a) (IV) the term includes a geometric isomer; in sections 18-18-203 (2) (a) (VIII) and (2) (a) (XLII) and 18-18-206 (2) (c) the term includes a positional isomer; and in sections 18-18-206 (2) (b) (XXXV) and (2) (c) and 18-18-205 (2) (a) the term includes any positional or geometric isomer.

(17) "Manufacture" means to produce, prepare, propagate, compound, convert, or process a controlled substance, directly or indirectly, by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance:

(a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

(18) "Marijuana" means all parts of the plant *cannabis sativa* L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. It does not include fiber produced from the stalks, oil, or cake made from the seeds of the plant, or sterilized seed of the plant which is incapable of germination if these items exist apart from any other item defined as "marijuana" in this subsection (18). "Marijuana" does not include marijuana concentrate as defined in subsection (19) of this section.

(19) "Marijuana concentrate" means hashish, tetrahydrocannabinols, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinols.

(20) "Narcotic drug" means any of the following, however manufactured:

(a) Opium, opium derivative, and any derivative of either including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation, but not isoquinoline alkaloids of opium;

(b) Synthetic opiate and any derivative of synthetic opiate, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, of them that are theoretically possible within the specific chemical designation;

(c) Poppy straw and concentrate of poppy straw;

(d) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(e) Cocaine, or any salt, isomer, or salt of isomer of cocaine;

(f) Cocaine base;

(g) Ecgonine, or any derivative, salt, isomer, or salt of isomer of ecgonine;

(h) Any compound, mixture, or preparation containing any quantity of a substance listed in this subsection (20).

(21) "Opiate" means a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. The term includes opium, opium derivatives, and synthetic opiates. The term does not include, unless specifically scheduled as a controlled substance under section 18-18-201, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). The term includes the racemic and levorotatory forms of dextromethorphan.

(22) "Opium poppy" means the plant of the species *Papaver somniferum* L., except its seeds.

(23) "Order" means:

(a) A prescription order which is any order, other than a chart order, authorizing the dispensing of drugs or devices that is written, mechanically produced, computer generated, transmitted electronically or by facsimile, or produced by other means of communication by a practitioner and that includes the name or identification of the patient, the date, the symptom or purpose for which the drug is being prescribed, if included by the practitioner at the patient's authorization, and sufficient information for compounding, dispensing, and labeling; or

(b) A chart order which is an order for inpatient drugs or medications to be dispensed by a pharmacist, or pharmacy intern under the direct supervision of a pharmacist, which is to be administered by an authorized person only during the patient's stay in a hospital facility. It shall contain the name of the patient and of the medicine ordered and such directions as the practitioner may prescribe concerning strength, dosage, frequency, and route of administration.

(24) "Peace officer" shall have the same meaning as set forth in section 16-2.5-101, C.R.S.

(25) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government or governmental subdivision or agency, or any other legal or commercial entity.

(26) "Peyote" means all parts of the plant presently classified botanically as *lophophora williamsii* lemaire, whether growing or not, the seeds thereof, any extraction from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or extracts.

(27) "Pharmacy" means a prescription drug outlet as defined in section 12-42.5-102 (35), C.R.S.

(28) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(29) "Practitioner" means a physician, podiatrist, dentist, optometrist, veterinarian, researcher, pharmacist, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by this state, to distribute, dispense, conduct research with respect to, administer, or to use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

(30) "Production", unless the context otherwise requires, includes the manufacturing of a controlled substance and the planting, cultivating, growing, or harvesting of a plant from which a controlled substance is derived.

(31) "Remuneration" means anything of value, including money, real property, tangible and intangible personal property, contract rights, choses in action, services, and any rights of use or employment or promises or agreements connected therewith.

(32) "Researcher" means any person licensed by the department pursuant to this article to experiment with, study, or test any controlled substance within this state and includes analytical laboratories.

(33) "Sale" means a barter, an exchange, or a gift, or an offer therefor, and each such transaction made by any person, whether as the principal, proprietor, agent, servant, or employee.

(33.5) "Salvia divinorum" means salvia divinorum, salvinorin A, and any part of the plant classified as salvia divinorum, whether growing or not, including the seeds thereof, any extract from any part of the plant, and any compound, manufacture, salts, derivative, mixture, or preparation of the plant, its seeds, or its extracts.

(34) "State", unless the context otherwise requires, means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(34.5) (a) "Synthetic cannabinoid" means any chemical compound that is chemically synthesized and either:

(I) Has been demonstrated to have binding activity at one or more cannabinoid receptors; or

(II) Is a chemical analog or isomer of a compound that has been demonstrated to have binding activity at one or more cannabinoid receptors.

(b) “Synthetic cannabinoid” includes but is not limited to the following substances:

(I) HU-210: (6aR, 10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;

(II) HU-211: dexanabinol, (6aS, 10aS)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a, 7, 10, 10a-tetrahydrobenzo[c]chromen-1-ol;

(III) JWH-018: 1-pentyl-3-(1-naphthoyl)indole;

(IV) JWH-073: 1-butyl-3-(1-naphthoyl)indole;

(V) JWH-081: 1-pentyl-3-(4-methoxy-1-naphthoyl)indole, also known as 4-methoxynaphthalen-1-yl-(1-pentylindol-3-yl)methanone;

(VI) JWH-200: 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole;

(VII) JWH-250: 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as 2-(2-methoxyphenyl)-1-(1-pentylindol-3-yl)ethanone; and

(VIII) CP 47, 497, and homologues: 2-[(1R, 3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol.

(c) “Synthetic cannabinoid” does not mean:

(I) Any tetrahydrocannabinols, as defined in subsection (35) of this section; or

(II) Nabilone.

(d) As used in this subsection (34.5), “analog” means any chemical that is substantially similar in chemical structure to a chemical compound that has been determined to have binding activity at one or more cannabinoid receptors.

(35) (a) “Tetrahydrocannabinols” means synthetic equivalents of the substances contained in the plant, or in the resinous extractives of, cannabis, sp., or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity, such as the following:

(I) ¹Cis or trans tetrahydrocannabinol, and their optical isomers;

(II) ⁶Cis or trans tetrahydrocannabinol, and their optical isomers;

(III) ^{3,4}Cis or trans tetrahydrocannabinol, and their optical isomers.

(b) Since the nomenclature of the substances listed in paragraph (a) of this subsection (35) is not internationally standardized, compounds of these structures, regardless of the numerical designation of atomic positions, are included in this definition.

(36) “Ultimate user” means an individual who lawfully possesses a controlled substance for the individual’s own use or for the use of a member of the individual’s household or for administering to an animal owned by the individual or by a member of the individual’s household.

Source: **L. 92:** Entire article R&RE, p. 324, § 1, effective July 1. **L. 93:** (16) amended, p. 1776, § 39, effective June 6. **L. 94:** (8) amended, p. 2736, § 361, effective July 1. **L. 96:** (23)(a) amended, p. 1426, § 15, effective July 1. **L. 2002:** (8) amended, p. 664, § 5, effective May 28. **L. 2003:** (23)(a) amended, p. 764, § 3, effective March 25; (24) amended, p. 1616, § 16, effective August 6. **L. 2010:** (5), (18), and (19) amended, (HB 10-1352), ch. 259, p. 1173, § 18, effective August 11. **L. 2011:** (5) amended and (33.5) and (34.5) added, (SB 11-134), ch. 261, p. 1138, § 1, effective July 1. **L. 2012:** (3.5) added and (5) amended, (HB 12-1310), ch. 268, p. 1404, § 29, effective June 7; (2) and (27) amended, (HB 12-1311), ch. 281, p. 1621, § 51, effective July 1.

Editor’s note: This section is similar to former §§ 12-22-102 and 12-22-303 as they existed prior to 1992.

ANNOTATION

Crime of simple possession is lesser included offense of the crime of possession with the intent to distribute. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

The definition of “controlled substance analog” as applied to pseudoephedrine is not

unconstitutionally vague. *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

The definition of “cocaine” in subsection (4), by its plain language, includes a mixture that includes any amount of cocaine. Therefore, the amount of cocaine involved in a trans-

action is determined by the total amount of the mixture containing the cocaine, not just the amount of cocaine in the mixture. People v. Esquivel-Alaniz, 985 P.2d 22 (Colo. App. 1999).

It is evident that one who “manufactures” a controlled substance also possesses the substance in the course of manufacturing it. Patton v. People, 35 P.3d 124 (Colo. 2001).

18-18-103. Special definition - board. As used in parts 1 and 2 of this article, “board” means the state board of pharmacy. As used in parts 3, 4, 5, and 6 of this article, “board” means the respective licensing board responsible for licensing and registering practitioners or other persons who are subject to registration pursuant to part 3 of this article. For physicians the respective board is the Colorado medical board, for podiatrists the respective board is the Colorado podiatry board, for dentists the respective board is the state board of dental examiners, for optometrists the respective board is the state board of optometry, for pharmacists and pharmacies the respective board is the state board of pharmacy, for veterinarians the respective board is the state board of veterinary medicine, and for manufacturers, distributors, and humane societies the respective board is the state board of pharmacy.

Source: L. 92: Entire article R&RE, p. 332, § 1, effective July 1. **L. 2010:** Entire section amended, (HB 10-1260), ch. 403, p. 1987, § 78, effective July 1. **L. 2011:** Entire section amended, (SB 11-094), ch. 129, p. 451, § 30, effective April 22.

PART 2

STANDARDS AND SCHEDULES

18-18-201. Authority to control. The board shall administer this part 2 and the general assembly, by bill, may add substances to or delete or reschedule substances listed in section 18-18-203, 18-18-204, 18-18-205, 18-18-206, or 18-18-207.

Source: L. 92: Entire article R&RE, p. 332, § 1, effective July 1.

Editor’s note: This section is similar to former § 12-22-103 as it existed prior to 1992.

18-18-202. Nomenclature. The controlled substances listed in or to be added to the schedules in sections 18-18-203, 18-18-204, 18-18-205, 18-18-206, and 18-18-207 are listed or added by any official, common, usual, chemical, or trade name used.

Source: L. 92: Entire article R&RE, p. 332, § 1, effective July 1.

18-18-203. Schedule I. (1) A substance shall be added to schedule I by the general assembly when:

- (a) The substance has high potential for abuse;
 - (b) The substance has no currently accepted medical use in treatment in the United States; and
 - (c) The substance lacks accepted safety for use under medical supervision.
- (2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule I:

(a) Any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

- (I) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl] -N-phenylacetamide);
- (II) Acetylmethadol;
- (III) Allylprodine;
- (IV) Alphacetylmethadol;

- (V) Alphameprodine;
- (VI) Alphamethadol;
- (VII) Alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)- 4-(N-propanilido) piperidine);
- (VIII) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl) ethyl-4-piperidiny]-N-phenylpropanamide);
- (IX) Benzethidine;
- (X) Betacetylmethadol;
- (XI) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4- piperidiny]-N-phenylpropanamide);
- (XII) Beta-hydroxy-3-methylfentanyl (other name: N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidiny]- N-phenylpropanamide);
- (XIII) Betameprodine;
- (XIV) Betamethadol;
- (XV) Betaprodine;
- (XVI) Clonitazene;
- (XVII) Dextromoramide;
- (XVIII) Diampromide;
- (XIX) Diethylthiambutene;
- (XX) Difenoxin;
- (XXI) Dimenoxadol;
- (XXII) Dimepheptanol;
- (XXIII) Dimethylthiambutene;
- (XXIV) Dioxaphetyl butyrate;
- (XXV) Dipipanone;
- (XXVI) Ethylmethylthiambutene;
- (XXVII) Etonitazene;
- (XXVIII) Etoxeridine;
- (XXIX) Furethidine;
- (XXX) Hydroxypethidine;
- (XXXI) Ketobemidone;
- (XXXII) Levomoramide;
- (XXXIII) Levophenacetylmorphan;
- (XXXIV) 3-methylfentanyl (N-[3-methyl-1-(2- phenylethyl)-4-piperidyl]-N-phenylpropanamide);
- (XXXV) 3-methylthiofentanyl (N-[3-methyl-1-(2- thienyl)ethyl-4-piperidiny]-N-phenylpropanamide);
- (XXXVI) Morpheridine;
- (XXXVII) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);
- (XXXVIII) Noracymethadol;
- (XXXIX) Norlevorphanol;
- (XL) Normethadone;
- (XLI) Norpipanone;
- (XLII) Para-fluorofentanyl (N-(4-fluorophenyl)-N- [1-(2-phenethyl) -4-piperidiny]-propanamide);
- (XLIII) PEPAP (1-(2-phenethyl)-4-phenyl- 4-acetoxypiperidine);
- (XLIV) Phenadoxone;
- (XLV) Phenampromide;
- (XLVI) Phenomorphan;
- (XLVII) Phenoperidine;
- (XLVIII) Piritramide;
- (XLIX) Proheptazine;
- (L) Properidine;
- (LI) Propiram;
- (LII) Racemoramide;
- (LIII) Thiofentanyl (N-phenyl-N-[1-(2- thienyl) ethyl-4-piperidiny]-propanamide);
- (LIV) Tilidine;

(LV) Trimeperidine.

(b) Any of the following opium derivatives, including their salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

- (I) Acetorphine;
- (II) Acetyldihydrocodeine;
- (III) Benzylmorphine;
- (IV) Codeine methylbromide;
- (V) Codeine-N-Oxide;
- (VI) Cyprenorphine;
- (VII) Desomorphine;
- (VIII) Dihydromorphine;
- (IX) Drotebanol;
- (X) Etorphine, except hydrochloride salt;
- (XI) Heroin;
- (XII) Hydromorphanol;
- (XIII) Methyl-desorphine;
- (XIV) Methyl-dihydromorphine;
- (XV) Morphine methylbromide;
- (XVI) Morphine methylsulfonate;
- (XVII) Morphine-N-Oxide;
- (XVIII) Myrophine;
- (XIX) Nicocodeine;
- (XX) Nicomorphine;
- (XXI) Normorphine;
- (XXII) Pholcodine;
- (XXIII) Thebacon.

(c) Any material, compound, mixture, or preparation containing any quantity of the following hallucinogenic substances, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) 4-bromo-2, 5-dimethoxy-amphetamine (Some trade or other names: 4-bromo-2, 5-dimethoxy-alpha- methylphenethylamine; 4-bromo-2, 5-DMA.);

(II) 2,5-dimethoxyamphetamine (Some trade or other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA.);

(II.5) 2,5-Dimethoxy-4-ethylamphetamine (DOET);

(III) 4-methoxyamphetamine (Some trade or other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine, PMA.);

(IV) 5-methoxy-3,4-methylenedioxy amphetamine;

(IV.5) 5-methoxy-N, N-diisopropyltryptamine (5-MeO-DiPT);

(V) 4-methyl-2,5-dimethoxy-amphetamine (Some trade and other names: 4-methyl-2,5-dimethoxy-alpha- methylphenethylamine; DOM; and STP);

(VI) 3,4-methylenedioxy amphetamine;

(VII) 3,4-methylenedioxymethamphetamine (MDMA);

(VIII) 3,4,5-trimethoxy amphetamine;

(VIII.5) Alpha-methyltryptamine (AMT);

(IX) Bufotenine (Some trade and other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2- dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine.);

(X) Diethyltryptamine (Some trade or other names: N,N-Diethyltryptamine; DET.);

(XI) Dimethyltryptamine (Some trade or other names: DMT.);

(XII) Ibogaine (Some trade and other names: (7-Ethyl-6,6B,7,8,9,10,12,13-octahydro-2- methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepine [5,4- b] indole; Tabernanthe iboga.);

(XIII) Lysergic acid diethylamide;

(XIV) Mescaline;

(XV) Parahexyl (Some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9- trimethyl-6H-dibenzo[b,d]pyran; Synhexyl.);

(XVI) Peyote (Meaning all parts of the plant classified botanically as *Lophophora williamsii* Lemaire, whether growing or not, its seeds, any extract from any part of the plant, and every compound, salt, derivative, mixture, or preparation of the plant, or its seeds or extracts);

(XVII) N-ethyl MDA;

(XVIII) N-ethyl-3-piperidyl benzilate;

(XIX) N-hydroxy MDA;

(XX) N-methyl-3-piperidyl benzilate;

(XXI) Psilocybin;

(XXII) Psilocyn;

(XXIII) Tetrahydrocannabinols;

(XXIV) Ethylamine analog of phencyclidine (Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.);

(XXV) Pyrrolidine analog of phencyclidine (Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.);

(XXVI) Thiophene analog of phencyclidine (Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.);

(XXVII) TCPy.

(d) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) Mecloqualone;

(II) Methaqualone.

(e) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(I) Repealed.

(II) Fenethylline;

(III) Methcathinone;

(IV) N-ethylamphetamine;

(V) (+) Cis-4-methylaminorex;

(VI) N,N-dimethylamphetamine.

(f) Any material, compound, mixture, or preparation containing any quantity of gamma hydroxybutyrate [GHB], including its salts, isomers, and salts of isomers.

(g) Any material, compound, mixture, or preparation which is a controlled substance analog, the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in this subsection (2) or that was specifically designed to produce an effect substantially similar to or greater than the effect of a controlled substance listed in this subsection (2), all or part of which is intended for human consumption.

(h) Any material, compound, mixture, or preparation containing any quantity of N-benzylpiperazine (BZP), including its salts, isomers, and salts of isomers.

Source: L. 92: Entire article R&RE, p. 332, § 1, effective July 1. L. 94: (2)(c)(II.5) added and (2)(e) amended, pp. 1721, 1722, §§ 20, 21, effective July 1. L. 96: (2)(e)(I), (2)(e)(III), and (2)(e)(V) amended, p. 1843, § 8, effective July 1. L. 2001: (2)(f) and (2)(g) added, pp. 858, 860, §§ 3, 9, effective July 1. L. 2005: (2)(c)(IV.5) and (2)(c)(VIII.5) added, p. 1501, § 7, effective July 1, 2006. L. 2009: (2)(h) added, (HB 09-1157), ch. 342, p. 1795, § 1, effective July 1. L. 2012: (2)(e)(I) repealed, (HB 12-1310), ch. 268, p. 1405, § 30, effective June 7.

Editor's note: This section is similar to former § 12-22-309 as it existed prior to 1992.

ANNOTATION

Annotator's note. Since § 18-18-203 is similar to § 12-22-309 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

Applied in *People v. Donald*, 637 P.2d 392 (Colo. 1981); *People v. Deschamp*, 662 P.2d 171 (Colo. 1983); *People v. Holmberg*, 992 P.2d 705 (Colo. App. 1999).

18-18-204. Schedule II. (1) A substance shall be added to schedule II by the general assembly when:

- (a) The substance has high potential for abuse;
- (b) The substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and
- (c) The abuse of the substance may lead to severe psychological or physical dependence.

(2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule II:

- (a) Any of the following substances, however manufactured:
 - (I) Opium and opium derivative, and any salt, compound, derivative, or preparation of opium or opium derivative, excluding apomorphine, dextrophan, nalbuphine, butorphanol, nalmefene, naloxone, and naltrexone, but including:
 - (A) Raw opium;
 - (B) Opium extracts;
 - (C) Opium fluid;
 - (D) Powdered opium;
 - (E) Granulated opium;
 - (F) Tincture of opium;
 - (G) Codeine;
 - (H) Ethylmorphine;
 - (I) Etorphine hydrochloride;
 - (J) Hydrocodone;
 - (K) Hydromorphone;
 - (L) Metopon;
 - (M) Morphine;
 - (N) Oxycodone;
 - (O) Oxymorphone;
 - (P) Thebaine.
 - (II) Any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in subparagraph (I) of this paragraph (a), but not isoquinoline alkaloids of opium;
- (III) Opium poppy and poppy straw;
- (IV) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine;
- (V) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrene alkaloids of the opium poppy).
- (b) Any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:
 - (I) Alfentanil;
 - (II) Alphaprodine;
 - (III) Anileridine;
 - (IV) Benzitramide;
 - (V) Carfentanyl;

- (VI) Dihydrocodeine;
- (VII) Diphenoxylate;
- (VIII) Fentanyl;
- (IX) Isomethadone;
- (IX.5) Levo-alphaacetylmethadol;
- (X) Levomethorphan;
- (XI) Levorphanol;
- (XII) Metazocine;
- (XIII) Methadone;
- (XIV) Methadone - Intermediate, 4-cyano-2- dimethylamino-4, 4-diphenyl butane;
- (XV) Moramide - Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid;
- (XVI) Pethidine (meperidine);
- (XVII) Pethidine - Intermediate-A, 4-cyano-1- methyl-4-phenylpiperidine;
- (XVIII) Pethidine - Intermediate-B, ethyl-4- phenylpiperidine-4-carboxylate;
- (XIX) Pethidine - Intermediate-C, 1-methyl- 4-phenylpiperidine-4-carboxylic acid;
- (XX) Phenazocine;
- (XXI) Piminodine;
- (XXII) Propoxyphene (non-dosage forms);
- (XXIII) Racemethorphan;
- (XXIV) Racemorphan;
- (XXV) Sufentanil.

(c) Any material, compound, mixture, or preparation containing any quantity of the following substances, their salts, isomers, or salts of isomers, having a stimulant effect on the central nervous system:

- (I) Amphetamine;
- (II) Methamphetamine;
- (III) Phenmetrazine;
- (IV) Methylphenidate.

(d) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

- (I) Amobarbital;
- (II) Pentobarbital;
- (III) Phencyclidine;
- (IV) Secobarbital;
- (V) Glutethimide.

(e) (I) Repealed.

(II) Nabilone [Another name for nabilone: (+) trans-3-(1,1-demethylheptyl)-6,6a,7,8,10, 10a-hexahydro- 1-hydroxy-6,6-dimethyl-9Hdibenzo [b,d] pyran-9-one].

(f) Any material, compound, mixture, or preparation containing any quantity of the following substances:

(I) Immediate precursor to amphetamine and methamphetamine: phenylacetone (Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.), ephedrine, alpha-phenylacetoacetonitrile, phenylacetic acid, and 1-phenyl-2-nitropropene;

(II) Immediate precursors to phencyclidine:

- (A) 1-phenylcyclohexylamine;
- (B) 1-piperidinocyclohexanecarbonitrile (PCC);
- (C) Piperidine;
- (D) Morpholine;
- (E) Pyrrolidine;
- (III) Remifentanil hydrochloride.

(g) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which is a controlled substance analog, as defined in section 18-18-102 (6), the chemical structure of which is substantially similar to the

chemical structure of a controlled substance in schedule II of this part 2 or that was specifically designed to produce an effect substantially similar to or greater than the effect of a controlled substance in schedule II of this part 2, all or part of which is intended for human consumption, shall be treated for the purposes of this article as a controlled substance in schedule II of this part 2.

Source: **L. 92:** Entire article R&RE, p. 337, § 1, effective July 1. **L. 94:** (2)(b)(IX.5) added, p. 1722, § 22, effective July 1. **L. 96:** (2)(f)(I) amended, p. 1843, § 9, effective July 1. **L. 99:** (2)(f)(III) added, p. 797, § 12, effective July 1. **L. 2000:** (2)(e)(I) repealed, p. 697, § 13, effective July 1.

Editor's note: This section is similar to former § 12-22-310 as it existed prior to 1992.

ANNOTATION

Annotator's note. Since § 18-18-204 is similar to § 12-22-310 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

The statutory language of the Uniform Controlled Substance Act of 1992 does not convey an intention by the Colorado general assembly to limit its application solely to designer drugs. Thus, the argument that pseudoephedrine is not a designer drug and therefore outside the jurisdiction of this act is invalid. *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

Coca leaves, including cocaine, included. It is the legislative intent that any derivative of coca leaves, including cocaine, be included as a

"Schedule II" controlled substance. *People v. Root*, 650 P.2d 562 (Colo. 1982).

The description, "having a stimulant effect on the central nervous system", does not create a separate element of proof. It provides guidance as to the category into which any new substance should be placed. *People v. Moran*, 983 P.2d 143 (Colo. App. 1999).

The definition of "controlled substance analog" as applied to pseudoephedrine is not unconstitutionally vague. Thus, pseudoephedrine is a controlled substance analog and enforceable under subsection (2)(g). *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

Applied in *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983); *People v. Chase*, 675 P.2d 315 (Colo. 1984).

18-18-205. Schedule III. (1) A substance shall be added to schedule III by the general assembly when:

(a) The substance has a potential for abuse less than the substances included in schedules I and II;

(b) The substance has currently accepted medical use in treatment in the United States; and

(c) The abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

(2) Unless specifically excepted by Colorado or federal law, or Colorado or federal regulation, or more specifically included in another schedule, the following controlled substances are listed in schedule III:

(a) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) Any compound, mixture, or preparation in dosage unit form containing any stimulant substance included in schedule II and which was listed as an excepted compound on August 25, 1971, pursuant to the federal "Controlled Substances Act", and any other drug of the quantitative composition shown in that list for those drugs or which is the same except for containing a lesser quantity of controlled substances;

(II) Benzphetamine;

(III) Chlorphentermine;

(IV) Clortermine;

(V) Phendimetrazine.

(b) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system:

(I) Any compound, mixture, or preparation containing any of the following drugs or their salts and one or more other active medicinal ingredients not included in any schedule:

- (A) Amobarbital;
- (B) Secobarbital;
- (C) Pentobarbital;

(II) Any of the following drugs, or their salts, in suppository dosage form, approved by the federal food and drug administration for marketing only as a suppository:

- (A) Amobarbital;
- (B) Secobarbital;
- (C) Pentobarbital;

(III) Any substance containing any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid;

- (IV) Chlorhexadol;
- (V) Lysergic acid;
- (VI) Lysergic acid amide;
- (VII) Methypylon;
- (VIII) Sulfondiethylmethane;
- (IX) Sulfonethylmethane;
- (X) Sulfonmethane;

(XI) Tiletamine and zolazepam or any of their salts (Some trade or other names for a tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-e] [1,4]-diazepin-7(1H)-one. flupyrzapon.).

(c) Nalorphine;

(d) Any material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as follows:

(I) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(II) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(III) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(IV) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(V) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(VI) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(VII) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(VIII) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Anabolic steroids.

(f) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product [Other names for dronabinol:

(6aR-trans)-6a,7,8,10a- tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d] pyran-1-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol];

(g) Ketamine, its salts, isomers, and salts of isomers [Other names for ketamine: (+)-2-(2-chlorophenyl)-2-(methylamino)-cyclohexanone].

(3) The board may exempt by rule a compound, mixture, or preparation containing any stimulant or depressant substance listed in paragraph (a) or (b) of subsection (2) of this section from the application of all or part of this article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system and if the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a stimulant or depressant effect on the central nervous system.

Source: L. 92: Entire article R&RE, p. 341, § 1, effective July 1. L. 2000: (2)(f) and (2)(g) added, p. 697, §§ 12, 14, effective July 1.

Editor's note: This section is similar to former § 12-22-311 as it existed prior to 1992.

18-18-206. Schedule IV - repeal. (1) A substance shall be added to schedule IV by the general assembly when:

(a) The substance has a low potential for abuse relative to substances included in schedule III;

(b) The substance has currently accepted medical use in treatment in the United States; and

(c) The abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances included in schedule III.

(2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule IV:

(a) Any material, compound, mixture, isomers or salts or isomers, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as follows:

(I) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(II) Propoxyphene (dosage forms);

(III) Butorphanol;

(b) Any material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(I) Alprazolam;

(II) Barbital;

(III) Bromazepam;

(IV) Camazepam;

(V) Chloral betaine;

(VI) Chloral hydrate;

(VII) Chlordiazepoxide;

(VIII) Clobazam;

(IX) Clonazepam;

(X) Clorazepate;

(XI) Clotiazepam;

(XII) Cloxazolam;

(XIII) Delorazepam;

(XIV) Diazepam;

(XV) Estazolam;

(XVI) Ethchlorvynol;

(XVII) Ethinamate;

(XVIII) Ethyl loflazepate;

- (XIX) Fludiazepam;
- (XX) Flunitrazepam;
- (XXI) Flurazepam;
- (XXII) Halazepam;
- (XXIII) Haloxazolam;
- (XXIV) Ketazolam;
- (XXV) Loprazolam;
- (XXVI) Lorazepam;
- (XXVII) Lormetazepam;
- (XXVIII) Mebutamate;
- (XXIX) Medazepam;
- (XXX) Meprobamate;
- (XXXI) Methohexital;
- (XXXII) Methylphenobarbital (mephobarbital);
- (XXXIII) Midazolam;
- (XXXIV) Nimetazepam;
- (XXXV) Nitrazepam;
- (XXXVI) Nordiazepam;
- (XXXVII) Oxazepam;
- (XXXVIII) Oxazolam;
- (XXXIX) Paraldehyde;
- (XL) Petrichloral;
- (XLI) Phenobarbital;
- (XLII) Pinazepam;
- (XLIII) Prazepam;
- (XLIV) Quazepam;
- (XLV) Temazepam;
- (XLVI) Tetrazepam;
- (XLVII) Triazolam;
- (XLVIII) Zolpidem;

(c) (I) Any material, compound, mixture, or preparation containing any quantity of the following substance, including any salts, isomers of it that are theoretically possible: Fenfluramine.

(II) This paragraph (c) is repealed upon removal of fenfluramine and its salts and isomers from schedule IV of the federal "Controlled Substances Act" (21 U.S.C. sec. 812; 21 CFR 1308.14).

(d) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

- (I) Cathine;
- (II) Diethylpropion;
- (III) Fencamfamin;
- (IV) Fenpropore;
- (V) Mazindol;
- (VI) Pemoline (including organometallic complexes and chelates thereof);
- (VII) Phentermine;
- (VIII) Pipradrol;
- (IX) SPA ((-)-1-dimethylamino-1,2-diphenylethane);

(e) Any material, compound, mixture, or preparation containing any quantity of the following substances, including their salts and isomers:

- (I) Modafinil;
- (II) Pentazocine;
- (III) Sibutramine;
- (IV) Stadol (butorphanol tartrate);
- (f) Zaleplon.

(3) The board may exempt by rule any compound, mixture, or preparation containing any depressant substance listed in paragraph (b) of subsection (2) of this section from the

application of all or any part of this article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a depressant effect on the central nervous system.

Source: **L. 92:** Entire article R&RE, p. 344, § 1, effective July 1. **L. 94:** (2)(b)(XLVIII) added, p. 1722, § 23, effective July 1. **L. 96:** (2)(c) amended, p. 1427, § 16, effective July 1. **L. 98:** (2)(a)(III) added, p. 1445, § 36, effective July 1. **L. 99:** (2)(e) amended, p. 797, § 13, effective July 1. **L. 2000:** (2)(f) added, p. 708, § 38, effective July 1.

Editor's note: This section is similar to former § 12-22-312 as it existed prior to 1992.

ANNOTATION

Applied in *People v. Deschamp*, 662 P.2d 171 (Colo. 1983) (decided under § 12-22-312 as it existed prior to its repeal in 1992).

18-18-207. Schedule V. (1) A substance shall be added to schedule V by the general assembly when:

(a) The substance has a low potential for abuse relative to substances included in schedule IV;

(b) The substance has currently accepted medical use in treatment in the United States; and

(c) The abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances included in schedule IV.

(2) Unless specifically excepted by Colorado or federal law or Colorado or federal regulation or more specifically included in another schedule, the following controlled substances are listed in schedule V:

(a) Any material, compound, mixture, or preparation containing any of the following narcotic drug and its salts: Buprenorphine;

(b) Any compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth in this paragraph (b), which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(I) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(II) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(III) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(IV) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(V) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams;

(VI) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(c) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers: Pyrovalerone.

Source: **L. 92:** Entire article R&RE, p. 347, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-313 as it existed prior to 1992.

PART 3

REGULATION OF MANUFACTURE, DISTRIBUTION,
AND DISPENSING OF CONTROLLED SUBSTANCES

18-18-301. Rules. The board or the department may adopt rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this state.

Source: L. 92: Entire article R&RE, p. 348, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-108 as it existed prior to 1992.

18-18-302. Registration requirements. (1) Every person who manufactures, distributes, or dispenses any controlled substance within this state, or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance within this state, shall obtain annually or biannually, if applicable, a registration, issued by the respective licensing board or the department in accordance with rules adopted by such board or by the department. For purposes of this section and this article, "registration" or "registered" means the registering of manufacturers, pharmacists, pharmacies, and humane societies located in this state, and distributors located in or doing business in this state, by the state board of pharmacy as set forth in article 42.5 of title 12, C.R.S., the licensing of physicians by the Colorado medical board, as set forth in article 36 of title 12, C.R.S., the licensing of podiatrists by the Colorado podiatry board, as set forth in article 32 of title 12, C.R.S., the licensing of dentists by the state board of dental examiners, as set forth in article 35 of title 12, C.R.S., the licensing of optometrists by the state board of optometry, as set forth in article 40 of title 12, C.R.S., the licensing of veterinarians by the state board of veterinary medicine, as set forth in article 64 of title 12, C.R.S., and the licensing of researchers and addition programs by the department of human services, as set forth in part 2 of article 80 of title 27, C.R.S.

(2) A person registered by the board or the department under this part 3 to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by the registration and in conformity with this article and with article 42.5 of title 12, C.R.S.

(3) The following persons need not register and may lawfully possess controlled substances under this article:

(a) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if the agent or employee is acting in the usual course of business or employment;

(b) A common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment;

(c) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner.

(4) The board or department may waive by rule the requirement for registration of certain manufacturers, distributors, or dispensers upon finding it consistent with the public health and safety.

(5) The board or department may inspect the establishment of a registrant or applicant for registration of those persons they are authorized to register under this part 3 in accordance with rules adopted by the board or department.

Source: L. 92: Entire article R&RE, p. 348, § 1, effective July 1. **L. 94:** (1) amended, p. 2605, § 4, effective July 1. **L. 2010:** (1) amended, (HB 10-1260), ch. 403, p. 1988, § 79, effective July 1. **L. 2011:** (1) amended, (SB 11-094), ch. 129, p. 451, § 31, effective April 22. **L. 2012:** (1) and (2) amended, (HB 12-1311), ch. 281, p. 1621, § 52, effective July 1.

Editor's note: This section is similar to former § 12-22-304 as it existed prior to 1992.

18-18-303. Registration. (1) The board or department shall register an applicant to manufacture or distribute substances included in schedules I through V unless the board or department determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board or department shall consider the following factors:

- (a) Maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;
- (b) Compliance with applicable state and local law;
- (c) Promotion of technical advances in the art of manufacturing controlled substances and the development of new substances;
- (d) Any convictions of the applicant under any laws of another country or federal or state laws relating to any controlled substance;
- (e) Past experience of the applicant in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;
- (f) Furnishing by the applicant of false or fraudulent material in any application filed under this article;
- (g) Suspension or revocation of the applicant's federal registration or the applicant's registration of another state to manufacture, distribute, or dispense controlled substances as authorized by federal law; and
- (h) Any other factors relevant to and consistent with the public health and safety.

(2) Registration under subsection (1) of this section entitles a registrant to manufacture or distribute a substance included in schedule I or II only if it is specified in the registration.

(3) A practitioner must be registered with the board or department before dispensing a controlled substance or conducting research with respect to a controlled substance included in schedules II through V. The department need not require separate registration under this article for practitioners engaging in research with nonnarcotic substances included in schedules II through V where the registrant is already registered under this article in another capacity. Practitioners registered under federal law to conduct research with substances included in schedule I may conduct research with substances included in schedule I within this state upon furnishing the department evidence of that federal registration.

(4) A manufacturer or distributor registered under the federal "Controlled Substances Act", 21 U.S.C. sec. 801 et seq., may submit a copy of the federal application as an application for registration as a manufacturer or distributor under this section. The board may require a manufacturer or distributor to submit information in addition to the application for registration under the federal act.

(5) Persons licensed or registered under article 42.5 of title 12, C.R.S., or article 32, 35, 36, 40, or 64 of title 12, C.R.S., need not be licensed separately to distribute or dispense controlled substances to the extent provided under law if they are registered or are exempt from registration by the federal drug enforcement administration, provided that such persons indicate on any initial application or renewal application the schedules of controlled substances that the persons are authorized to use under Public Law 91-513, known as the federal "Comprehensive Drug Abuse Prevention and Control Act of 1970".

Source: L. 92: Entire article R&RE, p. 349, § 1, effective July 1. L. 2012: (5) amended, (HB 12-1311), ch. 281, p. 1622, § 53, effective July 1.

Editor's note: This section is similar to former § 12-22-305 as it existed prior to 1992.

18-18-304. Suspension or revocation of registration. (1) The board or department may suspend or revoke a registration under section 18-18-303 to manufacture, distribute, or dispense a controlled substance upon finding that the registrant has:

- (a) Furnished false or fraudulent material information in any application filed under this part 3;
- (b) Been convicted of a felony under any state or federal law relating to any controlled substance;

(c) Had the registrant's federal registration suspended or revoked and is no longer authorized by federal law to manufacture, distribute, or dispense controlled substances; or

(d) Committed acts that would render registration under section 18-18-303 inconsistent with the public interest as determined under that section.

(2) The board or department may deny, suspend, revoke, or take other authorized disciplinary action to limit the authority of any registrant to prescribe, distribute, dispense, or administer controlled substances, or any classification thereof, within this state if grounds for denial, suspension, or revocation exist. These proceedings shall be conducted in accordance with the provisions of article 4 of title 24, C.R.S.

(3) If a registration is suspended or revoked, the board or department may place under seal all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. When a revocation order becomes final, the court may order the controlled substances forfeited to the state.

(4) The board or department may seize or place under seal any controlled substance owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner contemplated by the registration. The controlled substance must be held for the benefit of the registrant or the registrant's successor in interest. The board or department shall notify a registrant, or the registrant's successor in interest, whose controlled substance is seized or placed under seal, of the procedures to be followed to secure the return of the controlled substance and the conditions under which it will be returned. The board or department may not dispose of any controlled substance seized or placed under seal under this subsection (4) until the expiration of one hundred eighty days after the controlled substance was seized or placed under seal. The costs incurred by the board or department in seizing, placing under seal, maintaining custody, and disposing of any controlled substance under this subsection (4) may be recovered from the registrant, any proceeds obtained from the disposition of the controlled substance, or from both. Any balance remaining after the costs have been recovered from the proceeds of any disposition must be delivered to the registrant or the registrant's successor in interest.

(5) The board or department shall promptly notify the drug enforcement administration of all orders restricting, suspending, or revoking registration and all forfeitures of controlled substances.

Source: L. 92: Entire article R&RE, p. 351, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-308 as it existed prior to 1992.

18-18-305. Order to show cause. (1) Before denying, suspending, or revoking a registration, or refusing a renewal of registration, the board or department shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or the renewal refused. The order must state its grounds and direct the applicant or registrant to appear before the board or department at a specified time and place not less than thirty days after the date of service of the order. In case of a refusal to renew a registration, the order must be served not later than thirty days before the expiration of the registration. These proceedings must be conducted in accordance with section 24-4-105, C.R.S. The proceedings do not preclude any criminal prosecution or other proceeding. A proceeding to refuse to renew a registration does not affect the existing registration, which remains in effect until completion of the proceeding.

(2) The board or department may suspend, without an order to show cause, any registration simultaneously with the institution of proceedings under section 18-18-304, or where renewal of registration is refused, upon finding that there is an imminent danger to the public health or safety which warrants this action. The suspension continues in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the board or department or dissolved by a court of competent jurisdiction.

Source: L. 92: Entire article R&RE, p. 352, § 1, effective July 1.

18-18-306. Records of registrants. Persons registered to manufacture, distribute, or dispense controlled substances under this part 3 shall keep records and maintain inventories in conformance with the record keeping and inventory requirements of federal law and with any additional rules adopted by the board or department.

Source: L. 92: Entire article R&RE, p. 353, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-318 as it existed prior to 1992.

18-18-307. Order forms. A substance included in schedule I or II may be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of federal law respecting order forms constitutes compliance with this section.

Source: L. 92: Entire article R&RE, p. 353, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-318 as it existed prior to 1992.

18-18-308. Prescriptions. (1) As used in this section, "medical treatment" includes dispensing or administering a narcotic drug for pain, including intractable pain.

(2) Except as provided in section 18-18-414, a person may dispense a controlled substance only as provided in this section.

(3) (a) Except as provided in paragraph (b) of this subsection (3), a person shall not dispense a substance included in schedule II to an ultimate user of the substance without:

(I) The written prescription of a practitioner; or

(II) An electronic prescription drug order for a schedule II substance that is created and transmitted in accordance with 21 CFR 1311.

(b) A practitioner, other than a pharmacy, may dispense a schedule II substance directly to the ultimate user without a written prescription.

(4) (a) Except as provided in paragraph (b) of this subsection (4), a person shall not dispense a substance included in schedule III, IV, or V to an ultimate user of the substance without:

(I) A written or oral prescription order of a practitioner; or

(II) An electronic prescription drug order for a schedule III, IV, or V substance that is created and transmitted in accordance with 21 CFR 1311.

(b) A practitioner, other than a pharmacy, may dispense a schedule III, IV, or V substance directly to the ultimate user without a written prescription.

(c) A prescription order for a schedule III, IV, or V substance must not be filled or refilled more than six months after the date of the order or be refilled more than five times.

(5) A practitioner may dispense or deliver a controlled substance to or for an individual or animal only for medical treatment or authorized research in the ordinary course of that practitioner's profession.

(6) No civil or criminal liability or administrative sanction may be imposed on a pharmacist for action taken in reliance on a reasonable belief that an order purporting to be a prescription was issued by a practitioner in the usual course of professional treatment or in authorized research.

Source: L. 92: Entire article R&RE, p. 353, § 1, effective July 1. L. 96: (4) amended, p. 1427, § 17, effective July 1. L. 98: (2) amended, p. 430, § 2, effective July 1. L. 2012: (3) and (4) amended, (SB 12-037), ch. 40, p. 139, § 1, effective March 22.

Editor's note: This section is similar to former § 12-22-122 as it existed prior to 1992.

18-18-309. Diversion prevention and control. (1) As used in this section, "diversion" means the transfer of any controlled substance from a licit to an illicit channel of distribution or use.

(2) The department shall regularly prepare and make available to other state regulatory, licensing, and law enforcement agencies a report on the patterns and trends of actual distribution, diversion, and abuse of controlled substances.

(3) The department shall enter into written agreements with local, state, and federal agencies for the purpose of improving identification of sources of diversion and to improve enforcement of and compliance with this article and other laws and regulations pertaining to unlawful conduct involving controlled substances. An agreement must specify the roles and responsibilities of each agency that has information or authority to identify, prevent, and control drug diversion and drug abuse. The department shall convene periodic meetings to coordinate a state diversion prevention and control program. The department shall arrange for cooperation and exchange of information among agencies and with neighboring states and the federal government.

(4) The department shall annually report to the governor and to the president of the senate and the speaker of the house of representatives on the outcome of this program with respect to its effects on distribution and abuse of controlled substances, including recommendations for improving control and prevention of the diversion of controlled substances in this state.

Source: L. 92: Entire article R&RE, p. 353, § 1, effective July 1.

PART 4

OFFENSES AND PENALTIES

18-18-401. Legislative declaration. (1) The general assembly hereby finds, determines, and declares that:

(a) The regulation of controlled substances in this state is important and necessary for the preservation of public safety and public health;

(b) Successful, community-based substance abuse treatment and education programs, in conjunction with mental health treatment as necessary, provide effective tools in the effort to reduce drug usage and criminal behavior in communities. Therapeutic intervention and ongoing individualized treatment plans prepared through the use of meaningful and proven assessment tools and evaluations offer a potential alternative to incarceration in appropriate circumstances and should be utilized accordingly.

(c) Savings recognized from reductions in incarceration rates should be dedicated toward funding community-based treatment options and other mechanisms that are accessible to all of the state's counties for the implementation and continuation of such programs.

Source: L. 92: Entire article R&RE, p. 354, § 1, effective July 1. L. 2010: Entire section amended, (HB 10-1352), ch. 259, p. 1162, § 1, effective August 11.

Editor's note: This section is similar to former § 12-22-302 as it existed prior to 1992.

18-18-402. Definitions - terms used. As used in this part 4, unless this part 4 otherwise provides or unless the context otherwise requires, terms used in this part 4 shall have the same meanings as those set forth in part 2 of this article.

Source: L. 92: Entire article R&RE, p. 354, § 1, effective July 1.

Editor's note: This section is similar to former § 18-18-102 as it existed prior to 1992.

18-18-403. Additional definition. As used in this part 4, unless the context otherwise requires:

(1) "Sale" includes a barter, an exchange, or a gift, or an offer therefor, and each such transaction made by any person, whether as the principal, proprietor, agent, servant, or employee, with or without remuneration.

Source: L. 92: Entire article R&RE, p. 354, § 1, effective July 1.

Editor's note: This section is similar to former § 18-18-103 as it existed prior to 1992.

18-18-403.5. Unlawful possession of a controlled substance. (1) Except as authorized by part 1 or 3 of article 42.5 of title 12, C.R.S., part 2 of article 80 of title 27, C.R.S., section 18-1-711, or part 2 or 3 of this article, it is unlawful for a person knowingly to possess a controlled substance.

(2) A person who violates subsection (1) of this section by possessing:

(a) (I) Any material, compound, mixture, or preparation weighing four grams or less that contains any quantity of flunitrazepam, ketamine, or a controlled substance listed in schedule I or II of part 2 of this article except methamphetamine commits a class 6 felony.

(II) Any material, compound, mixture, or preparation weighing more than four grams that contains any quantity of flunitrazepam, ketamine, or a controlled substance listed in schedule I or II of part 2 of this article except methamphetamine commits a class 4 felony.

(b) (I) Any material, compound, mixture, or preparation weighing two grams or less that contains any quantity of methamphetamine commits a class 6 felony.

(II) Any material, compound, mixture, or preparation weighing more than two grams that contains any quantity of methamphetamine commits a class 4 felony.

(c) Any material, compound, mixture, or preparation that contains any quantity of a controlled substance listed in schedule III, IV, or V of part 2 of this article except flunitrazepam or ketamine commits a class 1 misdemeanor.

Source: L. 2010: Entire section added, (HB 10-1352), ch. 259, p. 1165, § 4, effective August 11. **L. 2012:** (1) amended, (SB 12-020), ch. 225, p. 988, § 4, effective May 29; (1) amended, (HB-1311), ch. 281, p. 1622, § 54, effective July 1.

Editor's note: Amendments to subsection (1) by House Bill 12-1311 and Senate Bill 12-020 were harmonized.

Cross references: For the legislative declaration in the 2012 act amending subsection (1), see section 1 of chapter 225, Session Laws of Colorado 2012.

ANNOTATION

There is no double jeopardy violation when a conviction for possession of a controlled substance and a conviction for distribution of a controlled substance were each based on a different quantum of drugs. People v. Davis, 2012 COA 1, __ P.3d __.

18-18-404. Unlawful use of a controlled substance. (1) (a) Except as is otherwise provided for offenses concerning marijuana and marijuana concentrate in sections 18-18-406 and 18-18-406.5, and as described by section 18-1-711, a person who uses any controlled substance, except when it is dispensed by or under the direction of a person licensed or authorized by law to prescribe, administer, or dispense the controlled substance for bona fide medical needs, commits a class 2 misdemeanor.

(b) Repealed.

(1.1) Repealed.

(2) and (3) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1163, § 2, effective August 11, 2010.)

(4) Repealed.

Source: L. 92: Entire article R&RE, p. 354, § 1, effective July 1. **L. 98:** (4) added, p. 1435, § 4, effective July 1. **L. 99:** IP(1) amended, p. 799, § 17, effective July 1. **L. 2000:** (4) amended, p. 1359, § 41, effective July 1, 2001. **L. 2002:** (4) amended, p. 1583, § 12, effective July 1. **L. 2003:** (1) amended and (1.1) added, p. 2681, § 2, effective July 1; (3) amended, p. 2429, § 2, effective July 1. **L. 2007:** (1)(b) and (1.1) repealed, p. 1689, § 10, effective July 1. **L. 2009:** (4) repealed, (HB 09-1266), ch. 347, p. 1815, § 4, effective

August 5. **L. 2010:** (1)(a), (2), and (3) amended, (HB 10-1352), ch. 259, p. 1163, § 2, effective August 11. **L. 2012:** (1)(a) amended, (SB 12-020), ch. 225, p. 988, § 5, effective May 29.

Editor's note: This section is similar to former § 18-18-104 as it existed prior to 1992.

Cross references: For the legislative intent contained in the 2003 act amending subsection (1) and enacting subsection (1.1), see section 1 of chapter 424, Session Laws of Colorado 2003. For the legislative declaration in the 2012 act amending subsection (1)(a), see section 1 of chapter 225, Session Laws of Colorado 2012.

ANNOTATION

Law reviews. For article, "Felony Sentencing in Colorado", see 18 Colo. Law. 1689 (1989).

Equal protection is not violated when a defendant is charged for the same conduct under both this section and § 18-18-405(1)(a) because unlawful use and unlawful possession are distinct offenses that each require proof of at least one fact that the other does not. *People v. District Ct. of 11th Jud. Dist.*, 964 P.2d 498 (Colo. 1998).

This section and § 18-18-405 do not contain identical elements for purposes of an equal protection analysis. The general assembly's choice to classify possession as a graver offense than use is reasonably related to the general purposes of the criminal legislation. *Campbell v. People*, 73 P.3d 11 (Colo. 2003).

As written, this section is clear and unambiguous in exempting § 18-18-406.5 from its provisions, including the treatment option. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

By intentionally omitting marihuana from the treatment option available under this section, the general assembly explicitly chose to offer the treatment option only to those addicted to other substances. Such a classifica-

tion has a rational basis based upon real in fact differences between the substances and is not completely arbitrary or irrational. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

Under § 18-18-404 (3), defendant's guilty plea is tantamount to a conviction in that it establishes guilt. *People v. Roberts*, 865 P.2d 938 (Colo. App. 1993).

Trial court exceeded its jurisdiction by applying sentencing alternative under subsection (3) applicable to unlawful "use" of controlled substance offenses to resentencing of probationer convicted of "possession" of a controlled substance under § 18-18-405. *People v. Hutchings*, 881 P.2d 466 (Colo. App. 1994).

Court order to surrender a driver's license and pay certain victim's fees and a drug surcharge fee was not erroneous where the defendant pled guilty to the charge and where the statute authorizes the court to impose "reasonable conditions." *People v. Roberts*, 865 P.2d 938 (Colo. App. 1993).

While an individual may unlawfully possess a controlled substance without voluntarily using it, it is simply not feasible for an individual to voluntarily use a controlled substance without also possessing it. *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

18-18-405. Unlawful distribution, manufacturing, dispensing, or sale. (1) (a) Except as authorized by part 1 of article 42.5 of title 12, C.R.S., part 2 of article 80 of title 27, C.R.S., or part 2 or 3 of this article, it is unlawful for any person knowingly to manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or possess one or more chemicals or supplies or equipment with intent to manufacture a controlled substance.

(b) As used in this subsection (1), "dispense" does not include labeling, as defined in section 12-42.5-102 (18), C.R.S.

(2) (a) Except as is otherwise provided for offenses concerning marijuana and marijuana concentrate in section 18-18-406 and for offenses involving minors in section 18-18-407 (1) (g), any person who violates any of the provisions of subsection (1) of this section:

(I) In the case of a controlled substance listed in schedule I or II of part 2 of this article, commits:

(A) A class 3 felony; or

(B) A class 2 felony, if the violation is committed subsequent to a prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the

United States of a violation to which this subparagraph (I) applies or would apply if convicted in this state;

(II) In the case of a controlled substance listed in schedule III of part 2 of this article, commits:

(A) A class 4 felony; or

(B) A class 3 felony, if the violation is committed subsequent to any prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation to which subparagraph (I) of this paragraph (a) or this subparagraph (II) applies or would apply if convicted in this state;

(III) In the case of a controlled substance listed in schedule IV of part 2 of this article, commits:

(A) A class 5 felony; or

(B) A class 4 felony, if the violation is committed subsequent to a prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation to which subparagraph (I) or (II) of this paragraph (a) or this subparagraph (III) applies or would apply if convicted in this state;

(IV) In the case of a controlled substance listed in schedule V of part 2 of this article, commits:

(A) A class 1 misdemeanor; or

(B) A class 5 felony, if the violation is committed subsequent to any prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation to which subparagraph (I), (II), or (III) of this paragraph (a) or this subparagraph (IV) applies or would apply if convicted in this state.

(b) Repealed.

(2.1) Repealed.

(2.3) (a) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1163, § 3, effective August 11, 2010.)

(b) Repealed.

(2.5) (a) Notwithstanding the provisions of subparagraph (III) of paragraph (a) of subsection (2) of this section, a person who violates the provisions of subsection (1) of this section with regard to flunitrazepam or ketamine commits a class 3 felony; except that the person commits a class 2 felony if the violation is committed subsequent to a prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation involving flunitrazepam or ketamine or to which subparagraph (I) of paragraph (a) of subsection (2) of this section applies or would apply if convicted in this state.

(b) Any person convicted of violating the provisions of subsection (1) of this section with regard to flunitrazepam or ketamine shall be subject to the mandatory sentencing provisions of subsection (3) of this section.

(c) Repealed.

(2.6) Repealed.

(3) (a) Unless a greater sentence is required pursuant to the provisions of another statute, any person convicted pursuant to subparagraph (I) of paragraph (a) of subsection (2) of this section for knowingly manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute, or inducing, attempting to induce, or conspiring with one or more other persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute an amount that is or has been represented to be:

(I) At least twenty-five grams or one ounce but less than four hundred fifty grams of any material, compound, mixture, or preparation that contains a schedule I or schedule II controlled substance as listed in section 18-18-203 or 18-18-204 shall be sentenced to the department of corrections for at least the minimum term of incarceration in the presumptive range provided for such offense in section 18-1.3-401 (1) (a) with regard to offenses other than manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute, and for at least the minimum term of incarceration in the presumptive range provided for such offense in section 18-1.3-401 (1) (a) as modified

pursuant to section 18-1.3-401 (10) with regard to manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute;

(II) At least four hundred fifty grams or one pound but less than one thousand grams of any material, compound, mixture, or preparation that contains a schedule I or schedule II controlled substance as listed in section 18-18-203 or 18-18-204 shall be sentenced to the department of corrections for a term of at least the midpoint of the presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) with regard to offenses other than manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute, and for a term of at least the midpoint of the presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) as modified pursuant to section 18-1.3-401 (10) with regard to manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute;

(III) One thousand grams or one kilogram or more of any material, compound, mixture, or preparation that contains a schedule I or schedule II controlled substance as listed in section 18-18-203 or 18-18-204 shall be sentenced to the department of corrections for a term greater than the maximum presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) with regard to offenses other than manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute, and for a term greater than the maximum presumptive range but not more than twice the maximum presumptive range provided for such offense in section 18-1.3-401 (1) (a) as modified pursuant to section 18-1.3-401 (10) with regard to manufacturing, dispensing, selling, distributing, or possessing with intent to manufacture, dispense, sell, or distribute.

(b) In addition to any other penalty imposed under this subsection (3), upon conviction, a person who violates this subsection (3) shall be fined not less than one thousand dollars but not more than five hundred thousand dollars. For offenses committed on or after July 1, 1985, the fine shall be in an amount within the presumptive range set out in section 18-1.3-401 (1) (a) (III).

(3.5) The felony offense of unlawfully manufacturing, dispensing, selling, distributing, or possessing with intent to unlawfully manufacture, dispense, sell, or distribute a controlled substance is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10).

(4) Repealed.

(5) When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, or ketamine, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, and the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, or ketamine involved equals or exceeds twenty-five grams, the defendant shall be sentenced pursuant to the mandatory sentencing requirements specified in subsection (3) of this section.

(6) Repealed.

(7) Notwithstanding the provisions of subsection (2) of this section, and except as otherwise provided in sub-subparagraph (B) of subparagraph (I) of paragraph (a) of subsection (2) or paragraph (a) of subsection (2.5) of this section, a person who violates subsection (1) of this section by selling, dispensing, or distributing a controlled substance other than marijuana or marijuana concentrate to a minor under eighteen years of age and who is at least eighteen years of age and at least two years older than the minor commits a class 3 felony and, unless a greater sentence is provided under any other statute, shall be sentenced to the department of corrections for a term of at least the minimum, but not more than twice the maximum, of the presumptive range provided for such offense in section 18-1.3-401 (1) (a) as modified pursuant to section 18-1.3-401 (10).

Source: L. 92: Entire article R&RE, p. 356, § 1, effective July 1. L. 93: (4) amended, p. 972, § 2, effective July 1. L. 94: (2)(a)(I) and (4)(a) amended, p. 1723, § 24, effective

July 1. **L. 97:** (2)(a)(I) and (3)(a) amended and (4) repealed, pp. 1542, 1543, §§ 9, 10, effective July 1. **L. 98:** (5) amended and (6) added, pp. 1443, 1435, §§ 30, 5, effective July 1. **L. 99:** (2.5) added and (5) amended, pp. 795, 796, §§ 6, 8, effective July 1. **L. 2000:** (6) amended, p. 1360, § 42, effective July 1, 2001. **L. 2002:** (1)(a) amended, p. 1270, § 1, effective July 1; (2)(a)(II), (2)(b)(II), (2)(c)(II), (2)(d)(II), (2.5)(a), and (6) amended, pp. 1579, 1583, §§ 4, 13, effective July 1; (3)(a)(I), (3)(a)(II), (3)(a)(III), and (3)(b) amended, p. 1518, § 212, effective October 1. **L. 2003:** IP(3)(a) amended, p. 1424, § 2, effective April 29; (2), (2.5), and IP(3)(a) amended and (2.1), (2.3), and (2.6) added, p. 2682, § 3, effective July 1. **L. 2004:** (3)(a) amended and (3.5) added, p. 636, § 12, effective August 4. **L. 2007:** (2)(b), (2.1), (2.3)(b), (2.5)(c), and (2.6) repealed, p. 1689, § 10, effective July 1. **L. 2009:** (6) repealed, (HB 09-1266), ch. 347, p. 1815, § 5, effective August 5. **L. 2010:** (1)(a), IP(2)(a), (2)(a)(I)(A), (2.3)(a), (2.5)(a), (2.5)(b), IP(3)(a), and (5) amended and (7) added, (HB 10-1352), ch. 259, pp. 1163, 1166, §§ 3, 5, effective August 11. **L. 2012:** (1) amended, (HB 12-1311), ch. 281, p. 1622, § 55, effective July 1.

Editor's note: (1) This section is similar to former § 18-18-105 as it existed prior to 1992.

(2) Amendments to the introductory portion to subsection (3)(a) by House Bill 03-1236 and Senate Bill 03-318 were harmonized.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (3)(a)(I), (3)(a)(II), (3)(a)(III), and (3)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative intent contained in the 2003 act amending subsections (2) and (2.5) and the introductory portion to subsection (3)(a) and enacting subsections (2.1), (2.3), and (2.6), see section 1 of chapter 424, Session Laws of Colorado 2003.

ANNOTATION

Annotator's note. Since § 18-18-405 is similar to § 18-18-105 as it existed prior to the repeal and reenactment of this article in 1992, relevant cases construing that provision have been included in the annotations to this section.

Provision of this section classifying conspiracy to distribute a schedule II controlled substance as a class three felony does not violate equal protection even though distribution of a schedule II controlled substance is itself a class three felony and § 18-2-206 generally classifies any conspiracy to commit a class three felony as a class four felony. The general assembly could reasonably determine that conspiracies to distribute drugs have greater social impact and consequences than other conspiracies and should carry harsher penalties. *People v. Thurman*, 948 P.2d 69 (Colo. App. 1997).

Defendant's felony conviction under this statute did not violate equal protection when compared with § 12-22-314, which punishes cocaine possession as a misdemeanor, in that practitioners are engaged in an occupation which regularly requires administration, dispensation, and possession of controlled substance. *People v. Unruh*, 713 P.2d 370 (Colo.), cert. denied, 479 U.S. 1171, 106 S. Ct. 2894, 90 L. Ed.2d 981 (Colo. 1986).

Equal protection is not violated when a defendant is charged for the same conduct under both this section and § 18-18-404(1)(a) because unlawful use and unlawful possession are distinct offenses that each require proof of at least

one fact that the other does not. *People v. District Ct. of 11th Jud. Dist.*, 964 P.2d 498 (Colo. 1998).

Prohibiting possession of controlled substances under this section does not violate equal protection when compared with § 18-18-104, which punishes use of the same controlled substances less harshly, because punishing possession more harshly than use is justified to control distribution of controlled substances. *People v. Cagle*, 751 P.2d 614 (Colo. 1988), appeal dismissed for want of a substantial federal question, 486 U.S. 1028, 108 S. Ct. 2009, 100 L. Ed 2d 597 (1988); *People v. Warren*, 55 P.3d 809 (Colo. App. 2002); *People v. Campbell*, 58 P.3d 1080 (Colo. App. 2002), aff'd on other grounds, 73 P.3d 11 (Colo. 2003).

This section and § 18-18-404 do not contain identical elements for purposes of an equal protection analysis. The general assembly's choice to classify possession as a graver offense than use is reasonably related to the general purposes of the criminal legislation. *Campbell v. People*, 73 P.3d 11 (Colo. 2003).

Conduct proscribed under this statute different than conduct proscribed by more general criminal attempt and conspiracy statutes; therefore, this statute's harsher penalty does not violate equal protection. *People v. Roy*, 723 P.2d 1345 (Colo. 1986).

Defendant's due process rights not violated when the amount of cocaine was included in the information and jury instructions. The instructions correctly charged the jury to deter-

mine the substantive offense: Possession with intent to sell the controlled substance. *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001) (decided under law in effect prior to 1997 amendment).

There is no double jeopardy violation when a conviction for possession of a controlled substance and a conviction for distribution of a controlled substance were each based on a different quantum of drugs. *People v. Davis*, 2012 COA 1, __ P.3d __.

The general assembly has chosen to make drug possession a crime requiring only a general intent: if one knowingly possesses the substance, he has violated the statute. *People v. Barry*, 888 P.2d 327 (Colo. App. 1994).

“Knowing” element. This section requires only that a person know that he or she possesses a controlled substance, and not that he or she know the precise controlled substance possessed. *People v. Perea*, 126 P.3d 241 (Colo. App. 2005).

“Knowingly” requirement does not apply to the amount of controlled substance. “Knowingly” appears only in subsection (1)(a) and applies only to the elements of the crime. The amount of controlled substance in subsection (2) operates as a sentence enhancer and does not contain a mens rea. *People v. Scheffer*, 224 P.3d 279 (Colo. App. 2009).

To sustain a conviction for possession of a controlled substance, the prosecution must show that defendant had knowledge that he or she was in possession of a narcotic drug and that he or she knowingly intended to possess the drug. This element may be established circumstantially: If the defendant has exclusive possession of the premises in which drugs are found, the jury may infer knowledge from the fact of possession. Similarly, knowledge can be inferred from the fact that defendant was the driver and sole occupant of a vehicle, irrespective of whether he or she was also the vehicle’s owner. *People v. Baca*, 109 P.3d 1005 (Colo. App. 2004).

A conviction for unlawful possession of a controlled substance may be predicated on circumstantial evidence. The controlled substance need not be found on the person of the defendant as long as it is found in a place under his or her dominion and control. Whenever a person is not in exclusive possession of the premises where the drugs are found, such an inference may not be drawn unless there are statements or circumstances tending to buttress the inference of possession. *People v. Atencio*, 140 P.3d 73 (Colo. App. 2005).

In this case, there are four pieces of circumstantial evidence that buttress the inference: (1) The defendant fled from officers; (2) the baggies were found in the place where defendant’s flight was interrupted; (3) the baggies were warmer than the night air; and (4) the baggies had not

been in the location of the yard prior to apprehension of the defendant. *People v. Atencio*, 140 P.3d 73 (Colo. App. 2005).

“Knowingly” element of this section is applied in *People v. Romero*, 689 P.2d 692 (Colo. App. 1984).

In light of all the indications suggesting a legislative intent to create a single, unitary offense, as well as the absence of evidence to the contrary, the acts enumerated in subsection (1)(a) all represent stages in the commission of one crime. *People v. Abiodun*, 111 P.3d 462 (Colo. 2005).

The statutory language of the Uniform Controlled Substance Act of 1992 does not convey an intention by the Colorado general assembly to limit its application solely to designer drugs. Thus, the argument that pseudophedrine is not a designer drug and therefore outside the jurisdiction of this act is invalid. *People v. Frantz*, 114 P.3d 34 (Colo. App. 2004).

Legislature did not intend to limit representations regarding the amount to those made during the transaction. The statute is intended to target offenders whose level of involvement is that of an “ounce dealer”, and all representations made by a defendant regarding the amount are indicative of an offender’s level of involvement in a transaction. *People v. Abiodun*, 87 P.3d 164 (Colo. App. 2003), *aff’d* on other grounds, 111 P.3d 462 (Colo. 2005).

Quantity not an element. Subsection (3)(a) does not create an additional element of quantity for the underlying substantive offense; rather, it defines circumstances that, if proven beyond a reasonable doubt, may require a sentence greater than the presumptive minimum contained in § 18-1.3-401 (1)(a). *Whitaker v. People*, 48 P.3d 555 (Colo. 2002); *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff’d* in part and *rev’d* in part on other grounds, 169 P.3d 662 (Colo. 2007).

Nevertheless, quantity still must be proved beyond a reasonable doubt. *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff’d* in part and *rev’d* in part on other grounds, 169 P.3d 662 (Colo. 2007).

The provision in subsection (2.3)(a) applies to possession of one gram or less of a compound, mixture, or preparation that contains any quantity of a controlled substance not to the weight of the controlled substance itself. *People v. Reeves*, 252 P.3d 1137 (Colo. App. 2010).

Where the quantity of a drug is so minute that it amounts to only a trace, there is no basis, from that fact alone, for any logical or reasonable inference that the defendant had knowledgeable possession. *People v. Theel*, 505 P.2d 964 (Colo. 1973).

When the amount of contraband is less than a usable quantity, other evidence may be

necessary to establish knowing possession. *People v. Theel*, 505 P.2d 964 (Colo. 1973); *People v. Ceja*, 904 P.2d 1308 (Colo. 1995); *Richardson v. People*, 25 P.3d 54 (Colo. 2001).

The absence of a usable quantity does not constitute evidence that the defendant did not know that he possessed the drug. Rather, evidence of a usable quantity alone is sufficient evidence of knowledge to permit the case to go to a jury. Where there is not evidence of a usable quantity, the People must present other evidence regarding the defendant's knowledge to justify the jury's consideration of the element. *Richardson v. People*, 25 P.3d 54 (Colo. 2001).

Evidence sufficient to uphold conviction. The jury could infer that defendant was at the scene to sell drugs based on the evidence that an informant had arranged a drug deal for \$300, defendant was one of two people at the location of the drug deal, and there was \$300 worth of drugs under defendant's car seat. *People v. Robinson*, 226 P.3d 1145 (Colo. App. 2009).

Whether defendant had been previously convicted of possession of a controlled substance was not required to be proven beyond a reasonable doubt since previous conviction related to sentence enhancement statutory provision, properly deemed so by the trial court. *People v. Whitley*, 998 P.2d 31 (Colo. App. 1999).

When sentence enhancement provision increases punishment based on a defendant's criminal history but requires no statutory burden of proof or hearing procedure applicable to determination of the prior criminal conduct, due process is satisfied as long as the defendant receives reasonable notice of the potential for an increased sentence and the prosecution meets its burden of proving the prior criminal conduct by a preponderance of the evidence. *People v. Whitley*, 998 P.2d 31 (Colo. App. 1999).

A positive field test result is not a prerequisite for a warrantless arrest of a defendant for a drug-related offense if sufficient other factors are present to support probable cause for such an arrest. *People v. Rayford*, 725 P.2d 1142 (Colo. 1986).

Presence at defendant's laboratory of phenylacetonitrile, which can be combined with other substances to produce a schedule II controlled substance, was insufficient to support conviction of attempted manufacture and possession of schedule II controlled substance against defendant. *People v. Noland*, 739 P.2d 906 (Colo. App. 1987).

Taking delivery of a controlled substance by purchase is inevitably incident to the criminal conduct of one who delivers it; therefore, the person who purchases the controlled substance is exempt from liability as a complicitor for the crime of distribution committed by the

person delivering the controlled substance. *People v. Hart*, 787 P.2d 186 (Colo. App. 1989).

Adoption of the rule that "transitory" handling of a drug may not constitute "possession" would provide no defense to defendant since jurisdictions with such rule have held that the rule is inapplicable in a case in which the defendant had flushed an alleged narcotic down the toilet when police raided the residence. *People v. Barry*, 888 P.2d 327 (Colo. App. 1994).

The prescription exception referenced in subsection (1)(a) of this section and appearing in § 18-18-302 (3)(c) is an affirmative defense, notwithstanding the fact that the general assembly did not label it as such. Thus, the trial court erred by refusing to instruct the jury that it was the prosecution's burden to disprove, beyond a reasonable doubt, evidence that defendant attempted to gain possession of the controlled substance pursuant to a lawful order of a practitioner. *People v. Whaley*, 159 P.3d 757 (Colo. App. 2006).

While subsection (1)(a) uses both the words "sale" and "distribute" to define methods by which the statute may be violated, those words no longer have distinct legal meaning or effect as they had prior to the enactment of the Colorado Controlled Substances Act. Both are words used to describe an exchange involving the unauthorized delivery of a controlled substance. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

Where the information charged the defendant with "sale and distribution" of a controlled substance, and although the verdict found that he "sold or distributed" such a substance, thereby charging and sustaining only one offense, the trial court properly instructed the jury as to the elements of the crime of sale or distribution of cocaine and as to the pertinent definition of distribution, its refusal to instruct on the "procuring agent" defense was not error. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

With the exception of simple possession, the general assembly intended the drug-related crimes proscribed in subsection (1), including possession with intent to distribute, to be punished as class 3 felonies. *People v. Pierre*, 30 P.3d 816 (Colo. App. 2001).

Crime of simple possession is lesser included offense of the crime of possession with the intent to distribute. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

While an individual may unlawfully possess a controlled substance without voluntarily using it, it is simply not feasible for an individual to voluntarily use a controlled substance without also possessing it. *People v. Villapando*, 984 P.2d 51 (Colo. 1999).

A type of possession is a lesser-included offense of the crime of manufacture. It is evident that one who manufactures a controlled substance also possesses the substance in the

course of manufacturing it; possession requires immediate and knowing control over the substance. *Patton v. People*, 35 P.3d 124 (Colo. 2001).

Possession is incidental and necessary to distribution, and convictions for possession must merge with the convictions for distribution. *People v. Abiodun*, 87 P.3d 164 (Colo. App. 2003), *aff'd* on other grounds, 111 P.3d 462 (Colo. 2005).

Manufacturing a controlled substance is a lesser included offense of child abuse based on manufacturing a controlled substance. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008) (decided under law in effect prior to 2006 amendment to § 18-6-401 (1)(c)).

No conflict between this section and § 18-1.3-401. In this section, the general assembly defined the elements of the crime of possession with intent to distribute and incorporated the presumptive range found in § 18-1.3-401 (1)(a). This section does not preclude the finding that an offense is an extraordinary risk crime and does not preclude the application of § 18-1.3-401 (10) to increase the presumptive range found in subsection (1)(a). *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo. App. 2005), *aff'd* in part and *rev'd* in part on other grounds, 169 P.3d 662 (Colo. 2007).

Conspiracy to distribute a controlled substance is not an extraordinary risk crime. A plain reading of the statute does not include inchoate crimes. *People v. Valenzuela*, 216 P.3d 588 (Colo. 2009).

Subsection (3)(a) requires that, when a defendant is convicted pursuant to subsection (3)(a) and another drug offense with a different sentencing regimen, the court shall apply the regimen producing the greater sentence. In this case, defendant was convicted as a special offender under this section and convicted of possession with intent to distribute under § 18-18-407. Under the regimen in § 18-18-407, the sentencing range was eight to 48 years, under the regimen for this section, the court was required to impose a sentence of at least 16 years and one day, so the court correctly sentenced the defendant pursuant to the regimen of this section. *People v. Montalvo-Lopez*, 215 P.3d 1139 (Colo. App. 2008).

For the sentence enhancer in subsection (3), a finding of the defendant's knowledge of the precise amount possessed is not required whether the person is a principal or a complicitor. Once a determination of guilt has been made, then if the amount is 28 grams or more, the court is required to sentence the defendant to a minimum presumptive sentence. *People v. Ramirez*, 997 P.2d 1200 (Colo. App. 1999), *aff'd*, 43 P.3d 611 (Colo. 2001).

Under subsection (3), defendant is not entitled to credit against sentence for time served in a supervised, nonresidential com-

munity corrections program rather than in incarceration in the department of corrections. *People v. Winters*, 789 P.2d 1120 (Colo. App. 1990).

Trial court exceeded its jurisdiction in applying sentencing alternative available under § 18-18-404 (3) to probationer who was convicted under this section. *People v. Hutchings*, 881 P.2d 466 (Colo. App. 1994).

A reviewing court's decision whether to address a challenge to multiple punishments by first comparing the acts for which punishment was separately imposed, or by first assessing whether the acts constitute separate offenses, is largely a matter of preference, based on the circumstances of each case and the extent to which one or the other analysis is likely to completely resolve the question. *People v. Abiodun*, 111 P.3d 462 (Colo. 2005).

As long as each legally distinct offense has been charged with sufficient specificity to distinguish it from other offenses and evidence at trial is sufficient to support convictions of each charge, general verdicts of guilt will be adequate to support multiple convictions. *People v. Abiodun*, 111 P.3d 462 (Colo. 2005).

Convictions for possession of a controlled substance and possession of manufacturing chemicals or supplies were based on factually distinct conduct and do not violate double jeopardy. *People v. Crespi*, 155 P.3d 570 (Colo. App. 2006).

This section as it existed prior to its amendment in 1987 mandated sentencing defendants convicted of cocaine offenses involving more than 28 grams to the department of corrections and did not permit sentencing of such defendants to community corrections. *People v. Winters*, 765 P.2d 1010 (Colo. 1988).

To obtain a conviction for possession of cocaine, subsection (1)(a) does not require the prosecution to prove that the defendant knowingly possessed a usable quantity of cocaine. Rather, the prosecution must prove that the defendant knowingly possessed some quantity of a controlled substance. *People v. Ceja*, 904 P.2d 1308 (Colo. 1995) (decided under former § 18-18-105 (1)(a) as it existed prior to the 1992 repeal and reenactment of the "Uniform Controlled Substances Act of 1992", article 18 of title 18); *People v. Richardson*, 8 P.3d 562 (Colo. App. 2000), *aff'd*, 25 P.3d 54 (Colo. 2001).

Subsection (3)(a) was not intended to create a separate offense for possessing more than 25 grams of a schedule I or schedule II controlled substance, but instead was merely intended to be a mandatory sentencing provision. Therefore, defendant's conviction and sentence for possession of 28 grams or more of cocaine must be vacated. *People v. Salcedo*, 985 P.2d 7 (Colo. App. 1998), *rev'd* on other

grounds, 999 P.2d 833 (Colo. 2000); *People v. Tafoya*, 985 P.2d 26 (Colo. App. 1999).

The language in the introductory paragraph of subsection (3)(a) stating "[e]xcept as otherwise provided in § 18-18-407 relating to special offenders" gives the court discretion in special offender cases to impose a minimum sentence less than the minimum sentence otherwise required by subsection (3)(a). *People v. Coleman*, 55 P.3d 817 (Colo. App. 2002).

The definition of "cocaine" in § 18-18-102 (4), by its plain language, includes a mixture that includes any amount of cocaine. Therefore, the amount of cocaine involved in a transaction is determined by the total amount of the mixture containing the cocaine, not just the amount of cocaine in the mixture. *People v. Esquivel-Alaniz*, 985 P.2d 22 (Colo. App. 1999).

Possession of 28 grams or more of cocaine is not a separate offense, but rather triggers a mandatory sentencing provision. *People v. Ramirez*, 1 P.3d 233 (Colo. App. 1999) (decided under law in effect prior to 1997 amendment).

Possession of more than 25 grams of cocaine is an element that increases the length of sentence, not a separate offense. However, where defendant's sentence reflected the appropriate application of this section to the sentence imposed for his conviction of other charges under this section, his sentence did not need to be changed. Only the mittimus need be changed to reflect two convictions rather than three. *People v. Esquivel-Alaniz*, 985 P.2d 22 (Colo. App. 1999).

The general assembly intended to punish as a class 3 felony possession with intent to distribute a schedule II controlled substance when the amount possessed does not trigger the enhanced sentencing provisions of subsection

(3). *People v. Perry*, 68 P.3d 472 (Colo. App. 2002).

Defendant's conviction and sentence for possession with intent to sell greater than 28 grams of a controlled substance must be vacated when defendant's conviction had already been enhanced by § 18-18-407; and may not be applied as a sentence enhancer to either defendant's possession conviction or his conspiracy conviction because the charge of which defendant had notice in the charging document only allowed for the 28 grams or more of a controlled substance to be applied to the possession with intent to sell conviction. *People v. Pineda-Eriza*, 49 P.3d 329 (Colo. App. 2001).

Sufficient evidence to support crime of possession with intent to distribute. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Repeat offender penalty enhancer does not have to be considered by the jury. The fact of a prior conviction does not have to be proved a jury. *People v. Gilmore*, 97 P.3d 123 (Colo. App. 2003).

Court required to apply both § 18-1.3-801 and this section. A second violation of this section for unlawful distribution and sale of a schedule II controlled substance increases the offense to a class 2 felony. If defendant has been convicted of three previous felonies, § 18-1.3-801 (2) requires court to sentence defendant to four times the maximum of the presumptive range for a class 2 felony. *People v. Cordova*, 199 P.3d 1 (Colo. App. 2007).

Applied in *People v. Donald*, 637 P.2d 392 (Colo. 1981); *People v. Nunez*, 658 P.2d 879 (Colo. 1983); *People v. Clements*, 661 P.2d 267 (Colo. 1983); *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983); *People v. Sprow*, 718 P.2d 524 (Colo. 1986); *People v. Holmberg*, 992 P.2d 705 (Colo. App. 1999).

18-18-406. Offenses relating to marijuana and marijuana concentrate. (1) Except as described in section 18-1-711, a person who possesses two ounces or less of marijuana commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars.

(2) Whenever a person is arrested or detained for a violation of subsection (1) of this section, the arresting or detaining officer shall prepare a written notice or summons for such person to appear in court. The written notice or summons shall contain the name and address of such arrested or detained person, the date, time, and place where such person shall appear, and a place for the signature of such person indicating the person's written promise to appear on the date and at the time and place indicated on the notice or summons. One copy of said notice or summons shall be given to the person arrested or detained, one copy shall be sent to the court where the arrested or detained person is to appear, and such other copies as may be required by the law enforcement agency employing the arresting or detaining officer shall be sent to the places designated by such law enforcement agency. The date specified in the notice or summons to appear shall be at least seven days after such arrest or detention unless the person arrested or detained demands an earlier hearing. The place specified in the notice or summons to appear shall be before a judge having jurisdiction of such class 2 petty offense within the county in which the class 2 petty offense charged is alleged to have been committed. The arrested or detained person, in order to secure release from arrest or detention, shall promise in writing to appear in court by signing

the notice or summons prepared by the arresting or detaining officer. Any person who does not honor such written promise to appear commits a class 3 misdemeanor.

(3) (a) (I) Except as described in section 18-1-711, a person who openly and publicly displays, consumes, or uses two ounces or less of marijuana commits a class 2 petty offense and, upon conviction thereof, shall be punished, at a minimum, by a fine of not less than one hundred dollars or, at a maximum, by a fine of not more than one hundred dollars and, notwithstanding the provisions of section 18-1.3-503, by fifteen days in the county jail.

(II) Open and public display, consumption, or use of more than two ounces of marijuana or any amount of marijuana concentrate shall be deemed possession thereof, and violations shall be punished as provided for in subsection (4) of this section.

(b) Except as is otherwise provided for in paragraph (a) of this subsection (3), consumption or use of marijuana or marijuana concentrate shall be deemed possession thereof, and violations shall be punished as provided for in subsections (1), (2), and (4) of this section.

(4) (a) Any person who possesses more than two ounces of marijuana but no more than six ounces of marijuana commits:

(I) A class 2 misdemeanor.

(II) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1166, § 6, effective August 11, 2010.)

(b) Any person who possesses more than six ounces of marijuana but no more than twelve ounces of marijuana or three ounces or less of marijuana concentrate commits:

(I) A class 1 misdemeanor.

(II) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1166, § 6, effective August 11, 2010.)

(c) Any person who possesses more than twelve ounces of marijuana or more than three ounces of marijuana concentrate commits a class 6 felony.

(5) Transferring or dispensing two ounces or less of marijuana from one person to another for no consideration is a class 2 petty offense and shall not be deemed dispensing or sale thereof.

(6) (a) (I) A person shall not knowingly process or manufacture any marijuana or marijuana concentrate or knowingly allow to be processed or manufactured on land owned, occupied, or controlled by him or her any marijuana or marijuana concentrate except as authorized pursuant to part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.

(II) Any person who violates the provisions of subparagraph (I) of this paragraph (a) commits:

(A) A class 4 felony; or

(B) A class 3 felony if the violation is committed subsequent to a prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation to which subparagraph (I) of this paragraph (a) applies or would apply if committed in this state.

(b) (I) Except as is otherwise provided in subsection (7) of this section and except as authorized by part 1 of article 42.5 of title 12, C.R.S., part 2 of article 80 of title 27, C.R.S., or part 2 or 3 of this article, it is unlawful for any person knowingly to dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate; or attempt, induce, attempt to induce, or conspire with one or more other persons, to dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate.

(II) As used in subparagraph (I) of this paragraph (b), "dispense" does not include labeling, as defined in section 12-42.5-102 (18), C.R.S.

(III) Any person who violates any of the provisions of subparagraph (I) of this paragraph (b) commits:

(A) A class 5 felony if the amount of marijuana is less than five pounds or the amount of marijuana concentrate is less than one pound;

(B) A class 4 felony if the amount of marijuana is at least five pounds but not more than one hundred pounds or the amount of marijuana concentrate is at least one pound but not more than one hundred pounds;

(C) A class 3 felony if the amount of marijuana or marijuana concentrate is more than one hundred pounds; or

(D) A class 3 felony if the violation is committed subsequent to any prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation to which subparagraph (I) of this paragraph (b) applies or would apply if committed in this state.

(7) (a) Any provision of this article to the contrary notwithstanding, any person eighteen years of age or older who sells, transfers, or dispenses more than two ounces but less than five pounds of marijuana for consideration to any person under eighteen years of age but at least fifteen years of age or less than one pound of marijuana concentrate, with or without consideration, to another person under eighteen years of age commits a class 4 felony and, in addition to the punishment prescribed in section 18-1.3-401, shall be punished by a fine of not more than five thousand dollars. For offenses committed on or after July 1, 1985, the fine shall be in an amount within the presumptive range set out in section 18-1.3-401 (1) (a) (III).

(b) The sale, transfer, or dispensing of five or more pounds of marijuana or one pound or more of marijuana concentrate to a person under eighteen years of age but at least fifteen years of age is a class 3 felony.

(c) Any person eighteen years of age or older who sells, transfers, or dispenses any amount of marijuana or marijuana concentrate, with or without consideration, to any person under fifteen years of age commits a class 3 felony, and the court shall be required to sentence the defendant to the department of corrections for a term that is at least the minimum in the presumptive range but no more than the maximum term authorized for the punishment of a class 3 felony. For offenses committed on or after July 1, 1985, the fine shall be in an amount within the presumptive range set out in section 18-1.3-401 (1) (a) (III).

(d) Any person commits a class 3 felony if the violation is committed subsequent to a prior conviction in this or any other state, the United States, or any territory subject to the jurisdiction of the United States of a violation to which paragraph (a) of this subsection (7) applies or would apply if convicted in this state, and, in addition to the punishment provided in section 18-1.3-401, the court shall sentence the defendant to the department of corrections for at least the minimum term in the presumptive range. For offenses committed on or after July 1, 1985, the fine shall be in an amount within the presumptive range set out in section 18-1.3-401 (1) (a) (III).

(7.5) Except for a person who lawfully cultivates medical marijuana pursuant to the authority granted in section 14 of article XVIII of the state constitution, a person shall not knowingly cultivate, grow, or produce a marijuana plant or knowingly allow a marijuana plant to be cultivated, grown, or produced on land that the person owns, occupies, or controls. A person who violates the provisions of this subsection (7.5) commits:

(a) A class 1 misdemeanor, if the offense involves six or fewer plants; or

(b) A class 5 felony if the offense involves more than six but fewer than thirty plants; or

(c) A class 4 felony if the offense involves thirty or more plants.

(8) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1166, § 6, effective August 11, 2010.)

(9) (Deleted by amendment, L. 2003, p. 1428, § 12, effective April 29, 2003.)

(10) The provisions of this section shall not apply to any person who possesses, uses, prescribes, dispenses, or administers any drug classified under group C guidelines of the national cancer institute, as amended, approved by the federal food and drug administration.

(11) The provisions of this section shall not apply to any person who possesses, uses, prescribes, dispenses, or administers dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product, pursuant to part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.

(12) Repealed.

Source: L. 92: Entire article R&RE, p. 358, § 1, effective July 1. L. 95: (10) amended, p. 206, § 21, effective April 13. L. 98: (12) added, p. 1436, § 6, effective July 1. L. 2000:

(12) amended, p. 1360, § 43, effective July 1, 2001. **L. 2002:** (4)(a)(II), (4)(b)(II), (7)(c), (8)(a)(II)(B), (8)(b)(III)(B), and (12) amended, pp. 1580, 1583, §§ 5, 14, effective July 1; (3)(a)(I), (7)(a), (7)(b), and (7)(c) amended, p. 1519, § 213, effective October 1. **L. 2003:** (7)(c) and (9) amended, p. 1428, § 12, effective April 29. **L. 2009:** (12) repealed, (HB 09-1266), ch. 347, p. 1815, § 6, effective August 5. **L. 2010:** (1), (3), (4), (5), (6), (7), and (8) amended and (7.5) added, (HB 10-1352), ch. 259, p. 1166, § 6, effective August 11. **L. 2011:** (3)(a)(II) and (3)(b) amended, (HB 11-1303), ch. 264, p. 1157, § 35, effective August 10. **L. 2012:** (1) and (3)(a)(I) amended, (SB 12-020), ch. 225, p. 988, § 6, effective May 29; (2) amended, (SB-175), ch. 208, p. 874, § 133, effective July 1; (6)(a)(I), (6)(b)(I), (6)(b)(II), and (11) amended, (HB-1311), ch. 281, p. 1622, § 56, effective July 1.

Editor's note: (1) This section is similar to former § 18-18-106 as it existed prior to 1992.

(2) Amendments to subsection (7)(c) by House Bill 02-1237 and House Bill 02-1046 were harmonized.

(3) Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (3)(a)(I), (7)(a), (7)(b), and (7)(c), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in the 2012 act amending subsections (1) and (3)(a)(I), see section 1 of chapter 225, Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-18-406 is similar to § 18-18-106 as it existed prior to the repeal and reenactment of this article in 1992, relevant cases construing that provision have been included in the annotations to this section.

Double jeopardy. The elements of the offense of possession of eight or more ounces of marihuana and the offense of cultivation of marihuana are not identical; therefore, conviction of both offenses does not violate constitutional protections against double jeopardy. *People v. Benson*, 124 P.3d 851 (Colo. App. 2005).

Possession of hashish constitutionally treated differently. Because hashish is readily distinguishable from and potentially more intoxicating than marijuana, the general assembly may constitutionally treat possession of those substances differently, subsection (1) and (4)(b)(I), even though hashish falls into the statutory definition of marijuana in § 12-22-303(17). *People v. Velasquez*, 666 P.2d 567 (Colo. 1983), appeal dismissed for want of substantial federal question, 465 U.S. 1001, 104 S. Ct. 989, 79 L. Ed.2d 223 (1984).

As is possession of hash oil. Since the active ingredient in hash oil is THC and occurs in greater concentrations in hash oil than in hashish, statute providing for more severe punishment for possession of hashish and hash oil is based upon reasonable classification and does not deny equal protection. *People v. Siwierka*, 683 P.2d 356 (Colo. 1984).

Penalty scheme does not violate equal protection even though lesser penalties for criminal conspiracy are established under § 18-2-206. *People v. Finnessey*, 747 P.2d 673 (Colo. 1987).

The phrase "intent to distribute" is not unconstitutionally vague. The phrase is a term that a person of ordinary intelligence can understand. The quantity required to permit the fact finder to infer that the possessor intended to distribute a controlled substance is evidentiary in nature and necessarily depends upon all the facts and circumstances of the case. *People v. Clendenin*, 232 P.3d 210 (Colo. App. 2009) (decided prior to 2010 amendment).

The distinction between marihuana and marihuana concentrate as set forth in §§ 12-22-303(17) and 12-22-303(18) complies with both the equal protection and due process requirements of the Colorado and United States constitutions. *People v. Rickstrew*, 712 P.2d 1008 (Colo. 1986).

Subsection (5) does not state an element of felony distribution and the language used demonstrates a deliberate choice by the general assembly to differentiate the crime of possession from the crime of dispensing or sale under subsection (8)(b)(I) and the circumstances giving rise to the crime of possession. *People v. Torres*, 812 P.2d 672 (Colo. App. 1990) (decided prior to 2010 amendment).

The absence of the phrase "[a]ny provision of this article to the contrary notwithstanding" in subsection (7)(b) does not indicate that any statutory provisions of article 18 of title 18 that are "to the contrary" of that subsection are not overridden by it, nor does the absence of this phrase require a court to instruct a jury in accordance with subsection (5). *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

The 1982 addition of subsection (8)(b)(I) makes clear that subsections (8)(b)(I) and (5)

are independent of one another, define distinctly different crimes, and effectuate different legislative goals. *People v. Torres*, 812 P.2d 672 (Colo. App. 1990).

Multiple drug convictions sustainable if factually distinct. Both of the defendant's marihuana convictions are sustainable because the facts suggest one package of marihuana was intended for personal use and the other package was intended for distribution. *People v. Valencia*, 169 P.3d 212 (Colo. App. 2007).

There was no basis for a jury to have acquitted defendant on felony distribution charge under subsection (8)(b)(I) and at the same time find him guilty of possession under subsection (5) because the transactions involved consideration and the fact that defendant's motive was a desire to develop a friendship and sexual relationship with the detective rather than profit did not change the character of the transaction. *People v. Torres*, 812 P.2d 672 (Colo. App. 1990).

Possession of eight ounces of marijuana or more is a lesser included offense of possession with the intent to distribute marijuana. Each element of the possession offense is included in the offense of possession with intent to distribute except the quantity; however, the quantity is a sentence enhancer, not an essential element of the offense. *People v. Garcia*, 251 P.3d 1152 (Colo. App. 2010).

Possession of marijuana is not a lesser included offense of transferring marijuana under subsection (7)(b) or contributing to the delinquency of a minor under § 18-6-701. *People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

Possession not lesser included offense to crime of introducing contraband. Because proof of possession is not an essential element to the crime of introducing contraband (§ 18-8-203), the crime of possession of cannabis cannot be a lesser included offense thereof. *People v. Etchells*, 646 P.2d 950 (Colo. App. 1982).

Probable cause to believe defendant committed the crime of possession of contraband under § 18-8-204.1 where defendant tested positive for marijuana and was in the custody of the department of corrections on the date of the

offense and evidence of use assumes possession. *People v. Smith*, 984 P.2d 50 (Colo. 1999).

A person may not be subject to a custodial arrest for violating this section. The plain meaning of this section is that a peace officer may issue a summons and complaint and may subject a person only to a non-custodial arrest, under which circumstances a peace officer may conduct only a pat-down search for weapons and search for instrumentalities or evidence of the specific crime for which the officer had probable cause to make an arrest. *People v. Bland*, 884 P.2d 312 (Colo. 1994).

"Arrest and detention", as used in subsection (2), are synonymous terms; both refer to "noncustodial" arrests. *People v. Bland*, 884 P.2d 312 (Colo. 1994).

Even though a person may not be subject to a custodial arrest for possessing one ounce or less of marihuana in violation of this section, the non-custodial arrest of such a person may permit not only a search for weapons, but also an extensive search for the instrumentalities of the crime. *People v. Bland*, 884 P.2d 312 (Colo. 1994).

Lawful possession of marihuana under subsection (10) is an affirmative defense to charges of unlawful possession with intent to distribute marihuana and unlawful possession of eight or more ounces of marihuana. The provision provides a legal justification to what would otherwise be criminally culpable behavior. *People v. Reed*, 932 P.2d 842 (Colo. App. 1996).

Question of the validity of § 42-2-124 was ripe for determination where court stayed its surrender of defendant's license pending appeal after convicting defendant of drug use under this section. *People v. Smith*, 944 P.2d 639 (Colo. App. 1997).

Subsection (10) does not preclude a finding of probable cause to conduct a search based upon the smell of burning marihuana. *People v. Mendez*, 948 P.2d 105 (Colo. App. 1997), aff'd on other grounds, 986 P.2d 275 (Colo. 1999).

Applied in *People v. Root*, 650 P.2d 562 (Colo. 1982); *Corr v. District Court*, 661 P.2d 668 (Colo. 1983); *People v. Hazelhurst*, 662 P.2d 1081 (Colo. 1983).

18-18-406.1. Unlawful use or possession of synthetic cannabinoids or salvia divinorum. (1) On and after January 1, 2012, it is unlawful for any person to use or possess any amount of any synthetic cannabinoid or salvia divinorum.

(2) A person who violates any provision of subsection (1) of this section commits a class 2 misdemeanor.

Source: L. 2011: Entire section added, (SB 11-134), ch. 261, p. 1139, § 2, effective July 1.

18-18-406.2. Unlawful distribution, manufacturing, dispensing, sale, or cultivation of synthetic cannabinoids or salvia divinorum. (1) It is unlawful for any person knowingly to:

(a) Manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell, or distribute, any amount of any synthetic cannabinoid or salvia divinorum;

(b) Induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute, any amount of any synthetic cannabinoid or salvia divinorum; or

(c) Cultivate salvia divinorum with intent to dispense, sell, or distribute any amount of the salvia divinorum.

(2) A person who violates any provision of subsection (1) of this section commits a class 5 felony.

(3) Notwithstanding the provisions of subsection (2) of this section, a person who violates any provision of subsection (1) of this section by dispensing, selling, or distributing any amount of any synthetic cannabinoid or salvia divinorum commits a class 4 felony if the person:

(a) Dispenses, sells, or distributes the synthetic cannabinoid or salvia divinorum to a minor who is less than eighteen years of age; and

(b) Is at least eighteen years of age and at least two years older than said minor.

(4) As used in this section, "dispense" does not include labeling, as defined in section 12-42.5-102 (18), C.R.S.

Source: L. 2011: Entire section added, (SB 11-134), ch. 261, p. 1139, § 2, effective July 1. **L. 2012:** (4) amended, (HB 12-1311), ch. 281, p. 1623, § 57, effective July 1.

18-18-406.3. Medical use of marijuana by persons diagnosed with debilitating medical conditions - unlawful acts - penalty - medical marijuana program cash fund.

(1) The general assembly hereby finds and declares that:

(a) Section 14 of article XVIII of the state constitution was approved by the registered electors of this state at the 2000 general election;

(b) Section 14 of article XVIII of the state constitution creates limited exceptions to the criminal laws of this state for patients, primary care givers, and physicians concerning the medical use of marijuana by a patient to alleviate an appropriately diagnosed debilitating medical condition;

(c) Section 14 of article XVIII of the state constitution requires a state health agency designated by the governor to establish and maintain a confidential registry of patients authorized to engage in the medical use of marijuana;

(d) The governor, in accordance with paragraph (h) of subsection (1) of section 14 of article XVIII of the state constitution, has designated the department of public health and environment, referred to in this section as the department, to be the state health agency responsible for the administration of the medical marijuana program;

(e) Section 14 of article XVIII of the state constitution requires the department to process the applications of patients who wish to qualify for and be placed on the confidential registry for the medical use of marijuana, and to issue registry identification cards to patients who qualify for placement on the registry;

(f) Section 14 of article XVIII of the state constitution sets forth the lawful limits on the medical use of marijuana;

(g) Section 14 of article XVIII of the state constitution requires the general assembly to determine and enact criminal penalties for specific acts described in the constitutional provision;

(h) In interpreting the provisions of section 14 of article XVIII of the state constitution, the general assembly has applied the definitions contained in subsection (1) of the constitutional provision and has attempted to give the remaining words of the constitutional provision their plain meaning;

(i) This section reflects the considered judgment of the general assembly regarding the meaning and implementation of the provisions of section 14 of article XVIII of the state constitution.

(2) (a) Any person who fraudulently represents a medical condition to a physician, the department, or a state or local law enforcement official for the purpose of falsely obtaining a marijuana registry identification card from the department, or for the purpose of avoiding arrest and prosecution for a marijuana-related offense, commits a class 1 misdemeanor.

(b) If an officer or employee of the department receives information that causes such officer or employee reasonably to believe that fraudulent representation, as described in paragraph (a) of this subsection (2), has occurred, such officer or employee shall report the information to either the district attorney of the county in which the applicant for the marijuana registry identification card resides, or to the attorney general.

(3) The fraudulent use or theft of any person's marijuana registry identification card, including, but not limited to, any card that is required to be returned to the department pursuant to section 14 of article XVIII of the state constitution, is a class 1 misdemeanor.

(4) The fraudulent production or counterfeiting of, or tampering with, one or more marijuana registry identification cards is a class 1 misdemeanor.

(5) Any person including, but not limited to, any officer, employee, or agent of the department, or any officer, employee, or agent of any state or local law enforcement agency, who releases or makes public any confidential record or any confidential information contained in any such record that is provided to or by the marijuana registry of the department without the written authorization of the marijuana registry patient commits a class 1 misdemeanor.

(6) The use, possession, manufacturing, dispensing, selling, or distribution of a synthetic cannabinoid, as defined in section 18-18-102 (34.5), shall not be considered an exception to the criminal laws of this state for the purposes of this section or of section 14 of article XVIII of the state constitution.

(7) An owner, officer, or employee of a business licensed pursuant to article 43.3 of title 12, C.R.S., or an employee of the state medical marijuana licensing authority, a local medical marijuana licensing authority, or the department of public health and environment, who releases or makes public a patient's medical record or any confidential information contained in any such record that is provided to or by the business licensed pursuant to article 43.3 of title 12, C.R.S., without the written authorization of the patient commits a class 1 misdemeanor; except that the owner, officer, or employee shall release the records or information upon request by the state or local medical marijuana licensing authority. The records or information produced for review by the state or local licensing authority shall not become public records by virtue of the disclosure and may be used only for a purpose authorized by article 43.3 of title 12, C.R.S., or for another state or local law enforcement purpose. The records or information shall constitute medical data as defined by section 24-72-204 (3) (I), C.R.S. The state or local medical marijuana licensing authority may disclose any records or information so obtained only to those persons directly involved with any investigation or proceeding authorized by article 43.3 of title 12, C.R.S., or for any state or local law enforcement purpose.

Source: L. 2001: Entire section added, p. 471, § 1, effective April 27. L. 2011: (6) added, (SB 11-134), ch. 261, p. 1140, § 3, effective July 1; (7) added, (HB 11-1043), ch. 266, p. 1215, § 28, effective July 1.

Editor's note: Subsection (7) was numbered as subsection (6) in House Bill 11-1043 but was renumbered on revision for ease of location.

ANNOTATION

Primary care-giver must do more than merely supply a patient with marijuana for medical use in order to meet the constitutional requirement of having a significant responsibility for managing the well-being of a patient who has a debilitating medical condition. *People v. Clendenin*, 232 P.3d 210 (Colo. App. 2009).

Primary care-giver affirmative defense does not apply where the provision of marijuana is itself the substance of the relationship. *People v. Clendenin*, 232 P.3d 210 (Colo. App. 2009).

18-18-406.5. Unlawful use of marijuana in a detention facility. (1) Any person confined in any detention facility in this state who possesses or uses up to eight ounces of marijuana commits a class 6 felony; except that, if the person commits a second or subsequent violation where both the initial and subsequent violations involved more than one ounce of marijuana, the person commits a class 5 felony.

(2) Any person confined in any detention facility in this state who possesses or uses eight ounces or more of marijuana shall be subject to the provisions of section 18-18-406 (4) (b).

(3) For purposes of this section, "detention facility" means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

Source: L. 99: Entire section added, p. 798, § 16, effective July 1. L. 2010: (1) and (2) amended, (HB 10-1352), ch. 259, p. 1174, § 19, effective August 11.

ANNOTATION

This section does not violate the equal protection clause of the Colorado or U.S. Constitution by failing to provide the treatment option available under § 18-18-404. This section presents a classification that is neither arbitrary nor irrational. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

By intentionally omitting marihuana from the treatment option available under § 18-18-404, the legislature explicitly chose to offer the treatment option only to those addicted to other substances. Such a classification has a rational basis based upon real in fact differences between the substances. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

This section is directly related to the legislature's purpose of punishing those who use marihuana in a detention facility. Section 18-

18-404 is clear and unambiguous in exempting this section from its provisions, including the treatment option. The legislature explicitly intended that marihuana users not be given the treatment option provided for in § 18-18-404. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

Defendant's argument rests on the misleading presumption that, because use of a schedule I or II controlled substance is a more serious crime than the use of marihuana in a detention facility, any opportunity given those charged with the more serious crime must also be given to those charged with the less serious crime. Such symmetry of punishment, however, is not required by the constitution where valid classifications, based on varieties of evils, exist. *People v. Goodale*, 78 P.3d 1103 (Colo. 2003).

18-18-406.7. Unlawful possession of cathinones. (1) It is unlawful for any person to possess any amount of any cathinones.

(2) A person who violates any provision of subsection (1) of this section commits a class 1 misdemeanor.

Source: L. 2012: Entire section added, (HB 12-1310), ch. 268, p. 1405, § 31, effective June 7.

18-18-406.8. Unlawful distribution, manufacturing, dispensing, or sale of cathinones. (1) It is unlawful for any person to knowingly:

(a) Distribute, manufacture, dispense, or sell, or to possess with intent to distribute, manufacture, dispense, or sell, any amount of any cathinones; or

(b) Induce, attempt to induce, or conspire with one or more other persons to distribute, manufacture, dispense, or sell, or possess with intent to distribute, manufacture, dispense, or sell, any amount of any cathinones.

(2) A person who violates subsection (1) of this section commits a class 3 felony and shall be sentenced as provided in section 18-1.3-401; except that, unless a greater sentence is provided under any other statute, the person shall be sentenced to the department of corrections for a term of at least the minimum, but not more than twice the maximum, of the presumptive range provided for the offense in section 18-1.3-401 (1) (a) as modified pursuant to section 18-1.3-401 (10), if the person is at least eighteen years of age and:

(a) Distributed, dispensed, or sold; or possessed with intent to distribute, dispense, or sell; any amount of any cathinones to a minor under eighteen years of age who is at least two years younger than said person; or

(b) Induced, attempted to induce, or conspired with one or more other persons to distribute, dispense, or sell any amount of any cathinones to a minor under eighteen years of age who is at least two years younger than said person.

Source: L. 2012: Entire section added, (HB 12-1310), ch. 268, p. 1406, § 31, effective June 7.

18-18-407. Special offender. (1) Upon a felony conviction under this part 4, the presence of any one or more of the following extraordinary aggravating circumstances designating the defendant a special offender shall require the court to sentence the defendant to the department of corrections for a term of at least the minimum term of years within the presumptive range for a class 2 felony but not more than twice the maximum term of years within the presumptive range for a class 2 felony:

(a) The defendant was previously convicted in courts of the United States or a state or any political subdivision thereof for two or more offenses involving the manufacture, sale, dispensing, or distribution of controlled substances, which offenses did not arise from the same criminal episode or course of events and differ from the pending felony and which were punishable by imprisonment in excess of one year;

(b) The defendant committed an offense as part of a pattern of manufacturing, sale, dispensing, or distributing controlled substances, which offense is a felony under applicable laws of Colorado, which constituted a substantial source of that person's income, and in which that person manifested special skill or expertise;

(c) The defendant committed a felony which was, or was in furtherance of, a conspiracy with one or more persons to engage in a pattern of manufacturing, sale, dispensing, or distributing a controlled substance, which offense is a felony under applicable laws of Colorado, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or manufacture, sale, dispensing, or distributing, or give or receive a bribe, or use force in connection with such manufacture, sale, dispensing, or distribution;

(d) The defendant unlawfully introduced, distributed, or imported into the state of Colorado more than four grams of any schedule I or II controlled substance listed in part 2 of this article or more than two grams of methamphetamine;

(e) The defendant unlawfully sold, dispensed, distributed, possessed, or imported into the state of Colorado a quantity in excess of one hundred pounds of marijuana or marijuana concentrate;

(f) (I) The defendant used, displayed, or possessed on his or her person or within his or her immediate reach, a deadly weapon as defined in section 18-1-901 (3) (e) at the time of the commission of a violation of this part 4; or

(II) The defendant or a confederate of the defendant possessed a firearm, as defined in section 18-1-901 (3) (h), to which the defendant or confederate had access in a manner that posed a risk to others or in a vehicle the defendant was occupying during the commission of a violation of this part 4;

(g) The defendant solicited, induced, encouraged, intimidated, employed, hired, or procured a child, as defined in section 19-1-103 (18), C.R.S., to act as his agent to assist in the unlawful distribution, manufacturing, dispensing, sale, or possession for the purposes of sale of any controlled substance in violation of section 18-18-405. It shall not be a defense under this paragraph (g) that the defendant did not know the age of any such individual.

(h) (I) The defendant engaged in a continuing criminal enterprise by violating any provision of this part 4 which is a felony; and

(II) The violation is a part of a continuing series of two or more violations of this part 4 on separate occasions:

(A) Which are undertaken by that person in concert with five or more other persons with respect to whom that person occupies a position of organizer, supervisor, or any other position of management; and

(B) From which that person obtained substantial income or resources.

(2) (a) A defendant shall be a special offender if the defendant is convicted of selling, distributing, possessing with intent to distribute, manufacturing, or attempting to manufacture any controlled substance in violation of section 18-18-405 either within or upon the grounds of any public or private elementary, middle, junior high, or high school, vocational school, or public housing development, or within one thousand feet of the perimeter of any such school or public housing development grounds on any street, alley, parkway, sidewalk, public park, playground, or other area or premises that is accessible to the public, or within any private dwelling that is accessible to the public for the purpose of the sale, distribution, use, exchange, manufacture, or attempted manufacture of controlled substances in violation of this article, or in any school vehicle, as defined in section 42-1-102 (88.5), C.R.S., while such school vehicle is engaged in the transportation of persons who are students. The court is required in addition to imposing the sentence to imprisonment in the department of corrections required by subsection (1) of this section, to fine the defendant without suspension at least twice the minimum fine provided for in section 18-1.3-401 (1) (a) (III) if the defendant's offense is a felony or in section 18-1.3-501 (1) if the defendant's offense is a misdemeanor.

(b) The department of education may cooperate with local boards of education and the officials of public housing developments, and make recommendations regarding the uniform implementation and furnishing of notice of the provisions of this subsection (2). Such recommendations may include, but shall not be limited to, the uniform use of signs and other methods of notification which may be used to implement this subsection (2).

(c) For the purposes of this section, the term "public housing development" means any low-income housing project of any state, county, municipal, or other governmental entity or public body owned and operated by a public housing authority that has an on-site manager. "Public housing development" shall not include single-family dispersed housing or small or large clusters of dispersed housing having no on-site manager.

(3) (a) In support of the findings under paragraph (b) of subsection (1) of this section, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such manufacture, sale, dispensing, or distribution of controlled substances.

(b) For the purposes of paragraph (b) of subsection (1) of this section only, a "substantial source of that person's income" means a source of income which, for any period of one year or more, exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, or which, for the same period, exceeds fifty percent of the defendant's declared adjusted gross income under Colorado or any other state law or under federal law, whichever adjusted gross income is less.

(c) For the purposes of paragraph (b) of subsection (1) of this section, "special skill or expertise" in such manufacture, sale, dispensing, or distribution includes any unusual knowledge, judgment, or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, directing, managing, supervising, executing, or concealing of such manufacture, sale, dispensing, or distributing, the enlistment of accomplices in such manufacture, sale, dispensing, or distribution, the escape from detection or apprehension for such manufacture, sale, dispensing, or distribution, or the disposition of the fruits or proceeds of such manufacture, sale, dispensing, or distribution.

(d) For the purposes of paragraphs (b) and (c) of subsection (1) of this section, such manufacture, sale, dispensing, or distribution forms a pattern if it embraces criminal acts which have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(4) Nothing in this section shall preclude the court from considering aggravating circumstances other than those stated in subsection (1) of this section as a basis for sentencing the defendant to a term greater than the presumptive range for the felony.

(5) If a defendant who is subject to the provisions of this section is subject to a greater sentence pursuant to the provisions of another statute, the court shall impose sentence pursuant to that statute. The prosecution shall not be forced to elect under which statute to proceed.

Source: **L. 92:** Entire article R&RE, p. 361, § 1, effective July 1. **L. 93:** (2) amended, p. 972, § 3, effective July 1. **L. 94:** (2)(a) amended, p. 1723, § 25, effective July 1; (2)(a) amended, p. 2553, § 45, effective January 1, 1995. **L. 97:** IP(1), (2)(a), and (2)(c) amended, pp. 1542, 1544, §§ 8, 12, effective July 1. **L. 2000:** (1)(d) and (2)(a) amended, pp. 709, 708, §§ 42, 40, effective July 1. **L. 2002:** (2)(a) amended, p. 1581, § 6, effective July 1; (2)(a) amended, p. 1520, § 214, effective October 1. **L. 2003:** IP(1), (2)(a), and (5) amended, p. 1423, § 1, effective April 29. **L. 2010:** (2)(a) amended, (HB 10-1232), ch. 163, p. 568, § 2, effective April 28; (1)(d), (1)(e), and (1)(f) amended, (HB 10-1352), ch. 259, p. 1170, § 7, effective August 11.

Editor's note: (1) This section is similar to former § 18-18-107 as it existed prior to 1992.

(2) Amendments to subsection (2)(a) in House Bill 94-1126 and Senate Bill 94-1 were harmonized, effective January 1, 1995. Amendments to subsection (2)(a) by House Bill 02-1237 and House Bill 02-1046 were harmonized.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (2)(a), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Law reviews. For article, "Felony Sentencing in Colorado", see 18 Colo. Law. 1689 (1989).

Attorney's note. Since § 18-18-407 is similar to § 18-18-107 as it existed prior to the repeal and reenactment of this article in 1992, relevant cases construing that provision have been included in the annotations to this section.

Subsection (1)(d) is not unconstitutionally vague or overbroad. There is no constitutionally protected right of expression in introducing, distributing, or importing a controlled substance into Colorado. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

The words "introduced," "distributed," and "imported" have meanings commonly understood by persons of reasonable intelligence and, therefore, the trial court did not need to provide definitional instructions for these terms. *People v. Whitaker*, 32 P.3d 511 (Colo. App. 2000), *aff'd* on other grounds, 48 P.3d 555 (Colo. 2002).

Subsection (1)(d) does not deny defendants' equal protection rights. The special offender statute does not proscribe precisely the same unlawful act as the substantive statute, and any defendant who is convicted of a controlled substance offense, and as part of that criminal act also unlawfully introduced, distributed, or imported the controlled substance into Colorado is subject to the special offender statute. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

Subsection (1)(f) is not unconstitutionally vague or overbroad. Subjecting a narcotics offender to special offender sentencing because of the offender's possession of a deadly weapon is reasonably related to the government's legitimate interest in preventing crime, and constitutes a valid exercise of the state's police power and does not violate the right to bear arms in self-defense as protected in the Colorado con-

stitution. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Evidence showing that defendant had a loaded 9 millimeter handgun in a bedroom in close proximity to the drugs and to where the defendant was arrested established sufficient nexus between the deadly weapon and the offense. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Term "deadly weapon" is not vague; it was not necessary for the prosecution to show that the defendant intended to use the handgun found in his bedroom as a deadly weapon. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Ordinary and commonplace definitions of the terms "used," "displayed," "possessed," or "available for use" provide fair notice of the conduct prohibited by subsection (1)(f) of this section. *People v. Atencio*, 878 P.2d 147 (Colo. App. 1994).

Proximity of revolver to methamphetamine sufficient to establish its "availability for use" under the statute even if its trigger mechanism was secured by a padlock. *People v. Martinez*, 165 P.3d 907 (Colo. App. 2007).

Provisions of this section do not define substantive offenses, but rather merely represent sentence enhancement provisions which limit the sentencing discretion of the district court. Therefore the defendant is not entitled to a preliminary hearing. *Felts v. County Court*, 725 P.2d 61 (Colo. App. 1986); *People v. Vega*, 870 P.2d 549 (Colo. App. 1993) (decided under former § 18-18-107).

Since subsection (1) is a sentence-enhancing provision and does not create a separate criminal offense, it was not necessary for the trial court to instruct the jury as to a culpable mental state and it was sufficient for the jury to be given a special interrogatory. *People v. Whitaker*, 32 P.3d 511 (Colo. App. 2000), *aff'd*, 48 P.3d 555 (Colo.

2002); *People v. Hopper*, __ P.3d __ (Colo. App. 2011).

Defendant should not receive a separate sentence on the special offender count because section does not create a substantive offense. *People v. Rios*, 43 P.3d 726 (Colo. App. 2001).

Evidence that defendant brought a controlled substance from a foreign or external source into the state is sufficient evidence to convict defendant under subsection (1)(d). Because the statute uses the disjunctive "or", defendant need not have intended both the importation and distribution of the substance in the state. *People v. Montalvo-Lopez*, 215 P.3d 1139 (Colo. App. 2008).

Prosecution was not required to prove that defendant "knew" the quantity of drugs he possessed or that defendant "knew" that he imported a controlled substance into Colorado to increase a defendant's sentence pursuant to this section. *Whitaker v. People*, 48 P.3d 555 (Colo. 2002).

When defendant convicted and sentenced on a separate charge as a special offender as a substantive offense in addition to the conviction and sentence upon the enhanced offenses, the conviction and sentence on the special offender charge must be vacated. *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001).

The enhancement provision of §18-18-405 (3), as it previously existed, does not apply if an accused was found to be a special offender; defendant's sentence on a count cannot be enhanced twice. *People v. Martinez*, 36 P.3d 201 (Colo. App. 2001).

Defendant's drug conviction, as both a special drug offender under prior version of subsection (1) and as an habitual criminal, should have resulted in a prison sentence determined by the additional aggravating circumstances of this section. By using a formula that increases the sentence length without reclassifying the offense for which it is imposed, the legislature requires the application of two different sentence enhancing provisions when the special offender is also an habitual criminal, independently mandating sentence enhancement for different aggravating circumstances. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

Neither this section nor the habitual criminal statute purports to limit the effect of additional aggravation or to place an upper limit on the ultimate sentence for a defendant to whom its provisions apply. *Martinez v. People*, 69 P.3d 1029 (Colo. 2003).

The plain language of the 1997 amendment to the introductory paragraph of subsection (1) shows that the general assembly gave sentencing courts discretion to impose a lower minimum sentence under this section than would in some circumstances be the minimum sentence under § 18-18-405 (3)(a). *People v. Coleman*, 55 P.3d 817 (Colo. App. 2002).

The correct interpretation of subsection (2)(a) is that it requires a showing that the defendant intended to distribute the controlled substance to a person who was within, or on the grounds of, the school or public housing development. *People v. Trusty*, 53 P.3d 668 (Colo. App. 2001).

Assertion of an affirmative defense to a charge brought pursuant to this section is inappropriate. *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993).

Bifurcated trial on special offender count not required. This section is not analogous to the habitual criminal statute but is instead analogous to the crime of violence sentence enhancement statute. Therefore a separate charge, a special interrogatory to the jury, and an instruction to the jury that the beyond a reasonable doubt burden of proof applies to the special offender count are required, but a bifurcated trial is not required in order to adequately accord the defendant procedural and constitutional safeguards. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

Nor is defendant entitled to a bifurcated trial under this section. *People v. Vazquez*, 768 P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. 1990).

This section does not require proof of a mental state. *People v. Vazquez*, 768 P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. 1990); *People v. Pineda-Eriza*, 49 P.3d 329 (Colo. App. 2001); *People v. Hopper*, __ P.3d __ (Colo. App. 2011).

Knowledge of the amount of illegal drugs involved is not required even if the defendant is convicted as a complicitor. Complicitor is held to the same level of culpability as a principal. Defendant convicted as a complicitor is subject to the enhanced penalties under the provisions of this section. *People v. Ramirez*, 997 P.2d 1200 (Colo. App. 1999), aff'd, 43 P.3d 611 (Colo. 2001).

Section as applied to defendant convicted as a complicitor does not violate federal or state constitutional due process rights. *People v. Ramirez*, 997 P.2d 1200 (Colo. App. 1999), aff'd, 43 P.3d 611 (Colo. 2001).

Imposition of a 20-year sentence was not an abuse of discretion where underlying offense was possession of four pounds of cocaine with intent to distribute and defendant had violated terms of probation imposed in previous drug-related murder case. *People v. Garcia*, 752 P.2d 570 (Colo. 1988).

Trial court's conclusion that the minimum mandatory enhanced sentence defendant could receive for possession with intent to sell a controlled substance was 24 years and one day was not abuse of discretion, statute was not ambiguous, and rule of lenity does not apply. *People v. Pineda-Eriza*, 49 P.3d 329 (Colo. App. 2001).

This statute constitutes a sentence enhancement provision which limits the trial court's sentencing discretion. *People v. Delgado*, 832 P.2d 971 (Colo. App. 1991).

Section does not permit a mandatory parole sentence in excess of that authorized for the underlying class of felony. The statute is a sentence enhancer that is not a reclassification of the underlying substantive offense. *People v. Butler*, 224 P.3d 380 (Colo. App. 2009); *People v. Garcia*, 251 P.3d 1152 (Colo. App. 2010).

Section 18-1-105 (10) allows the trial court only to suspend the imposition or execution of a sentence, not the length of the sentence, and in light of the mandatory language of this section, the trial court was required to sentence the defendant within the range set forth in the statute. *People v. Delgado*, 832 P.2d 971 (Colo. App. 1991).

This section mandates only the length of sentence which a special drug offender must receive, without altering the sentencing options otherwise within the court's discretion. The general assembly intended merely to increase the length of the sentence prescribed for each particular offense, rather than shifting discretion from the courts to the executive director of the department of corrections, regardless of the character and circumstances of the underlying

ing offense. *Shipley v. People*, 45 P.3d 1277 (Colo. 2002).

No special verdict required. This statute is a presumptive penalty statute which requires no special verdict of special offender status by the jury and therefore affirmative defenses are not applicable and no determination of aggravating or mitigating factors are required. *People v. Vega*, 870 P.2d 549 (Colo. App. 1993) (decided under former § 18-18-107).

A bifurcated trial is not required under the special offender statute. *People v. Vega*, 870 P.2d 549 (Colo. App. 1993) (decided under former § 18-18-107).

Defendant not entitled to the ameliorative effects of amendatory legislation if the legislature has not indicated its intent to require retroactive application; thus trial court had no discretion to reduce defendant's sentence under an amended statute when legislation specified that the amendment applied only to offenses committed on or after a date that occurred after defendant committed his offense. *People v. Pineda-eriza*, 49 P.3d 329 (Colo. App. 2001).

The evidence supported a conclusion that the knives were readily accessible for use by defendant with defendant's intended drug trafficking activity. *People v. Tweedy*, 126 P.3d 303 (Colo. App. 2005).

18-18-408. Money laundering - illegal investments - penalty. (Repealed)

Source: L. 92: Entire article R&RE, p. 364, § 1, effective July 1. **L. 2010:** Entire section repealed, (HB 10-1081), ch. 256, p. 1141, § 4, effective August 11.

18-18-409. Reduction or suspension of sentence for providing substantial assistance. Notwithstanding any other provision of this article, the district attorney may request the sentencing court to reduce or suspend the sentence of any individual who is convicted of a violation of section 18-18-405 or 18-18-407 (1) (e) and who provides substantial assistance in the identification, arrest, or conviction of any person for a violation of this article. Upon good cause shown, the request may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the assistance rendered was substantial.

Source: L. 92: Entire article R&RE, p. 365, § 1, effective July 1.

18-18-410. Declaration of class 1 public nuisance. Any store, shop, warehouse, dwelling house, building, vehicle, boat, or aircraft or any place whatsoever which is frequented by controlled substance addicts for the unlawful use of controlled substances or which is used for the unlawful storage, manufacture, sale, or distribution of controlled substances is declared to be a class 1 public nuisance and subject to the provisions of section 16-13-303, C.R.S. Any real or personal property which is seized or confiscated as a result of an action to abate a public nuisance shall be disposed of pursuant to part 7 of article 13 of title 16, C.R.S.

Source: L. 92: Entire article R&RE, p. 365, § 1, effective July 1.

Editor's note: This section is similar to former § 18-18-108 as it existed prior to 1992.

ANNOTATION

Storage for purposes of § 16-13-303 denotes that an item is left at a location for some period of time. It is not synonymous with possession. Generally the term indicates duration and not a transient situation. *People v. One 1967*

Ford Mustang, 781 P.2d 186 (Colo. App. 1989) (decided under § 18-18-108 as it existed prior to the 1992 repeal and reenactment of this article).

18-18-411. Keeping, maintaining, controlling, renting, or making available property for unlawful distribution or manufacture of controlled substances. (1) It is unlawful for any person knowingly or intentionally to keep, maintain, control, rent, lease, or make available for use any store, shop, warehouse, dwelling, building, vehicle, vessel, aircraft, room, enclosure, or other structure or place, which that person knows is resorted to for the purpose of keeping for distribution, transporting for distribution, or distributing controlled substances in violation of this article.

(2) Except as authorized by this article, it is unlawful for any person to:

(a) Knowingly or intentionally open or maintain any place which that person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance; or

(b) Manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly or intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure which that person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance.

(3) A person does not violate subsection (2) of this section:

(a) By reason of any act committed by another person while that other person is unlawfully on or in the structure or place, if the person lacked knowledge of the unlawful presence of that other person; or

(b) If the person has notified a law enforcement agency with jurisdiction to make an arrest for the illegal conduct.

(4) A person who violates this section commits a class 1 misdemeanor.

Source: L. 92: Entire article R&RE, p. 365, § 1, effective July 1.

18-18-412. Abusing toxic vapors - prohibited. (1) No person shall knowingly smell or inhale the fumes of toxic vapors for the purpose of causing a condition of euphoria, excitement, exhilaration, stupefaction, or dulled senses of the nervous system. No person shall knowingly possess, buy, or use any such substance for the purposes described in this subsection (1), nor shall any person knowingly aid any other person to use any such substance for the purposes described in this subsection (1). This subsection (1) shall not apply to the inhalation of anesthesia or other substances for medical or dental purposes.

(2) Any person who knowingly violates the provisions of subsection (1) of this section commits the offense of abusing toxic vapors. Abusing toxic vapors is a class 1 petty offense; except that no person shall receive a sentence to confinement in jail for being convicted of a first offense pursuant to this subsection (2). Any person convicted of a second or any subsequent offense pursuant to this subsection (2) may receive a sentence to confinement in jail.

(3) For the purposes of this section, the term "toxic vapors" means the following substances or products containing such substances:

- (a) Alcohols, including methyl, isopropyl, propyl, or butyl;
- (b) Aliphatic acetates, including ethyl, methyl, propyl, or methyl cellosolve acetate;
- (c) Acetone;
- (d) Benzene;
- (e) Carbon tetrachloride;
- (f) Cyclohexane;
- (g) Freons, including freon 11 and freon 12;
- (h) Hexane;
- (i) Methyl ethyl ketone;

- (j) Methyl isobutyl ketone;
- (k) Naphtha;
- (l) Perchloroethylene;
- (m) Toluene;
- (n) Trichloroethane; or
- (o) Xylene.

(4) In a prosecution for a violation of this section, evidence that a container lists one or more of the substances described in subsection (3) of this section as one of its ingredients shall be prima facie evidence that the substance in such container contains toxic vapors and emits the fumes thereof.

(5) Any juvenile charged with an offense pursuant to this section shall be subject to the jurisdiction of the juvenile court pursuant to section 19-2-104, C.R.S.

Source: L. 92: Entire article R&RE, p. 366, § 1, effective July 1. L. 96: (5) amended, p. 1693, § 29, effective January 1, 1997.

Editor's note: This section is similar to former § 18-18-111 as it existed prior to 1992.

18-18-412.5. Unlawful possession of materials to make methamphetamine and amphetamine - penalty. (1) The general assembly finds and declares that persons are manufacturing methamphetamine and amphetamine using nonprescription drugs that are readily and legally available. The general assembly further finds that it is necessary to make illegal the possession of such nonprescription drugs with the intent to use them as immediate precursors in manufacturing any controlled substance.

(2) Notwithstanding any other provision of law to the contrary, no person shall possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use such product as an immediate precursor in the manufacture of any controlled substance.

(3) A person who violates the provisions of this section commits a class 3 felony.

Source: L. 2002: Entire section added, p. 1265, § 1, effective August 7.

18-18-412.7. Sale or distribution of materials to manufacture controlled substances. (1) A person who sells or distributes chemicals, supplies, or equipment, and who knows or reasonably should know or believes that a person intends to use the chemicals, supplies, or equipment to illegally manufacture a controlled substance violates this section.

(2) A violation of this section is a class 3 felony. A violation of this section is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401 (10).

Source: L. 2003: Entire section added, p. 2387, § 2, effective July 1, 2004. L. 2004: (2) amended, p. 637, § 13, effective August 4.

Cross references: For the legislative declaration contained in the 2003 act enacting this section, see section 1 of chapter 360, Session Laws of Colorado 2003.

18-18-412.8. Retail sale of methamphetamine precursor drugs - unlawful acts - penalty.

(1) (Deleted by amendment, L. 2006, p. 1705, § 3, effective July 1, 2006.)

(2) (a) A person may not knowingly deliver in or from a store to the same individual during any twenty-four-hour period more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs.

(b) A person may not purchase more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs during any twenty-four-hour period.

(c) It is unlawful for a methamphetamine precursor drug that is offered for retail sale in or from a store to be offered for sale or stored or displayed prior to sale in an area of the store to which the public is allowed access.

(2.5) (a) A person may not deliver in a retail sale in or from a store a methamphetamine precursor drug to a minor under eighteen years of age.

(b) It shall be an affirmative defense to a prosecution under this subsection (2.5) that the person performing the retail sale was presented with and reasonably relied upon a document that identified the person receiving the methamphetamine precursor drug as being eighteen years of age or older.

(3) (a) A person who knowingly violates a provision of this section commits a class 2 misdemeanor and, upon conviction, shall be punished as provided in section 18-1.3-501.

(b) A person who is an owner, operator, manager, or supervisor at a store in which, or from which, a retail sale of a methamphetamine precursor drug in violation of this section is made shall not be liable under this section if he or she:

(I) Did not have knowledge of the sale; and

(II) Did not participate in the sale; and

(III) Did not knowingly direct the person making the sale to commit a violation of this section.

(4) For purposes of this section:

(a) (I) Except as otherwise provided in subparagraph (II) of this paragraph (a), "methamphetamine precursor drug" means ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, isomers, or salts of isomers.

(II) "Methamphetamine precursor drug" does not include a substance contained in any package or container that is labeled by the manufacturer as intended for pediatric use.

(b) "Person" means an individual who owns, operates, is employed by, or is an agent of a store.

(c) "Store" means any establishment primarily engaged in the sale of goods at retail.

(5) Nothing in this section shall be construed to restrict the discretion of a district attorney to bring charges under this section against a person who also is charged with violating section 18-18-412.7.

Source: L. 2005: Entire section added, p. 606, § 2, effective July 1. L. 2006: (1) and (2) amended and (2.5) added, p. 1705, § 3, effective July 1.

Cross references: For the legislative declaration contained in the 2005 act enacting this section, see section 1 of chapter 172, Session Laws of Colorado 2005. For the legislative declaration contained in the 2006 act amending subsections (1) and (2) and enacting subsection (2.5), see section 1 of chapter 341, Session Laws of Colorado 2006.

18-18-413. Authorized possession of controlled substances. A person to whom or for whose use any controlled substance has been prescribed or dispensed by a practitioner may lawfully possess it, but only in the container in which it was delivered to him unless he is able to show that he is the legal owner or a person acting at the direction of the legal owner of the controlled substance. Any person convicted of violating this section commits a class 1 petty offense.

Source: L. 92: Entire article R&RE, p. 367, § 1, effective July 1.

Editor's note: This section is similar to former § 18-18-109 as it existed prior to 1992.

18-18-414. Unlawful acts - licenses - penalties. (1) Except as otherwise provided in this article or in article 42.5 of title 12, C.R.S., the following acts are unlawful:

(a) The dispensing or possession of a schedule I controlled substance except by a researcher who is registered under federal law to conduct research with that schedule I controlled substance;

(b) Except as provided in subsection (2) of this section, the dispensing of any schedule II controlled substance unless such substance is dispensed:

(I) From a pharmacy pursuant to a written order or an order electronically transmitted in accordance with 21 CFR 1311; or

(II) By any practitioner in the course of his or her professional practice;

(c) The dispensing of any schedule III, IV, or V controlled substance unless such controlled substance is dispensed from a pharmacy pursuant to a written, oral, mechanically produced, computer generated, electronically transmitted, or facsimile transmitted order or is dispensed by any practitioner in the course of his or her professional practice;

(d) The dispensing of any marijuana or marijuana concentrate;

(e) To refill any schedule III, IV, or V controlled substance more than six months after the date on which such prescription was issued or more than five times;

(f) The failure of a pharmacy to file and retain the prescription as required in section 12-42.5-131, C.R.S.;

(g) The failure of a hospital to record and maintain a record of such dispensing as provided in section 12-42.5-131 or 27-80-210, C.R.S.;

(h) The refusal to make available for inspection and to accord full opportunity to check any record or file as required by this article, part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.;

(i) The failure to keep records as required by this article, part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.;

(j) The failure to obtain a license or registration as required by this article, part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.;

(k) Except when controlled substances are dispensed by a practitioner for direct administration in the course of his practice or are dispensed for administration to hospital inpatients, the failure to affix to the immediate container a label stating:

(I) The name and address of the person from whom such controlled substance was dispensed;

(II) The date on which such controlled substance was dispensed;

(III) The number of such prescription as filed in the prescription files of the pharmacy which dispensed such prescription;

(IV) The name of the prescribing practitioner;

(V) The directions for use of the controlled substance as contained in the prescription; and

(VI) The name of the patient and, if for an animal, the name of the owner;

(l) The failure of a practitioner, in dispensing a controlled substance other than by direct administration in the course of his practice, to affix to the immediate container a label bearing directions for use of the controlled substance, his name and registry number, the name of the patient, the date, and, if for an animal, the name of the owner;

(m) The administration of a controlled substance other than to the patient for whom prescribed;

(n) The possession, by any practitioner, of a controlled substance which was not obtained from a pharmacy and which was received from a person who is not licensed as a manufacturer, distributor, or practitioner. It is also unlawful for a pharmacy to have possession of a controlled substance which is received from any person who is not licensed as a manufacturer or distributor; except that a pharmacy may buy controlled substances from another pharmacy.

(o) Knowingly transferring drug precursors to any person who uses them for an unlawful activity;

(p) (Deleted by amendment, L. 96, p. 149, § 5, effective April 8, 1996.)

(q) Knowingly acquiring or obtaining, or attempting to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception, or subterfuge;

(r) Knowingly furnishing false or fraudulent material information in, or omitting any material information from, any application, report, or other document required to be kept or filed under this article, part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S., or any record required to be kept by this article, part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.;

(s) (Deleted by amendment, L. 96, p. 149, § 5, effective April 8, 1996.)

(t) The refusal of entry into any premises for any inspection authorized by this article, part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.

(2) (a) A pharmacist in an emergency situation, in lieu of a written or electronically transmitted prescription order, in good faith, may dispense up to a seventy-two-hour supply of any controlled substance listed in schedule II of part 2 of this article without a written or electronically transmitted prescription order. An "emergency situation", as used in this paragraph (a), means a situation in which the prescribing practitioner determines:

(I) That immediate dispensing of the controlled substance is necessary for proper treatment of the intended ultimate user;

(II) That no alternative prescription drug is available, including drugs that are not controlled substances under schedule II of part 2 of this article;

(III) That it is not reasonably possible for the prescribing practitioner to provide a written prescription order to be presented to the person dispensing the controlled substance, or to electronically transmit a prescription order to the dispenser, prior to such dispensing.

(b) (I) Upon receiving an emergency oral prescription order from the practitioner, the pharmacist shall immediately reduce the prescription order to writing or an electronic format and shall write or otherwise ensure that the following language and information is recorded in the prescription record: "Authorization for emergency dispensing" and the date and time of dispensing of the oral prescription.

(II) The prescribing practitioner shall reduce the prescription order to writing or an electronic format and shall deliver the prescription order to the pharmacist in person, by facsimile transmission as provided in paragraph (c) of this subsection (2), by mail, or by electronic transmission within seventy-two hours after prescribing the schedule II controlled substance. If delivered by mail, the envelope must be postmarked within seventy-two hours after prescribing. Upon receipt of the prescription order, the pharmacist shall maintain the prescription order with the oral prescription order that has been reduced to writing or an electronic format.

(III) The pharmacist shall notify the board if the prescribing practitioner fails to deliver the written or electronic prescription order to the pharmacist.

(c) (I) A prescription for a controlled substance listed in schedule II of part 2 of this article may be transmitted via facsimile equipment, so long as the original written, signed prescription is presented to the pharmacist for review prior to the actual dispensing of the controlled substance, except as provided in subparagraph (II) of this paragraph (c).

(II) A prescription written for a schedule II controlled substance for a hospice patient or for a resident of a long-term care facility or for the direct home administration to a patient by parenteral, intravenous, intramuscular, subcutaneous, or intraspinal infusion (infusion drug therapy) may be transmitted by the practitioner or the practitioner's agent to the dispensing pharmacy or pharmacist by facsimile transmission. The practitioner or the practitioner's agent shall note on the prescription that the patient is a hospice patient or a resident in a long-term care facility or a patient receiving infusion drug therapy. The facsimile serves as the original written prescription for purposes of this section and shall be maintained as specified by the board.

(III) For the purposes of this paragraph (c):

(A) "Hospice patient" means an individual who is receiving hospice care from an entity licensed and regulated by the department of public health and environment pursuant to sections 25-1.5-103 (1) (a) (I) and 25-3-101, C.R.S.

(B) "Long-term care facility" means a facility that is licensed and regulated as a skilled nursing facility or nursing care facility by the department of public health and environment pursuant to sections 25-1.5-103 (1) (a) (I) and 25-3-101, C.R.S.

(3) Any person who violates paragraph (a), (b), (c), or (d) of subsection (1) of this section shall be punished as provided for in section 18-18-405 or 18-18-406.

(4) Any person who violates paragraph (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n) of subsection (1) of this section or subsection (2) of this section or any other provision of this part 4 for which a penalty is not specified is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by

imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

(5) Any person who violates paragraph (o), (q), (r), or (t) of subsection (1) of this section commits a class 4 felony.

Source: **L. 92:** Entire article R&RE, p. 368, § 1, effective July 1. **L. 95:** (1)(d) amended, p. 206, § 22, effective April 13. **L. 96:** (1)(o), (1)(p), (1)(s), and (5) amended, p. 149, § 5, effective April 8; (1)(c) and (2) amended, p. 1427, § 18, effective July 1. **L. 97:** (2) amended, p. 17, § 1, effective March 20. **L. 98:** (2) amended, p. 428, § 1, effective July 1. **L. 2003:** (2)(c)(III) amended, p. 704, § 25, effective July 1. **L. 2010:** (1)(d) amended, (HB 10-1352), ch. 259, p. 1174, § 20, effective August 11. **L. 2012:** (1)(b), IP(2)(a), (2)(a)(III), and (2)(b) amended, (SB 12-037), ch. 40, p. 140, § 2, effective March 22; IP(1), (1)(f), (1)(g), (1)(h), (1)(i), (1)(j), (1)(r), and (1)(t) amended, (HB-1311), ch. 281, p. 1623, § 58, effective July 1.

Editor's note: This section is similar to former § 12-22-314 as it existed prior to 1992.

ANNOTATION

Annotator's note. Since § 18-18-414 is similar to § 12-22-314 as it existed prior to its repeal in 1992 and is similar to §§ 12-22-302, 12-22-313, 12-22-322, 12-22-404, and 12-22-412 as they existed prior to the repeal and reenactment of part 3 and part 4 of article 22 of title 12 in 1981, relevant cases construing those provisions have been included in the annotations to this section. For other cases construing the former provisions, see the annotations following those sections in the 1978 replacement volume 5 and the 1980 cumulative supplement thereto.

No equal protection violation stems from the fact that this statute punishes cocaine possession as a misdemeanor and § 18-18-105 punishes cocaine possession as a felony, since practitioners are engaged in an occupation which regularly requires administration, dispensation, and possession of controlled substances. *People v. Unruh*, 713 P.2d 370 (Colo.), cert. denied, 476 U.S. 1171, 106 S. Ct. 2894, 90 L. Ed.2d 981 (1986).

For constitutionality of legislative distinction between narcotics and other drugs, see *People v. Caponey*, 647 P.2d 668 (Colo. 1982).

Possession deemed general intent crime. Possession of a narcotic drug in violation of former § 12-22-302 is a general intent crime. *People v. Harfmann*, 633 P.2d 500 (Colo. App. 1981).

The offenses proscribed by §§ 12-22-302 and 12-22-314, now encompassed by this section, were general intent offenses having a culpability requirement of knowing conduct which did not entitle a defendant to an instruction on specific intent. And, the court must instruct the jury that each of the elements constituting the offense must be done "knowingly". *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983).

Defense of voluntary intoxication not applicable. The policies adopted by the general assembly in refusing to permit a defense of

voluntary intoxication in general intent crimes defined in the criminal code apply with equal force to general intent crimes under the Colorado Controlled Substances Act. *People v. Harfmann*, 633 P.2d 500 (Colo. App. 1981).

Chemical tests are not necessary in all cases to prove that a particular substance is a narcotic drug. *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981); *People ex rel. J.G.*, 97 P.3d 300 (Colo. App. 2004).

Proof through circumstantial evidence. The prosecution may prove that a substance is cocaine through circumstantial evidence. *People v. Steiner*, 640 P.2d 250 (Colo. App. 1981).

The prosecution does not need to admit a substance into evidence to prove that is a controlled substance. So long as a sufficient chain of custody is established, the prosecution can meet its burden through circumstantial evidence. *People ex rel. J.G.*, 97 P.3d 300 (Colo. App. 2004).

Procuring agent defense requires that the defendant act as an exclusive agent for the buyer; as such, the defendant becomes a principal, or a conspirator in the purchase rather than in the sale of the narcotics and, therefore, he cannot be convicted of sale or conspiracy to sell. *People v. Smith*, 623 P.2d 404 (Colo. 1981); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983).

Defense is available in prosecution under this section for sale of a narcotic. *People v. Hall*, 44 Colo. App. 535, 622 P.2d 571 (1980).

Procuring agent defense negates existence of essential element of offense of sale of narcotic, the sale itself. *People v. Hall*, 44 Colo. App. 535, 622 P.2d 571 (1980).

Under the "procuring agent" defense, a defendant becomes a principal or conspirator in the purchase rather than the sale of the narcotics and, therefore, cannot be convicted of sale or conspiracy to sell narcotic drugs. *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

Trial court must credit defendant for time served against maximum as well as minimum sentence term. When the trial court credits the defendant for time already served in setting the minimum term of his sentence, it is error for the trial court not to also credit the defendant for that time against the maximum term of the sentence. *People v. Stewart*, 626 P.2d 685 (Colo. 1981).

Applied in *People v. Macias*, 631 P.2d 584 (Colo. 1981); *People v. Gomez*, 632 P.2d 586 (Colo. 1981), cert. denied, 455 U.S. 943, 101 S. Ct. 1439, 71 L. Ed.2d 655 (1982); *People v. Ball*, 639 P.2d 1078 (Colo. 1982); *People v. Hoffman*, 655 P.2d 393 (Colo. 1982); *People v. Sprowl*, 718 P.2d 524 (Colo. 1986).

18-18-415. Fraud and deceit. (1) (a) No person shall obtain a controlled substance or procure the administration of a controlled substance by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of an order; or by the concealment of a material fact; or by the use of a false name or the giving of a false address.

(b) Information communicated to a practitioner in an effort to procure a controlled substance other than for legitimate treatment purposes or unlawfully to procure the administration of any such controlled substance shall not be deemed a privileged communication.

(c) No person shall willfully make a false statement in any order, report, or record required by this article.

(d) No person, for the purpose of obtaining a controlled substance, shall falsely assume the title of, or represent himself to be, a manufacturer, distributor, practitioner, or other person authorized by law to obtain a controlled substance.

(e) No person shall make or utter any false or forged order.

(f) No person shall affix any false or forged label to a package or receptacle containing a controlled substance.

(2) Any person who violates any provision of this section commits:

(a) A class 6 felony and shall be punished as provided in section 18-1.3-401.

(b) (Deleted by amendment, L. 2010, (HB 10-1352), ch. 259, p. 1170, § 8, effective August 11, 2010.)

Source: L. 92: Entire article R&RE, p. 371, § 1, effective July 1. L. 2002: (2)(a) and (2)(b) amended, p. 1520, § 215, effective October 1. L. 2010: (2) amended, (HB 10-1352), ch. 259, p. 1170, § 8, effective August 11.

Editor's note: This section is similar to former § 12-22-315 as it existed prior to 1992.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (2)(a) and (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Annotator's note. Since § 18-18-415 is similar to § 12-22-315 as it existed prior to its repeal in 1992 and is similar to § 12-22-319 as it existed prior to the repeal and reenactment of part 3 of article 22 of title 12 in 1981, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (1)(b) is not unconstitutionally vague on its face. *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

Subsection (1)(b) of this section operates as an exception to the physician-privilege in § 13-90-107 (1)(d). When subsection (1)(b) applies, there is no privilege as to a communication made by a patient to a physician, and no waiver is required to introduce the communication at trial. *People v. Harte*, 231 P.3d 1180 (Colo. App. 2005).

The determination whether subsection (1)(b) applies to a communication between a patient and practitioner rests with the trial court, not with the recipient of the communication, a prospective witness, or another health care provider. *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

An attorney's guilty plea to making and altering a false and forged prescription for Phentermine, a controlled substance, and of criminal attempt to obtain a controlled substance by forgery and alteration constituted "serious crimes" as defined by C.R.C.P. 241.16 (e). *People v. Moore*, 849 P.2d 40 (Colo. 1993).

Criminal provisions not overlapping. Section 12-22-126 and former § 12-22-319 (now this section) do not proscribe the same conduct and, hence, do not violate the constitutional

guarantees of equal protection and due process. People v. Wellington, 633 P.2d 1390 (Colo. 1981); People v. Caponey, 647 P.2d 668 (Colo. 1982).

Applied in People v. Madonna, 651 P.2d 378 (Colo. 1982); People v. Frayer, 661 P.2d 1198 (Colo. App. 1982).

18-18-416. Controlled substances - inducing consumption by fraudulent means.

(1) It is unlawful for any person, surreptitiously or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge, to cause any other person to unknowingly consume or receive the direct administration of any controlled substance, as defined in section 18-18-102 (5); except that nothing in this section shall diminish the scope of health care authorized by law.

(2) Any person who violates the provisions of this section commits a class 4 felony.

Source: L. 92: Entire article R&RE, p. 371, § 1, effective July 1.

18-18-417. Notice of conviction. Upon the conviction of any person for a violation of any provision of this part 4, a copy of the judgment, sentence, and opinion, if any, of the court shall be sent by the clerk of the court to the state board of pharmacy or the department of public health and environment or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business.

Source: L. 92: Entire article R&RE, p. 372, § 1, effective July 1. L. 94: Entire section amended, p. 2736, § 362, effective July 1.

Editor's note: This section is similar to former § 12-22-316 as it existed prior to 1992.

18-18-418. Exemptions. (1) The provisions of section 18-18-414 shall not apply to:

(a) Agents of persons licensed under part 2 of article 80 of title 27, C.R.S., or under part 3 of this article, acting within the provisions of their licenses; or

(b) Officers or employees of appropriate agencies of federal, state, or local governments acting pursuant to their official duties; or

(c) A student who is in possession of an immediate precursor who is enrolled in a chemistry class for credit at an institution of higher education, or a work study student, a teaching assistant, a graduate assistant, or a laboratory assistant, if such student's or technician's use of the immediate precursor is for a bona fide educational purpose or research purpose and if the chemistry department of the institution of higher education otherwise possesses all the necessary licenses required by the department.

(2) All combination drugs that are exempted by regulation of the attorney general of the United States department of justice, pursuant to section 1006 (b) of Public Law 91-513 (84 Stat. 1236), known as the "Comprehensive Drug Abuse Prevention and Control Act of 1970", on or after July 1, 1981, are exempted from the provisions of part 1 of article 42.5 of title 12, C.R.S., part 2 of article 80 of title 27, C.R.S., and part 3 of this article.

(3) The provisions of this part 4 do not apply to peyote if said controlled substance is used in religious ceremonies of any bona fide religious organization.

(4) The provisions of section 12-42.5-131 and 27-80-210, C.R.S., shall not apply to a practitioner authorized to prescribe with respect to any controlled substance that is listed in schedule III, IV, or V of part 2 of this article and that is manufactured, received, or dispensed by the practitioner in the course of his or her professional practice unless he or she dispenses, other than by direct administration, any such controlled substance to patients and they are charged therefor either separately or together with charges for other professional services or unless the practitioner regularly engages in dispensing any such controlled substance to his or her patients.

(5) The exemptions set forth in this section shall be available as a defense to any person accused of violating the provisions of section 18-18-414.

(6) It shall not be necessary for the state to negate any exemption or exception in this part 4, part 1 of article 42.5 of title 12, C.R.S., part 2 of article 80 of title 27, C.R.S., or part

3 of this article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this part 4. The burden of proof of any such exemption or exception is upon the person claiming it.

Source: L. 92: Entire article R&RE, p. 372, § 1, effective July 1. **L. 2012:** (1)(a), (2), (4), and (6) amended, (HB 12-1311), ch. 281, p. 1624, § 59, effective July 1.

Editor's note: This section is similar to former § 12-22-317 as it existed prior to 1992.

18-18-419. Imitation and counterfeit controlled substances act. Sections 18-18-419 to 18-18-424 shall be known and may be cited as the "Imitation and Counterfeit Controlled Substances Act".

Source: L. 92: Entire article R&RE, p. 373, § 1, effective July 1.

18-18-420. Imitation controlled substances - definitions. As used in sections 18-18-419 to 18-18-424, unless the context otherwise requires:

(1) "Controlled substance" shall have the same meaning as set forth in section 18-18-102 (5).

(2) "Distribute" means the actual, constructive, or attempted transfer, delivery, or dispensing to another of an imitation controlled substance, with or without remuneration.

(3) "Imitation controlled substance" means a substance that is not the controlled substance that it is purported to be but which, by appearance, including color, shape, size, and markings, by representations made, and by consideration of all relevant factors as set forth in section 18-18-421, would lead a reasonable person to believe that the substance is the controlled substance that it is purported to be.

(4) "Manufacture" means the production, preparation, compounding, processing, encapsulating, packaging or repackaging, or labeling or relabeling of an imitation controlled substance.

Source: L. 92: Entire article R&RE, p. 373, § 1, effective July 1.

ANNOTATION

Legislative intent of "purported". The general assembly intended the term "purported", as applied in this section, to refer to the circumstances surrounding defendant's conduct. Based on the substance's appearance by a representation made and by consideration of all relevant

factors as set out in § 18-18-421, a reasonable person would believe the substance to be a controlled substance. There is no requirement, therefore, that a defendant knowingly purport the substance to be a controlled substance. *People v. Taylor*, 131 P.3d 1158 (Colo. App. 2005).

18-18-421. Imitation controlled substances - determination - considerations.

(1) In determining whether a substance is an imitation controlled substance, the trier of fact may consider, in addition to all other relevant factors, the following:

(a) Statements by an owner or by anyone in control of the substance concerning the nature of the substance or its use or effect;

(b) Statements made to the recipient that the substance may be resold for inordinate profit which is more than the normal markup charged by legal retailers of similar pharmaceutical products;

(c) Whether the substance is packaged in a manner normally used for illicit controlled substances;

(d) Evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(e) The proximity of the imitation controlled substance to any controlled substances when conduct purported to be illegal under this article is observed.

Source: L. 92: Entire article R&RE, p. 373, § 1, effective July 1.

ANNOTATION

Legislative intent of “purported” in § 18-18-420. The general assembly intended the term “purported”, as applied in § 18-18-420, to refer to the circumstances surrounding defendant’s conduct. Based on the substance’s appearance by a representation made and by consideration of all relevant factors as set out in this section, a

reasonable person would believe the substance to be a controlled substance. There is no requirement, therefore, that a defendant knowingly purport the substance to be a controlled substance. *People v. Taylor*, 131 P.3d 1158 (Colo. App. 2005).

18-18-422. Imitation controlled substances - violations - penalties. (1) (a) Except as provided in section 18-18-424, it is unlawful for any person to manufacture, distribute, or possess with intent to distribute an imitation controlled substance.

(b) Any person who violates the provisions of paragraph (a) of this subsection (1) commits:

(I) A class 5 felony; or

(II) A class 4 felony, if the violation is committed subsequent to a prior conviction for a violation of this subsection (1).

(2) (a) It is unlawful for a person eighteen years of age or over to distribute an imitation controlled substance to a person under eighteen years of age.

(b) Any person who violates the provisions of paragraph (a) of this subsection (2) commits:

(I) A class 4 felony; or

(II) A class 3 felony, if the violation is committed subsequent to a prior conviction for a violation of this subsection (2).

(3) (a) It is unlawful for any person to place in a newspaper, magazine, handbill, or other publication or to post or distribute in any public place any advertisement or solicitation which he knows will promote the distribution of imitation controlled substances.

(b) Any person who violates the provisions of paragraph (a) of this subsection (3) commits a class 1 misdemeanor.

(4) It is not a defense to a violation of this section that the defendant believed that the imitation controlled substance was a genuine controlled substance.

Source: L. 92: Entire article R&RE, p. 374, § 1, effective July 1.

18-18-423. Counterfeit substances prohibited - penalty. (1) It is unlawful for any person knowingly or intentionally to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser, other than the person who in fact manufactured, distributed, or dispensed the substance.

(2) It is unlawful for any person knowingly or intentionally to make, distribute, or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof.

(3) Any person who violates this section commits a class 5 felony.

Source: L. 92: Entire article R&RE, p. 375, § 1, effective July 1.

18-18-424. Imitation controlled substances - exceptions. The provisions of sections 18-18-419 to 18-18-424 shall not apply to practitioners licensed, registered, or otherwise authorized under the laws of this state to possess, administer, dispense, or distribute a controlled substance, if the distribution, possession, dispensing, or administering of the imitation controlled substance is done in the lawful course of his professional practice.

Source: L. 92: Entire article R&RE, p. 375, § 1, effective July 1.

Cross references: For the “Colorado Licensing of Controlled Substances Act”, see part 3 of article 22 of title 12.

18-18-425. Drug paraphernalia - legislative declaration. (1) The general assembly hereby finds and declares that the possession, sale, manufacture, delivery, or advertisement of drug paraphernalia results in the legitimization and encouragement of the illegal use of controlled substances by making the drug culture more visible and enticing and that the ready availability of drug paraphernalia tends to promote, suggest, or increase the public acceptability of the illegal use of controlled substances. Therefore, the purposes of the provisions controlling drug paraphernalia are:

(a) To protect and promote the public peace, health, safety, and welfare by prohibiting the possession, sale, manufacture, and delivery, or advertisement, of drug paraphernalia; and

(b) To deter the use of controlled substances by controlling the drug paraphernalia associated with their use.

Source: L. 92: Entire article R&RE, p. 375, § 1, effective July 1.

Editor’s note: This section is similar to former § 12-22-501 as it existed prior to 1992.

ANNOTATION

Law reviews. For article, “Constitutional Law and Civil Rights”, see 59 Den. L.J. 239 (1982).

Annotator’s note. Since § 18-18-425 is similar to § 12-22-501 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

This part is not unconstitutionally vague on its face with regard to the issue of subjective intent. *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-426. Drug paraphernalia - definitions. As used in sections 18-18-425 to 18-18-430, unless the context otherwise requires:

(1) “Drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the laws of this state. “Drug paraphernalia” includes, but is not limited to:

(a) Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of controlled substances under circumstances in violation of the laws of this state;

(b) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(c) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marijuana;

(d) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(e) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(f) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances; or

(g) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(I) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

- (II) Water pipes;
- (III) Carburetion tubes and devices;
- (IV) Smoking and carburetion masks;
- (V) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand;
- (VI) Miniature cocaine spoons and cocaine vials;
- (VII) Chamber pipes;
- (VIII) Carburetor pipes;
- (IX) Electric pipes;
- (X) Air-driven pipes;
- (XI) Chillums;
- (XII) Bongs; or
- (XIII) Ice pipes or chillers.

Source: **L. 92:** Entire article R&RE, p. 376, § 1, effective July 1. **L. 2010:** (1)(c), IP(1)(g), and (1)(g)(V) amended, (HB 10-1352), ch. 259, p. 1174, § 21, effective August 11.

Editor's note: This section is similar to former § 12-22-502 as it existed prior to 1992.

ANNOTATION

Law reviews. For article, "Constitutional Law and Civil Rights", see 59 Den. L.J. 239 (1982).

Annotator's note. Since § 18-18-426 is similar to § 12-22-502 as it existed prior to its repeal in 1992, relevant cases construing those provisions have been included in the annotations to this section.

Terms "designed" and "primarily" in definition of "drug paraphernalia" are not unconstitutionally vague. High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984).

Term "intended" is unconstitutionally vague and is severed from the definition. High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984).

Definition of "drug paraphernalia" does not violate due process. By severing the word

"adapted" from the definition, the act can be upheld. Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981) (decided prior to the 1981 amendment to subsection (2) which deleted the word "adapted").

Term "designed" not overbroad. As this section restricts the term "designed," by requiring that an item must be primarily designed for use with illegal drugs in order to constitute paraphernalia, that term, as used in this part, not overbroad. Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981).

Intent requirement of subsection (2) refers to intent of possessor or seller. Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981).

Applied in Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982).

18-18-427. Drug paraphernalia - determination - considerations. (1) In determining whether an object is drug paraphernalia, a court, in its discretion, may consider, in addition to all other relevant factors, the following:

- (a) Statements by an owner or by anyone in control of the object concerning its use;
- (b) The proximity of the object to controlled substances;
- (c) The existence of any residue of controlled substances on the object;
- (d) Direct or circumstantial evidence of the knowledge of an owner, or of anyone in control of the object, or evidence that such person reasonably should know, that it will be delivered to persons who he knows or reasonably should know, could use the object to facilitate a violation of sections 18-18-425 to 18-18-430;
- (e) Instructions, oral or written, provided with the object concerning its use;
- (f) Descriptive materials accompanying the object which explain or depict its use;
- (g) National or local advertising concerning its use;
- (h) The manner in which the object is displayed for sale;
- (i) Whether the owner, or anyone in control of the object, is a supplier of like or related items to the community for legal purposes, such as an authorized distributor or dealer of tobacco products;

- (j) The existence and scope of legal uses for the object in the community;
- (k) Expert testimony concerning its use.
- (2) In the event a case brought pursuant to sections 18-18-425 to 18-18-430 is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section. Such hearing shall be conducted in camera.

Source: L. 92: Entire article R&RE, p. 377, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-503 as it existed prior to 1992.

ANNOTATION

Law reviews. For article, "Constitutional Law and Civil Rights", see 59 Den. L.J. 239 (1982).

Annotator's note. Since § 18-18-427 is similar to § 12-22-503 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

Constitutionality of Drug Paraphernalia Act upheld against challenge based on assertion that use of the terms "reasonably should know" and "could" were unconstitutionally vague and overbroad as used in this section. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Overbreadth analysis not applicable. Since an overbreadth analysis is appropriately employed where the legislation at issue affects constitutionally protected conduct, and since no constitutionally protected conduct was raised in

challenge to Drug Paraphernalia Act, law will not be invalidated as overbroad or vague. *Lee v. Smith*, 772 P.2d 85 (Colo. 1989).

Standards not set for courts alone. The 11 specific standards of this section, to be considered when determining whether an item falls within the definition of drug paraphernalia, are not for the court's use alone. They were not intended to be withheld from the enforcement officers or anyone else administering or complying with the statute. *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981).

Section contains sufficient language to avoid arbitrary enforcement even though there are no guidelines specifically directed to enforcement authorities. *High Gear and Toke Shop v. Beacom*, 689 P.2d 624 (Colo. 1984).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-428. Possession of drug paraphernalia - penalty. (1) Except as described in section 18-1-711, a person commits possession of drug paraphernalia if he or she possesses drug paraphernalia and knows or reasonably should know that the drug paraphernalia could be used under circumstances in violation of the laws of this state.

(2) Any person who commits possession of drug paraphernalia commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars.

Source: L. 92: Entire article R&RE, p. 378, § 1, effective July 1. L. 2012: (1) amended, (SB 12-020), ch. 225, p. 989, § 7, effective May 29.

Editor's note: This section is similar to former § 12-22-504 as it existed prior to 1992.

Cross references: For the legislative declaration in the 2012 act amending subsection (1), see section 1 of chapter 225, Session Laws of Colorado 2012.

ANNOTATION

Annotator's note. Since § 18-18-428 is similar to § 12-22-504 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

Constitutionality of Drug Paraphernalia Act upheld against challenge based on assertion that use of the terms "reasonably should know"

and "could" were unconstitutionally vague and overbroad as used in this section. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Overbreadth analysis not applicable. Since an overbreadth analysis is appropriately employed where the legislation at issue affects constitutionally protected conduct, and since no constitutionally protected conduct was raised in

challenge to Drug Paraphernalia Act, law will not be invalidated as overbroad or vague. *Lee v. Smith*, 772 P.2d 85 (Colo. 1989).

Knowingly. This section will be construed to require that the defendant acted “knowingly”, that is, with knowledge that the object is prac-

tically certain to be put to an illegal use in connection with a controlled substance. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-429. Manufacture, sale, or delivery of drug paraphernalia - penalty. Any person who sells or delivers, possesses with intent to sell or deliver, or manufactures with intent to sell or deliver equipment, products, or materials knowing, or under circumstances where one reasonably should know, that such equipment, products, or materials could be used as drug paraphernalia commits a class 2 misdemeanor.

Source: L. 92: Entire article R&RE, p. 378, § 1, effective July 1.

Editor’s note: This section is similar to former § 12-22-505 as it existed prior to 1992.

ANNOTATION

Annotator’s note. Since § 18-18-429 is similar to § 12-22-505 as it existed prior to its repeal in 1992, relevant cases construing that provision have been included in the annotations to this section.

Constitutionality of Drug Paraphernalia Act upheld against challenge based on assertion that use of the terms “reasonably should know” and “could” were unconstitutionally vague and overbroad as used in this section. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Overbreadth analysis not applicable. Since an overbreadth analysis is appropriately employed where the legislation at issue affects

constitutionally protected conduct, and since no constitutionally protected conduct was raised in challenge to Drug Paraphernalia Act, law will not be invalidated as overbroad or vague. *Lee v. Smith*, 772 P.2d 85 (Colo. 1989).

Knowingly. This section will be construed to require that the defendant acted “knowingly”, that is, with knowledge that the object is practically certain to be put to an illegal use in connection with a controlled substance. *Lee v. Smith*, 772 P.2d 82 (Colo. 1989).

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982).

18-18-430. Advertisement of drug paraphernalia - penalty. Any person who places an advertisement in any newspaper, magazine, handbill, or other publication and who intends thereby to promote the sale in this state of equipment, products, or materials designed and intended for use as drug paraphernalia commits a class 2 misdemeanor.

Source: L. 92: Entire article R&RE, p. 378, § 1, effective July 1.

Editor’s note: This section is similar to former § 12-22-506 as it existed prior to 1992.

ANNOTATION

Applied in *Wakabayashi v. Tooley*, 648 P.2d 655 (Colo. 1982) (decided under former § 12-22-506 prior to its repeal in 1992).

18-18-430.5. Drug paraphernalia - exemption. A person shall be exempt from the provisions of sections 18-18-425 to 18-18-430 if he or she is participating as an employee or volunteer in an approved syringe exchange program created pursuant to section 25-1-520, C.R.S.

Source: L. 2010: Entire section added, (SB 10-189), ch. 272, p. 1252, § 1, effective August 11.

18-18-431. Defenses. The common law defense known as the “procuring agent defense” is not a defense to any crime in this title.

Source: L. 92: Entire article R&RE, p. 378, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-324 as it existed prior to 1992.

ANNOTATION

Annotator's note. Since this section is similar to § 18-18-110 as it existed prior to the repeal and reenactment of this article in 1992, a relevant case construing that provision has been included in the annotations to this section.

Where the information charged the defendant with "sale and distribution" of a controlled substance, and although the verdict found that he "sold or distributed" such a substance, thereby charging and sustaining only one offense, the trial court properly instructed the jury as to the elements of the crime of sale or distribution of cocaine and as to the pertinent

definition of distribution, its refusal to instruct on the "procuring agent" defense was not error. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

Cases relied on by the defendant all involved charges for sale or conspiracy to sell narcotic drugs under the old statute rather than for distribution of drugs after the enactment of the Colorado Controlled Substances Act in 1981 and are distinguishable under the rationale expressed in *People v. Dinkel* (189 Colo. 404, 541 P.2d 898 (1975)), which has now been formally codified in this section. *People v. Farris*, 812 P.2d 654 (Colo. 1991).

18-18-432. Drug offender public service and rehabilitation program. (1) As used in this section, unless the context otherwise requires:

(a) "Convicted" and "conviction" mean a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.

(b) "Drug offender" means any person convicted of any offense under this article.

(c) "Useful public service" means any work which is beneficial to the public and which involves a minimum of direct supervision or other public cost. "Useful public service" does not include any work which would endanger the health or safety of a drug offender.

(2) (a) Upon conviction, each drug offender, other than an offender sentenced to the department of corrections or an offender sentenced directly to a community corrections facility, shall be sentenced by the court to pay for and complete, at a minimum, forty-eight hours of useful public service for any felony, twenty-four hours of useful public service for any misdemeanor, and sixteen hours of useful public service for any petty offense. Such useful public service shall be in addition to, and not in lieu of, any other sentence received by the drug offender. The court shall not suspend any portion of the minimum number of useful public service hours ordered. If any drug offender is sentenced to probation, whether supervised by the court or by a probation officer, the order to pay for and complete the useful public service hours shall be made a condition of probation.

(b) The provisions of this subsection (2) relating to the performance of useful public service are also applicable to any drug offender who receives a deferred prosecution in accordance with section 18-1.3-101 or who receives a deferred sentence in accordance with section 18-1.3-102 and the completion of any stipulated amount of useful public service hours to be completed by the drug offender shall be ordered by the court in accordance with the conditions of such deferred prosecution or deferred sentence as stipulated to by the prosecution and the drug offender.

(c) If not already established pursuant to law, there may be established in each judicial district in the state a useful public service program under the direction of the chief judge of the judicial district. It shall be the purpose of the useful public service program to identify and seek the cooperation of governmental entities and political subdivisions thereof and corporations organized not for profit or charitable trusts for the purpose of providing useful public service jobs; to interview and assign persons who have been ordered by the court to perform useful public service to suitable useful public service jobs; and to monitor compliance or noncompliance of such persons in performing useful public service assignments as specified in paragraph (a) of this subsection (2).

(d) Any general public liability insurance policy obtained pursuant to this subsection (2) shall be in a sum of not less than the current limit on government liability under the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

(e) For the purposes of the “Colorado Governmental Immunity Act”, article 10 of title 24, C.R.S., “public employee” does not include any person who is sentenced pursuant to this subsection (2) to participate in any type of useful public service.

(f) No governmental entity shall be liable under the “Workers’ Compensation Act of Colorado”, articles 40 to 47 of title 8, C.R.S., or under the “Colorado Employment Security Act”, articles 70 to 82 of title 8, C.R.S., for any benefits on account of any person who is sentenced pursuant to this section to participate in any type of useful public service, but nothing in this subsection (2) shall prohibit a governmental entity from electing to accept the provisions of the “Workers’ Compensation Act of Colorado” by purchasing and keeping in force a policy of workers’ compensation insurance covering such person.

(3) Upon a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102 or a verdict of guilty by the court or a jury, to any offense under this article, or upon entry of a deferred prosecution pursuant to section 18-1.3-101 for any offense under this article, the court shall order the drug offender to immediately report to the sheriff’s department in the county where the drug offender was charged, at which time the drug offender’s fingerprints and photographs shall be taken and returned to the court, which fingerprints and photographs shall become a part of the court’s official documents and records pertaining to the charges against the drug offender and the drug offender’s identification in association with such charges. On any trial for a violation of any criminal law of this state, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the drug offender named in said convictions and judgments shall be prima facie evidence of such convictions and may be used in evidence against the drug offender. Identification photographs and fingerprints that are part of the record of such former convictions and judgments of any court of record or which are part of the record at the place of the drug offender’s incarceration after sentencing for any of such former convictions and judgments shall be prima facie evidence of the identity of the drug offender and may be used in evidence against such drug offender. Any drug offender who fails to immediately comply with the court’s order to report to the sheriff’s department, to furnish fingerprints, or to have photographs taken may be held in contempt of court.

Source: **L. 93:** Entire section added, p. 1777, § 40, effective June 6. **L. 2002:** (1)(a), (2)(b), and (3) amended, p. 1520, § 216, effective October 1. **L. 2004:** (2)(c) amended, p. 506, § 2, effective August 4.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (1)(a), (2)(b), and (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 5

ENFORCEMENT AND ADMINISTRATIVE PROCEDURES

18-18-501. Administrative inspections and warrants. (1) As used in this section, “controlled premises” means:

(a) Places where persons registered or exempted from registration requirements under this article are required to keep records; and

(b) Places including factories, warehouses, establishments, and conveyances in which persons registered or exempted from registration requirements under this article are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance.

(2) The procedure for issuance and execution of administrative inspection warrants is as follows:

(a) A judge of a state court of record within the judge’s jurisdiction, and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections of controlled premises as authorized by this article or rules adopted under this article, and seizures of property appropriate to the inspections. For

purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a reasonable belief that this article or the rules adopted therein have been violated, sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the warrant.

(b) A warrant may issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that grounds for the application exist or that there is probable cause to believe they exist, the judge shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant must:

(I) State the grounds for its issuance and the name of each individual whose affidavit has been taken in support thereof;

(II) Be directed to an individual authorized under Colorado law to execute it;

(III) Command the individual to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(IV) Identify the item or types of property to be seized, if any; and

(V) Direct that it be served during normal business hours and designate the court to which it must be returned.

(c) A warrant issued pursuant to this section must be executed and returned within fourteen days after its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy must be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant must be made promptly, accompanied by a written inventory of any property taken. The inventory must be made in the presence of the individual executing the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible individual other than the individual executing the warrant. A copy of the inventory must be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(d) The judge or court who has issued a warrant shall attach to the warrant a copy of the return and all papers returnable in connection therewith and file them with the clerk of the appropriate state court for the judicial district in which the inspection was made.

(3) The board or department may make administrative inspections of controlled premises of those persons they are authorized to register under this article in accordance with the following provisions:

(a) If authorized by an administrative inspection warrant issued pursuant to subsection (2) of this section, an officer or employee designated by the board or department, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection.

(b) If authorized by an administrative inspection warrant, an officer or employee designated by the board or department may:

(I) Inspect and copy records required by this article to be kept;

(II) Inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in paragraph (d) of this subsection (3), all other things therein, including records, files, papers, processes, controls, and facilities bearing on violation of this article; and

(III) Inventory any stock of any controlled substance therein and obtain samples thereof.

(c) This section does not prevent the inspection without a warrant of books and records pursuant to an administrative subpoena issued in accordance with section 24-4-105, C.R.S., nor does it prevent entries and administrative inspections, including seizures of property, without a warrant:

(I) If the owner, operator, or agent in charge of the controlled premises consents;

- (II) In situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;
- (III) In any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or
- (IV) In all other situations in which a warrant is not constitutionally required.
- (d) An inspection authorized by this section may not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

Source: L. 92: Entire article R&RE, p. 378, § 1, effective July 1. L. 2012: (2)(c) amended, (SB 12-175), ch. 208, p. 874, § 134, effective July 1.

Editor's note: Section 173 of chapter 208, Session Laws of Colorado 2012, provides that the act amending subsection (2)(c) applies to specified time intervals. For more information, see page 896 of Session Laws of Colorado 2012.

18-18-502. Injunctions. (1) The district courts of this state have jurisdiction to restrain or enjoin violations of this article.

(2) The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section. Nothing in this section shall preclude any person from applying for injunctive relief from administrative inspections and warrants conducted under this article or for the immediate return of property seized under this article.

Source: L. 92: Entire article R&RE, p. 381, § 1, effective July 1.

18-18-503. Cooperative arrangements and confidentiality. (1) The board and the department shall cooperate with federal and other state agencies in discharging the board's and the department's responsibilities concerning controlled substances and in controlling the abuse of controlled substances. To this end, the department may:

- (a) Arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;
- (b) Coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;
- (c) Cooperate with the drug enforcement administration by establishing a centralized unit to accept, catalog, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within this state, and make the information available for federal, state, and local law enforcement purposes, but may not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (3) of this section; and
- (d) Conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(2) Results, information, and evidence received from the drug enforcement administration relating to the regulatory functions of this article, including results of inspections conducted by it, may be relied and acted upon by the board or department in the exercise of the regulatory functions under this article.

(3) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the board or department, nor may the practitioner be compelled in any state or local civil, criminal, administrative, legislative, or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

Source: L. 92: Entire article R&RE, p. 381, § 1, effective July 1.

18-18-504. Pleadings - presumptions - liabilities. (1) It is not necessary for the state to negate any exemption or exception in this article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this article.

(2) No person is presumed to be the holder of an appropriate registration or order form issued under this article.

(3) No civil or criminal liability is imposed by this article upon any authorized state, county, or municipal officer, engaged in the lawful administration or enforcement of this article.

Source: L. 92: Entire article R&RE, p. 382, § 1, effective July 1.

18-18-505. Judicial review. All final determinations, findings, and conclusions of the board or department under this article are subject to judicial review pursuant to section 24-4-106, C.R.S.

Source: L. 92: Entire article R&RE, p. 382, § 1, effective July 1.

Editor's note: This section is similar to former § 12-22-125.5 as it existed prior to 1992.

18-18-506. Education and research. (1) The department shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs, the department may:

(a) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(b) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(c) Consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(d) Evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(e) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to alleviate them; and

(f) Assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(2) The department shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this article, the department may:

(a) Establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(b) Make studies and undertake programs of research to:

(I) Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this article;

(II) Determine patterns of misuse and abuse of controlled substances and the social effects thereof; and

(III) Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(c) Enter into contracts with public institutions of higher education and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(3) The department may enter into contracts for educational and research activities.

(4) The department may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subjects of the research. Persons who obtain this authorization are not compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(5) The department may authorize the possession and distribution of controlled substances by persons engaged in research. Persons who obtain this authorization are exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization.

Source: L. 92: Entire article R&RE, p. 382, § 1, effective July 1.

PART 6

MISCELLANEOUS

18-18-601. Pending proceedings - applicability. (1) This article does not affect or abate a prosecution for a violation of law occurring before July 1, 1992. If the offense being prosecuted is similar to one set out in part 4 of this article, the penalties under said part 4 apply if they are less than those under prior law.

(2) This article does not affect a civil seizure, forfeiture, or injunctive proceeding commenced before July 1, 1992.

(3) All administrative proceedings pending under previous laws that are superseded by this article must be continued and brought to a final determination in accord with the laws and rules in effect before July 1, 1992. Any substance controlled under prior law but which is not listed in section 18-18-203, 18-18-204, 18-18-205, 18-18-206, or 18-18-207 is automatically controlled without further proceedings and must be included in the appropriate schedule.

(4) The board or department shall initially permit persons to register who own or operate any establishment engaged in the manufacture, distribution, or dispensing of any controlled substance prior to July 1, 1992, and who are registered or licensed by the state.

Source: L. 92: Entire article R&RE, p. 384, § 1, effective July 1.

18-18-602. Continuation of rules - application to existing relationships. Any orders and rules adopted under any law affected by this article and in effect on July 1, 1992, and not in conflict with this article continue in effect until modified, superseded, or repealed. Rights and duties that matured, penalties that were incurred, and proceedings that were begun prior to July 1, 1992, are not affected by the enactment of the "Uniform Controlled Substances Act of 1992" or the corresponding repeal of provisions in article 42.5 of title 12, C.R.S., and part 6 of article 5 of this title.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1. **L. 2012:** Entire section amended, (HB 12-1311), ch. 281, p. 1624, § 60, effective July 1.

18-18-603. Statutes of limitations. A civil action under this article must be commenced within seven years after the claim for relief became known or should have become known, excluding any time during which a party is out of the state or in confinement or during which criminal proceedings relating to a party are in progress.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1.

18-18-604. Uniformity of interpretation. To the extent that this article is uniform, the judiciary may look to decisions regarding the "Uniform Controlled Substances Act of 1990" among states enacting it, subject to rights and obligations provided under other Colorado statutes and the state constitution.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1.

18-18-605. Severability. If any provision of this article or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or

applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Source: L. 92: Entire article R&RE, p. 385, § 1, effective July 1.

ARTICLE 18.5

Methamphetamine Abuse Prevention, Intervention, and Treatment and the Response of the Criminal Justice System

Cross references: For the legislative declaration contained in the 2006 act enacting this article, see section 1 of chapter 341, Session Laws of Colorado 2006.

18-18.5-101.	Legislative declaration.		ship - duties.
18-18.5-102.	Definitions.	18-18.5-104.	Task force funding.
18-18.5-103.	State methamphetamine task force - creation - member-	18-18.5-105.	Cash fund - created.
		18-18.5-106.	Repeal of article.

18-18.5-101. Legislative declaration. (1) The general assembly finds that:

(a) Methamphetamine is a central nervous system stimulant that can be orally ingested, smoked, snorted, or injected;

(b) Current legitimate medical uses for methamphetamine are very limited, consisting of relatively short-term treatment for narcolepsy, attention deficit disorder, and obesity;

(c) Methamphetamine continues to exhibit a high potential for addiction and abuse;

(d) Methamphetamine use and manufacturing place countless Colorado children at risk of methamphetamine ingestion and exposure to toxic chemicals, weapons, pornography, predators, and impaired and neglectful caretakers. These children are at increased risk of neglect as well as physical and sexual abuse.

(e) Methamphetamine abuse during pregnancy places children at direct risk for complications, including premature delivery, altered neonatal behavior patterns such as abnormal reflexes and extreme irritability, congenital deformities, low birth weight, attention deficit disorder, and prenatal and postnatal neglect, many of which cause lifelong defects;

(f) In Colorado, the rate of methamphetamine treatment admissions increased over two hundred percent between 1997 and 2004 and has risen since. Methamphetamine-related arrests and prosecutions have increased at a similar rate, and seventy percent of Colorado counties reported a major increase in out-of-home foster care placements in the last five years due to the use or manufacture of methamphetamine.

(g) Each year Colorado spends significant amounts of money in costs related to untreated substance abuse.

(2) The general assembly further finds that methamphetamine labs and abuse are a scourge that harms citizens of Colorado. Improvements in responses to the methamphetamine epidemic should be supported in the criminal justice system, mental health services, social services, child welfare and youth services, community task forces, treatment for parents who abuse methamphetamine and treatment for children affected by methamphetamine use or manufacture, and other systems affected by methamphetamine.

(3) The general assembly, therefore, determines and declares that it is necessary to create a state methamphetamine task force to:

(a) Examine and implement the most effective models and practices for the prevention of methamphetamine production, distribution, and abuse and for the treatment of children and adults affected by methamphetamine addiction;

(b) Formulate and implement a response from the criminal justice sector regarding the methamphetamine problem; and

(c) Make recommendations to the general assembly for the development of statewide strategies and legislative proposals related to these issues.

Source: L. 2006: Entire article added, p. 1699, § 2, effective July 1.

18-18.5-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Task force" means the state methamphetamine task force established pursuant to section 18-18.5-103.

Source: L. 2006: Entire article added, p. 1700, § 2, effective July 1.

18-18.5-103. State methamphetamine task force - creation - membership - duties.

(1) There is hereby created the state methamphetamine task force.

(2) The task force shall consist of the following members:

(a) (I) The attorney general or his or her designee, who shall serve as the chair;

(II) An expert in the field of methamphetamine abuse prevention, who shall be appointed by the president of the senate and serve as a vice-chair;

(III) An expert in the field of methamphetamine abuse treatment, who shall be appointed by the speaker of the house of representatives and serve as a vice-chair;

(IV) A representative of the criminal justice system, who shall be appointed by the governor and serve as a vice-chair;

(V) The president of the senate or his or her designee;

(VI) The minority leader of the senate or his or her designee;

(VII) The speaker of the house of representatives or his or her designee;

(VIII) The minority leader of the house of representatives or his or her designee;

(a.5) The terms of the members appointed by the speaker of the house of representatives and the president of the senate and who are serving on March 22, 2007, shall be extended to and expire on or shall terminate on the convening date of the first regular session of the sixty-seventh general assembly. As soon as practicable after such convening date, the speaker and the president shall each appoint or reappoint one member in the same manner as provided in subparagraphs (II) and (III) of paragraph (a) of this subsection (2). Thereafter, the terms of members appointed or reappointed by the speaker and the president shall expire on the convening date of the first regular session of each general assembly, and all subsequent appointments and reappointments by the speaker and the president shall be made as soon as practicable after such convening date. The person making the original appointment or reappointment shall fill any vacancy by appointment for the remainder of an unexpired term. Members appointed or reappointed by the speaker and the president shall serve at the pleasure of the appointing authority and shall continue in office until the member's successor is appointed.

(b) Sixteen members appointed by the task force chair and vice-chairs as follows:

(I) A representative of a statewide child advocacy organization;

(II) A representative of a major health facility that focuses on the treatment of children;

(III) A representative of a human services agency with experience in child welfare issues;

(IV) An expert in alcohol and drug treatment procedures;

(V) A representative of the criminal defense bar;

(VI) A representative of a mental health treatment provider;

(VII) A representative of the department of education, who is familiar with the department's drug prevention initiatives;

(VIII) A representative of the Colorado district attorneys council;

(IX) A representative of a Colorado sheriffs' organization;

(X) A representative of a Colorado police chiefs' organization;

(XI) A county commissioner from a rural county;

(XII) A representative of an organization that provides information, advocacy, and support services to municipalities located in rural counties;

(XIII) A licensed pharmacist;

(XIV) A representative of the department of public safety;

(XV) A representative of the office of the child's representative;

(XVI) A representative of the division of adult parole of the department of corrections;

(c) Two members appointed by the chief justice of the Colorado supreme court who represent the judicial department, one of whom is a district court judge experienced in

handling cases involving methamphetamine and one of whom represents the division of probation within the judicial department;

(d) A member appointed by the governor who represents the governor's policy staff.

(3) A vacancy occurring in a position shall be filled as soon as possible by the appropriate appointing authority designated in subsection (2) of this section.

(4) The task force shall:

(a) Assist local communities in implementing the most effective models and practices for methamphetamine abuse prevention, intervention, and treatment and in developing the responses by the criminal justice system;

(b) Review model programs that have shown the best results in Colorado and across the United States and provide information on the programs to local communities and local drug task forces;

(c) Assist and augment local drug task forces without supplanting them;

(d) Investigate collaborative models on protecting children and other victims of methamphetamine production, distribution, and abuse;

(e) Measure and evaluate the progress of the state and local jurisdictions in preventing methamphetamine production, distribution, and abuse and in prosecuting persons engaging in these acts;

(f) Evaluate approaches to increase public awareness of methamphetamine production, distribution, and abuse;

(g) Assist local communities with implementation of the most effective practices to respond to illegal methamphetamine production, distribution, and use;

(h) Consider any other issues concerning methamphetamine production, distribution, and abuse that arise during the course of the task force study.

(5) All state and local agencies shall cooperate with the task force and provide such data and other information as the task force may require in carrying out its duties under this section. Any state or local agency or organization that is represented on the task force may provide staff assistance to the task force, subject to the discretion of the chair. Any staff assistance provided to the task force pursuant to this subsection (5) shall be without compensation.

(6) In addition, the task force shall:

(a) Meet at least four times each year from the date of the first meeting until January 1, 2014, or more often as directed by the chair of the task force;

(b) Communicate with and obtain input from groups throughout the state affected by the issues identified in subsection (4) of this section;

(c) Create subcommittees as needed to carry out the duties of the task force. The subcommittees may consist, in part, of persons who are not members of the task force. Such persons may vote on issues before the subcommittee but shall not be entitled to a vote at meetings of the task force.

(d) Submit a written report to the judiciary committees, or any successor committees, of the senate and the house of representatives of the general assembly by January 1, 2007, and by each January 1 thereafter through January 1, 2014, at a minimum specifying the following:

(I) Issues to be studied in upcoming task force meetings and a prioritization of those issues;

(II) Findings and recommendations regarding issues of prior consideration by the task force;

(III) Legislative proposals of the task force that identify the policy issues involved, the agencies responsible for the implementation of the changes, and the funding sources required for such implementation.

(7) (a) Except as otherwise provided in paragraph (b) of this subsection (7), members of the task force shall serve without compensation.

(b) Notwithstanding the provisions of section 2-2-307, C.R.S., legislative members of the task force may receive payment of per diem and reimbursement for actual and necessary expenses authorized pursuant to said section and any other direct or indirect costs associated

with the duties of the legislative members of the task force set forth in this article only from moneys appropriated from the methamphetamine abuse prevention, intervention, and treatment cash fund, created in section 18-18.5-105.

Source: L. 2006: Entire article added, p. 1700, § 2, effective July 1. L. 2007: (2)(a.5) added, p. 179, § 9, effective March 22. L. 2009: (6)(a) and IP(6)(d) amended, (SB 09-231), ch. 151, p. 631, § 1, effective April 20.

18-18.5-104. Task force funding. (1) The division of criminal justice in the department of public safety, on behalf of the task force, is authorized to receive and expend contributions, grants, services, and in-kind donations from any public or private entity for any direct or indirect costs associated with the duties and functions of the task force set forth in this article.

(2) The task force shall, no later than August 1, 2006, identify all funding sources described in subsection (1) of this section that the task force intends to utilize for its operation through August 1, 2008.

(3) Subject to available moneys, the task force may approve grants to recipients. In selecting grant recipients, the task force, to the extent possible, shall ensure that grants are awarded to law enforcement agencies or other applicants in a variety of geographic areas of the state.

Source: L. 2006: Entire article added, p. 1704, § 2, effective July 1.

18-18.5-105. Cash fund - created. (1) (a) All private and public funds received by the task force or the division of criminal justice in the department of public safety, on behalf of the task force, through grants, contributions, and donations pursuant to this article shall be transmitted to the state treasurer, who shall credit the same to the methamphetamine abuse prevention, intervention, and treatment cash fund, which fund is hereby created and referred to in this section as the "fund". The moneys in the fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs associated with the implementation of this article. All moneys in the fund not expended for the purpose of this article may be invested by the state treasurer as provided by law. All interest and income derived from the investment and deposit of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or another fund. All unexpended and unencumbered moneys remaining in the fund as of July 1, 2014, shall be transferred to the general fund.

(b) It is the intent of the general assembly that the task force and the division of criminal justice of the department of public safety, on behalf of the task force, shall not be required to solicit gifts, grants, or donations from any source and that the task force shall operate in accordance with the provisions of this article, independently of the balance in the fund.

(2) Compensation as provided in section 18-18.5-103 (7) (b) for legislative members of the task force shall be approved by the chair of the legislative council and paid by vouchers and warrants drawn as provided by law from moneys appropriated for such purpose and allocated to the legislative council from the fund.

Source: L. 2006: Entire article added, p. 1704, § 2, effective July 1. L. 2009: (1)(a) amended, (SB 09-231), ch. 151, p. 631, § 2, effective April 20.

18-18.5-106. Repeal of article. This article is repealed, effective July 1, 2014.

Source: L. 2006: Entire article added, p. 1705, § 2, effective July 1. L. 2009: Entire section amended, (SB 09-231), ch. 151, p. 632, § 3, effective April 20.

ARTICLE 19**Drug Offender Surcharge**

18-19-101.	Legislative declaration.	18-19-103.5.	Rural alcohol and substance
18-19-102.	Definitions.		abuse surcharge - repeal.
18-19-103.	Source of revenues - allocation of moneys.	18-19-104.	Judicial district drug offender treatment boards.

18-19-101. Legislative declaration. The general assembly hereby finds, determines, and declares that the use of controlled substances exacts an unacceptable toll on the fiscal resources of both state and local government and thereby increases the fiscal burden on the taxpayers of this state. It is the intent of the general assembly in enacting this article to shift the costs of controlled substance use to those persons who unlawfully traffic, possess, or use controlled substances.

Source: L. 91: Entire article added, p. 445, § 12, effective May 29.

18-19-102. Definitions. As used in this article, unless the context otherwise requires: (1) "Alcohol- or drug-related offender" means a person convicted of any of the following offenses or of attempt to commit any of the following offenses:

(a) Violation of a protection order as described in section 18-1-1001 (4), if the protection order prohibited the possession or consumption of alcohol or controlled substances and the violation related to such provisions;

(b) Vehicular homicide as described in section 18-3-106 (1) (b);

(c) Vehicular assault as described in section 18-3-205 (1) (b);

(d) Bringing alcohol beverages into the major league stadium as described in section 18-9-123 (1) (a) (I); or

(e) Illegal possession or consumption of ethyl alcohol by an underage person as described in section 18-13-122.

(1.5) "Convicted" and "conviction" means a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.

(2) "Drug offender" means any person convicted of any offense under article 18 of this title or an attempt to commit such offense as provided by article 2 of this title.

Source: L. 91: Entire article added, p. 445, § 12, effective May 29. **L. 95:** (2) amended, p. 1255, § 20, effective July 1. **L. 2002:** (1) amended, p. 1521, § 217, effective October 1. **L. 2009:** (1) amended and (1.5) added, (HB 09-1119), ch. 397, p. 2147, § 5, effective January 1, 2010.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-19-103. Source of revenues - allocation of moneys. (1) For offenses committed on and after July 1, 1996, each drug offender who is convicted, or receives a deferred sentence pursuant to section 18-1.3-102, shall be required to pay a surcharge to the clerk of the court in the county in which the conviction occurs or in which the deferred sentence is entered. Such surcharge shall be in the following amounts:

(a) For each class 2 felony of which a person is convicted, four thousand five hundred dollars;

(b) For each class 3 felony of which a person is convicted, three thousand dollars;

(c) For each class 4 felony of which a person is convicted, two thousand dollars;

(d) For each class 5 felony of which a person is convicted, one thousand five hundred dollars;

(e) For each class 6 felony of which a person is convicted, one thousand two hundred fifty dollars;

(f) For each class 1 misdemeanor of which a person is convicted, one thousand dollars;
(g) For each class 2 misdemeanor of which a person is convicted, six hundred dollars;
(h) For each class 3 misdemeanor of which a person is convicted, three hundred dollars.
(2) Each drug offender convicted of a violation of section 18-18-406 (1), or who receives a deferred sentence pursuant to section 18-1.3-102 for a violation of section 18-18-406 (1), shall be assessed a surcharge of two hundred dollars.

(3) The clerk of the court shall disburse the surcharge required by subsection (1) of this section as follows:

(a) Five percent shall be retained by the clerk for purposes of administering the disbursement of the surcharge pursuant to this subsection (3).

(b) Four percent shall be disbursed to the investigating agency to cover the costs of fingerprinting and photographing offenders pursuant to section 16-21-104 (1), C.R.S.

(c) One percent shall be disbursed to the sheriff of the county in which the conviction or deferred sentence is entered, to cover the costs of fingerprinting and photographing offenders pursuant to section 18-18-432 (3).

(d) Ninety percent shall be disbursed to the state treasurer who shall credit the same to the correctional treatment cash fund created pursuant to subsection (4) of this section.

(3.5) (a) Repealed.

(b) The general assembly shall appropriate to the correctional treatment cash fund created pursuant to subsection (4) of this section at least seven million six hundred fifty-six thousand two hundred dollars in fiscal year 2012-13 from the general fund, at least nine million five hundred thousand dollars in fiscal year 2013-14 from the general fund, and each year thereafter generated from estimated savings from House Bill 10-1352, enacted in 2010.

(4) (a) There is hereby created in the state treasury the correctional treatment cash fund, referred to in this paragraph (a) as the "fund", which shall consist of moneys received by the state treasurer pursuant to paragraph (d) of subsection (3) of this section and subsection (3.5) of this section, and, in addition, each year, the general assembly shall appropriate at least two million two hundred thousand dollars generated from estimated savings from the enactment of Senate Bill 03-318, enacted in 2003, to the fund. The moneys in the fund shall be used for the purposes described in paragraph (c) of subsection (5) of this section. All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any moneys not appropriated by the general assembly shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(a.5) Repealed.

(b) Notwithstanding any provision of paragraph (a) of this subsection (4) to the contrary, on April 20, 2009, the state treasurer shall deduct one hundred fifty-one thousand three hundred forty-one dollars from the drug offender surcharge fund and transfer such sum to the general fund.

(c) Notwithstanding any provision of paragraph (a) of this subsection (4) to the contrary, on July 1, 2009, the state treasurer shall deduct one million three hundred sixty thousand dollars from the drug offender surcharge fund and transfer such sum to the general fund.

(5) (a) The correctional treatment board, hereby created and referred to in this subsection (5) as the "board", shall prepare an annual treatment funding plan that includes a fair and reasonable allocation of resources for programs throughout the state. The judicial department shall include the annual treatment funding plan in its annual presentation to the joint budget committee.

(b) The board consists of:

- (I) The executive director of the department of corrections or his or her designee;
 - (II) The director of the division of probation services in the judicial department or his or her designee;
 - (III) The executive director of the department of public safety or his or her designee;
 - (IV) The executive director of the department of human services or his or her designee.
- If the executive director appoints a designee, the executive director is encouraged to select someone with expertise in addiction counseling and substance abuse issues;
- (V) The state public defender or his or her designee;

(VI) The president of the statewide association representing district attorneys or his or her designee; and

(VII) The president of the statewide association representing county sheriffs or his or her designee.

(c) The board may direct that moneys in the correctional treatment cash fund may be used for the following purposes:

(I) Alcohol and drug screening, assessment, and evaluation;

(II) Alcohol and drug testing;

(III) Substance abuse education and training;

(IV) An annual statewide conference regarding substance abuse treatment;

(V) Treatment for assessed substance abuse and co-occurring disorders;

(VI) Recovery support services; and

(VII) Administrative support to the correctional treatment board including, but not limited to, facilitating and coordinating data collection, conducting data analysis, developing contracts, preparing reports, scheduling and staffing board and subcommittee meetings, and engaging in budget planning and analysis.

(d) Moneys from the correctional treatment cash fund may be used to serve the following populations:

(I) Adults and juveniles serving a diversion sentence for a state offense;

(II) Adults and juveniles serving a probation sentence for a state offense, including Denver county;

(III) Adults and juveniles on parole;

(IV) Offenders sentenced or transitioned to a community corrections program; and

(V) Offenders serving a sentence in a county jail, on a work-release program supervised by the county jail, or receiving after-care treatment following release from jail if the offender participated in a jail treatment program.

(e) Before adopting the annual treatment fund plan, the board shall review the information specified in paragraph (f) of this subsection (5) and shall consider proposals from the drug offender treatment boards created in section 18-19-104 for funding local assessed treatment needs.

(f) The board shall determine the scope, method, and frequency of the data collection and the parties responsible for data collection, analysis, and reporting. The data shall be organized by judicial district and shall include, at a minimum, the following from each treatment program:

(I) Name and location of the program, including the county and judicial district;

(II) The referring criminal agency;

(III) Demographic information including gender and ethnicity;

(IV) Level of treatment delivered;

(V) Actual length of time in treatment for each client;

(VI) Discharge status and, if the status is negative, the reason for the negative discharge; and

(VII) Any special licenses held by the treatment program.

(5.5) Repealed.

(6) (a) The court may not waive any portion of the surcharge required by this section unless the court first finds that the drug offender is financially unable to pay any portion of said surcharge.

(b) The finding required by paragraph (a) of this subsection (6) shall only be made after a hearing at which the drug offender shall have the burden of presenting clear and convincing evidence that he is financially unable to pay any portion of the surcharge.

(c) The court shall waive only that portion of the surcharge which the court has found the drug offender is financially unable to pay.

Source: **L. 91:** Entire article added, p. 445, § 12, effective May 29. **L. 93:** (3)(c) amended, p. 1779, § 41, effective June 6. **L. 94:** (2) and (3) amended, p. 1632, § 36, effective May 31; (4) amended, p. 2605, § 5, effective July 1. **L. 96:** (1) amended, p. 134, § 1, effective March 25. **L. 2002:** IP(1) and (2) amended, p. 1522, § 218, effective October 1. **L. 2003:** (5.5) added, p. 2686, § 4, effective July 1. **L. 2009:** (4) and (5.5)

amended, (SB 09-208), ch. 149, p. 621, § 13, effective April 20; (4)(c) added, (SB 09-279), ch. 367, p. 1926, § 5, effective June 1. **L. 2010:** (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (2), (4)(a), and (5.5)(b) amended and (3.5) added, (HB 10-1352), ch. 259, pp. 1175, 1171, §§ 25, 9, effective August 11. **L. 2011:** (5.5)(c) added, (SB 11-164), ch. 33, p. 92, § 2, effective March 18. **L. 2012:** (3)(d), (3.5)(b), (4)(a), (5), and (5.5) amended, (3.5)(a) repealed, and (4)(a.5) added, (HB 12-1310), ch. 268, p. 1407, § 35, effective June 7.

Editor's note: (1) Subsection (5.5)(b) was amended by House Bill 10-1352 in 2010; however, section 9 of House Bill 10-1352 failed to include the subsection (5.5) designation in the amending clause for this section.

(2) (a) For the amendments to subsections (4)(a.5) and (5.5) that were in effect from June 7, 2012, to July 1, 2012, see chapter 268, Session Laws of Colorado. (L. 2012, p. 1407.)

(b) (I) Amendments to subsection (4)(a.5) provided for its repeal, effective July 1, 2012.

(II) Amendments to subsection (5.5) provided for its repeal, effective July 2, 2012.

Cross references: For the legislative declaration contained in the 2002 act amending the introductory portion to subsection (1) and subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative intent contained in the 2003 act enacting subsection (5.5), see section 1 of chapter 424, Session Laws of Colorado 2003.

ANNOTATION

Drug offender surcharge is properly characterized as a punishment rather than as a nonpunitive, compensatory payment. As such, the surcharge is appropriately scrutinized against constitutional provisions prohibiting ex post facto legislation. *People v. Stead*, 845 P.2d 1156 (Colo. 1993).

Imposition of drug offender surcharge violated prohibition against ex post facto laws where defendant committed offenses before effective date of statute. *People v. Stead*, 845 P.2d 1157 (Colo. 1993); *People v. Henry*, 845 P.2d 1160 (Colo. 1993); *People v. Ellington*, 854 P.2d 223 (Colo. 1993); *People v. Brown*, 854 P.2d 228 (Colo. 1993); *People v. Stead*, 854 P.2d 229 (Colo. 1993).

Court erred in imposing surcharge for offenses that took place in December, 1990. Statute was intended to apply to acts committed

on or after July 1, 1991, and imposition of surcharge for 1990 act violates constitutional prohibition against ex post facto law. *People v. Racheli*, 878 P.2d 46 (Colo. App. 1994).

The double jeopardy clause requires the trial court to impose the drug offender surcharge at the time it imposes defendant's sentence in open court. The surcharge is considered punishment and may be waived in full or in part based upon a defendant's financial ability to pay. *People v. McQuarrie*, 66 P.3d 181 (Colo. App. 2002).

Incarceration does not necessarily render a defendant unable to pay the drug offender surcharge. *People v. Griffiths*, 251 P.3d 462 (Colo. App. 2010).

18-19-103.5. Rural alcohol and substance abuse surcharge - repeal. (1) In addition to the surcharges established in section 18-19-103, each drug offender and each alcohol- or drug-related offender who is convicted, or receives a deferred sentence pursuant to section 18-1.3-102, shall be required to pay a surcharge to the clerk of the court in the county in which the conviction occurs or in which the deferred sentence is entered. The surcharge shall be in an amount determined by the judge but shall be not less than one dollar nor more than ten dollars.

(2) The clerk of the court shall disburse the surcharge required by subsection (1) of this section as follows:

(a) Five percent shall be retained by the clerk for purposes of administering the disbursement of the surcharge pursuant to this subsection (2);

(b) Ninety-five percent shall be disbursed to the state treasurer who shall credit the same to the rural alcohol and substance abuse cash fund created in section 27-80-117 (3), C.R.S.

(3) The minimum penalty surcharge shall be mandatory, and the court shall have no discretion to suspend or waive the surcharge; except that the court may suspend or waive the surcharge for a defendant determined by the court to be indigent.

(4) This section is repealed, effective July 1, 2016, unless the general assembly extends the repeal of the rural alcohol and substance abuse prevention and treatment program created in section 27-80-117, C.R.S.

Source: **L. 2009:** Entire section added, (HB 09-1119), ch. 397, p. 2148, § 6, effective January 1, 2010. **L. 2010:** (2)(b) and (4) amended, (SB 10-175), ch. 188, p. 788, § 35, effective April 29.

18-19-104. Judicial district drug offender treatment boards. (1) Each judicial district shall create a drug offender treatment board, whose membership is knowledgeable about adult criminal and juvenile justice matters, consisting of:

- (a) The district attorney serving the judicial district or his or her designee;
- (b) The chief public defender serving the judicial district or his or her designee;
- (c) The chair of the local community corrections board or his or her designee;
- (d) A parole officer working in the judicial district chosen by the director of the department of corrections or his or her designee;
- (e) A sheriff that serves the judicial district chosen by the chief judge of the judicial district;
- (f) A representative of a drug court or similar problem-solving court if such a court exists in the judicial district chosen by the chief judge of the judicial district;
- (g) A person with expertise in juvenile matters chosen by the chief judge of the judicial district; and
- (h) A probation officer working in the judicial district chosen by the chief judge of the judicial district.

(2) The board shall give priority to drug court funding if the jurisdiction operates a drug court and the drug court operates with best evidence-based or promising practices. Each drug offender treatment board shall annually make recommendations to the correctional treatment board for funding local assessed treatment needs.

(3) Each judicial district's drug offender treatment board may adopt rules and guidelines as necessary to perform the functions of the board.

(4) and (5) Repealed.

Source: **L. 2003:** Entire section added, p. 2688, § 6, effective July 1. **L. 2008:** (2) amended, p. 1890, § 58, effective August 5. **L. 2009:** (5) repealed, (SB 09-292), ch. 369, p. 1949, § 33, effective August 5. **L. 2012:** (1) and (2) amended and (4) repealed, (HB 12-1310), ch. 268, p. 1410, § 36, effective June 7.

Cross references: For the legislative intent contained in the 2003 act enacting this section, see section 1 of chapter 424, Session Laws of Colorado 2003.

ARTICLE 20

Offenses Related to Limited Gaming

18-20-101.	Legislative declaration.	18-20-109.	Use of counterfeit or unapproved chips or tokens or unlawful coins or devices - possession of certain unlawful devices, equipment, products, or materials.
18-20-102.	Definitions - terms used.		
18-20-103.	Violations of taxation provisions - penalties.		
18-20-104.	False statement on application - violations of rules or provisions of article 47.1 of title 12, C.R.S., as felony.	18-20-110.	Cheating game and devices.
18-20-105.	Slot machines - shipping notices.	18-20-111.	Unlawful manufacture, sale, distribution, marking, altering, or modification of equipment and devices associated with limited gaming - unlawful instruction.
18-20-106.	Cheating.		
18-20-107.	Fraudulent acts.		
18-20-108.	Use of device for calculating probabilities.	18-20-112.	Unlawful entry by excluded

	and ejected persons.	18-20-114.	False or misleading information - unlawful.
18-20-113.	Personal pecuniary gain or conflict of interest.	18-20-115.	Exceptions.

18-20-101. Legislative declaration. The general assembly hereby finds, determines, and declares that the strict control of limited gaming in this state is necessary for the immediate and future preservation of the public peace, health, and safety.

Source: L. 91: Entire article added, p. 1583, § 11, effective June 4.

18-20-102. Definitions - terms used. (1) As used in this article, unless this article otherwise provides or unless the context otherwise requires, terms used in this article shall have the same meanings as those set forth in article 47.1 of title 12, C.R.S.

(2) The term “repeating gambling offender” means any person who is convicted of an offense under section 18-10-103 (2), sections 18-10-105 to 18-10-107, or sections 18-20-103 to 18-20-114 or sections 12-47.1-809 to 12-47.1-811 or 12-47.1-818 to 12-47.1-832 or 12-47.1-839, C.R.S., within five years after a previous misdemeanor conviction under said sections or under a former statute prohibiting gambling activities or at any time after a previous felony conviction under any of said sections. A conviction in any jurisdiction of the United States of an offense which, if committed in this state, would be professional gambling shall constitute a previous conviction for purposes of a prosecution in this state as a repeating gambling offender.

Source: L. 91: Entire article added, p. 1583, § 11, effective June 4.

18-20-103. Violations of taxation provisions - penalties. (1) Any person who:

- (a) Makes any false or fraudulent return in attempting to defeat or evade the tax imposed by article 47.1 of title 12, C.R.S., commits a class 5 felony;
- (b) Fails to pay tax due under article 47.1 of title 12, C.R.S., within thirty days after the date the tax becomes due commits a class 1 misdemeanor;
- (c) Fails to file a return required by article 47.1 of title 12, C.R.S., within thirty days after the date the return is due commits a class 1 misdemeanor;
- (d) Violates section 12-47.1-603 (1) (b) or (1) (c), C.R.S., two or more times in any twelve-month period commits a class 5 felony;
- (e) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under or in connection with any matter arising under any title administered by the commission or a return, affidavit, claim, or other document which is fraudulent or is false as to any material fact, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document commits a class 5 felony.

(2) For purposes of this section, “person” includes corporate officers having control or supervision of, or responsibility for, completing tax returns or making payments pursuant to article 47.1 of title 12, C.R.S.

Source: L. 91: Entire article added, p. 1583, § 11, effective June 4.

18-20-104. False statement on application - violations of rules or provisions of article 47.1 of title 12, C.R.S., as felony. Any person who knowingly makes a false statement in any application for a license or in any statement attached to the application, or who provides any false or misleading information to the commission or the division, or who fails to keep books and records to substantiate the receipts, expenses, or uses resulting from limited gaming conducted under article 47.1 of title 12, C.R.S., as prescribed in rules or regulations promulgated by the commission, or who falsifies any books or records which relate to any transaction connected with the holding, operating, and conducting of any limited card games or slot machines, or who knowingly violates any of the provisions of

article 47.1 of title 12, C.R.S., or any rule or regulation adopted by the commission or any terms of any license granted under said article 47.1, commits a class 5 felony.

Source: L. 91: Entire article added, p. 1584, § 11, effective June 4.

ANNOTATION

This section is neither unconstitutionally overbroad nor unconstitutionally vague. People v. Luke, 948 P.2d 87 (Colo. App. 1997).

This section does not require that a "false or misleading" statement be material. People v. Luke, 948 P.2d 87 (Colo. App. 1997).

Where the defendant's capacity as chief executive officer for applicant was such that

he could speak for the applicant, it is not necessary that the defendant have an individual key employee application pending or that the applicant be a licensee at the time the false statement is made or the misleading information is provided. People v. Luke, 948 P.2d 87 (Colo. App. 1997).

18-20-105. Slot machines - shipping notices. (1) Any slot machine manufacturer or distributor shipping or importing a slot machine into the state of Colorado shall provide to the Colorado limited gaming control commission created in section 12-47.1-301, C.R.S., at the time of shipment a copy of the shipping invoice which shall include, at a minimum, the destination, the serial number of each machine, and a description of each machine. Any person within the state of Colorado receiving a slot machine shall, upon receipt of the machine, provide to the Colorado limited gaming control commission upon a form available from the commission information showing at a minimum the location of each machine, its serial number, and description. Such report shall be provided regardless of whether the machine is received from a manufacturer or any other person. Any machine licensed pursuant to section 12-47.1-803, C.R.S., shall be licensed for a specific location, and movement of the machine from that location shall be reported to said commission within the time period set out in rules promulgated pursuant to section 12-47.1-803 (1) (d), C.R.S. Any person violating any provision of section 12-47.1-803, C.R.S., commits a class 5 felony. Any slot machine which is not in compliance with article 47.1 of title 12, C.R.S., is declared contraband and may be summarily seized and destroyed after notice and hearing.

(2) Slot machines which because of age and condition bear no manufacturer serial number shall be assigned a serial number by a remanufacturer of slot machines. Such new serial number shall be duly recorded as required by federal regulations.

(3) The director of the division of gaming appointed pursuant to section 12-47.1-201, C.R.S., may approve a change to the registration of a slot machine under circumstances constituting an emergency. If said director approves such an emergency change, the registration of the slot machine shall not be suspended pending the filing of a supplemental application.

Source: L. 91: Entire article added, p. 1584, § 11, effective June 4. **L. 97:** (1) amended, p. 1013, § 18, effective August 6.

18-20-106. Cheating. (1) It is unlawful for any person, whether he is an owner or employee of, or a player in, an establishment, to cheat at any limited gaming activity.

(2) For purposes of article 47.1 of title 12, C.R.S., "cheating" means to alter the selection of criteria which determine:

(a) The result of a game; or

(b) The amount or frequency of payment in a game.

(3) Any person issued a license pursuant to article 47.1 of title 12, C.R.S., violating any provision of this section commits a class 6 felony, and any other person violating any provision of this section commits a class 1 misdemeanor. If the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1585, § 11, effective June 4.

18-20-107. Fraudulent acts. (1) It is unlawful for any person:

- (a) To alter or misrepresent the outcome of a game or other event on which wagers have been made after the outcome is made sure but before it is revealed to the players;
 - (b) To place, increase, or decrease a bet or to determine the course of play after acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game or which is the subject of the bet or to aid anyone in acquiring such knowledge for the purpose of placing, increasing, or decreasing a bet or determining the course of play contingent upon that event or outcome;
 - (c) To claim, collect, or take, or attempt to claim, collect, or take, money or anything of value in or from a limited gaming activity with intent to defraud and without having made a wager contingent thereon, or to claim, collect, or take an amount greater than the amount won;
 - (d) Knowingly to entice or induce another to go to any place where limited gaming is being conducted or operated in violation of the provisions of article 47.1 of title 12, C.R.S., with the intent that the other person play or participate in that limited gaming activity;
 - (e) To place or increase a bet after acquiring knowledge of the outcome of the game or other event which is the subject of the bet, including past-posting and pressing bets;
 - (f) To reduce the amount wagered or to cancel a bet after acquiring knowledge of the outcome of the game or other event which is the subject of the bet, including pinching bets;
 - (g) To manipulate, with the intent to cheat, any component of a gaming device in a manner contrary to the designed and normal operational purpose for the component, including, but not limited to, varying the pull of the handle of a slot machine, with knowledge that the manipulation affects the outcome of the game or with knowledge of any event that affects the outcome of the game;
 - (h) To, by any trick or slight of hand performance, or by fraud or fraudulent scheme, cards, or device, for himself or another, win or attempt to win money or property or a representative of either or reduce a losing wager or attempt to reduce a losing wager in connection with limited gaming;
 - (i) To conduct any limited gaming operation without a valid license;
 - (j) To conduct any limited gaming operation on an unlicensed premises;
 - (k) To permit any limited gaming game or slot machine to be conducted, operated, dealt, or carried on in any limited gaming premises by a person other than a person licensed for such premises pursuant to article 47.1 of title 12, C.R.S.;
 - (l) To place any limited gaming games or slot machines into play or display such games or slot machines without the authorization of the Colorado limited gaming control commission;
 - (m) To employ or continue to employ any person in a limited gaming operation who is not duly licensed or registered in a position whose duties require a license or registration pursuant to article 47.1 of title 12, C.R.S.; or
 - (n) To, without first obtaining the requisite license or registration pursuant to article 47.1 of title 12, C.R.S., be employed, work, or otherwise act in a position whose duties would require licensing or registration pursuant to said article.
- (2) Any person issued a license pursuant to article 47.1 of title 12, C.R.S., violating any provision of this section commits a class 6 felony, and any other person violating any provision of this section commits a class 1 misdemeanor. If the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1585, § 11, effective June 4.

18-20-108. Use of device for calculating probabilities. (1) It is unlawful for any person at a licensed gaming establishment to use, or possess with the intent to use, any device to assist:

- (a) In projecting the outcome of the game;
- (b) In keeping track of the cards played;
- (c) In analyzing the probability of the occurrence of an event relating to the game; or
- (d) In analyzing the strategy for playing or betting to be used in the game, except as permitted by the Colorado limited gaming control commission.

(2) Any person issued a license pursuant to article 47.1 of title 12, C.R.S., violating any provision of this section commits a class 6 felony and any other person violating any provision of this section commits a class 1 misdemeanor. If the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1587, § 11, effective June 4.

18-20-109. Use of counterfeit or unapproved chips or tokens or unlawful coins or devices - possession of certain unlawful devices, equipment, products, or materials.

(1) It is unlawful for any licensee, employee, or other person to use counterfeit chips in any limited gaming activity.

(2) It is unlawful for any person, in playing or using any limited gaming activity designed to be played with, to receive, or to be operated by chips or tokens approved by the Colorado limited gaming control commission or by lawful coin of the United States of America:

(a) Knowingly to use anything other than chips or tokens approved by the Colorado limited gaming control commission or lawful coin, legal tender of the United States of America, or to use coin not of the same denomination as the coin intended to be used in that limited gaming activity; or

(b) To use any device or means to violate the provisions of article 47.1 of title 12, C.R.S.

(3) It is unlawful for any person to possess any device, equipment, or material which he knows has been manufactured, distributed, sold, tampered with, or serviced in violation of the provisions of article 47.1 of title 12, C.R.S.

(4) It is unlawful for any person, not a duly authorized employee of a licensee acting in furtherance of his or her employment within an establishment, to have on his or her person or in his or her possession any device intended to be used to violate the provisions of article 47.1 of title 12, C.R.S.

(5) It is unlawful for any person, not a duly authorized employee of a licensee acting in furtherance of his or her employment within an establishment, to have on his or her person or in his or her possession while on the premises of any licensed gaming establishment any key or device known to have been designed for the purpose of and suitable for opening, entering, or affecting the operation of any limited gaming activity, drop box, or electronic or mechanical device connected thereto, or for removing money or other contents therefrom.

(6) Possession of more than one of the devices, equipment, products, or materials described in this section shall give rise to a rebuttable presumption that the possessor intended to use them for cheating.

(7) It is unlawful for any person to use or possess while on the premises any cheating or thieving device, including but not limited to, tools, drills, wires, coins, or tokens attached to strings or wires or electronic or magnetic devices, to facilitate the alignment of any winning combination or to facilitate removing from any slot machine any money or contents thereof, unless the person is a duly authorized gaming employee acting in the furtherance of his or her employment.

(8) Any person violating any provision of this section commits a class 6 felony; except that, if the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1587, § 11, effective June 4. **L. 2001:** (8) amended, p. 605, § 3, effective July 1.

ANNOTATION

In adopting the Limited Gaming Act of 1991, including the specific offenses included in this section, the general assembly intended that offenses defined in this section be prosecuted under this section or under the criminal

provisions included in § 12-47.1-825 rather than under the general offenses specified in other portions of this title. Therefore, the district attorney had no discretion to charge the defendant with the broader offenses of burglary

and possession of burglary tools for actions that violated the specific provisions of this section. *People v. Warner*, 930 P.2d 564 (Colo. 1996).

18-20-110. Cheating game and devices. (1) It is unlawful for any person playing any licensed game in licensed gaming premises to:

(a) Knowingly conduct, carry on, operate, or deal or allow to be conducted, carried on, operated, or dealt any cheating or thieving game or device; or

(b) Knowingly deal, conduct, carry on, operate, or expose for play any game or games played with cards or any mechanical device, or any combination of games or devices, which have in any manner been marked or tampered with or placed in a condition or operated in a manner the result of which tends to deceive the public or tends to alter the normal random selection of characteristics or the normal chance of the game which could determine or alter the result of the game.

(2) Any person violating any provision of this section commits a class 6 felony; except that, if the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1589, § 11, effective June 4. L. 2001: (2) amended, p. 606, § 4, effective July 1.

18-20-111. Unlawful manufacture, sale, distribution, marking, altering, or modification of equipment and devices associated with limited gaming - unlawful instruction. (1) It is unlawful to manufacture, sell, or distribute any cards, chips, dice, game, or device which is intended to be used to violate any provision of article 47.1 of title 12, C.R.S.

(2) It is unlawful to mark, alter, or otherwise modify any associated equipment or limited gaming device in a manner that:

(a) Affects the result of a wager by determining win or loss; or

(b) Alters the normal criteria of random selection, which affects the operation of a game or which determines the outcome of a game.

(3) It is unlawful for any person to instruct another in cheating or in the use of any device for that purpose, with the knowledge or intent that the information or use so conveyed may be employed to violate any provision of article 47.1 of title 12, C.R.S.

(4) Any person issued a license pursuant to article 47.1 of title 12, C.R.S., violating any provision of this section commits a class 6 felony, and any other person violating any provision of this section commits a class 1 misdemeanor. If the person is a repeating gambling offender, the person commits a class 5 felony.

Source: L. 91: Entire article added, p. 1589, § 11, effective June 4.

18-20-112. Unlawful entry by excluded and ejected persons. (1) It is unlawful for any person whose name is on the list promulgated by the Colorado limited gaming control commission pursuant to section 12-47.1-1001 or 12-47.1-1002, C.R.S., to enter the licensed premises of a limited gaming licensee.

(2) It is unlawful for any person whose name is on the list promulgated by the Colorado limited gaming control commission pursuant to section 12-47.1-1001 or 12-47.1-1002, C.R.S., to have any personal pecuniary interest, direct or indirect, in any limited gaming licensee, licensed premises, establishment, or business involved in or with limited gaming or in the shares in any corporation, association, or firm licensed pursuant to article 47.1 of title 12, C.R.S.

(3) Any person violating the provisions of this section commits a class 5 felony.

Source: L. 91: Entire article added, p. 1590, § 11, effective June 4.

18-20-113. Personal pecuniary gain or conflict of interest. (1) It is unlawful for any person to issue, suspend, revoke, or renew any license pursuant to article 47.1 of title 12, C.R.S., for any personal pecuniary gain or any thing of value, as defined in section 18-1-901

(3) (r), or for any person to violate any of the provisions of part 4 of article 47.1 of title 12, C.R.S.

(2) Any person violating any of the provisions of this section commits a class 3 felony.

Source: L. 91: Entire article added, p. 1590, § 11, effective June 4.

18-20-114. False or misleading information - unlawful. (1) It is unlawful for any person to provide any false or misleading information under the provisions of article 47.1 of title 12, C.R.S.

(2) Any person violating any of the provisions of this section commits a class 5 felony.

Source: L. 91: Entire article added, p. 1590, § 11, effective June 4.

18-20-115. Exceptions. Nothing contained in this article shall be construed to modify, amend, or otherwise affect the validity of any provisions contained in article 10 of this title.

Source: L. 91: Entire article added, p. 1590, § 11, effective June 4.

ARTICLE 21

Sex Offender Surcharge

18-21-101. Legislative declaration.
18-21-102. Definitions.

18-21-103. Source of revenues - allocation of moneys - sex offender surcharge fund - creation.

18-21-101. Legislative declaration. The general assembly hereby finds, determines, and declares that the commission of sex offenses exacts an unacceptable toll on the fiscal resources of both state and local government and thereby increases the fiscal burden upon the taxpayers of this state. It is the intent of the general assembly in enacting this article to require, as much as possible, that persons convicted of a sex offense pay for the cost of the evaluation, identification, and treatment and continuing monitoring to protect victims and potential victims as described in article 11.7 of title 16, C.R.S.

Source: L. 92: Entire article added, p. 462, § 10, effective June 2.

18-21-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Convicted" and "conviction" means a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102 or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.

(2) "Sex offense" has the same meaning as defined in section 16-11.7-102 (3), C.R.S.

Source: L. 92: Entire article added, p. 462, § 10, effective June 2. **L. 2002:** (1) amended, p. 1522, § 219, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-21-103. Source of revenues - allocation of moneys - sex offender surcharge fund - creation. (1) On and after July 1, 1992, each person who is convicted of a sex offense, or receives for such offense a deferred sentence pursuant to section 18-1.3-102, shall be required to pay a surcharge to the clerk of the court in which the conviction occurs or in which the deferred sentence is entered. Such surcharge shall be in the following amounts:

- (a) For each class 2 felony of which a person is convicted, three thousand dollars;
- (b) For each class 3 felony of which a person is convicted, two thousand dollars;

- (c) For each class 4 felony of which a person is convicted, one thousand dollars;
- (d) For each class 5 felony of which a person is convicted, seven hundred fifty dollars;
- (e) For each class 6 felony of which a person is convicted, five hundred dollars;
- (f) For each class 1 misdemeanor of which a person is convicted, four hundred dollars;
- (g) For each class 2 misdemeanor of which a person is convicted, three hundred dollars;
- (h) For each class 3 misdemeanor of which a person is convicted, one hundred fifty dollars.

(1.5) On and after July 1, 2000, each juvenile who is adjudicated for commission of an offense that would constitute a sex offense if committed by an adult or who receives for such offense a deferred adjudication shall be required to pay a surcharge to the clerk of the court in which the adjudication occurs or in which the deferred adjudication is entered. The amount of such surcharge shall be half the amount that would have been assessed against an adult offender pursuant to subsection (1) of this section for commission of the offense.

(2) The clerk of the court shall allocate the surcharge required by subsection (1) of this section as follows:

(a) Five percent shall be retained by the clerk for administrative costs incurred pursuant to this subsection (2). Such amount retained shall be transmitted to the state treasurer, who shall credit the same to the general fund, and such amount shall be subject to appropriation by the general assembly for the costs of such administration.

(b) Ninety-five percent shall be transferred to the state treasurer who shall credit the same to the sex offender surcharge fund created pursuant to subsection (3) of this section.

(3) There is hereby created in the state treasury a sex offender surcharge fund which shall consist of moneys received by the state treasurer pursuant to paragraph (b) of subsection (2) of this section. The state treasurer may invest any moneys in the fund not expended for the purpose of this section as provided by law. The state treasurer shall credit all interest and income derived from the investment and deposit of moneys in the fund to the fund. Any moneys not appropriated by the general assembly shall remain in the sex offender surcharge fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year. All moneys in the fund shall be subject to annual appropriation by the general assembly to the judicial department, the department of corrections, the division of criminal justice of the department of public safety, and the department of human services, after consideration of the plan developed pursuant to section 16-11.7-103 (4) (c), C.R.S., to cover the direct and indirect costs associated with the evaluation, identification, and treatment and the continued monitoring of sex offenders.

(4) The court may waive all or any portion of the surcharge required by this section if the court finds that a person convicted of a sex offense is indigent or financially unable to pay all or any portion of such surcharge. The court shall waive only that portion of the surcharge which the court has found that the person convicted of a sex offense is financially unable to pay.

Source: L. 92: Entire article added, p. 462, § 10, effective June 2. L. 94: (3) amended, p. 2657, § 141, effective July 1. L. 2000: (1.5) added, p. 923, § 13, effective July 1. L. 2002: IP(1) amended, p. 1522, § 220, effective October 1. L. 2012: (3) amended, (HB 12-1310), ch. 268, p. 1398, § 17, effective June 7.

Cross references: For the legislative declaration contained in the 2002 act amending the introductory portion to subsection (1), see section 1 of chapter 318, Session Laws of Colorado 2002.

ANNOTATION

Surcharge improperly applied where offense occurred approximately 18 months before section enacted. People v. Salas, 902 P.2d 398 (Colo. App. 1994).

Imposition of two surcharges for conviction does not violate the prohibition against double jeopardy. The surcharge created by sub-

section (1)(c) and the surcharge created by § 24-4.2-104 (1)(a)(II)(A) may both be applied to the conviction for second degree sexual assault. People v. Thien Van Vo, 932 P.2d 849 (Colo. App. 1996).

Assessment of surcharges pursuant to this section violates the prohibition against ex

post facto laws since the offenses at issue occurred before the effective date of this section. People v. Bowring, 902 P.2d 911 (Colo. App. 1995).

Imposition of the mandatory \$1,000 fine for persons convicted of a class 4 felony sex offense was not unconstitutionally excessive where the trial court discussed the defendant's ability to pay the surcharge at the sentencing hearing and defendant did not object to the amount of the fine or request a reduction of the amount. People v. Bolt, 984 P.2d 1181 (Colo. App. 1999).

The surcharge amounts specified in this section are not disproportionate to the levels

of offenses as a matter of law. People v. Bolt, 984 P.2d 1181 (Colo. App. 1999).

Trial court improperly imposed surcharge where defendant plead guilty to an offense that is not included in the definition of "sex offense" in § 16-11.7-102. Although defendant was a "sex offender", as defined in § 16-11.7-102, because her plea was based on acts that were included in the definition of "sex offense" and thus created a history of sex offenses, the surcharge created in this section applies only to persons convicted of a "sex offense". People v. Meidinger, 987 P.2d 937 (Colo. App. 1999).

ARTICLE 22

Juvenile Offender Surcharge

18-22-101.	Legislative declaration.	18-22-103.	Source of revenues - allocation of moneys.
18-22-102.	Definitions.		

18-22-101. Legislative declaration. The general assembly hereby finds, determines, and declares that the commission of violent crimes by juveniles exacts an unacceptable toll on the fiscal resources of both state and local government and thereby increases the financial burden upon the taxpayers of this state. It is the intent of the general assembly in enacting this article to require, as much as possible, that juveniles convicted as adults of violent crimes pay for the cost of the rehabilitation, education, and treatment of juveniles sentenced to the youthful offender system or committed to the department of human services.

Source: L. 93, 1st Ex. Sess.: Entire article added, p. 26, § 1, effective September 13.
L. 94: Entire section amended, p. 2657, § 142, effective July 1.

18-22-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Convicted" and "conviction" means a plea of guilty, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102 or a verdict of guilty by a judge or jury, and includes a plea of no contest accepted by the court.

(2) "Juvenile" means a person under the age of eighteen years.

(3) "Violent crime" means a felony enumerated as a crime of violence pursuant to section 18-1.3-406 or a felony involving a weapon or firearm.

Source: L. 93, 1st Ex. Sess.: Entire article added, p. 26, § 1, effective September 13.
L. 2002: (1) and (3) amended, p. 1522, § 221, effective October 1.

Cross references: For the legislative declaration contained in the 2002 act amending subsections (1) and (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-22-103. Source of revenues - allocation of moneys. (1) Each juvenile who is convicted as an adult of a violent crime shall be required to pay a surcharge to the clerk of the court in which the conviction occurs in an amount equal to any fine imposed by such court.

(2) The clerk of the court shall allocate the surcharge required by subsection (1) of this section as follows:

(a) (I) Five percent shall be retained by the clerk for administrative costs incurred pursuant to this section. Such amount retained shall be transmitted to the state treasurer, who shall credit the same to the general fund, and such amount shall be subject to appropriation by the general assembly for the costs of such administration.

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), on and after July 1, 2008, the portion of the surcharge that is retained under this paragraph (a) shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(b) Ninety-five percent shall be transferred to the state treasurer who shall credit the same to the youthful offender system surcharge fund created pursuant to subsection (3) of this section.

(3) There is hereby created in the state treasury a youthful offender system surcharge fund which shall consist of moneys received by the state treasurer pursuant to paragraph (b) of subsection (2) of this section. In accordance with section 24-36-114, C.R.S., all interest derived from the deposit and investment of this fund shall be credited to the general fund. Any moneys not appropriated by the general assembly shall remain in the youthful offender system surcharge fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year. All moneys in the fund shall be subject to annual appropriation by the general assembly to the department of corrections to cover the direct and indirect costs associated with the rehabilitation, education, and treatment of youthful offenders sentenced to a youthful offender system.

(4) A surcharge assessed by the court pursuant to this section may be collected in the same manner as a judgment in a civil action and the court shall order the district attorney to institute proceedings to collect such surcharge if the court finds that a juvenile convicted as an adult of a violent crime is financially unable to pay all or any portion of such surcharge at the time of sentencing.

Source: L. 93, 1st Ex. Sess.: Entire article added, p. 27, § 1, effective September 13. L. 94: (3) amended, p. 2657, § 143, effective July 1. L. 96: (3) amended, p. 1693, § 30, effective January 1, 1997. L. 2007: (2)(a) amended, p. 1538, § 30, effective May 31. L. 2008: (2)(a)(II) amended, p. 2146, § 22, effective June 4.

Cross references: For the legislative declaration contained in the 2008 act amending subsection (2)(a)(II), see section 1 of chapter 417, Session Laws of Colorado 2008.

ARTICLE 23

Gang Recruitment Act

18-23-101. Definitions.

18-23-102.

Recruitment of juveniles for a criminal street gang.

18-23-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal:

(a) Which has as one of its primary objectives or activities the commission of one or more predicate criminal acts; and

(b) Whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(2) "Pattern of criminal gang activity" means the commission, attempt, conspiracy, or solicitation of two or more predicate criminal acts which are committed on separate occasions or by two or more persons.

(3) "Predicate criminal acts" means the commission of or attempt, conspiracy, or solicitation to commit any of the following:

(a) Any conduct defined as racketeering activity in section 18-17-103 (5);

(b) Any violation of section 18-8-706 or any criminal act committed in any jurisdiction of the United States which, if committed in this state, would violate section 18-8-706.

Source: L. 2001: Entire article added, p. 986, § 1, effective March 1, 2002.

18-23-102. Recruitment of juveniles for a criminal street gang. (1) A person commits recruitment of a juvenile for a criminal street gang if he or she is eighteen years of age or older and:

(a) Knowingly solicits, invites, recruits, encourages, coerces, or otherwise causes a person younger than eighteen years of age to actively participate in or become a member of a criminal street gang; or

(b) By use of force, threat, or intimidation directed at any person, or by the infliction of bodily injury upon any person, knowingly prevents a person younger than eighteen years of age from leaving a criminal street gang.

(2) Recruitment of a juvenile for a criminal street gang is a class 1 misdemeanor.

(3) Nothing in this section shall affect the ability to charge criminal offenses under article 17 of this title.

Source: L. 2001: Entire article added, p. 987, § 1, effective March 1, 2002.

ARTICLE 24

Crimes Against Children Surcharge

18-24-101. Definitions.

18-24-102. Surcharge.

18-24-103.

Collection and distribution of funds - child abuse investigation surcharge fund - creation.

18-24-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Convicted" and "conviction" mean a plea of guilty accepted by the court, including a plea of guilty entered pursuant to a deferred sentence under section 18-1.3-102, a verdict of guilty by a judge or jury, or a plea of no contest accepted by the court.

(2) "Crime against a child" means any offense listed in section 18-3-411, or criminal attempt, conspiracy, or solicitation to commit any of those offenses, and any of the following offenses, or criminal attempt, conspiracy, or solicitation to commit any of the following offenses:

(a) Incest, in violation of section 18-6-301;

(b) Child abuse, in violation of section 18-6-401;

(c) Contributing to the delinquency of a minor, in violation of section 18-6-701;

(d) Internet luring of a child, in violation of section 18-3-306;

(e) Sexual assault on a client by a psychotherapist, in violation of section 18-3-405.5, when the victim is a child;

(f) Invasion of privacy for sexual gratification, in violation of section 18-3-405.6, when the victim is a child; or

(g) Coercion of involuntary servitude, in violation of section 18-3-503, when the victim is a child.

Source: L. 2006: Entire article added, p. 2040, § 1, effective July 1. **L. 2007:** (2)(b) and (2)(c) amended and (2)(d) added, p. 1688, § 7, effective July 1. **L. 2011:** (2) amended, (SB 11-232), ch. 199, p. 830, § 2, effective July 1.

Cross references: For the legislative declaration in the 2011 act amending subsection (2), see section 1 of chapter 199, Session Laws of Colorado 2011.

18-24-102. Surcharge. (1) Each person who is convicted of a crime against a child shall be required to pay a surcharge to the clerk of the court for the judicial district in which the conviction occurs.

(2) Surcharges pursuant to subsection (1) of this section shall be in the following amounts:

(a) For each class 2 felony of which a person is convicted, one thousand five hundred dollars;

- (b) For each class 3 felony of which a person is convicted, one thousand dollars;
- (c) For each class 4 felony of which a person is convicted, five hundred dollars;
- (d) For each class 5 felony of which a person is convicted, three hundred seventy-five dollars;
- (e) For each class 6 felony of which a person is convicted, two hundred fifty dollars;
- (f) For each class 1 misdemeanor of which a person is convicted, two hundred dollars;
- (g) For each class 2 misdemeanor of which a person is convicted, one hundred fifty dollars; and
- (h) For each class 3 misdemeanor of which a person is convicted, seventy-five dollars.

Source: L. 2006: Entire article added, p. 2041, § 1, effective July 1.

18-24-103. Collection and distribution of funds - child abuse investigation surcharge fund - creation. (1) The clerk of the court shall allocate the surcharge required by section 18-24-102 as follows:

(a) Five percent shall be retained by the clerk of the court for administrative costs incurred pursuant to this subsection (1). Such amount retained shall be transmitted to the state treasurer for deposit in the judicial stabilization cash fund created in section 13-32-101 (6), C.R.S.

(b) Ninety-five percent shall be transferred to the state treasurer, who shall credit the same to the child abuse investigation surcharge fund created pursuant to subsection (2) of this section.

(2) (a) There is hereby created in the state treasury the child abuse investigation surcharge fund that shall consist of moneys received by the state treasurer pursuant to this section. The moneys in the fund shall be subject to annual appropriation by the general assembly to the division of criminal justice in the department of public safety for distribution to the state chapter of a nonprofit or not-for-profit organization that coordinates programs that offer a multidisciplinary team response for child sexual abuse intervention in child-friendly, child-appropriate facilities, referred to in this section as the "state chapter".

(a.1) The division of criminal justice in the department of public safety shall establish guidelines for the distribution of the moneys from the fund, including but not limited to:

(I) Procedures for programs to use in applying to the state chapter for moneys from the fund;

(II) Procedures for the state chapter to use in reporting to the division pursuant to paragraph (a.7) of this subsection (2); and

(III) Accountability and performance standards for programs that receive moneys from the fund.

(a.3) The state chapter may use a portion of the moneys that it receives pursuant to paragraph (a) of this subsection (2) for training and technical assistance to facilitate the coordination of programs that offer a multidisciplinary team response for child sexual abuse intervention in child-friendly, child-appropriate facilities. The state chapter shall distribute the remainder of the moneys directly to the programs.

(a.5) Each program that receives moneys from the fund shall:

(I) Include in the services provided forensic interviews, therapeutic intervention, medical evaluations, victim advocacy, case tracking, and case review;

(II) Have a signed interagency agreement and protocol with the law enforcement agencies, the district attorney's office, and the county department of social services in the jurisdiction where the program is operating;

(III) Meet the national performance standards of a national accrediting body that requires programs to satisfy the criteria described in subparagraphs (I) and (II) of this paragraph (a.5); and

(IV) Satisfy the accountability and performance standards established by the division pursuant to subparagraph (III) of paragraph (a.1) of this subsection (2).

(a.7) The state chapter shall report to the division of criminal justice in the department of public safety on a regular basis to be specified by the division of criminal justice. The report shall include, but need not be limited to:

(I) A list of all programs that received moneys from the fund in the preceding fiscal year;

(II) A description of how each program that received moneys from the fund in the preceding fiscal year used those moneys;

(III) Documentation demonstrating that each program that received moneys from the fund in the preceding fiscal year satisfied all of the criteria specified in paragraph (a.5) of this subsection (2); and

(IV) Documentation demonstrating that each program that received moneys from the fund in the preceding fiscal year satisfied all of the accountability and performance standards established by the division pursuant to subparagraph (III) of paragraph (a.1) of this subsection (2).

(b) The division of criminal justice shall not expend any moneys until the fund has enough money to pay the expenses necessary to administer the fund.

(c) All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any moneys not appropriated by the general assembly shall remain in the fund and shall not be transferred or revert to the general fund of the state at the end of any fiscal year.

(3) The court may waive all or any portion of the surcharge required by section 18-24-102 if the court finds that a person convicted of a crime against a child is indigent or financially unable to pay all or any portion of the surcharge. The court may waive only that portion of the surcharge that the court finds that the person convicted of a crime against a child is financially unable to pay.

Source: **L. 2006:** Entire article added, p. 2041, § 1, effective July 1. **L. 2007:** (2) amended, p. 506, § 1, effective April 16. **L. 2008:** (1)(a) amended, p. 2147, § 23, effective June 4.

Cross references: For the legislative declaration contained in the 2008 act amending subsection (1)(a), see section 1 of chapter 417, Session Laws of Colorado 2008.

